

NORTH CAROLINA
COURT OF APPEALS
REPORTS

VOLUME 255

15 AUGUST 2017

3 OCTOBER 2017

RALEIGH

2019

CITE THIS VOLUME

255 N.C. APP.

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

ELIZABETH BALL, EMPLOYEE, PLAINTIFF
v.
BAYADA HOME HEALTH CARE, EMPLOYER, ARCH INSURANCE GROUP, INC., CARRIER
(GALLAGHER BASSETT SERVICES, INC., THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA16-1219

Filed 15 August 2017

**Workers' Compensation—temporary total disability benefits—
average weekly wage—method of calculation—fair and just**

The Industrial Commission erred in a workers' compensation case by utilizing Method 3 set out in N.C.G.S. § 97-2(5) to calculate plaintiff's average weekly wage for temporary total disability benefits. The method was not "fair and just" as required by the statute since it ignored an undisputed fact of the employee's employment and the case was remanded to the Commission to utilize Method 5 to appropriately consider plaintiff's post-injury work.

Appeal by Plaintiff from opinion and award entered 16 August 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 May 2017.

Ganly & Ramer PLLC, by Thomas F. Ramer, for Plaintiff-Appellant.

Brewer Defense Group, by Joy H. Brewer and Ginny P. Lanier, for Defendants-Appellees.

McGEE, Chief Judge.

BALL v. BAYADA HOME HEALTH CARE

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

Elizabeth Ball (“Plaintiff”) appeals from a final decision of the North Carolina Industrial Commission (“the Commission”). The Commission utilized a particular method set out in N.C. Gen. Stat. § 97-2(5) – Method 3 – to calculate Plaintiff’s average weekly wage for her temporary total disability benefits. We conclude that use of Method 3 was not “fair and just” to Plaintiff, a requirement of N.C.G.S. § 97-2(5). Accordingly, we reverse and remand to the Commission for calculation of Plaintiff’s benefits using the appropriate statutory method.

I. Background

Plaintiff began her employment as a certified nurse’s assistant with Bayada Home Health Care (“Bayada”) on 26 May 2010. Plaintiff worked on a part-time basis for Bayada from 26 May 2010 until 30 November 2010, when she began to work a full-time schedule. During this time in her employment, Plaintiff earned \$8.00 per hour. In February 2011, Plaintiff was transferred from Bayada’s Asheville office to its Hendersonville office, where she began working with a single, specific client (“the client”). As a result of this change, Plaintiff began working an increased number of hours, and at an increased wage – \$10.00 per hour. On Plaintiff’s first day of work with the client at the higher hourly rate, 10 February 2011, Plaintiff was injured when the client, who suffered from Alzheimer’s, pushed Plaintiff down several stairs.

Plaintiff sought medical treatment for her injuries that same day and was released to limited duty work. Three days later, Plaintiff requested a release for full work duty and was granted such by her medical care provider. Despite her 10 February 2011 injury, Plaintiff continued to work for the client, with the attendant increase in hours and rate of pay, through 18 May 2011. On that date, Plaintiff alleged, she suffered a second injury while working with the client.

Plaintiff filed a Form 18 on 20 March 2012 informing Bayada, its insurance carrier Arch Insurance Group, Inc., and the third-party administrator, Gallagher Bassett Services, Inc. (together, “Defendants”) of her 10 February 2011 incident. In the Form 18, Plaintiff claimed injuries to her left hand, both knees, and right hip from the 10 February 2011 incident. Plaintiff filed a second Form 18 on the same day, informing Defendants of the alleged 18 May 2011 incident, and claimed injuries in that incident to both of her knees. Defendants admitted the compensability of Plaintiff’s 10 February 2011 injury to her right leg, but denied the compensability of the injuries to her hips and hands. Defendants also denied compensability of all injuries stemming from the 18 May 2011 incident. Despite denying the compensability of Plaintiff’s alleged 18 May

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

2011 injuries, Defendants filed a Form 60 on 10 June 2011, admitting Plaintiff's "disability resulting from the injur[ies] began on" 19 May 2011.

Plaintiff filed a Form 33 on 31 May 2012, requesting that her disability claim be assigned for hearing, and a hearing was held before a deputy commissioner on 26 May 2015. Following that hearing, the deputy commissioner filed an opinion 16 August 2012 concluding as a matter of law that Plaintiff suffered compensable injuries on both 10 February 2011 and 18 May 2011. The deputy commissioner also determined that the appropriate method to determine Plaintiff's average weekly wage was Method 5, as listed in N.C.G.S. § 97-2(5), which resulted in an average weekly wage of \$510.33 and a corresponding weekly compensation rate of \$340.24 for Plaintiff's temporary total disability payments. Defendants appealed to the Commission.

Upon its *de novo* review, the Commission concluded as a matter of law that, *inter alia*: (1) Plaintiff had suffered a compensable injury on 10 February 2011; (2) there was not sufficient, competent evidence of Plaintiff's being injured on 18 May 2011; (3) Plaintiff's disability began on 19 May 2011; and (4) Plaintiff had ongoing medical treatment needs. The Commission concluded as a matter of law that Methods 1, 2, and 4, as listed in N.C.G.S. § 97-2(5), were inapplicable to the facts of the present case, and as such that "utilization of [M]ethod [3] for calculation of average weekly wage" applied to Plaintiff's claim.

The Commission determined that, applying Method 3, Plaintiff was entitled to "an average weekly wage of \$284.79 with a compensation rate of \$189.87." The Commission further found that "calculation of [P]laintiff's average weekly wage using [Method 3] [was] fair and just to both [P]laintiff and [D]efendants." Plaintiff appeals.

II. Analysis

Plaintiff contends the Commission erred in utilizing Method 3 in N.C.G.S. § 97-2(5) because use of that method is not "fair and just" to her, as required by that statute. Our review of an opinion and award of the Industrial Commission "is limited to a determination of whether the Full Commission's findings of fact are supported by any competent evidence, and whether those findings support the Full Commission's legal conclusions." *Conyers v. New Hanover Cty. Sch.*, 188 N.C. App. 253, 255, 654 S.E.2d 745, 748 (2008) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)). The Commission's conclusions of law are reviewable *de novo*. *Id.* Findings of fact not challenged are binding on appeal. See *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 707, 654 S.E.2d 263, 266 (2007). Plaintiff only challenges the trial court's finding and

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

conclusion that utilization of Method 3 to calculate her average weekly wages was “fair and just” to her.

“In North Carolina, the calculation of an injured employee’s average weekly wages is governed by N.C. Gen. Stat. § 97-2(5).” *Conyers*, 188 N.C. App. at 255, 654 S.E.2d at 748. N.C.G.S. § 97-2(5) “sets forth in priority sequence five methods by which an injured employee’s average weekly wages are to be computed.” *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 459, 665 S.E.2d 449, 451 (2008) (citation omitted). As relevant to the present case, N.C.G.S. § 97-2(5) provides:

[Method 1:] “Average weekly wages” shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . , divided by 52;

. . . .

[Method 3:] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; *provided, results fair and just to both parties will be thereby obtained.*

. . . .

[Method 5:] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.”

N.C. Gen. Stat. § 97-2(5) (2015) (emphasis added).

The “dominant intent” of N.C.G.S. § 97-2(5) “is to obtain results that are fair and just to both employer and employee.” *Conyers*, 188 N.C. App. at 256, 654 S.E.2d at 748 (citing *Joyner v. A. J. Carey Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966)). The words “fair and just”

may not be considered generalities, variable according to the predilections of the individuals who from time to time compose the Commission. These words must be related to the standard set up by the statute. Results fair and just,

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

within the meaning of [N.C.G.S. § 97-2(5)],¹ consist of such “average weekly wages” as will most nearly approximate the amount which the injured employee *would be earning* were it not for the injury, in the employment in which he was working at the time of his injury.

Liles v. Faulkner Neon & Elec. Co., 244 N.C. 653, 660, 94 S.E.2d 790, 796 (1956) (emphasis in original).

Plaintiff argues that use of Method 3 to calculate her average weekly wage was not “fair and just” to her. Use of Method 3, she argues, only takes into account the part-time work she completed at a lower hourly rate, and ignores the uncontested fact that she worked, post-injury, at a higher hourly wage and frequency. We agree. Plaintiff began work with Bayada on 26 May 2010 and was injured some nine months later, on 10 February 2011. During that time period, Plaintiff worked part-time and was paid an hourly rate of \$8.00, and earned \$3,215.25 over a period of 79 days. On the day Plaintiff was injured, she had begun to work with a new Bayada client, which required her to work increased hours and she earned a higher rate of pay – \$10.00 per hour, two dollars per hour more than she had previously earned. Plaintiff continued working the increased hours at the increased rate of pay for more than three months, from the date of her injury until 18 May 2011, the date of her alleged second injury.

We hold that only taking into account Plaintiff’s pre-injury compensation, through use of Method 3, is unfair to Plaintiff, as it ignores the months of increased hours and pay Plaintiff worked after her 10 February 2011 injury, and would effectively treat Plaintiff as if she had never worked increased hours at a higher rate of pay. We must reject the use of Method 3 on the facts of the present case, as use of that method “squarely conflicts with the statute’s unambiguous command to use a methodology that ‘will most nearly approximate the amount which the injured employee would be earning were it not for the injury.’” *Tedder v. A&K Enters.*, 238 N.C. App. 169, 175, 767 S.E.2d 98, 103 (2014) (quoting N.C.G.S. § 97-2(5)). Defendants admitted that Plaintiff was disabled as a result of her 10 February 2011 injury. In order to “most nearly approximate” what Plaintiff would be earning if she had not been injured, we believe that Plaintiff’s post-injury work must be taken into account.

Defendants main argument in response is that, due to the nature of Plaintiff’s employment, there was no certainty that Plaintiff would have continued to earn higher wages with increased hours but for her

1. *Liles* cited to N.C. Gen. Stat. § 97-2(e) (1956), the predecessor statute and section to the present-day N.C.G.S. § 97-2(5).

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

injury. As support for this argument, Defendants point to the hearing testimony of Plaintiff's supervisor at Bayada, Elizabeth Kader ("Kader"). Kader generally testified that Bayada employees each had different schedules, and that some employees "work six different clients every week" while others "work the same client every single week fifty-two weeks out of the year." From this testimony, Defendants suggest there was no certainty that Plaintiff would continue to work increased hours at a higher hourly rate. While it is certainly true that there was no absolute assurance that Plaintiff would continue to work increased hours at a higher rate of pay, this uncertainty is no different than the uncertainty found in any at-will employment.² On the unique facts of the present case, we need not speculate about whether Plaintiff would have worked increased hours and pay for at least some period of time after her 10 February 2011 injury, as evidence in the record proves that she did. It is undisputed that, after Plaintiff's 10 February 2011 injury, she worked for more than three months at the increased hours and pay – a fact that application of Method 3 unfairly ignores.

We find instructive cases in which this Court and our Supreme Court determined that use of Method 3 was not "fair and just." In *Joyner*, an injured truck driver worked on an as-needed basis during the 52 weeks prior to his injury. *See Joyner*, 266 N.C. at 519, 146 S.E.2d at 450. Our Supreme Court described the employee's work as "inherently part-time and intermittent" and held it was unfair "to the employer . . . [not to] take into consideration both peak and slack periods" in calculating average weekly wages. *Id.* at 522, 146 S.E.2d at 450. As a result, the Court held that the employee's average weekly wage should have been calculated pursuant to Method 5. *Id.*

In *Conyers*, a school bus driver for a public school system suffered a compensable injury during the course of her employment. *Conyers*, 188 N.C. App. at 254, 654 S.E.2d at 747. Since the employee only worked the previous ten months of the year, due to school bus drivers not working during a school's summer recess, the Commission utilized Method 3 to calculate the employee's average weekly wage. *Id.* at 255, 654 S.E.2d at 747. This Court determined that use of Method 3 was not "fair and just as [the employer] would be unduly burdened while [the employee] would

2. The facts of this case are decidedly unlike those in *Tedder*, where the employee was "a temporary employee hired to work for a limited time period of seven weeks." *Tedder*, 238 N.C. App. at 172, 767 S.E.2d at 101; *see also id.* at 176, 767 S.E.2d at 103 ("[I]n calculating average weekly wages for employees in temporary positions, the Commission must consider the number of weeks the employee would have been employed in that temporary position relative to a 52-week time period.").

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

receive a windfall. The purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury." *Id.* at 259, 654 S.E.2d at 750. This Court reversed and determined that use of Method 5 to calculate the bus driver's average weekly wage "most nearly approximat[ed]" the amount the bus driver would have earned "were it not for her injury." *Id.* at 261, 654 S.E.2d at 751-52.

It is worth noting that the Courts in *Joyner* and *Conyers* found use of Method 3 would be unfair and unjust to the employer, while we find that use of Method 3 in the present case to be unfair and unjust to the employee. Such a finding is not barred, but is instead explicitly contemplated, by the relevant statute. N.C.G.S. § 97-2(5) (stating that Method 3 may be utilized "provided [that] results fair and just to *both parties* will be thereby obtained"). The common thread running through the cases we have examined is that a method of average weekly wage calculation may not be used when use of that particular method would ignore an undisputed fact of the employee's employment.

Use of Method 3 in *Joyner* was inappropriate when use of that method would have ignored the fact that the employee's work was "inherently part-time and intermittent." *Joyner*, 266 N.C. at 522, 146 S.E.2d at 450. Method 3 was equally inappropriate when use of that method would have ignored the fact that a bus driver only worked ten months out of the year and Method 3 would treat her as if she worked all twelve months. *Conyers*, 188 N.C. App. at 259, 654 S.E.2d at 750. And, in the present case, the use of Method 3 is equally inappropriate, where use of that method ignores the uncontroverted evidence that Plaintiff worked for months after her 10 February 2011 injury at a higher frequency and at a higher rate of pay. Method 3 does not "most nearly approximate the amount which [Plaintiff] would be earning were it not for the injury," *Tedder*, 238 N.C. App. at 175, 767 S.E.2d at 103 (citation omitted), and thus its use is not "fair and just" to Plaintiff as required by N.C.G.S. § 97-2(5).

III. Conclusion

For the reasons stated, the Commission erred in utilizing Method 3 to calculate Plaintiff's average weekly wage. The opinion and award of the Commission is reversed, and this case is remanded to the Commission for a determination of Plaintiff's average weekly wages utilizing Method 5, and appropriately considering Plaintiff's post-injury work.

REVERSED AND REMANDED.

Judges HUNTER, JR. and ZACHARY concur.

C. TERRY HUNT INDUS., INC. v. KLAUSNER LUMBER TWO, LLC

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

C. TERRY HUNT INDUSTRIES, INC., PLAINTIFF

v.

KLAUSNER LUMBER TWO, LLC, DEFENDANT

No. COA16-1136

Filed 15 August 2017

Appeal and Error—interlocutory orders and appeals—arbitration order—no substantial right

Plaintiff company's appeal from an interlocutory order compelling arbitration in a claim for breach of a preliminary agreement for a construction project was dismissed. An order compelling arbitration does not affect a substantial right and does not fall within the enumerated grant of appellate review under N.C.G.S. § 1-569.28.

Judge INMAN concurring in separate opinion.

Appeal by plaintiff from orders entered 31 May 2016 and 17 June 2016 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 19 April 2017.

Hamilton Stephens Steele + Martin, PLLC, by Nancy S. Litwak and Erik M. Rosenwood, for plaintiff-appellant.

Nexsen Pruet, PLLC, by David S. Pokela and Eric H. Biesecker, for defendant-appellee.

BERGER, Judge.

C. Terry Hunt Industries, Inc. (“Hunt”) appeals from the order filed on May 31, 2016 granting the motion to compel arbitration made by Klausner Lumber Two, LLC (“Klausner”). Hunt also appeals from the order filed on June 17, 2016 denying both the motion to reconsider the order granting the motion to compel arbitration, and the motion to alter or amend the order. The interlocutory order compelled arbitration in Hunt’s lawsuit claiming breach of a preliminary agreement for a construction project. Hunt argues that interlocutory review is proper because the order affects a substantial right. We disagree and dismiss the appeal.

C. TERRY HUNT INDUS., INC. v. KLAUSNER LUMBER TWO, LLC

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

Factual & Procedural Background

On August 19, 2014, Hunt and Klausner entered into a Preliminary Contract Agreement and Authorization to Proceed (the “Preliminary Agreement”). In the Preliminary Agreement, Hunt agreed to provide the materials and labor necessary to construct a sawmill on property owned by Klausner in Halifax County, North Carolina (the “N.C. Project”). The Preliminary Agreement preceded the anticipated execution of a contract (the “N.C. Contract”) that would set the terms and conditions for the N.C. Project.

The Preliminary Agreement incorporated the contract used by the parties for a prior sawmill construction project completed in Live Oak, Florida (the “F.L. Contract”). This agreement provided, in pertinent part:

1.2 WHEREAS [Klausner] hereby intends to engage [Hunt] to undertake and perform all Work . . . in accordance with the [N.C.] Contract Documents for [Klausner’s] [N.C. Project], including the obligations and related liabilities as defined in the [N.C.] Contract, and [Hunt] has agreed to such engagement upon and subject to the terms and conditions of the [N.C.] Contract[.]

. . . .

2.1 In this Agreement, words and expressions shall have the same meanings as are respectively assigned to them in the [N.C.] Contract. The form and language of the [N.C.] Contract . . . shall be based on that used previously by the Parties for the Sawmill Project located in Live Oak, Florida. References in this Agreement to specific Articles or language to be included in the [N.C.] Contract shall refer to those same Articles and language included in the [F.L. Contract].

Additionally, the parties agreed that work on the N.C. Project would commence once the Preliminary Agreement was executed, prior to the completion of any other documents pertaining to the N.C. Contract. However, pursuant to the Preliminary Agreement, once the remaining N.C. Contract documents were agreed upon by the two parties, “they shall, along with [the Preliminary Agreement], constitute the [N.C. Contract] Documents.”

The F.L. Contract, the form and language of which the parties agreed would form the basis of the N.C. Contract, contained a three-step dispute

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resolution procedure in Sections 13.11-13.13. This procedure was enumerated in the FL. Contract as follows:

13.11 Direct Discussions. If the Parties cannot reach resolution on a matter relating to or arising out of the Agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties' representatives If the Parties' representatives are not able to resolve such matter . . . senior executives of the Parties shall meet . . . to endeavor to reach resolution. If the dispute remains unresolved . . . the Parties shall submit such matter to the dispute mitigation and dispute resolution procedures . . . herein.

13.12 Mediation. If direct discussions . . . do not result in resolution of the matter, the Parties shall endeavor to resolve the matter by mediation through the current Construction Industry Mediation Rules of the American Arbitration Association

13.13 Binding Dispute Resolution. If the matter is unresolved after submission of the matter to a mitigation procedure or to mediation, the Parties shall submit the matter to the binding dispute resolution procedure designated herein[,] Arbitration[,] using the current Construction Industry Arbitration Rules of the American Arbitration Association

From approximately October 27, 2014 until February 10, 2015, Hunt and Klausner attempted to negotiate the remaining terms of the N.C. Contract. However, negotiations stalled and no additional terms or documents were agreed upon by the parties. Instead of submitting the dispute to mediation, and then, if still unresolved, to arbitration, the parties moved toward litigating their dispute.

On November 24, 2015, Hunt filed a complaint against Klausner alleging breach of contract, quantum meruit, and enforcement of lien on property. In response to Hunt's complaint, Klausner filed a motion to dismiss, and an alternative motion to stay litigation and compel arbitration.

Following a hearing, the trial court filed an order on May 31, 2016 that granted Klausner's motion to stay litigation and compel arbitration. The trial court not only concluded that the parties had a valid and applicable arbitration agreement, but it also found that the "Preliminary Agreement incorporates by reference all the terms and conditions of the Florida Contract."

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Hunt filed a motion to reconsider the order granting the motion to stay litigation and compel arbitration, and an alternative motion to alter or amend the order compelling arbitration. Both motions were denied by the trial court in an order filed June 17, 2016. It is from the May 31 and June 17 orders that Hunt appeals.

Analysis

Pursuant to N.C. Gen. Stat. § 1-569.6(b), in order to determine the validity of an arbitration agreement, “[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” N.C.G.S. § 1-569.6(b) (2015). “Once a court has determined that a claim is subject to arbitration, then the merits of that claim . . . must be decided by the arbitrator.” *State v. Philip Morris USA, Inc.*, 193 N.C. App. 1, 18, 666 S.E.2d 783, 794 (2008), *writ denied, review denied*, 676 S.E.2d 54 (2009) (citing *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991) (“Courts must be careful not to overreach and decide the merits of an arbitrable claim. Our role is strictly limited to determining arbitrability and enforcing agreements to arbitrate, leaving the merits of the claim and any defenses to the arbitrator.” (brackets and quotation marks omitted)), *cert denied*, 503 U.S. 919, 117 L. Ed. 2d 516 (1992)).

As a general principal, “there is no right to appeal from an interlocutory order.” *Darroch v. Lea*, 150 N.C. App. 156, 158, 563 S.E.2d 219, 221 (2002) (citation omitted). “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 76, 711 S.E.2d 185, 188 (2011) (citation and quotation marks omitted). While an interlocutory appeal may be allowed in “exceptional cases,” this Court must dismiss an interlocutory appeal for lack of subject-matter jurisdiction, unless the appellant is able to carry its “burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature.” *Id.* at 77, 711 S.E.2d at 188-89 (citation omitted).

There are two instances in which an interlocutory appeal may be allowed:

First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted

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to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (internal citations and quotation marks omitted). In the instant case, Hunt argues that this appeal from the order compelling arbitration is proper because it affects a substantial right. We disagree.

This Court has held that an order compelling arbitration affects no substantial right that would warrant immediate appellate review under N.C. Gen. Stat. § 1-277. See *N.C. Electric Membership Corp. v. Duke Power Co.*, 95 N.C. App. 123, 127-29, 381 S.E.2d 896, 898-99, *disc. review denied*, 325 N.C. 709, 388 S.E.2d 461 (1989); *The Bluffs v. Wysocki*, 68 N.C. App. 284, 285, 314 S.E.2d 291, 293 (1984). Although Hunt argues that its appeal concerns the scope of the trial court's order, rather than merely the grant of the order, this minor difference in degree does not affect our review of an order compelling arbitration.

“A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.” *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citation and quotation marks omitted). No substantial rights are affected by an order compelling arbitration because the parties have not been barred access to the courts. *Darroch*, 150 N.C. App. at 162, 563 S.E.2d at 223 (citation omitted). The applicable statutory scheme, our Revised Uniform Arbitration Act (the “Act”), N.C. Gen. Stat. § 1-569.1 to .31 (2015), provides in Subsections .23 and .24 procedures by which a party to an arbitration may move the trial court to vacate, modify, or correct an arbitration award. One such ground for vacating an arbitration award is that there was no agreement to arbitrate. N.C.G.S. § 1-569.23(5) (2015). Accordingly, Plaintiff can obtain judicial review of the award resulting from arbitrating this matter.

Furthermore, Subsection .28 of the Act provides an enumerated list of the grounds from which an appeal may be taken:

- (a) An appeal may be taken from:
- (1) An order denying a motion to compel arbitration;
 - (2) An order granting a motion to stay arbitration;
 - (3) An order confirming or denying confirmation of an award;

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- (4) An order modifying or correcting an award;
- (5) An order vacating an award without directing a rehearing; or
- (6) A final judgment entered pursuant to this Article.

N.C.G.S. § 1-569.28 (2015). In analyzing the relevant portions of this Act, this Court has noted the six situations listed above and the “conspicuous absence from the list of an appeal from an order compelling arbitration. Such an order, [we have] held, is interlocutory and not immediately appealable.” *N.C. Electric Membership Corp.*, 95 N.C. App. at 127, 381 S.E.2d at 899 (citing *The Bluffs*, 68 N.C. App. at 285, 314 S.E.2d at 293).

“To [further] aid in statutory construction, the doctrine of *expressio unius est exclusio alterius* provides that the mention of such specific exceptions implies the exclusion of others.” *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (citations omitted). Under this doctrine, by specifically enumerating the permissible grounds for appeal, we can infer that the Legislature purposely excluded any other grounds for appeal not included in the statutory text. *See Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 141, 757 S.E.2d 302, 307 (2014). Accordingly, under Subsection .28, there is no right to interlocutory review of an order compelling arbitration. *Laws v. Horizon Housing, Inc.*, 137 N.C. App. 770, 771, 529 S.E.2d 695, 696 (2000) (citation omitted).

Hunt is unable to demonstrate that the order compelling arbitration affects a substantial right because Hunt is not barred from seeking relief from the trial court, and ultimately from petitioning this Court following arbitration. Additionally, under Subsection .28 of the Act, an order compelling arbitration is not an enumerated ground for appellate review of arbitration orders. For these reasons, we are unable to reach the merits of this appeal for lack of subject-matter jurisdiction.

Conclusion

Because an order compelling arbitration is interlocutory, and neither affects a substantial right that would be lost without our review, nor falls within the enumerated grant of appellate review of N.C. Gen. Stat. § 1-569.28, this appeal must be dismissed for lack of subject-matter jurisdiction.

DISMISSED.

Judge ELMORE concurs.

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Judge INMAN concurs with separate opinion.

INMAN, Judge, concurring.

I concur with the majority's decision dismissing this interlocutory appeal. I write separately to note that I do not construe N.C. Gen. Stat. § 1-569.28 or longstanding precedent to prohibit *per se* all interlocutory appeals from orders compelling arbitration.

Section 1-277(a) of the North Carolina General Statutes provides that

[a]n appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

N.C. Gen. Stat. § 1-277(a) (2015). Although this Court and the North Carolina Supreme Court have consistently held that orders compelling arbitration do not fall within the criteria of Section 1-277(a), if an appellant asserts that an order compelling arbitration affects a substantial right, some consideration of the nature of the case at issue is necessary before rejecting the argument.

The majority's analysis regarding why appellant here has not shown that the order compelling arbitration affects a substantial right is sound but, in my view, incomplete. I would hold that in addition to the generic reasons that an order to compel arbitration generally does not affect a substantial right, appellant here has not demonstrated any factual or procedural characteristic of this case that distinguishes it from other appeals from orders compelling arbitration that have been held not to affect a substantial right. *See, e.g., N.C. Electric Membership Corp. v. Duke Power Co.*, 95 N.C. App. 123, 128-29, 381, S.E.2d 896, 898-99 (1989)(holding that an order compelling arbitration did not affect a substantial right, based on analysis addressing specific contractual provisions disputed by the parties).

The majority's interpretation of our statutes and precedent as prohibiting an appeal from *any* order compelling arbitration provides a simple, bright line rule at the expense of an appeal of right in the rare

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case which meets Section 1-277's substantial right criteria. This expense may be more theoretical than practical, because an appellant who cannot establish a right to appeal can petition for certiorari review. *See State v. Phillip Morris USA, Inc.*, 193 N.C. App. 1, 6, 666 S.E.2d 783, 787 (2008)(holding based on the contract in dispute that the appellant had not shown an order compelling arbitration affected a substantial right, but granting a petition for a writ of certiorari to review the interlocutory order). Nevertheless, I see no need to completely foreclose all such appeals where facts may arise in which a substantial right is affected.



PAUL FRAMPTON, PETITIONER-PLAINTIFF

v.

THE UNIVERSITY OF NORTH CAROLINA AND THE UNIVERSITY OF NORTH
CAROLINA AT CHAPEL HILL, RESPONDENT-DEFENDANTS

No. COA16-1236

Filed 15 August 2017

1. Attorney Fees—termination of tenured professor—substantial justification

The trial court did not abuse its discretion, in a case involving the termination of a tenured professor who was arrested in an airport in Argentina and ultimately convicted of smuggling cocaine found in his suitcase, by denying the professor's request for attorney fees under N.C.G.S. § 6-19.1(a) where defendant university acted with substantial justification in managing an unusual set of circumstances.

2. Attorney Fees—termination of tenured professor—special circumstances

The trial court did not abuse its discretion, in a case involving the termination of a tenured professor who was arrested in an airport in Argentina and ultimately convicted of smuggling cocaine found in his suitcase, by denying the professor's request for attorney fees under N.C.G.S. § 6-19.1(a) where it would be unjust to require the State to pay attorney fees under such special circumstances based on defendant university's responsibility to manage public funds and plaintiff professor's own choices that precipitated this dispute.

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Appeal by plaintiff from orders entered 28 June and 3 August 2016 by Judge James E. Hardin, Jr., in Orange County Superior Court. Heard in the Court of Appeals 2 May 2017.

Law Office of Barry Nakell, by Barry Nakell, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for defendant-appellee.

BRYANT, Judge.

Where the plain language of a statute permits the trial court to exercise its discretion in the award of attorney’s fees and where plaintiff does not establish an abuse of discretion in the court’s denial of plaintiff’s motion for attorney’s fees, we affirm.

The background of this case is set out in *Frampton v. Univ. of N.C. (Frampton I)*, 241 N.C. App. 401, 773 S.E.2d 526 (2015). In brief, the case addressed the termination of Paul Frampton (“plaintiff”), a tenured professor at the University of North Carolina at Chapel Hill (“UNC”), who was arrested in an airport in Buenos Aires, Argentina and ultimately convicted of smuggling cocaine found in his suitcase. *Id.* Following plaintiff’s arrest, UNC’s chancellor placed plaintiff on unpaid leave and terminated his salary and benefits without pursuing the disciplinary procedures outlined in the university’s tenure policies. After appealing to the UNC Board of Trustees, which upheld the decision to place plaintiff on leave without pay, plaintiff filed a petition for judicial review of a State agency decision in Orange County Superior Court. The superior court affirmed UNC’s actions, and plaintiff appealed to this Court. On appeal, this Court held that by placing plaintiff on personal, unpaid leave instead of pursuing formal disciplinary proceedings pursuant to the tenure policy, UNC violated its own policies. On this basis, this Court reversed the trial court’s ruling and remanded the matter for the trial court to determine the appropriate amount of the salary and benefits withheld that should have been paid to plaintiff. *Id.* at 414, 773 S.E.2d at 535.

Upon remand, plaintiff filed a motion requesting compensation for unpaid salary and benefits as well as attorney’s fees. The trial court awarded plaintiff \$231,475.92 in back salary and \$31,824.53 for loss of benefits, but denied the motion for attorney’s fees. The trial court found “UNC-Chapel Hill did not act without substantial justification as it attempted to manage an unusual set of circumstances that were not of its own making, and that it would be unjust to require the State to pay

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attorney fees under such special circumstances.” Plaintiff now appeals the trial court’s denial of his request for attorney’s fees to this Court.¹

On appeal, plaintiff argues the trial court abused its discretion by denying his motion for an award of attorney’s fees, made pursuant to our General Statutes, section 6-19.1, contending the trial court improperly concluded UNC (I) acted with substantial justification (2) under special circumstances that would make the award unjust. We disagree.

The standard of review for a trial court’s decision whether to award attorney’s fees is abuse of discretion. *High Rock Lake Partners, LLC v. N.C. Dep’t of Transp.*, 234 N.C. App. 336, 760 S.E.2d 750 (2014). “A ruling committed to a trial court’s discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *Smith v. Beaufort Cty. Hosp. Ass’n, Inc.*, 141 N.C. App. 203, 210, 540 S.E.2d 775, 780 (2000) (citation omitted). On appeal, the appellant has the burden to show the trial court’s ruling was unsupported by reason or could not be the product of a reasoned decision. *High Rock Lake Partners, LLC*, 234 N.C. App. at 340, 760 S.E.2d at 753.

As the appellant, here, plaintiff contends the trial court abused its discretion by finding “UNC-Chapel Hill did not act without substantial justification” under special circumstances and that it would be unjust to require UNC to pay plaintiff’s attorney’s fees.

General Statutes, section 6-19.1, specifically addresses the awarding of attorney’s fees to parties defending against agency decisions.

In any civil action . . . brought by a party who is contesting State action . . . the court may, in its discretion, allow the prevailing party to recover reasonable attorney’s fees, including attorney’s fees applicable to the administrative review portion of the case . . . if:

- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

1. On 30 March 2016, pursuant to the decision of this Court in *Frampton I*, plaintiff filed a motion seeking attorney’s fees. Following the trial court’s denial of the motion on 28 June 2016, plaintiff filed a motion for reconsideration of the ruling pursuant to Rules 59 and 60. In an order entered 3 August 2016, the trial court denied the motion for reconsideration. Plaintiff appeals both orders.

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- (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

N.C. Gen. Stat. § 6-19.1(a) (2015). In accordance with this statute, our Supreme Court determined that in order for a trial court to act within its discretion and award attorney's fees to the prevailing party, the trial court must first find that the State agency acted "without substantial justification" and, second, that there were no special circumstances which would make awarding attorney's fees unjust. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 342 N.C. 838, 843, 467 S.E.2d 675, 678 (1996). Thus, a trial court's power to award attorney's fees manifests only when the court determines that the agency acted without substantial justification and no special circumstances exist. *High Rock Lake Partners, LLC*, 234 N.C. App. at 339, 760 S.E.2d at 753. However, even when both criteria are met, the trial court is not *required* to award attorney's fees. *See id.* at 339, 760 S.E.2d at 753.

I. Substantial Justification

[1] Plaintiff first argues that the trial court erred in concluding UNC did not act without substantial justification. We disagree.

A state agency has the initial burden before the trial court to show substantial justification existed. *Early v. Cty. of Durham, Dep't. of Soc. Servs.*, 193 N.C. App. 334, 347, 667 S.E.2d 512, 522 (2008). The "substantial justification" standard requires that a State agency bear the burden "to demonstrate that its position, at and from the time of its initial action, was rational and legitimate to such degree that a reasonable person *could* find it satisfactory or justifiable in light of the circumstances then known to the agency." *Crowell Constructors*, 342 N.C. at 844, 467 S.E.2d at 679. On appeal, a trial court's determination that a state agency's actions were substantially justified is a reviewable conclusion of law, but findings of fact are binding if substantiated by evidence in the record. *See Whiteco Indus., Inc. v. Harrelson*, 111 N.C. App. 815, 819, 434 S.E.2d 229, 232–33 (1993); *see also Early*, 193 N.C. App. at 346–47, 667 S.E.2d at 522. "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." (citation omitted)).

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This Court has made it clear that an agency need not be “legally correct in order to avoid liability for attorney’s fees.” *Estate of Joyner v. N.C. Dep’t of Health & Human Servs.*, 214 N.C. App. 278, 292, 715 S.E.2d 498, 508 (2011).

The test for substantial justification is not whether this Court ultimately upheld respondent’s reasons . . . but, rather, whether respondent’s . . . [actions were] justified to a degree that could satisfy a reasonable person under the existing law and facts known to, or reasonably believed by, respondent at the time respondent . . . [acted].

S.E.T.A. UNC-CH, Inc. v. Huffines, 107 N.C. App. 440, 443–44, 420 S.E.2d 674, 676 (1992) (citation omitted).

Here on appeal, UNC argues that the trial court’s finding, “UNC-Chapel Hill did not act without substantial justification” by deciding to place plaintiff on unpaid, personal leave instead of pursuing disciplinary action as outlined by UNC’s tenure policies, was supported by the evidence before the trial court.

In *Frampton I*, this Court emphasized that the disciplinary procedures incorporated by UNC’s own policies provided a method of recourse in the event a tenured professor was unable to perform the professional duties required, such as in plaintiff’s case. 241 N.C. App. at 413, 773 S.E.2d at 534.

While we can envision scenarios in which it would be more beneficial to place a tenured faculty member on unpaid personal leave without his or her consent in order to protect the faculty member’s reputation from the stigma associated with disciplinary actions—even if those proceedings result in a favorable outcome—we believe that the *more reasoned* interpretation of the unpaid leave policy could only support its application if the faculty member either requested it or consented to it. Moreover, the fact that there is no “mandated” appeal procedure for this type of leave suggests that . . . the unpaid personal leave policy is not intended to be unilaterally imposed upon a tenured professor given the procedural protections afforded to faculty members in all other situations.

Id. (emphasis added). However, while our Court in *Frampton I* determined that UNC’s actions were not proper in light of its own tenure policies, the determination of whether the actions were based on substantial justification is reviewed for the first time in this appeal (*Frampton II*).

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In *Daily Express, Inc. v. Beatty*, after a trial court determined an agency's position was not legally correct, it awarded attorney fees to the plaintiff. 202 N.C. App. 441, 688 S.E.2d 791 (2010). On appeal, this Court reversed the attorney fee award to the plaintiff after making a distinction between whether the agency's actions were legally correct and whether the agency's actions were substantially justified. *Id.* at 455–56, 688 S.E.2d at 802. “[E]ven though we ultimately did not accept [the agency’s] construction of the applicable statutory provisions, we recognized that [the agency’s] construction of the relevant statutory language had some level of support in both logic and the language enacted by the General Assembly.” *Id.* at 455, 688 S.E.2d at 802. Therefore, this Court in *Daily Express* held that the agency was not liable to plaintiff for attorney’s fees under N.C. Gen. Stat. § 6-19.1, because although the agency’s actions were later determined to be erroneous, “at the time that action was taken, [the agency was] not without substantial justification[.]” *Id.* at 456, 688 S.E.2d at 802.

Thus, as our Court reasoned in *Daily Express* (notwithstanding an erroneous decision, a court must consider the existence of substantial justification), the Orange County Superior Court reasoned that “UNC-Chapel Hill did not act without substantial justification.” We uphold the trial court’s determination, and therefore, the court’s order has met the substantial justification prong of section 6-19.1.

II. Special Circumstances

[2] Plaintiff next argues the trial court erred in finding that there were special circumstances that would make an award of attorney’s fees unjust. We disagree.

North Carolina case law is limited with regard to interpreting what qualifies as special circumstances that would make an award of attorney’s fees unjust. However, our courts have looked to federal decisions applying similar laws for guidance on interpreting statutory language. *See generally Newberne v. Dep’t of Crime Control & Pub. Safety*, 359 N.C. 782, 618 S.E.2d 201 (2005). Specifically, our Supreme Court, when interpreting N.C. Gen. Stat. § 6-19.1, has incorporated the United States Supreme Court’s interpretation of the federal Equal Access to Justice Act (“EAJA”) which “contains an attorney’s fees provision almost identical to [N.C. Gen. Stat. § 6-19.1].” *See Crowell*, 342 N.C. at 843, 467 S.E.2d at 679 (showing the identical language of the substantial justification and special circumstances prongs and citing United States Supreme Court decisions to interpret the language of the federal statute that is identical to that of the North Carolina statute).

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Interpreting “special circumstances” in the EAJA as a “safety valve” preventing unjust awards, the United States Supreme Court stated the special circumstances provisions allow “the [trial] court[s] discretion to deny awards where equitable considerations dictate an award should not be made.” *Scarborough v. Principi*, 541 U.S. 401, 423, 158 L. Ed. 2d 674, 692 (2004) (citation omitted).

Though not giving deference to UNC’s basis for withholding benefits in *Frampton I*, this Court did acknowledge the uniqueness of the situation UNC faced. 241 N.C. App. at 412, 773 S.E.2d at 534. “This case requires this Court, as it required the trial court and the University, to resolve an unusual and controversial dispute that tests the University’s responsibilities as an employer of tenured faculty and as a steward of public funds.” *Id.* at 401–02, 773 S.E.2d at 527. In reviewing the issues that are currently before this Court, we hold that based on UNC’s responsibility to manage public funds and plaintiff’s own choices that precipitated this dispute, the trial court acted within its discretion in determining special circumstances would make an award of attorney’s fees unjust in this case, thus satisfying the second prong of section 6-19.1.

Regardless, even if UNC acted without substantial justification and no special circumstances existed, the controlling statute specifically states that a trial court “may” use its discretion to decide whether to grant or deny an award of attorney’s fees. N.C. Gen. Stat. § 6-19.1(a). It is not *required* to award attorney’s fees. *See High Rock Lake Partners, LLC*, 234 N.C. App. at 339, 760 S.E.2d at 753 (setting out the standard of review for a trial court’s decision on whether or not to award attorney’s fees as abuse of discretion). Plaintiff relies on what he contends was the trial court’s error in finding substantial justification for UNC’s action to support the conclusion that the trial court was “operating under a mistake of law” and “abused its discretion in denying the motion for an award of attorney’s fees.” However, on appeal, plaintiff asserts “the trial court erred on both points, ‘rational basis’ and ‘special circumstance,’ so there can be no ‘reason’ supporting its decision to deny the motion.” By this assertion, plaintiff improperly implies that a failure to prove both provisions—substantial justification and special circumstances—mandates that the trial court award attorney’s fees. Yet, the plain language of the statute merely permits the trial court to decide whether to grant the award of attorney’s fees; the use of “may” does not necessitate an action by the trial court when both prongs are satisfied.

In the order denying plaintiff attorney’s fees, the trial court based its conclusion that “it would be unjust to require the State to pay attorney’s fees” to plaintiff on “the record in this case, the decision of the North

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Carolina Court of Appeals [in *Frampton I*], the submissions of the parties, the arguments of counsel, and the relevant-statutory and case law.” Given the trial court’s reasoned response and plaintiff’s failure to establish that the trial court abused its discretion in reaching its decision to deny the requested award, we overrule plaintiff’s argument.

Therefore, the orders entered 28 June 2016 and 3 August 2016 denying appellant’s request for attorney’s fees, are

AFFIRMED.

Judges STROUD and DAVIS concur.

RICHARD HOWSE AND MARY B. REED, PLAINTIFFS
v.
BANK OF AMERICA, N.A. AND FEDERAL NATIONAL MORTGAGE
ASSOCIATION, DEFENDANTS

No. COA16-979

Filed 15 August 2017

1. Declaratory Judgments—foreclosure by power of sale—collateral attack—North Carolina Uniform Declaratory Judgments Act—equitable action

The trial court erred in a declaratory judgment action for a foreclosure by power of sale under N.C.G.S. § 45-21.16(d) by determining that the entirety of plaintiffs’ complaint was a collateral attack on a valid judgment. While plaintiffs’ claims under the North Carolina Uniform Declaratory Judgments Act in N.C.G.S. § 1-253 et seq. were an impermissible collateral attack, plaintiffs’ complaint was sufficient to invoke equitable jurisdiction pursuant to N.C.G.S. § 45-21.36 to argue equitable grounds to enjoin the foreclosure sale. On remand, the trial court was instructed to ensure that the rights of the parties have not become fixed before proceeding with an equitable action pursuant to N.C.G.S. § 45-21.34.

2. Declaratory Judgments—foreclosure by power of sale—denial of motion to compel discovery—abuse of discretion—equitable claims

The trial court abused its discretion in a declaratory judgment action for a foreclosure by power of sale under N.C.G.S. § 45-21.16(d) by denying plaintiffs’ motion to compel discovery.

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Judge BERGER concurring in part and dissenting in part.

Appeal by Plaintiffs from order entered 5 May 2016 by Judge Gregory R. Hayes in Superior Court, Catawba County. Heard in the Court of Appeals 6 March 2017.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for Plaintiffs-Appellants.

McGuire Woods, LLP, by Nathan J. Taylor, for Defendants-Appellees.

McGEE, Chief Judge.

Richard Howse and Mary B. Reed (“Plaintiffs”) appeal from the trial court’s 5 May 2016 order granting Bank of America, N.A.’s (“Bank of America”) and Federal National Mortgage Association’s (“Fannie Mae”) (collectively, “Defendants”) motion for summary judgment, and denying Plaintiffs’ motion to compel. We affirm in part, reverse and remand in part.

I. Background

Plaintiffs executed a promissory note (“the Note”) in the principal amount of \$376,000.00, made payable to Bank of America, on 16 July 2008. The Note was secured by a deed of trust (the “Deed of Trust”) executed by Plaintiffs on 16 July 2008 on real property located at 6965 Navahjo [sic] Trail, Sherrills Ford, North Carolina 28673 (“the Property”). Bank of America was named as the lender in the Deed of Trust. The terms of the Deed of Trust allowed “[t]he Note or a partial interest in the Note . . . [to] be sold one or more times without prior notice to [Plaintiffs].” The Deed of Trust also provided that Plaintiffs would be given written notice of a change in loan servicer.

Bank of America sold the Note to Fannie Mae on 1 August 2008, but Bank of America remained the loan servicer. Bank of America remained the loan servicer throughout the life of the loan. Bank of America “was authorized by Fannie Mae to make determinations with respect [to] borrower eligibility for loan modification programs offered by Fannie Mae.”

Plaintiffs defaulted on the Note in November 2009. After defaulting, Plaintiffs contacted Bank of America on several occasions regarding the Note. Plaintiffs delivered a letter of hardship, along with certain financial statements, to Bank of America on or about 8 April 2010. On or about 28 June 2010, Plaintiffs told Bank of America that the Property was a vacation rental property and, therefore, the Property was not eligible for

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Fannie Mae's "Making Home Affordable" Program. Plaintiffs again sent correspondence to Bank of America inquiring about the Note and Deed of Trust on 12 March 2012. Bank of America notified Plaintiffs by letter on 4 June 2012 that "[t]he current owner of the [N]ote is [Fannie Mae]."¹

On 8 August 2012, Bank of America commenced a foreclosure by power of sale proceeding by filing a notice of hearing before the Clerk of Superior Court for Catawba County ("the Clerk"). The Clerk entered an order on 8 November 2012 finding that "the [Note] is now in default and the instrument securing said debt gives the note holder the right to foreclose under a power of sale." The order further provided that a foreclosure sale could proceed on the Deed of Trust (the "Order for Sale"). Plaintiffs appealed the Order for Sale to the superior court on 11 November 2012.

While Plaintiffs' appeal to the superior court was pending, Bank of America repurchased the Note from Fannie Mae on 7 January 2013. After repurchasing the Note, Bank of America sent Plaintiffs a letter on 22 March 2013 to determine whether Plaintiffs qualified for a loan modification. Bank of America did not receive a response from Plaintiffs.

The superior court entered an order on 12 June 2013 affirming the Order for Sale entered by the Clerk. In the orders of the Clerk and the trial court, Bank of America was found to be the holder of the Note. Plaintiffs appealed the trial court's order affirming the Clerk's Order for Sale to this Court, and we affirmed the trial court's order in an opinion entered 15 April 2014. *See In re Foreclosure of a Deed of Trust Executed by Reed*, 233 N.C. App. 598, 758 S.E.2d 902, 2014 N.C. App. LEXIS 381 (2014) (unpublished) (hereinafter "*Foreclosure of Reed*"). This Court held that

the [Deed of Trust] contains a description of the land sufficient to identify the subject property. Further, the record contains competent evidence for us to conclude that [Bank of America] was the current holder of a valid debt. Accordingly, the trial court did not err in ordering [Bank of America] to proceed with the foreclosure pursuant to N.C. Gen. Stat. § 45-21.16[.]

Id. at *10.

1. Some facts described herein originate from Plaintiffs' complaint. Because this case is before this Court on an appeal from the trial court's grant of summary judgment in favor of Defendants, we consider all facts in the light most favorable to Plaintiffs, the non-moving parties. *See Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 202, 377 S.E.2d 285, 287 (1989).

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Subsequent to this Court's decision in *Foreclosure of Reed*, Plaintiffs initiated the present lawsuit by filing a complaint for declaratory judgment and other relief on 16 March 2015. In their complaint, Plaintiffs alleged, *inter alia*, that Defendants breached the covenants of good faith and fair dealing by their "conduct of concealment and misrepresentation[.]" and by their negligent misrepresentation of material facts that Plaintiffs relied upon to their detriment. Plaintiffs requested a declaratory judgment that North Carolina's foreclosure by power of sale statute, N.C. Gen. Stat. § 45-21.16(d), was unconstitutional as applied to them. Plaintiffs requested an accounting "of all funds to be applied to the Note;" and requested "declaratory relief . . . pursuant to . . . the Uniform Declaratory Judgments Act[, N.C. Gen. Stat. § 1-253 *et seq.*]" for the declaration that none of the Defendants have any legal or equitable rights in the Note or Deed of Trust, including for purposes of foreclosure[.] The complaint requested the court, "[p]ursuant to N.C.G.S. § 45-21.34 and § 1-485," issue "a preliminary injunction barring any sale, conveyance, or foreclosure of the Property pending the full disposition of" Plaintiffs' lawsuit.

Defendants filed a motion to dismiss Plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on 12 June 2015. The trial court denied Defendants' motion by order entered 11 August 2015. Defendants served their answer and affirmative defenses to Plaintiffs' complaint on 28 August 2015. While the discovery process was ongoing, Defendants filed a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 on 1 April 2016. Plaintiffs filed a motion to compel on 18 April 2016, arguing that Defendants had failed to answer interrogatories and produce documents requested in the discovery process.

A hearing was held on 2 May 2016 on Defendants' motion for summary judgment and Plaintiffs' motion to compel. Plaintiffs argued they were unable to procure evidence in support of their claims due to Defendants' failure to answer their discovery requests. Following the hearing, the trial court held that Plaintiffs' complaint "contain[ed] a collateral attack on a valid judgment; that there [was] no genuine issue of material fact and that Defendants [were] entitled to judgment as a matter of law." Accordingly, the trial court granted Defendants' motion for summary judgment and denied Plaintiffs' motion to compel. Plaintiffs appeal.

II. Analysis

The central question on appeal concerns whether the present lawsuit is, as the trial court found, a "collateral attack" on the foreclosure by power of sale proceeding this Court upheld as valid in *Foreclosure of*

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Reed. In addition to arguing that the present lawsuit is not a collateral attack and the trial court erred in so finding, Plaintiffs also argue the trial court erred in granting Defendants' motion for summary judgment while Plaintiffs' motion to compel discovery was still pending.

A. Collateral Attack on a Valid Judgment; N.C. Gen. Stat. § 45-21.34

[1] Plaintiffs argue the trial court erred in granting summary judgment to Defendants on the grounds that their lawsuit was an impermissible collateral attack on an otherwise valid judgment. Summary judgment has been described by this Court as a "drastic remedy," the purpose of which is to "save time and money for litigants in those instances where there is no dispute as to any material fact." *Leake*, 93 N.C. App. at 201, 377 S.E.2d at 286 (citing *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975)). On appeal, "we review summary judgments to determine if there was a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *MacFadden v. Louf*, 182 N.C. App. 745, 746, 643 S.E.2d 432, 433 (2007). The standard of review for summary judgment is *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

A collateral attack "is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969) (quotation marks and citation omitted); *see also Regional Acceptance Corp. v. Old Republic Surety Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) ("A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." (internal quotation marks omitted)).

We find the present lawsuit, to the extent that Plaintiffs seek relief pursuant to the North Carolina Uniform Declaratory Judgments Act, N.C. Gen. Stat. § 1-253 *et seq* ("UDJA"), to be an impermissible collateral attack. In the foreclosure by power of sale proceeding, the Clerk "entered an order authorizing [Bank of America] to foreclose on [the Property] pursuant to N.C. Gen. Stat. § 45-21.16." *Foreclosure of Reed*, 2014 N.C. App. LEXIS 381, at *2. Plaintiffs appealed to the trial court and, after the trial court denied Plaintiffs' appeal, this Court held "the trial court did not err in ordering [Bank of America] to proceed with the foreclosure pursuant to N.C. Gen. Stat. § 45-21.16[.]" *Id.* at *10.

The UDJA is a statutory scheme wholly separate from the statutory procedure for foreclosure by power of sale provided by N.C.G.S. § 45-21.16 *et seq*, and any relief potentially available under the UDJA

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would require the “judgment in another action” – the foreclosure by power of sale action in this matter in which this Court held that the trial court did not err in ordering Bank of America to proceed with the foreclosure – to be “adjudicated invalid.” *Thrasher*, 4 N.C. App. at 540, 167 S.E.2d at 553. Therefore, any relief pursuant to the UDJA would constitute an impermissible collateral attack. This conclusion, however, does not end our analysis. While Plaintiffs’ complaint in the present case primarily sought relief under the UDJA, Plaintiffs also sought relief pursuant to N.C.G.S. § 45-21.34. As explained below, we find that the trial court erred in granting Defendants’ motion for summary judgment on Plaintiffs’ equitable claims made pursuant to N.C.G.S. § 45-21.34.

“There are two methods of foreclosure possible in North Carolina: foreclosure by action and foreclosure by power of sale.” *Phil Mechanic Construction Co. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 3 (1985) (citation omitted). In foreclosure by power of sale proceedings, such as the one undertaken by Defendants on the Property which was the subject of our decision in *Foreclosure of Reed*, the clerk of superior court “is limited to making the six findings of fact specified” in N.C.G.S. § 45-21.16(d):

- (1) the existence of a valid debt of which the party seeking to foreclose is the holder;
- (2) the existence of default;
- (3) the trustee’s right to foreclose under the instrument;
- (4) the sufficiency of notice of hearing to the record owners of the property;
- (5) the sufficiency of pre-foreclosure notice under [N.C. Gen. Stat. § 45-102] and the lapse of the periods of time established by Article 11, if the debt is a home loan as defined under [N.C. Gen. Stat. § 45-101(1b)]; and
- (6) the sale is not barred by [N.C. Gen. Stat. § 45-21.12A].

In re Young, 227 N.C. App. 502, 505-06, 744 S.E.2d 476, 479 (2013) (citations and quotation marks omitted). While the clerk’s findings of fact “are appealable to the superior court for a hearing *de novo*,” the superior court’s authority in reviewing the clerk’s findings “is similarly limited to determining whether the six criteria of N.C. Gen. Stat. § 45-21.16(d) have been satisfied.” *Id.* In a *de novo* appeal to the superior court in a N.C.G.S. § 45-21.16 foreclosure by power of sale proceeding, “the trial court must decline to address any party’s argument for equitable relief, as such an action would exceed the superior court’s permissible scope of review.” *Id.* (citations, brackets and quotation marks omitted); see also *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374-75, 432 S.E.2d 855, 859 (1993) (“Equitable defenses to foreclosure . . .

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may not be raised in a hearing pursuant to [N.C.G.S.] § 45-21.16 or on appeal therefrom[.]”).

While equitable defenses to foreclosure are not available in a N.C.G.S. § 45-21.16 proceeding, “equitable defenses to foreclosure may be raised in a separate action to enjoin the foreclosure prior to the time the rights of the parties become fixed.” *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 423, 775 S.E.2d 1, 6 (2015). “The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to [N.C.]G.S. [§] 45-21.34.” *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978). N.C.G.S. § 45-21.34 provides, in relevant part,

Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to *enjoin such sale, upon . . . any . . . legal or equitable ground which the court may deem sufficient*: Provided, that the court or judge enjoining such sale, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the appellate division from any such order or injunction.

N.C. Gen. Stat. § 45-21.34 (2015) (emphasis added).

In the present case, Defendants sought foreclosure on the Property through foreclosure by power of sale. The Clerk found the six prerequisites required for foreclosure as specified in N.C.G.S. § 45-21.16 to be present, and ordered that the foreclosure proceed. The Clerk’s findings were upheld both on appeal to the superior court and this Court. *Foreclosure of Reed*, 2014 N.C. App. LEXIS 381, at *2-3. However, none of those proceedings – before the Clerk, the superior court, or this Court – dealt with any equitable defenses to foreclosure. This was not through any failure of Plaintiffs, but rather was by design: Plaintiffs were barred

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by our precedents from raising equitable defenses to foreclosure in the context of a N.C.G.S. § 45-21.16 foreclosure by power of sale proceeding. *E.g. In re Young*, 227 N.C. App. at 505-06, 744 S.E.2d at 479 (“the trial court must decline to address any party’s argument for equitable relief, as such an action would exceed the superior court’s permissible scope of review.” (citations, brackets and quotation marks omitted)).

It is clear that equitable defenses to foreclosure may only be considered through a proceeding pursuant to N.C.G.S. § 45-21.34. Such an action is not a collateral proceeding attacking a valid judgment, but is rather a statutorily-created method by which “[a]ny owner of real estate, or other person, firm or corporation having a legal or equitable interest therein” may present equitable defenses to foreclosure when the foreclosure proceeding does not otherwise contain a mechanism for those defenses to be considered.

In addition to presenting claims under the UDJA, Plaintiffs’ complaint in the present case requested injunctive relief “[p]ursuant to N.C.G.S. § 45-21.34,” and asked the trial court to “issue a preliminary injunction barring any sale, conveyance, or foreclosure of the Property pending the full disposition of” the present lawsuit. We hold that Plaintiffs’ invocation of N.C.G.S. § 45-21.34 was an “appl[ication] to a judge of the superior court” and was sufficient to raise Plaintiffs’ equitable claims as to why the trial court should “enjoin such [foreclosure] sale.” N.C.G.S. § 45-21.34. Therefore, Plaintiffs’ equitable claims were proper under N.C.G.S. § 45-21.34, and the trial court erred in granting summary judgment to Defendants as to those claims.

As this Court has held, an equitable action pursuant to N.C.G.S. § 45-21.34 must be commenced “prior to the time the rights of the parties become fixed.” *Funderburk*, 241 N.C. App. at 423, 775 S.E.2d at 6. In the present case, it appears Plaintiffs filed the present lawsuit after this Court issued its decision in *Foreclosure of Reed*, but before a foreclosure sale had occurred, as Plaintiffs’ complaint requested the trial court enjoin any sale of the Property during the pendency of the present lawsuit. The rights of parties in a foreclosure by power of sale proceeding become fixed if an upset bid “is not filed following a sale, resale, or prior upset bid” within ten days. *See* N.C. Gen. Stat. §§ 45-21.27; 45-21.29A (2015). On the record before us, it appears that the Property has not been sold in a foreclosure sale and, thus, the rights of the parties have not become fixed. On remand, the trial court should ensure that the rights of the parties have not become fixed before proceeding with an equitable action pursuant to N.C.G.S. § 45-21.34.

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B. Motion to Compel

[2] Plaintiffs also argue the trial court erred by granting summary judgment while discovery was not yet completed and while Plaintiffs' motion to compel was still pending. "Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994).

As our Supreme Court has held, "[o]rdinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979). This general rule is not absolute, and this Court has upheld awards of summary judgment when a motion to compel was pending where, for instance, summary judgment was properly granted on sovereign immunity grounds. *See Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C. App. 592, 597-98, 655 S.E.2d 920, 924 (2008); *see also N.C. Council of Churches v. State of North Carolina*, 120 N.C. App. 84, 92, 461 S.E.2d 354, 360 (1995) ("A trial court is not barred in every case from granting summary judgment before discovery is completed." (citations omitted)).

In the present case, though, it appears from the face of the trial court's order that it denied Plaintiffs' motion to compel *because* it had determined that Defendants' motion for summary judgment should be granted on the theory that Plaintiffs' entire lawsuit was an impermissible collateral attack. The trial court's order stated that "after considering the submissions and arguments of the parties," it determined that Plaintiffs' complaint "contain[ed] a collateral attack on a valid judgment" and therefore ordered that "Defendants' [m]otion for [s]ummary [j]udgment [was] granted" and "further ordered" that "Plaintiff's [m]otion to [c]ompel [was] denied." (all caps omitted).

In light of our determination that the trial court erred in granting Defendants' motion for summary judgment as to Plaintiffs' claims pursuant to N.C.G.S. § 45-21.34, and the fact that no other reason for the trial court's denial of Plaintiffs' motion to compel discovery appears on the face of the order, we find the trial court abused its discretion in denying Plaintiffs' motion to compel.

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The dissent cites the well-settled principle of North Carolina law which states that a trial court's ruling on a motion for summary judgment should be upheld upon "any theory of law" and should not be set aside "merely because the court gave a wrong or insufficient reason for it." *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (citation omitted). The dissent then discusses Plaintiffs' claims for relief and how, in the dissent's view, those claims cannot be sustained.

The dissent's analysis is surely thoughtful, and may – on remand and after consideration of Plaintiffs' motion to compel – be found to be meritorious. But it is clear reviewing the transcript of the hearing that the trial court believed Plaintiffs' entire lawsuit to be a collateral attack, which obviated the need for it to consider whether information useful to Plaintiffs' claims could be had with more discovery. When giving its oral ruling on Defendants' motion for summary judgment, the trial court stated that "having reviewed the file and having heard the argument of the attorneys, . . . I think [Plaintiffs' lawsuit is] a collateral attack on the foreclosure and therefore I'm going to grant the Defendants' Motion for Summary Judgment and deny Plaintiffs' Motion to Compel." As noted, this Court has previously stated that "[o]rdinarily it is error" for a trial court to rule on a motion for summary judgment "when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending." *Evans v. Appert*, 91 N.C. App. 362, 367, 372 S.E.2d 94, 97 (1988).

Once a party moving for summary judgment has shown that "(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law," the burden then "shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gavnt v. Pittaway*, 138 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000) (citations omitted).² In the present case, Plaintiffs had no opportunity to make that showing, as discovery had not been completed and the trial court did not allow Plaintiffs to "produce a forecast of evidence

2. Prior to moving for summary judgment, Defendants moved to dismiss Plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), contending the complaint "fail[ed] to allege any facts supporting a claim for relief" and that the complaint "[was] barred by the doctrines of collateral estoppel and res judicata and the statute of limitations." After a hearing, the trial court denied Defendants' motion, and Defendants did not appeal that ruling to this Court.

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... showing that he can at least establish a *prima facie* case at trial.” *Id.* Once the trial court determined that Plaintiffs’ lawsuit was a collateral attack, that was the end of the trial court’s inquiry.

In their motion to compel, Plaintiffs requested Defendants be compelled to produce documents, supplements to interrogatories, and other information that Defendants had not yet produced in the discovery process. Even if Plaintiffs had been given the opportunity to produce “a forecast of evidence” showing a *prima facie* case on each of their claims for relief, their ability to make such a showing would have been hindered by the incomplete discovery process and the lack of a merits ruling on their motion to compel. Therefore, the appropriate disposition in the present case is to reverse the grant of summary judgment and the denial of Plaintiffs’ motion to compel to allow the trial court to determine whether information relevant to any of Plaintiff’s claims could be exposed though the discovery sought in Plaintiffs’ motion to compel.³

III. Conclusion

The trial court erred in determining that the entirety of Plaintiffs’ complaint was a collateral attack on a valid judgment. While Plaintiffs’ claims under the UDJA were an impermissible collateral attack, Plaintiffs’ complaint was sufficient to invoke the trial court’s equitable jurisdiction pursuant to N.C.G.S. § 45-21.36 to argue the equitable grounds upon which the foreclosure sale should be enjoined. On remand, the trial court must determine whether the rights of the parties have become fixed pursuant to N.C.G.S. §§ 45-21.27 and 45-21.29A and, if not, which of Plaintiffs’ claims may proceed in a N.C.G.S. § 45-21.34 action. The trial court must then conduct further proceedings, as appropriate, on those equitable claims.

We also reverse the trial court’s denial of Plaintiffs’ motion to compel. Because the trial court erred in granting summary judgment to Defendants, the denial of Plaintiffs’ motion to compel was also in error.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge DAVIS concurs.

3. We note that the briefing to this Court from both Plaintiffs and Defendants focused *exclusively* on whether Plaintiffs’ lawsuit was an impermissible collateral attack and whether the trial court erred in denying Plaintiffs’ motion to compel. Neither party’s brief addressed whether the trial court properly granted summary judgment to Defendants for any other reason, such as those discussed by the dissent.

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

BERGER, Judge, concurring in part, dissenting in part in separate opinion.

I concur with the majority's opinion that Plaintiffs' claim is an impermissible collateral attack on the foreclosure order that was properly entered pursuant to N.C. Gen. Stat. § 45-21.16.

As to Plaintiffs' remaining claims, however, because Plaintiffs are unable to produce evidence supporting essential elements of their claims, I would affirm the trial court and respectfully dissent from the majority opinion.

Pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). The review of a trial court's grant of summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

A party moving for summary judgment may prevail by showing either: (1) "an essential element of the opposing party's claim is non-existent, or (2) . . . the opposing party cannot produce evidence to support an essential element of his . . . claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations omitted). Once the moving party has met this burden, the opposing party must "set forth *specific facts* showing that there is a genuine issue for trial." *Id.* at 369-70, 289 S.E.2d at 366 (citation omitted) (emphasis in original). Where the opposing party is unable to demonstrate the existence of a material fact, a grant of summary judgment in favor of the movant is appropriate. *Id.* at 370, 289 S.E.2d at 366.

Evidence presented by the parties by way of discovery and affidavits established that in July 2008, Plaintiff Mary Reed obtained a loan in the amount of \$376,000.00 payable to defendant Bank of America, N.A. ("BOA"). Said loan was secured by a Deed of Trust for property owned by both Plaintiffs located in Catawba County.

Plaintiffs did not use the property as their primary residence, but rather as income-producing vacation rental property. Despite having funds to do so, Plaintiffs failed to pay on the debt owed to BOA and

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defaulted on the Note in November 2009. Plaintiffs admit that they failed to pay their monthly mortgage obligation to BOA, as shown in a letter from Plaintiffs to BOA dated April 7, 2010 in which they state:

- (1) “I am writing this letter to explain our unfortunate set of circumstances that have caused us to become delinquent in our mortgage.”
- (2) “[W]e cannot afford to pay what is owed to you. It is our full intention to pay what we owe.” (Emphasis in original).
- (3) “[W]e had purchased several homes with the intent of repairing/remodeling etc. and selling . . . [but] we were not able to afford nor spend the time to do that.”
- (4) “We just got another home back that we had sold/financed when the person could not pay the monthly[.]”

Plaintiffs did not meet eligibility requirements for relief under Fannie Mae’s Making Home Affordable program. Even so, BOA sent a letter to Plaintiffs in March 2013 seeking to assist Plaintiffs with modification of the loan. Plaintiffs never responded to BOA’s inquiry.

In August 2012, foreclosure proceedings were initiated with the Catawba County Clerk of Court. An Order of Sale was entered by the Clerk which was eventually upheld by the trial court and this Court. Plaintiffs filed this action for equitable relief in Catawba County Superior Court in March 2015.

The Deed of Trust at issue contained typical language setting forth the responsibilities of both parties. Importantly, paragraph 20 specifically states:

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest on the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the “Loan Servicer”) that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and [a]pplicable [l]aw. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of

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the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA [Real Estate Settlement Procedures Act] requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

A review of the pleadings and discovery in this matter reveals that there is no genuine issue of material fact, and the trial court's entry of summary judgment should be affirmed.

Plaintiffs failed to perform under the Note. Plaintiffs' claims for relief concern allegations that Defendants "concealed . . . the true ownership of the Note" and misrepresented the identity of "the actual owner of the Note." Plaintiffs, however, pursuant to the terms of the Deed of Trust set forth above, forfeited notice for transfer of ownership of the Note unless there was a change to the Loan Servicer. The record in this case reflects BOA was the loan servicer throughout, and communications regarding Plaintiffs failure to perform under the Note were with BOA.

Although couched as equitable claims for relief, both of Plaintiffs' remaining claims stem from the legal obligations under the original Note and Deed of Trust. Plaintiffs' legal claims were resolved in the previous case, and as such, this was a collateral attack.

However, even if these are considered equitable claims, the trial court's entry of summary judgment should be affirmed. This Court previously held that, even if the court's decision was based on incorrect reasoning,

a trial court's 'ruling must be upheld if it is correct upon any theory of law,' and thus it should 'not be set aside merely because the court gives a wrong or insufficient reason for it.' *Manpower, Inc. v. Hedgecock*, 42 N.C. App. 515, 519, 257 S.E.2d 109, 113 (1979). *See also Sanitary District v. Lenoir*, 249 N.C. 96, 99, 105 S.E.2d 411, 413 (1958) (if correct result reached, judgment should not be disturbed even though [the] court may not have assigned the correct reasons for the judgment entered); *Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 555, 317 S.E.2d 408,

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411 (1984) (it is common learning that a correct judgment must be upheld even if entered for the wrong reason).

Templeton v. Town of Boone, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (citation and brackets omitted). Accordingly, this Court may review a trial court's grant of summary judgment to determine if it is legally justifiable upon any theory of law. *See Id.* (citation omitted).

Negligent misrepresentation

“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), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991) (citations omitted). In an ordinary debtor-creditor transaction, the lender's duty of care is defined by the loan agreement and does not extend beyond its terms. *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 368, 760 S.E.2d 263, 266-67 (2014); *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 449, 781 S.E.2d 1, 8 (2015) (“Here plaintiffs fail to allege any special circumstances that could establish a fiduciary relationship. Plaintiffs' allegations establish nothing more than a typical debtor-creditor relationship, wherein any duty would be created by contract through the loan agreement.”).

In the present case, in regard to Defendants' contractually created duties under the loan agreement, the Deed of Trust expressly allows “[t]he Note or a partial interest in the Note . . . [to] be sold one or more times without prior notice to [Plaintiffs].” Furthermore, Plaintiffs fail to allege any special circumstances within the complaint which would establish a fiduciary relationship between the parties. Accordingly, Plaintiffs' relationship with Defendants is no more than the “typical debtor-creditor relationship,” where Defendants' duties are controlled by the terms of the Deed of Trust. *See Arnesen*, 368 N.C. at 449, 781 S.E.2d at 8.

Pursuant to the express terms of the Deed of Trust, Plaintiffs forfeited notice of changes in ownership of the Note. Thus, because Defendants owed no duty to Plaintiffs regarding notice of ownership, contractually or otherwise, the negligent misrepresentation claim must fail because Plaintiffs cannot establish the elements necessary to create a genuine issue of material fact.

Even assuming, *arguendo*, that Defendants had a duty to inform Plaintiffs of changes in Note ownership, Plaintiffs' negligent

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misrepresentation claim must fail because the argument that Defendants' alleged misrepresentations "thwarted" Plaintiffs' ability to determine "whether modifications were permitted by [the Note's owner]" has no merit.

The uncontroverted evidence shows that even during Fannie Mae's ownership of the Note, BOA, as loan servicer, "was authorized by Fannie Mae to make determinations with respect [to] borrower eligibility for loan modification programs offered by Fannie Mae." *See Royal v. Armstrong*, 136 N.C. App. 465, 473, 524 S.E.2d 600, 605 (uncontested evidence may be used during a motion for summary judgement to establish the nonexistence of an element necessary to sustain a claim), *disc. rev. denied*, 351 N.C. 474, 543 S.E.2d 495 (2000). Accordingly, BOA's alleged misrepresentations regarding the Note ownership would have no impact on Plaintiffs' eligibility for loan modification. Plaintiffs did not qualify because they were using the home as income producing rental property, not because of any actions on the part of Defendants.

Moreover, Plaintiffs' claim further fails because they cannot show detrimental reliance. Plaintiffs have acknowledged and conceded that they failed to make payments under the Note. There is no evidence, allegation, or assertion that Plaintiffs paid monies pursuant to the Note to any entity and failed to receive credit.

Breach of the implied covenant of good faith and fair dealing

Every contract in our State contains an implied covenant of good faith and fair dealing which works to prevent any party to a contract from doing anything to destroy or injure the right of the other party to receive the benefits of the contract. *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56-57, 607 S.E.2d 286, 291 (2005). Ordinarily, a party's claim for breach of the covenant of good faith and fair dealing is "part and parcel" of a claim for breach of contract. *See Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996), *disc. rev. denied*, 345 N.C. 344, 483 S.E.2d 172-73 (1997); *see also Suntrust Bank v. Bryan/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 (holding that where a party does not breach any of the terms of a contract, "it would be illogical for this Court to conclude that [the same party] somehow breached implied terms" of that contract (citation omitted)), *disc. rev. denied*, 366 N.C. 417, 735 S.E.2d 180 (2012). However,

North Carolina recognizes an [independent] action for breach of an implied duty of good faith and fair dealing in limited circumstances involving special relationships

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between parties, e.g., cases involving contracts for funeral services and insurance. Outside such circumstances, actions for breach of good faith fail. *See Hogan v. City of Winston-Salem*, 121 N.C. App. 414, 466 S.E.2d 303 (1996) (no merit to claim of breach of duty of good faith involving retirement benefits); *Allman v. Charles*, 111 N.C. App. 673, 433 S.E.2d 3 (1993) (in a real estate sales contract, refusing to find an implied promise to make a good faith effort to sell); [*Claggett v. Wake Forest Univ.*, 126 N.C. App. 602, 610-11, 486 S.E.2d 443, 448] (no breach of good faith in denial of tenure where university rationally followed its procedures); *Phillips v. J.P. Stevens & Co.*, 827 F. Supp. 349 (M.D.N.C. 1993) (no implied duty of good faith in employment contracts).

Mechanical Indus., Inc. v. O'Brien/Atkins Assocs., P.A., No. 1:97cv99, 1998 U.S. Dist. LEXIS 5389, at *11 (M.D.N.C. Feb. 4, 1998).

Here, as previously noted, Plaintiffs have failed to allege any special relationship with Defendants that would give rise to a duty beyond the “typical debtor-creditor relationship.” *Arnesen*, 368 N.C. at 449, 781 S.E.2d at 8. Accordingly, because Plaintiffs’ legal claims were fully resolved in the prior foreclosure action, and because there is no special relationship between the parties, Plaintiffs’ claim for breach of the implied covenant of good faith and fair dealing should be denied.

Motion to Compel

While it is ordinarily error for a trial court to rule on a summary judgment motion without addressing a pending motion to compel discovery, “the court is not barred in every case from granting summary judgment before discovery is completed.” *Hamby v. Profile Prods., LLC*, 197 N.C. App. 99, 112-13, 676 S.E.2d 594, 603 (2009) (citation and internal quotation marks omitted). For instance, “[a] trial court’s granting [of] summary judgment before discovery is complete may not be reversible error if the party opposing summary judgment is not prejudiced.” *Id.* at 113, 676 S.E.2d at 603 (citations omitted).

Here, Plaintiffs cannot demonstrate prejudice. As mentioned above, the relationship between the parties did not extend beyond the contractual duties ordinarily found between debtors and creditors. The information that may have been gathered through further discovery would not change the relationship between the parties, and Plaintiffs were not prejudiced.

The entry of summary judgment by the trial court dismissing Plaintiffs’ equitable claims for (1) negligent misrepresentation, and (2)

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breach of the implied covenant of good faith and fair dealing was proper because necessary elements of both claims could not be supported, and no genuine issue of material fact existed. Therefore, the trial court did not err by granting Defendants' motion for summary judgment. Further, Plaintiffs have not been prejudiced by the trial court's ruling on the motion to compel, and I would affirm.

ARTHUR McARDLE, KIMBERLY McARDLE, SELDON JONES, JACOB McARDLE,
HANNAH McARDLE, BANNING McARDLE, AND FREDERICK S. BARBOUR
AS GUARDIAN AD LITEM FOR SOPHIE McARDLE, PLAINTIFFS

v.

MISSION HOSPITAL, INC. AND MISSION HEALTH SYSTEM, INC., DEFENDANTS

No. COA16-554

Filed 15 August 2017

**Mental Illness— involuntary commitment— initial examination—
negligence— no special relationship to third parties**

The trial court did not abuse its discretion in a negligence action by entering an order granting defendant hospital and health system company's motion to dismiss and denying plaintiff family's motion to amend as futile where defendant hospital owed no legal duty to plaintiff family during an initial examination of plaintiffs' relative (a dishonorably discharged Marine and drug abuser) prior to an involuntary commitment. Defendants did not assume custody or a legal right to control the relative under the mental health statutes of N.C.G.S. § 122C-261 et seq., and there was no special relationship creating a duty to third parties for harm resulting from an examiner's recommendation against involuntary commitment.

Appeal by Plaintiffs from Order entered 21 January 2016 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 29 November 2016.

Twiggs, Strickland & Rabenau, by Donald R. Strickland, Karen M. Rabenau, and Katherine A. King, for Plaintiffs-Appellants.

Roberts & Stevens, P.A., by Phillip T. Jackson and Eric P. Edgerton, and Patla, Straus, Robinson & Moore, P.A., by Richard S. Daniels, for Defendants-Appellees.

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INMAN, Judge.

[C]ompassion is a natural feeling . . . that hurries us without reflection to the relief of those who are in distress: it is this which in a state of nature supplies the place of laws, morals and virtues [T]he origin of society and law . . . irretrievably destroyed natural liberty . . . and serve as a substitute for natural compassion, which lost, when applied to societies, almost all the influence it had over individuals The people having in respect of their social relations concentrated all their wills in one, . . . becom[ing] so many fundamental laws, obligatory on all the members of the State without exception, and one of these articles regulates the choice and power of the magistrates appointed to watch over the execution of the rest.

Jean-Jacques Rousseau, *A Discourse on the Origin and Basis of Inequality, in The Social Contract & Discourses by Jean-Jacques Rousseau* 155, 199-228 (G. D. H. Cole trans., London, J. M. Dent & Sons Ltd., 1913) (1754).

“[E]very law is universal, and there are some things about which it is not possible to speak rightly when speaking universally.”

Aristotle, *Nicomachean Ethics* 100 (Joe Sachs trans. 2002).

When a respondent in an involuntary commitment proceeding is delivered to a hospital or other facility for an initial examination to recommend whether commitment without the respondent’s consent is required, neither the examiner nor the hospital or other facility obtains custody or a legal right to control the respondent unless and until involuntary commitment is recommended by the examiner. For this reason, neither the examiner nor the facility owes a duty to third parties for harm resulting from an examiner’s recommendation against involuntary commitment, even if the examination failed to comply with statutory requirements.

Arthur and Kimberly McArdle and their five surviving children (collectively “the McArdles”) appeal a trial court’s order of 21 January 2016 denying their motion to amend their complaint as futile and granting a motion to dismiss by Mission Hospital, Inc. and Mission Health System, Inc. (collectively “Defendants”) on the basis that Defendants owed the McArdles no legal duty. We affirm.

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I. Background and Procedural History

The McArdles' complaint and proposed amended complaint include the following allegations:

Joshua McArdle ("Joshua"), now deceased, was diagnosed with post-traumatic stress disorder (PTSD) after serving a tour of duty in a hostile area of Iraq as a United States Marine. He received an "Other than Honorable" discharge from the Marine Corps in 2008 due to drug abuse, which precluded him from receiving subsequent care through the Veterans Administration (VA). After discharge, Joshua received no mental health or substance abuse treatment. He abused alcohol, cocaine, Percocet, and marijuana, experienced extreme paranoia, and amassed a personal arsenal of weapons and ammunition.

The McArdles and other family members, including Joshua, gathered in Asheville, North Carolina in the days preceding the planned wedding of Joshua's sister Seldon Jones ("Seldon"), née McArdle, on 11 May 2013. During the pre-wedding gathering Joshua engaged in episodes of violence on 7 and 8 May 2013, including: (1) choking his brother Banning McArdle ("Banning") while Banning was driving, after Banning refused to take Joshua to buy drugs; (2) entering his brother Jacob McArdle's ("Jacob") house at night and awakening and beating Jacob; and (3) attempting to break down the door of his parents' house and again attacking Jacob. Joshua also threatened to beat up his biological father when he arrived in town for the wedding. During the altercation at the family home on the morning of 8 May 2013, Seldon called 911. Sheriff's deputies arrived at the home shortly after Joshua left.

One of the responding deputies suggested that, rather than having Joshua arrested, the family should instead pursue involuntary commitment. The McArdles all agreed on this course of action, and Arthur McArdle executed an Affidavit and Petition for Involuntary Commitment (the "Petition") before the Buncombe County Assistant Clerk of Superior Court on the same morning. Arthur's Petition sought involuntary commitment of Joshua on the grounds that he was: (1) mentally ill and dangerous to self or others and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness; and (2) a substance abuser and dangerous to self or others.

The Buncombe County Assistant Clerk of Superior Court issued a Findings and Custody Order for Involuntary Commitment (the "Custody Order") on 8 May 2013 finding reasonable grounds to believe that the allegations in the Petition were true and directing law enforcement

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officers to take Joshua into custody for an initial examination (“First Examination”) as required by N.C. Gen. Stat. §§ 122C-263 and 122C-283.¹ The Buncombe County Sheriff’s Department took Joshua into custody and delivered him to Mission Hospital at 1:45 p.m. on the same day.

At approximately 3:30 p.m. on 8 May 2013, nursing staff in Mission Hospital’s Emergency Department noted initial observations that Joshua appeared “Anxious” with “Impaired Focus/Concentration” and that he “Denies suicidal ideation/homicidal ideation at present” and “Minimizes problem.” At approximately 4:25 p.m., Mission Hospital emergency medicine physician James Roberson, M.D. (“Dr. Roberson”) referred Joshua to the hospital’s psychiatric unit for the required First Examination.

In the psychiatric unit at 4:40 p.m., a Patient/Family Services Consult was performed by clinical social worker David Weiner, who indicated in Joshua’s hospital chart that:

[t]he patient is under community petition by his father. The petition was due to a physical altercation with his brother wherein the patient tried to strangle him. The patient denies the severity of this altercation. The patient’s family reports that the patient is an ex-Marine and might be struggling with PTSD. Patient to be assessed by next available PC.

Subsequently on 8 May 2013, Dina Paul (“Paul”), a licensed clinical social worker and employee of Defendants, conducted an examination of Joshua. Paul interviewed Joshua and also received statements from several family members, including Arthur, Banning, and Jacob. Paul was apprised of Joshua’s alcohol and marijuana use, a drug screen testing positive for cannabinoids, his “Other than Honorable” discharge from the Marine Corps for drug abuse, his lack of current VA benefits, and Joshua’s acknowledgment of anger issues since returning from Iraq and his desire for treatment for PTSD. Paul wrote an Evaluation report to Dr. Roberson recommending against inpatient commitment for Joshua. Paul’s report concluded that “[Patient] can benefit from return to home with referral to VA for help with benefits and therapy. [Patient] in agreement with these recommendations.”

1. While these statutes do not explicitly term the examinations performed thereunder as “First Examinations,” both N.C. Gen. Stat. §§ 122C-263 (2015) and 122C-283 (2015) are titled “Duties of law-enforcement officer; first examination by physician or eligible psychologist.” In the interest of brevity, a reference to a “First Examination” in this opinion shall refer to an examination under either of these statutes unless specifically stated otherwise.

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The McArdules allege Paul was not qualified by statute or regulation to perform the First Examination.

After discussion with Paul, Dr. Roberson signed the North Carolina Department of Health and Human Services form entitled “Examination and Recommendation to Determine Necessity for Involuntary Commitment” (the “Recommendation”), indicating that Joshua did not meet the criteria for inpatient commitment. The Recommendation stated that Joshua was “able at this time to contract for safety – denies suicidal ideation and homicidal ideation with no psychotic symptoms. He has strong social supports, gainful employment. No psychiatric history.” Rather than indicating that Joshua was mentally ill and/or a substance abuser and dangerous to himself or others, the Recommendation noted that Joshua was “none of the above.” It further stated that “[t]he brothers reported they do not feel that the patient is a danger to anyone else or himself” but did not mention that Arthur had expressed the concern to Paul that Joshua was a danger to himself and others. The Recommendation included the note that Joshua “is in the process of getting care established at the VA medical center” without addressing Joshua’s eligibility for such benefits, which is discretionary for one discharged under “Other than Honorable” conditions. Mission Hospital discharged Joshua at approximately 10:09 p.m. on 8 May 2013, without notifying the McArdules.

Three nights later, at approximately 1:20 a.m. on 11 May 2013, Joshua broke into the McArdle family residence.² He shot and severely wounded Banning and Arthur before fatally shooting himself in the head. When Joshua shot himself, his body fell on his mother Kimberly, breaking her leg. Sisters Seldon, Hannah, and Sophie witnessed the shootings and their aftermath. After learning of the incident, Jacob rushed to Mission Hospital where he witnessed Arthur and Banning being treated for life-threatening injuries.

The McArdules filed suit on 29 December 2014 alleging negligence, gross negligence, and negligent infliction of emotional distress arising from the acts and omissions of Defendants and their employees in the First Examination. Defendants filed their answer and motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on 9 March 2015. The McArdules filed a motion to amend their complaint on 23 November 2015, and the trial court heard both Defendants’

2. A toxicology report indicated that at the time of Joshua’s death his blood alcohol content was .103 g/DL.

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motion to dismiss and the McArdles' motion to amend on 30 November 2015. On 21 January 2016, the trial court entered its order granting the motion to dismiss and denying the motion to amend as futile, holding that Defendants owed the McArdles no legal duty. The McArdles timely appealed.

II. Analysis

We review a denial of a motion to amend for abuse of discretion. *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985). A dismissal under Rule 12(b)(6), by contrast, is reviewed *de novo*. *Holleman v. Aiken*, 193 N.C. App. 484, 491, 668 S.E.2d 579, 585 (2008). In applying such a standard, the issue before the appellate court:

is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Block v. County of Person, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000) (internal citations and quotation marks omitted). However, "conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (internal quotation marks omitted).

The trial court dismissed the McArdles' complaint and denied their motion to amend for futility on the basis that no set of facts or circumstances "would support a finding that the Defendants owed the Plaintiffs any legally recognized duty . . ." We must therefore determine whether Defendants, in conducting their First Examination of Joshua, owed a legal duty to the McArdles as third parties.³ In resolving this question, we first review our state's common law concerning duties to third parties

3. The case authorities cited in this opinion use the terms "third persons" or "third parties" to refer to either the actor whose wrongful acts directly caused injury to a litigant or, alternatively, to the litigant claiming injury by said wrongful acts. *Compare Scadden v. Holt*, 222 N.C. App. 799, 802, 733 S.E.2d 90, 92 (2012) ("In general, there is neither a duty to control the actions of a third party, nor to protect another from a third party.") with *Davis v. N. C. Dept. of Human Resources*, 121 N.C. App. 105, 113, 465 S.E.2d 2, 7 (1995) ("Rivers was involuntarily committed into defendant's custody and it, therefore, had a duty to exercise reasonable care in the protection of third parties from injury by Rivers."). Because both parties in this action adopted the latter usage in their briefs by referring to Plaintiffs as the third parties in the tort analysis, we do the same except when quoting other courts' opinions.

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and then determine whether, under the statutory scheme for involuntary commitments set forth in N.C. Gen. Stat. §§ 122C-261 and 122C-281 *et seq.*, liability for the McArdles' injuries can arise from Defendants' First Examination.

A. Common Law Liability for Breach of Duty to Third Parties

"In general, there is neither a duty to control the actions of a third party, nor to protect another from a third party." *Scadden*, N.C. App. at 802, 733 S.E.2d at 92 (citing *King v. Durham Cnty. Mental Health Developmental Disabilities and Substance Abuse Auth.*, 113 N.C. App. 341, 345, 439 S.E.2d 771, 774, *disc. rev. denied*, 336 N.C. 316, 445 S.E.2d 396 (1994)). There is, however, "an exception to the general rule . . . where there is a special relationship between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct . . ." *Hedrick v. Rains*, 121 N.C. App. 466, 469, 466 S.E.2d 281, 283-84, *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996) (internal citations omitted).

A finding that a special relationship exists and imposes a duty to control is justified where "(1) the defendant knows or should know of the third person's violent propensities *and* (2) the defendant has the ability and opportunity to control the third person at the time of the third person's criminal acts."

Scadden, 222 N.C. App. at 803, 733 S.E.2d at 93 (emphasis added in original) (quoting *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 330, 626 S.E.2d 263, 269 (2006)). "The ability and opportunity to control must be more than mere physical ability to control. Rather, it must rise to the level of custody, or legal right to control." *Scadden*, 222 N.C. App. at 803, 733 S.E.2d at 93.

This Court has held that a special relationship exists when an individual is involuntarily committed, negligently released by the defendant, and the negligent release proximately results in harm to a third-party plaintiff. *See, e.g., Pangburn v. Saad*, 73 N.C. App. 336, 338-39, 326 S.E.2d 365, 367-68 (1985) (holding a duty to third parties existed where plaintiff alleged that defendant negligently released an involuntarily committed patient who then stabbed plaintiff approximately 20 times); *Davis*, 121 N.C. App. at 113, 465 S.E.2d at 7 ("Rivers was involuntarily committed into defendant's custody and it, therefore, had a duty to exercise reasonable care in the protection of third parties from injury by Rivers."); *Gregory v. Kilbride*, 150 N.C. App. 601, 607, 565 S.E.2d 685, 690 (2002)

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("[A]n independent duty arises to protect third persons from harm by the release of a mental patient who is involuntarily committed." (citation omitted)). But we have not held that such a duty to third parties existed when a voluntarily committed mental patient was released. *See King*, 113 N.C. App. at 346-47, 439 S.E.2d at 775 (holding that an individual's voluntary participation in the Willie M. program, though it obligated the defendants to provide services, did not confer upon defendants custody over the individual or the ability to control him absent a "court order").

In a related line of cases cited favorably by this Court, the Fourth Circuit's appellate and district courts have interpreted North Carolina law to hold that this State does not recognize an affirmative duty on the part of psychiatric care providers to seek involuntary commitment for individuals. *See Currie v. U.S.*, 836 F.2d 209, 214 (4th Cir. 1987) ("[I]t [is] most unlikely that the North Carolina Supreme Court would hold that North Carolina's public policy and its tort law would impose tort liabilities upon the psychiatrists at the VA hospital for a mistake in not seeking involuntary commitment."); *Cantrell v. U.S.*, 735 F. Supp. 670, 673 (E.D.N.C. 1988) ("North Carolina law d[oes] not impose an affirmative duty on mental health professionals to seek an involuntary commitment of a patient." (citing *Currie* at 212)); *Davis*, 121 N.C. App. at 112, 465 S.E.2d at 7 (citing *Currie* at 212-13); *King*, 113 N.C. App. at 347, 439 S.E.2d at 775 (citing *Cantrell* at 673).

While case law provides guidance as to the duty (or lack thereof) of mental healthcare providers to third parties prior to the commencement of involuntary commitment procedures, after involuntary commitment, and where an individual has been voluntarily committed, the issue of whether a special relationship creating a duty to third parties exists in the pre-commitment stages of an involuntary commitment proceeding is one of first impression.

The narrow question before this Court is whether, at the First Examination prior to a recommendation of involuntary commitment, a defendant examining a respondent has "custody, or [a] legal right to control" the respondent and therefore owes a duty to third parties. *Scadden*, 222 N.C. App. at 803, 733 S.E.2d at 93. The McArldles argue that "custody" and "legal right to control" are distinct, such that one party may be vested with the former and another with the latter. Assuming *arguendo* that such a distinction exists, we are required to examine our involuntary commitment statutes alongside the Custody Order in this case to determine whether "custody, or [a] legal right to control" was ever vested in Defendants. *Id.* at 803, 733 S.E.2d at 93.

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B. Custody, Control, and the Involuntary Commitment Statutory Scheme

Arthur McArdle instituted Joshua's involuntary commitment proceeding by executing an Affidavit and Petition for Involuntary Commitment under both N.C. Gen. Stat. §§ 122C-261 *et seq.* (2015) (allowing for the involuntary commitment of the mentally ill) and N.C. Gen. Stat. §§ 122C-281 *et seq.* (2015) (allowing for the involuntary commitment of substance abusers). Under both N.C. Gen. Stat. §§ 122C-261 and 122C-281, a clerk or magistrate "shall issue an order to a law enforcement officer or any other person authorized . . . to take the respondent into custody for examination by a physician or eligible psychologist" upon finding reasonable grounds that the facts alleged in the affidavit are true and the respondent is probably mentally ill (under N.C. Gen. Stat. § 122C-261(b)) or a substance abuser (under N.C. Gen. Stat. 122C-281(b)), and that the individual is a danger to himself or others.⁴ N.C. Gen. Stat. § 122C-261(b); *see also* N.C. Gen. Stat. § 122C-281(b) (using virtually identical language). Upon receipt of such an order under either statute, "a law enforcement officer or other person designated in the order shall take the respondent into custody within 24 hours after the order is signed . . ." N.C. Gen. Stat. § 122C-261(e); *see also* N.C. Gen. Stat. § 122C-281(e) (using virtually identical language).

Once a respondent is in the custody of a law enforcement officer or other properly designated individual, N.C. Gen. Stat. §§ 122C-263(a) and 122C-283(a) require that the respondent be transported to an "area facility for examination by a physician or eligible psychologist; if a physician or eligible psychologist is not available in the area facility, the person designated to provide transportation shall take the respondent to any physician or eligible psychologist locally available." N.C. Gen. Stat. § 122C-263(a); *see also* N.C. Gen. Stat. § 122C-283(a) (using virtually identical language). If neither option is available, "the respondent may be temporarily detained in an area facility," and, failing that, "the respondent may be detained under appropriate supervision in the respondent's home, in a private hospital or clinic, in a general hospital, or in a State facility for the mentally ill, but not in a jail or other penal facility." N.C. Gen. Stat. § 122C-263(a); *see also* N.C. Gen. Stat. § 122C-283(a).⁵

4. We acknowledge that a clerk or magistrate shall also issue a custody order under N.C. Gen. Stat. § 122C-261(b) upon finding it probable that the individual is mentally ill and needs treatment to avoid deterioration leading to predictable dangerousness.

5. The precise language of N.C. Gen. Stat. § 122C-283(a) (involuntary commitment for substance abuse) differs from the above-quoted language of N.C. Gen. Stat. § 122C-263(a)

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Upon “present[ation] for examination” by the respondent’s custodian to a physician or eligible psychologist, N.C. Gen. Stat. §§ 122C-263(c) and 122C-283(c) require that said physician or eligible psychologist conduct a First Examination. N.C. Gen. Stat. § 122C-263(c) requires, at a minimum, an examination of the respondent’s current and prior history of mental illness or retardation, his or her dangerousness to self or others under N.C. Gen. Stat. § 122C-3(11), his “[a]bility to survive safely without inpatient commitment,” and his capacity to make decisions concerning his care. The First Examination for involuntary commitment for substance abuse is similar, requiring the examiner to review the respondent’s “[c]urrent and previous substance abuse” and to determine if the respondent is dangerous to himself or others. N.C. Gen. Stat. § 122C-283(c).

Depending on the evaluation of the necessary factors in a First Examination, the involuntary commitment statutes dictate certain discrete outcomes: inpatient commitment, outpatient commitment, or a termination of proceedings and a release from custody by law enforcement or other properly designated individual. N.C. Gen. Stat. §§ 122C-263(d) and 122C-283(d). The medical provider conducting a First Examination must make certain findings, and, depending on the findings, the statutes compel either commitment (inpatient or outpatient) or release. N.C. Gen. Stat. §§ 122C-263(d) and 122C-283(d). The statutes provide for no additional alternative results. An examiner does not have discretion, for example, to release a respondent to an outpatient provider after making findings that, by statutory mandate, require inpatient commitment.⁶

(involuntary commitment for mental illness) only in respect to the pronouns used and the omission of the clause pertaining to state mental health facilities.

6. The statutes are less constraining on a course of treatment that a district court can order following examinations recommending involuntary commitment. For example, N.C. Gen. Stat. § 122C-271(b)(2) states that a court “may order inpatient commitment” for mentally ill individuals who are dangerous to self or others, and it “*may also* [order such a respondent] be committed to a combination of inpatient and outpatient commitment . . .” (emphasis added). This is in contrast to the statutory requirement in the same subsection that “[i]f the court does not find that the respondent meets either of the commitment criteria . . . , the respondent *shall* be discharged.” N.C. Gen. Stat. § 122C-271(b)(3) (emphasis added). In cases of involuntary commitment for substance abuse, the trial court does not actually determine whether inpatient or outpatient treatment is appropriate; rather, if the court orders commitment pursuant to the statute, N.C. Gen. Stat. § 122C-287, “[t]he area authority or physician . . . may prescribe or administer [the commitment] . . . either on an outpatient basis or in a 24-hour facility.” N.C. Gen. Stat. § 122C-290(a). This permissive language is entirely absent from the statutes concerning First Examinations, which instead employ the mandatory “*shall* recommend,” with outcomes dictated by whether the

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If inpatient commitment is compelled by findings made by an examiner, the respondent is delivered by law enforcement or other properly designated individual to a “24-hour facility described in [N.C. Gen. Stat. §] 122C-252 [titled ‘Twenty-four hour facilities for custody and treatment of involuntary clients’].” N.C. Gen. Stat. §§ 122C-263(d)(2) and 122C-283(d)(1). When a 24-hour facility is not available or appropriate for the medical care of a mentally ill respondent, the respondent “may be temporarily detained under appropriate supervision at the site of the first examination[;]” if, after seven days of temporary detention, no 24-hour facility becomes available or such a facility is no longer appropriate, the involuntary commitment proceedings are terminated. N.C. Gen. Stat. § 122C-263(d)(2). If proceedings are terminated, a respondent in a mental illness commitment proceeding is to be returned by law enforcement or an individual properly designated to his home or that of another consenting person and “the respondent shall be released from custody.” N.C. Gen. Stat. § 122C-263(d)(3). Upon termination of proceedings in a substance abuse case, the statute simply states that “the respondent shall be released . . .” N.C. Gen. Stat. § 122C-283(d)(2). In such circumstances, no involuntary commitment occurs. *Waldron v. Batten*, 191 N.C. App. 237, 241, 662 S.E.2d 568, 570 (2008) (holding that where a First Examination is administered to a respondent and no commitment is recommended, no involuntary commitment occurs).

The involuntary commitment statutes positively grant custody at the First Examination stage only to law enforcement or another properly designated individual by order of the clerk pursuant to N.C. Gen. Stat. §§ 122C-261(b) and 122C-281(b). Under those statutes, “the clerk or magistrate shall issue an order to a law enforcement officer or any other person authorized under G.S. 122C-251 to take the respondent into custody for examination . . .” N.C. Gen. Stat. § 122C-261(b); *see also* N.C. Gen. Stat. § 122C-281(b). Taking the McArdles’ allegations as true, the Custody Order issued in this case did exactly that; it directed the Buncombe County Sheriff’s Department to “take [Joshua] into custody within 24 hours after this order is signed and take [him] for examination by a person authorized by law to conduct the examination.” (internal quotation marks omitted).

required findings are found in the positive or negative, and there is no provision allowing for a recommendation of a combination of inpatient and outpatient commitment in a First Examination. N.C. Gen. Stat. §§ 122C-263(d) and 122C-283(d) (emphasis added). In a First Examination for substance abuse, the examiner must recommend commitment upon the finding of certain factors, but in doing so may allow the respondent to “be released or be held at a 24-hour facility pending hearing . . .” N.C. Gen. Stat. § 122C-283(d)(1).

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Following issuance of such an order and “[w]ithout unnecessary delay after assuming custody, the law enforcement officer . . . shall take the respondent . . . for examination by a physician or eligible psychologist . . .” N.C. Gen. Stat. § 122C-263(a); *see also* N.C. Gen. Stat. § 122C-283(a).⁷ No language in these statutes shifts custody from law enforcement to the examiner (or anyone else) in a First Examination; indeed, the First Examination in a mental illness proceeding may even be conducted via “telemedicine” outside the examiner’s physical presence. N.C. Gen. Stat. § 122C-263(c). As far as the import of the location of the First Examination is concerned, we note that the involuntary commitment statutes have specifically delineated between “24-hour facilities . . . for the *custody* and treatment of involuntary clients[,]” N.C. Gen. Stat. § 122C-252 (2015) (emphasis added), and other locations for evaluations and examinations. Notably, there is no requirement that the First Examination be conducted at such a facility.⁸

A plain reading of the statutes’ language demonstrates that, following a First Examination, custody continues with law enforcement until the respondent is, in cases recommending commitment, transferred to a 24-hour facility “for the custody and treatment of involuntary clients[,]” N.C. Gen. Stat. § 122C-252, or, in cases where commitment is not recommended, returned to a residence and “released from custody.” N.C. Gen.

7. We note that these statutes impose the duty on law enforcement (or another properly designated individual) to deliver the individual to a properly qualified examiner or, failing that, to temporarily detain him until such delivery can be accomplished. N.C. Gen. Stat. §§ 122C-263(a) and 122C-283(a). Indeed, the proposed amended complaint in this case specifically alleges that the Custody Order ordered the Buncombe County Sheriff’s Office to “take [Joshua] into custody within 24 hours after this order is signed and take the respondent for examination *by a person authorized by law to conduct the examination.*” (internal quotation marks omitted) (emphasis added). It also alleges that, upon delivery of an involuntary commitment respondent to Mission Hospital, a Buncombe County Sheriff’s deputy typically fills out a Return of Service section in the Findings and Custody Order acknowledging that “the respondent was *presented to an authorized examiner*” and providing the . . . Name of Examiner . . .” (emphasis added). The proposed amended complaint further alleges that the Buncombe County Sheriff’s deputy filled out this form when he dropped off Joshua at 1:45 p.m. and left, but that Joshua was not referred to the psychiatric unit until 4:25 p.m. Per the statute and as alleged in the proposed amended complaint, the Buncombe County Sheriff’s Department failed to deliver Joshua to a qualified examiner or to detain him until such an examiner was available. We do not consider the Buncombe County Sheriff’s Department’s potential liability, however, as it is not a party to this action.

8. The statutes contemplate that the First Examination can occur in a host of locations that may or may not be capable of assuming custody, including “in the respondent’s home, in a private hospital or a clinic, in a general hospital, or in a State facility for the mentally ill, but not in a jail or other penal facility.” N.C. Gen. Stat. § 122C-263(a); *see also* N.C. Gen. Stat. § 122C-283(a) (providing similar locations).

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Stat. §§ 122C-263(d); *see also* N.C. Gen. Stat. § 122C-283(d). It necessarily follows that the Buncombe County Sheriff's Department assumed custody of Joshua pursuant to the Custody Order and the applicable statutes until he was delivered to a 24-hour facility on a recommendation of commitment or, in the alternative, transported to his home or the home of a consenting individual following the termination of the proceeding. Because Defendants did not assume custody of Joshua under the statutory scheme, it cannot serve as the basis of a special relationship creating a duty to third parties. *See, e.g., Scadden*, 222 N.C. App. at 803, 733 S.E.2d at 93 (noting the requirement of "custody, or legal right to control.").

This reading of the statutes comports with our legislature's enactment of Session Law 2013-114, which specifically granted facilities in Ashe, Cumberland, and Wilkes Counties the ability to detain, pursue, and return individuals in the course of a First Examination *in the place of* law enforcement. 2013 N.C. Sess. Laws 235-36. Presuming as we must that our legislature passed Session Law 2013-114 with full knowledge of the involuntary commitment scheme, *Dickson v. Rucho*, 366 N.C. 332, 341, 737 S.E.2d 362, 369 (2013), and acknowledging the limitation of its effect to only three counties, its enactment confirms our conclusion that the legislature has not seen fit, as a general matter, to confer custody of an involuntary commitment respondent on anyone other than law enforcement or other person properly designated by the clerk or magistrate prior to and during a First Examination.

Beyond custody, the McArldes assert several well-stated arguments that the involuntary commitment scheme bestowed upon Defendants a legal right to control Joshua irrespective of custody. Assuming *arguendo* that there is a distinction between "custody" and "legal right to control," we nonetheless ultimately find the McArldes' arguments unavailing.

The McArldes argue that because "Defendants had the legal right to: (1) Retain Joshua in their 24-hour facility [by recommending involuntary commitment for mental illness] . . . ; and/or (2) Retain Joshua in their 24-hour facility [by recommending involuntary commitment for substance abuse,]" they had the legal right to control Joshua, creating a special relationship subjecting Defendants to liability to third persons. The McArldes argue that Defendants therefore "ha[d] the legal right to mandate that Joshua continue to remain restrained, [and] the corresponding positive duty to [decide] under [N.C. Gen. Stat.] § 122C-263(d) whether to further restrain or release." In advocating for the existence of the positive duty and legal right to mandate Joshua's restraint, the McArldes rightly note that the compulsory "shall" verbiage employed in

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N.C. Gen. Stat. § 122C-263(d) concerning the required findings in a First Examination is “the classic language of duty.” *See McLean v. Sale*, 38 N.C. App. 520, 523, 248 S.E.2d 372, 374 (1978) (holding that the use of “shall” in an earlier incarnation of North Carolina’s involuntary commitment statute “imposes a positive duty on the defendant to make the examination . . .”). However, we hold that the nature of the duty imposed, in light of the particulars of the statutory scheme, is insufficient to impose a “special relationship” between Defendants and the McArdles.

N.C. Gen. Stat. § 122C-263(d) imposes a statutory duty on Defendants, insofar as the examiner in a First Examination “shall make the following determinations . . .” The duty’s mere existence, however, does not mean that it extends beyond Joshua to third parties.

This Court has previously held that “N.C.G.S. § 122C-263 and the related involuntary commitment statutes are not public safety statutes.” *Kilbride*, 150 N.C. App. at 610-11, 565 S.E.2d at 692. The duties provided in these statutes are intended to protect the due process rights of the respondent, not the safety of the public. *Id.* at 610-11, 565 S.E.2d at 692 (“The primary purpose of an involuntary commitment proceeding is to protect the person who, *after due process*, has been found to be both mentally ill and imminently dangerous The purpose of the statutes is . . . to protect the rights of the individual who is the subject of the involuntary commitment proceedings.” (emphasis added) (internal citations omitted)).

Defendants had no right to control Joshua at the time of the alleged breach of duty to Joshua because it occurred prior to his admission to Defendants’ care. The McArdles contend that the examiner’s statutory authority to make findings about an involuntary commitment petition respondent means “[t]he power to release or not release is the first examiner’s[.]” But the examiner has no discretion whether or not to release a respondent. It is the *statutes* that dictate the result on the basis of the examiner’s findings, and the examiner is not authorized by law to deviate from those statutorily-imposed results. Nor may the examiner assume control over the respondent. In short, a right or duty to make a determination that may result in assuming a legal right to control is distinct from the legal right to control itself, and Defendants “‘had no legal right to mandate’ [Joshua’s] behavior” because the statutory mandate for commitment was never triggered. *Scadden*, 222 N.C. App. at 805-06, 733 S.E.2d at 94 (quoting *King*, 113 N.C. App. at 347, 439 S.E.2d at 775).⁹

9. A similar line was drawn in *Cantrell*. 735 F. Supp. at 673. There, the federal district court noted that although a mental health provider may, under N.C. Gen. Stat. § 122C-212(b),

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While it is true that “[i]t is the finding by the physician . . . that directly results in the restraint of respondent[,]” *McLean*, 38 N.C. App. at 523, the examiner at a First Examination is empowered only to make certain findings, and it is only after specific findings are made that control is exercised.¹⁰

Application of our law to the McArdles’ logic aptly demonstrates this distinction. N.C. Gen. Stat. § 122C-262(a) provides: “*Anyone* . . . who has knowledge of an individual who is subject to inpatient commitment . . . and who requires immediate hospitalization to prevent harm to self or others, may transport the individual directly to an area facility or other place [for a First Examination] . . .” N.C. Gen. Stat. § 122C-262(a) (emphasis added). A person may take control of such a person absent an order for custody under N.C. Gen. Stat. § 122C-261. *See In re Woodie*, 116 N.C. App. 425, 429, 448 S.E.2d 142, 144 (1994) (holding there was no error in an involuntary commitment action where police transported an individual to a hospital for examination by a physician under N.C. Gen. Stat. § 122C-262 “without having a petition for an order to take appellant into custody in the court file as required by [N.C. Gen. Stat.] § 122C-261 (1993).”). Thus, under particular circumstances, any member of the public may have the statutorily-provided option of exercising a degree of control over a person that is equivalent to, and otherwise reserved for, a custody order under the involuntary commitment statutes. If we were to hold, as the McArdles’ logic dictates, that “custody, or [a] legal right to control[,]” *Scadden*, 222 N.C. App. at 803, 733 S.E.2d at 93, is equivalent to “the legal ability” to assume the mantle of a legal right to control, then *any* person electing not to transport an individual consistent with N.C. Gen. Stat. § 122C-262(a) would fall within the “special relationship” giving rise to liability to others, if the person, per the very terms of N.C. Gen. Stat. § 122C-262, knew of the individual’s “violent propensities and . . . ha[d] the ability and opportunity to control” the individual. *Stein*, 360 N.C. at 330, 626 S.E.2d at 269. Such a holding would upend the general rule that “there is neither a duty to control the actions of a third party, nor to protect another from a third party.” *Scadden*, 222 N.C. App. at 802,

hold a voluntarily committed patient for 72 hours following a request for discharge, this ability did not rise to level of control sufficient to create a special relationship imposing liability to third parties. *Id.* at 673. Instead, the provider’s ability to hold an individual for 72 hours merely “enables the institution to *attempt* to gain control which *it does not have over the patient* by seeking involuntary commitment.” *Id.* at 673 (emphasis added).

10. We note that the pleadings in this matter also identify this distinction: the specific factual allegations of negligence in the McArdles’ original and amended complaints pertain to actions or omissions in the *First Examination itself* rather than in the exercise of any positive control over Joshua.

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733 S.E.2d at 92; *see also Currie*, 836 F.2d at 214 (“[I]t [is] most unlikely that the North Carolina Supreme Court would hold that North Carolina’s public policy and its tort law would impose tort liabilities upon the psychiatrists at the VA hospital for a mistake in not seeking involuntary commitment.”) and *Cantrell*, 735 F. Supp. at 672-73 (“North Carolina law d[oes] not impose an affirmative duty on mental health professionals to seek an involuntary commitment of a patient.” (citing *Currie*, 836 F.2d at 212)). We therefore decline to adopt the holding advocated by the McArldes to prevent “the exception [from] swallow[ing] the rule” *Scadden*, 222 N.C. App. at 803, 733 S.E.2d at 93. The exception creating liability to claims by third parties in the involuntary commitment context remains unchanged: “[W]here a person *has been involuntarily committed* . . . there is a duty on the institution to exercise control over the patient” *Davis*, 121 N.C. App. at 112, 465 S.E.2d at 7 (emphasis added); *see also King*, 113 N.C. App. at 346, 439 S.E.2d at 774 (noting the exception applies in “institution-involuntarily committed mental patient” cases).

For the same reason that we affirm the trial court’s conclusion that Defendants owed no duty to the McArldes, we also affirm the trial court’s denial of the McArldes’ motion to amend the complaint, because the complaint could not be amended to state a valid cause of action against Defendants.

III. Conclusion

The McArldes’ original and proposed amended complaints chronicle a terrible series of events and profound suffering. Even so, our sympathy does not empower us to step beyond the confines of the law: “Absent legal grounds for visiting civil liability on defendant[s], our courts cannot offer plaintiffs the requested remedy.” *Stein*, 360 N.C. at 325, 626 S.E.2d at 266. Because we hold that Defendants did not have custody of or a legal right to control Joshua when conducting their First Examination, no special relationship was created imposing liability, and the trial court did not abuse its discretion in denying the McArldes’ motion to amend or commit reversible error in dismissing their complaint.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

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ANDREA MORRELL, G. PONY MORRELL, AND THE PASTA WENCH, INC., PLAINTIFFS
v.
HARDIN CREEK, INC., JOHN SIDNEY GREENE, AND HARDIN CREEK
TIMBERFRAME AND MILLWORK, INC., DEFENDANTS

No. COA16-878

Filed 15 August 2017

1. Negligence—summary judgment—ambiguous commercial lease—burst water pipe—modified sprinkler system

The trial court erred in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, by granting summary judgment in favor of all defendants on plaintiff lessee's negligence claims where the language in a commercial lease was ambiguous. Further, the issue of the various defendants' degree of involvement in modifying a sprinkler system was an issue to be resolved by the trial court on a motion for directed verdict.

2. Parties—motion to amend complaint—add party—reconsideration

The trial court's denial of plaintiff lessee's motion to amend a complaint to add E. Greene as a party defendant in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, needed to be reconsidered based on the reversal of the trial court's order granting summary judgment in favor of all defendants.

3. Appeal and Error—preservation of issues—failure to cite legal authority—failure to argue

The trial court did not err in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, by denying defendant commercial landlord and construction company's counterclaims for breach of duty to maintain the leased premises and breach of contract where defendants failed to cite any legal authority or argue this issue.

4. Discovery—new discovery schedule—ambiguity in commercial lease

On remand in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, the trial court should consider setting a new discovery schedule

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pursuant to N.C.G.S. § 1A-1, Rule 26 to allow the parties to complete discovery based on an ambiguity in the parties' commercial lease.

Judge BERGER dissenting.

Appeal by Plaintiffs from order entered 27 April 2016 by Judge William Coward in Watauga County Superior Court. Heard in the Court of Appeals 22 March 2017.

Capua Law Firm, P.A., by Paul A. Capua and Genevieve A. Mente, for Plaintiff-Appellants.

Wall Babcock LLP, by Joseph T. Carruthers and Lee D. Denton, for Defendant-Appellees.

HUNTER, JR., Robert N., Judge.

Andrea Morrell ("Andrea"), G. Pony Morrell ("Morrell"), and The Pasta Wench, Inc. ("The Pasta Wench") (collectively "Plaintiffs") appeal the 27 April 2016 order by Judge William Coward granting summary judgment in favor of Hardin Creek, Inc. ("Hardin Creek"), John Sidney Greene ("S. Greene"), and Hardin Creek Timberframe and Millwork, Inc. ("Timberframe") (collectively "Defendants"), and dismissing Plaintiff's third party complaint against John Ellis Greene ("E. Greene") with prejudice. After review, we reverse the trial court's order and remand for further proceedings.

I. Facts and Background

Plaintiffs' forecast of the evidence tends to show the following. Andrea and Morrell are the founders and officers of The Pasta Wench. The Pasta Wench manufactures and distributes "specialty food products including homemade, organic raviolis and other pasta products." Hardin Creek is a commercial landlord. Timberframe is a timber manufacturing and construction company that builds and remodels residential and commercial buildings. S. Greene is the president of Hardin Creek, and the general contractor for Timberframe. E. Greene is S. Greene's father and owner of the property in question.

Andrea and Morrell started The Pasta Wench in April 2010. After experiencing success in local markets in Boone, North Carolina, Plaintiffs expanded to distribute their product across western North Carolina. Plaintiffs later contracted with Harris Teeter for regional distribution across North and South Carolina.

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On 2 February 2011, Plaintiffs entered into a commercial lease (“the lease”) with Hardin Creek for two units of a steel building located in Boone (“the premises”). Plaintiffs operated their business from the premises, and used the units as a kitchen and a pasta drying room. The lease contained several provisions concerning Plaintiffs’ responsibility to obtain liability and property insurance and to indemnify Hardin Creek for damages. The relevant lease paragraphs are as follows:

5. Alterations. . . .

. . . .

- (b) Tenant’s Neglect. Subject to the provisions set forth in the following sentence, Tenant shall pay for the cost of any repairs or damage resulting from negligence or the wrongful acts of his employees, representatives or visitors. However, and notwithstanding any other provision of this lease to the contrary, Landlord and Tenant and all parties claiming under them agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises, or covered by insurance in connection with the property owned or activities conducted on the leased premises, regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy.

. . . .

8. Insurance: Tenant shall maintain insurance in accordance with the provisions of subparagraphs (a) and (b) of this paragraph, and Tenant shall indemnify Landlord in accordance with the provisions of sub-paragraph (c).

- (a) Property Insurance: Tenant shall hold Landlord harmless for loss or damage by fire with regard to all of Tenant’s furniture, fixtures, and equipment about or within the leased premises.
- (b) Liability Insurance: Tenant shall provide and keep in force for the protection of the general public and Landlord liability insurance against claims for bodily

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injury or death upon or near the leased premises and the sidewalks, streets and service and parking areas adjacent thereto to the extent of not less than \$500,000.00 in respect to bodily injuries or death to any one person and the extent of not less than \$500,000.00 for bodily injuries or death to any number of persons arising out of one accident or disaster, and property damage with limits of not less than \$100,000.00. The Tenant shall furnish Landlord with satisfactory evidence of such insurance within thirty (30) days of execution of this lease.

Despite the opening paragraph's language, Paragraph 8 contains no subparagraph (c).

In early 2012, the North Carolina Department of Agriculture and Consumer Services ("NCDA&CS") inspected the premises. The NCDA&CS determined the interior required modification to accommodate food production. The NCDA&CS particularly required "the open layout of the kitchen in Unit B—four conventionally framed walls exposed to the domed, steel roof trusses and insulation approximately 25 feet above—to be enclosed with an interior kitchen ceiling."

Plaintiffs and Hardin Creek agreed to extend the lease by five years. As part of this agreement, S. Greene agreed to modify the premises consistent with the NCDA&CS's requirements.¹ In addition to building a new kitchen ceiling, S. Greene raised the kitchen's interior walls so the new kitchen ceiling was level with the drying room's ceiling. S. Greene also lowered the sprinkler system's shower heads so they protruded through the new ceiling. S. Greene expanded the sprinkler system to cover the area over a walk-in cooler, and constructed a ladder to access the top of that cooler.²

On 7 January 2014, the temperature in Boone dropped into the single digits. The cold temperature froze the water in Plaintiffs' sprinkler system. Plaintiffs alleged the pipes froze because Defendants "created

1. The terms of the agreement to extend the lease do not include S. Greene's promise to modify the premises. However, in their answer to Plaintiffs' complaint, Defendants admit S. Greene "on behalf of Hardin Creek, arranged to have modifications made to the premises at Hardin Creek's expense[.]"

2. Plaintiffs allege Hardin Creek, Timberframe, and S. Green were responsible for the modifications since each provided "construction and construction management services" to Plaintiffs.

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two separate heating zones between the newly enclosed kitchen and the open area above it, rendering the HVAC thermostat in the kitchen useless for regulating air temperature above the kitchen ceiling where the fire sprinkler system pipes were located.” Plaintiffs also alleged Defendants’ workers negligently left a vent near the apex of the roof open after performing repairs in December 2013.

Plaintiffs sought monetary damages for negligence and breach of the implied warranty of workmanlike performance against all Defendants. Plaintiffs also sought monetary damages for constructive eviction and breach of the covenant of quiet enjoyment against Hardin Creek, Inc. Finally, Plaintiffs alleged unfair and deceptive trade practices against S. Greene and Hardin Creek, Inc. Plaintiffs additionally sought treble damages and attorneys’ fees under the unfair and deceptive trade practices claim, and sought punitive damages “as a result of Defendants’ willful and wanton conduct and indifference to [Plaintiffs’] rights.” Plaintiffs attached copies of the lease and the lease extension agreement to their complaint.

On 2 March 2015, Defendants answered Plaintiffs’ complaint as moving to dismiss Plaintiffs’ claims. Defendants contended the lease was only between Hardin Creek and Plaintiffs. Defendants therefore asked the trial court to dismiss Plaintiffs’ claims against Timberframe and S. Greene pursuant to Rule 12(b)(6). Defendants also moved to dismiss Plaintiffs’ negligence, constructive eviction, and unfair and deceptive trade practices claims pursuant to Rule 12(b)(6). Defendants asserted the following affirmative defenses: (1) Plaintiffs were contributorily negligent in leaving the roof vent open; (2) Plaintiffs’ assumption of the risk; (3) Plaintiffs’ failure to mitigate damages; and (4) the damages were beyond the parties’ reasonable expectation and are therefore barred by the economic loss doctrine.

In an order filed on 15 October 2015, the trial court set a case management conference and a discovery scheduling order (“scheduling order”). Both parties consented to the scheduling order which set the discovery deadline for 15 April 2015. The parties consented to an amended scheduling order on 25 January 2016. This amended scheduling order required the trial court to hear all dispositive motions not more than thirty days before the trial date, which the trial court set for the session beginning 6 June 2016.

On 8 March 2016, Defendants amended their answer and filed two counterclaims. First, Defendants alleged Plaintiffs negligently left the roof vent open and breached their duty to maintain the premises.

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Second, Defendants claimed breach of contract. Under this second claim, Defendants alleged the lease obligated Plaintiffs to pay for repairs or damage due to Plaintiffs' negligence. Defendants sought monetary damages for each of these claims.

On 14 April 2016, Defendants moved for summary judgment.³ Defendants contended the trial court should dismiss Plaintiffs' claims against Timberframe and S. Greene since only Hardin Creek was responsible for the premises' modifications. Defendants contended (1) the lease was only between Plaintiffs and Hardin Creek; (2) S. Greene only interacted with Plaintiffs on Hardin Creek's behalf, not Timberframe; and (3) any work Timberframe performed on the premises was done on Hardin Creek's behalf. Defendants also contended a lack of privity of contract to support Plaintiffs' claim against either Timberframe or S. Greene for breach of implied warranty of workmanlike performance. As to Plaintiffs' constructive eviction claim and breach of the covenant of quiet enjoyment claim, Defendants alleged Plaintiffs caused the flooding since Plaintiffs left the roof vent open. Also, Defendants alleged Plaintiffs quit the lease despite Hardin Creek's willingness to restore the premises within ninety days of the incident. Finally, Defendants contended the lease discharged Hardin Creek "from all claims and liabilities arising from or caused by any hazard covered by insurance . . . regardless of the cause of the damage or loss . . ." pursuant to Paragraph 5(b) of the lease.

On 15 April 2016, Plaintiffs filed a motion to amend their complaint to add E. Greene as a party defendant. Plaintiffs alleged negligence and breach of the implied warranty of workmanlike performance. Plaintiffs also alleged they learned through discovery E. Greene "operated and oversaw property management and supervised the construction activities on the property that [gave] rise to this lawsuit."

Also on 15 April 2016, Plaintiffs filed a motion to continue the hearings and to enlarge the scheduling order deadlines. Plaintiffs alleged Defendants purposely delayed discovery, and Plaintiffs were still taking depositions and reviewing transcripts. Plaintiffs contended Defendants' motion for summary judgment was "premature and prejudicial," and requested more time "to prepare and present their case" before the trial court heard arguments on the dispositive motions.

3. Defendants complied with the deadline for dispositive motions in the amended scheduling order.

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On 22 April 2016, Plaintiffs filed a third party complaint against E. Greene. This brought all five claims Plaintiffs alleged in their original complaint against E. Greene. On 25 April 2016, the trial court heard Plaintiffs' and Defendants' motions, as well as Plaintiffs' third party complaint. On 27 April 2016, the trial court granted summary judgment in favor of Defendants. The trial court found Plaintiffs presented "no plausible reasons why further discovery would shed any light on paragraph 5(b) in the Lease[.]" The trial court also found "paragraph 5(b) in the lease is not ambiguous and is a complete defense to the claims raised in the Complaint[.]" The trial court also *sua sponte* granted summary judgment in favor of Plaintiffs as to Defendants' counter claims. The trial court dismissed Plaintiffs' third party complaint against E. Green with prejudice, and dismissed Plaintiffs' motions to amend and continue as moot.

On 20 May 2016, Plaintiffs filed notice of appeal. Plaintiffs appealed the trial court's 27 April 2016 order and "all rulings and statements of the trial court that contributed to, served as predicate for, or were encompassed by the foregoing Order, including all statements and rulings made in Court during the hearing held April 25, 2016, and decision communicated April 27, 2016, to not hold further hearings." Pursuant to Rule 10(c) of the Rules of Appellate Procedure, Defendants notified Plaintiffs and this Court of its intent to appeal the trial court's grant of summary judgment in favor of Plaintiffs on the counterclaim in the event this Court reverses the trial court's grant of summary judgment in favor of Defendants.

II. Jurisdiction

Plaintiffs appeal a superior court's order in a civil action disposing of all the parties' issues. Therefore, this Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b) (2016).

III. Standard of Review

This Court reviews the trial court's grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). This Court must review the record in the light most favorable to the non-movant and draw all inferences in the non-movant's favor. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). *See also Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

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any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2016). A party opposing a motion for summary judgment must only establish the existence of a genuine issue of material fact, and it need not show it would prevail on the issue at trial. *In re Will of Edgerton*, 29 N.C. App. 60, 63, 223 S.E.2d 524, 526 (1976).

“Appellate review of a trial court’s determination of whether a contract is ambiguous is *de novo*.” *Barrett Kays & Assoc., P.A. v. Colonial Bldg. Co., Inc. of Raleigh*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998).

IV. Analysis

[1] Plaintiffs contend the trial court erred in granting summary judgment in favor of Defendants because the language of Paragraph 5(b) of the Lease is ambiguous. We agree.

This Court interprets the terms of a lease as it would any contract. *Martin v. Ray Lackey Enterprises, Inc.*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990) (citation omitted). “Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties’ intent at the moment of execution.” *State v. Philip Morris USA, Inc.*, 363 N.C. 623, 631, 685 S.E.2d 85, 90 (2009) (quoting *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973)). “If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.” *Walton v. City of Raleigh*, 342 N.C. 879, 881 467 S.E.2d 410, 411 (1996). This Court derives the intent of the parties from the contract as a whole, rather than from any particular term or paragraph. *Jones v. Casstevens*, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) (“Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety.”) (citation and internal quotation marks omitted). “[I]f there is uncertainty as to what the agreement is between the parties, a contract is ambiguous.” *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008). “When an agreement is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the jury.” *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989).

Here, in granting summary judgment in favor of Defendants, the trial court exclusively relied on the lease’s language. Specifically, the trial court found Paragraph 5(b) was unambiguous and functioned as a complete defense to Plaintiffs’ claims. However, we conclude the text of the lease, when considered in its entirety, fails to clearly state the parties’ intentions and is ambiguous.

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Paragraph 5(b) states the landlord and tenant discharge each other from “all claims and liabilities arising from or caused by any hazard covered by insurance . . . regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy.” Paragraph 8 then purports to define the type and amount of insurance Defendants required Plaintiffs to carry. Paragraph 8 also includes the terms under which Plaintiffs would indemnify Defendants for damages covered by insurance. However, Paragraph 8 is incomplete. The opening sentence of Paragraph 8 states “Tenant shall maintain insurance in accordance with the provisions of subparagraphs (a) and (b) of this paragraph, and Tenant shall indemnify Landlord in accordance with the provisions of sub-paragraph (c).” The text of subparagraphs (a) and (b) follow this sentence. Subparagraph 8(a), titled “Property Insurance,” contains indemnification language and states Plaintiffs hold Hardin Creek harmless for damages or losses caused by fire to Plaintiffs’ furniture, fixtures, and equipment. Subparagraph 8(b), titled “Liability Insurance,” defines the types and amounts of liability insurance Defendants required Plaintiffs to carry. There is not a Subparagraph 8(c).

Both Subparagraph 5(b) and Paragraph 8 refer to limits on Hardin Creek’s liability under the lease. The incomplete construction of Paragraph 8 creates an ambiguity as to the type and amount of insurance Hardin Creek required of Plaintiffs. The incomplete construction of Paragraph 8 also creates an ambiguity relating to the scope of Subparagraph 5(b). The language the trial court relied on in Subparagraph 5(b) refers to any “hazard covered by insurance on the leased premises.” However, when Subparagraph 5(b) is read in connection with Paragraph 8, the exact meaning of the term “covered by insurance” is ambiguous. It is unclear whether that term refers to hazards covered only by insurance coverage as required by the lease, or whether that term is modified by the language in the missing subparagraph on indemnification.

Because the lease is ambiguous, and because the interpretation of an ambiguous lease is a question for the jury, the trial court erred in granting summary judgment in favor of Defendant Hardin Creek, Inc.

Even if this Court concluded the lease was unambiguous, the trial court still incorrectly found Paragraph 5(b) served as a complete release from liability. Generally, parties may contract to “bind themselves as they see fit” unless the contract violates the law or is against public policy. *Lexington Ins. Co. v. Tires Into Recycled Energy and Supplies, Inc.*, 136 N.C. App. 223, 225, 522 S.E.2d 798, 800 (1999) (quoting *Hall*

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v. Sinclair Refining Co., 242 N.C. 707, 709-10, 89 S.E.2d 185 (1953)). “However, contracts which attempt to relieve a party from liability for damages incurred through personal negligence are discouraged and narrowly construed[.]” *Id.* at 225, 522 S.E.2d at 800 (citation omitted). “The contract will never be so interpreted [to exempt liability for negligence] in the absence of clear and explicit words that such was the intent of the parties.” *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 596, 79 S.E.2d 185, 190 (1953).

Here, the trial court ruled Paragraph 5(b) of the lease meant both parties intended to waive claims relating to any matter covered by insurance. Plaintiffs concede their insurance covered up to \$60,000 for damages resulting from the flood. However, Plaintiffs contend they did not intend to waive claims for business losses not covered by insurance and caused by Defendants’ negligence.

In *William F. Freeman, Inc. v. Alderman Photo Co.* this Court held a lease which only addresses insurance coverage and subrogation rights will not extend to exempt the parties from liability for negligence. 89 N.C. App. 73, 75, 365 S.E.2d 183, 185 (1988). There, the lease required the parties to insure their own property, and this Court concluded the parties included the subrogation clause to ensure each party would only be required to pay for damages to his own property. *Id.* at 76, 365 S.E.2d at 185. This Court reasoned because the lease contained “no clear, explicit words waiving liability for negligence[.]” it would not infer the parties intended to do so. *Id.* at 76, 365 S.E.2d at 185.

This Court later distinguished the lease in *Freeman* in *Lexington* at 226, 522 S.E.2d at 800 (1999). In *Lexington*, this Court concluded the terms of the lease contained an explicit waiver by each party of its right to recover against the other for loss covered by insurance. *Lexington* at 226, 522 S.E.2d at 801. Additionally, this Court concluded the lease “clearly and explicitly evidences the intent of each of the parties to relieve the other from all liability . . . including liability for negligence.” *Id.* at 227, 522 S.E.2d at 801.

Even though the lease in the instant case states the parties “agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance,” the lease does not explicitly state the parties contemplated to waive claims stemming from negligence. This Court will not infer the parties intended to exempt each other from liability for negligence where the lease does not contain specific language indicating the parties’ intent to do so. *See Freeman* at 76, 365 S.E.2d at 185. Therefore, the trial court erred in interpreting Paragraph 5(b)

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as a complete release from all liability when that Paragraph did not contain language explicitly covering negligence.

In negligence cases, granting summary judgment is rare. Here the facts support a violation of a safety statute to wit: The pertinent provision of the North Carolina State Building Code states “[a]ll areas used for commercial or institutional food preparation and storage facilities adjacent thereto shall be provided with an automatic sprinkler system.” N.C. Gen. Stat. § 143-138(m)(2) (2017). “[T]he [North Carolina State Building] Code imposes liability on any person who constructs, supervises construction, or designs a building or alteration thereto, and violates the [Building] Code such that the violation proximately causes injury or damage.” *Lassiter v. Cecil*, 145 N.C. App. 679, 684, 551 S.E.2d 220, 223 (2001) (quoting *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 329, 363 S.E.2d 367, 375 (1988)). “[A] violation of the North Carolina Building Code constitutes negligence per se because the Code is a statute to promote the safety of others.” *Id.* at 684, 551 S.E.2d at 223. The owner of a building is not negligent *per se* for a violation of the North Carolina Building Code unless: “(1) the owner knew or should have known of the [Building] Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage.” *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (1990).

Here, Plaintiffs alleged Defendants owed a duty to Plaintiffs “to inspect, construct, and alter the Premises in a workmanlike manner such that it would be . . . in accordance with local building codes, building plans, and industry standards.” Plaintiffs also alleged “Defendants were warned that the insulation in the building was inadequate to properly protect the sprinkler systems during cold weather[.]” Finally, Plaintiffs alleged they suffered damages as a “direct and proximate cause” of Defendants’ negligence. Based on our review of these pleadings, along with the provisions of the North Carolina Building Code, we conclude Plaintiffs sufficiently alleged negligence to survive Defendants’ motion for summary judgment.

We now address this case’s procedural posture in light of our ruling. First, we reverse the trial court’s grant of summary judgment in favor of all Defendants as to Plaintiffs’ negligence claims. “Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues.” *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983). We cannot review or resolve the issue of the various Defendants’ degree of involvement in modifying

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the sprinkler system from our record on appeal. This is an issue for the trial court which the trial court may be able to resolve upon motion for directed verdict.

[2] Also, the trial court denied Plaintiffs' motion to amend their complaint to add E. Greene as a party defendant as a consequence of its order granting summary judgment in Defendants' favor. Because we reverse the trial court's order granting summary judgment as to Defendants, it follows the trial court should resolve and reconsider Plaintiffs' motion to add E. Greene as add a defendant to this action.

[3] As to Defendants' counterclaims against Plaintiffs, Defendants' brief summarily addresses this issue as follows:

Without diminishing the strength of Defendants' argument that the Exculpatory Clause is valid and enforceable and bars Plaintiffs' claims, Defendants, in the alternative, ask the Court to apply the Exculpatory Clause equally to both parties; and if the summary judgment in favor of Defendants is reversed, the Court should reverse the dismissal of the counterclaims."

Defendants fail to cite any legal authority or otherwise argue this issue.

Under our Rules of Appellate Procedure, "[t]he function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon." N.C. R. App. P. 28(a) (2017). "It is not the duty of this Court to supplement [a party's] brief with legal authority or arguments not contained therein." *Eaton v. Campbell*, 220 N.C. App. 521, 522, 725 S.E.2d 893, 894 (2012) (quoting *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005)). "Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28(a) (2017).

Here, Defendants fail to argue this issue and do not present this Court with a reason to disturb the trial court's order granting summary judgment in favor of Plaintiffs as to Defendants' counterclaims. Defendants have abandoned this issue on appeal, and we consequently affirm the trial court's ruling as to Defendants' counterclaims.

[4] Finally, the trial court denied Plaintiffs' motion to continue and to enlarge discovery deadlines because the trial court found "no plausible reasons why further discovery would shed any light on paragraph 5(b) in the Lease." However, because this Court disagrees with the trial court's

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interpretation of Paragraph 5(b), the trial court should, on remand, consider setting a new discovery schedule pursuant to Rule 26 to allow the parties to complete their discovery.

Based on the foregoing, we reverse the trial court's order of summary judgment and remand this action with instructions for the trial court to proceed consistently with this opinion.

REVERSED AND REMANDED.

Judge CALABRIA concur.

Judge BERGER dissents in a separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent from the majority's opinion reversing the trial court's order and remanding for further proceedings. The trial court properly granted summary judgment in favor of Defendants as Paragraph 5(b) (the "Exculpatory Clause") of the lease is unambiguous and operates as a complete defense to the claims raised by Plaintiffs.

"[W]hen the language of a contract is plain and unambiguous, construction of the language is a matter of law for the court." *Mountain Fed. Land Bank v. First Union Nat. Bank*, 98 N.C. App. 195, 200, 390 S.E.2d 679, 682 (1990) (citation omitted). "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Gould Morris Elec. Co. v. Atl. Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948) (citation omitted). "[W]hen the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld." *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965) (citation omitted). Therefore, this Court construes the parties' contractual intent from the time of the writing as preserved in the contract and their actions. *See Mountain Fed. Land Bank*, 98 N.C. App. at 200, 390 S.E.2d at 682.

There is no question that leases

which attempt to relieve a party from liability for damages incurred through personal negligence are discouraged and narrowly construed; any clause in a lease attempting to do so must show that this is the intent of the parties by clear and explicit language.

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Lexington Ins. Co. v. Tires Into Recycled Energy & Supplies, Inc., 136 N.C. App. 223, 225, 522 S.E.2d 798, 800 (1999) (citation omitted).

In *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 79 S.E.2d 185 (1953), the defendant contended it was relieved of liability for negligence pursuant to the terms of a commercial real estate lease with the plaintiff that provided, in relevant part:

[Paragraph 3]: The lessees . . . shall, at their own cost and expense, make any and all repairs that may be necessary inside the portion of the building hereby demised, excepting in case of destruction or damage by fire or other casualty, as set forth in Paragraph Six hereof.

[Paragraph 6]: The lessors agree to keep said theater buildings, and the equipment hereby leased, insured to the extent of its full insurable value in some reliable insurance company. In event the premises or property hereby leased shall at any time during the operation and continuance of this lease be damaged or destroyed by fire or other casualty, the lessors shall thereupon and forthwith repair and restore said premises and property to the same condition in which they were before the happening of such fire or other casualty.

Id. at 592, 79 S.E.2d at 188 (internal quotation marks omitted).¹ Our Supreme Court held this language was insufficient to shield defendant from liability for damage caused by its own negligence. *Id.* at 598, 79 S.E.2d at 192. The Court noted, “[i]f the parties intended such a contract, we would expect them to so state in exact terms.” *Id.* at 596, 79 S.E.2d at 191.

Similarly, as the majority here correctly states, this Court found no such clear, explicit waiver of liability for negligence in *William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183 (1988). The lease at issue in *Freeman* contained the following relevant language:

INSURANCE: The Lessor shall carry, pay the premium, and be responsible for fire and extended coverage insurance upon the premises. In the event any improvements or

1. The lease provisions were listed in the facts section found prior to the opinion. The opinion did not fully cite the provisions, but referenced the paragraph numbers and summarized the provisions.

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alterations are made by the Lessee as provided hereinafter, the amount of such insurance shall be increased, following receipt, by Lessor, of written notice from Lessee, to such an extent as to cover said improvements and alterations. Unless the additional insurance coverage is increased to cover any improvements and alterations as aforesaid, the Lessor shall not be responsible for the replacement or restoration in the event of other casualty.

The Lessee shall carry, pay the premiums, and be responsible for fire insurance and other insurance upon its property, contents and equipment and shall carry adequate and sufficient liability insurance for both the Lessee and Lessor and shall furnish the Lessor evidence of such coverage.

The Lessee will not do, suffer or permit anything to be done in or about the premises that will affect, impair or contravene any policies of insurance against the loss or damage by fire, casualty or otherwise that may be placed thereon by the Lessee or the Lessor.

All insurance policies shall be in the name of the Lessor and Lessee as their interests may appear. All insurance, whether carried by the Lessor or the Lessee, shall provide a waiver of subrogation against the other party[.]

Id. at 75, 365 S.E.2d at 185 (internal quotation marks omitted). This Court stated that the lease terms “contain[ed] no clear, explicit words waiving liability for negligence as required by *Winkler*.” *Id.* at 76, 365 S.E.2d at 185.

However, this Court previously enforced a commercial real estate lease which included a broad exculpatory clause to prevent substantial damages. *See Hyatt v. Mini Storage on the Green*, 236 N.C. App. 278, 763 S.E.2d 166 (2014) (enforcing an exculpatory clause that protected against “any personal injuries” sustained on landlord’s premises).² In *Hyatt*, the contractual language read as such:

Landlord shall not be liable to tenant and/or tenant[']s guest or invitees for any personal injuries sustained by

2. Commercial lessors are justified in including exculpatory clauses because “water damage to merchandise may run to substantial amounts. For this reason[,] landlords tend to include the broadest exculpatory clause that will be enforced.” MILTON R. FRIEDMAN, FRIEDMAN ON LEASES 1181 (4th ed. 1997).

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tenant and/or tenant[']s guest or invitees while on or about landlord's premises.

Id. at 282, 763 S.E.2d 169 (brackets omitted). This Court found this language constituted an exculpatory clause which "clearly and explicitly provides that [defendant] would not be liable for personal injuries sustained on the premises." *Id.* at 282-83, 763 S.E.2d at 170.

Further, in *Lexington*, this Court enforced a clause requiring the lessee to maintain insurance and waiving their rights to recovery. *Lexington*, 136 N.C. App at 227, 522 S.E.2d at 801. In *Lexington*, the subrogation agreement stated:

18. Waiver of Subrogation. Each party, notwithstanding any provision of this Lease otherwise permitting such recovery, *hereby waives any rights of recovery against the other for loss or injury against which such party is protected by insurance*, to the extent of the coverage provided by such insurance. Each insurance policy carried by either party with respect to the Leased Premises or the property of which they are a part which insures the interest of one party only, shall include provisions denying to the insurer acquisition by subrogation of any rights of recovery against the other party. The other party agrees to pay any additional resulting premium.

Id. at 223-24, 522 S.E.2d at 799 (emphasis added). This Court found the subrogation clause "plain and unambiguous" as both parties "agreed to include a subrogation waiver clause in any insurance policies . . . which covered the leased premises." *Id.* at 226-27, 522 S.E.2d at 801.

Conversely, in *Winkler*, the parties lacked contractual intent while the lease lacked a subrogation clause, and *Freeman* only required the parties to protect against damages to their own property. Commercial real estate leases which "clearly and explicitly evidence[] the intent of each of the parties to relieve the other from all liability for damages otherwise covered by insurance, including liability for negligence" are enforceable. *Lexington*, 136 N.C. App at 227, 522 S.E.2d at 801.

In the case *sub judice*, the parties clearly and explicitly waived all claims, including claims for negligence. The relevant portion of the Exculpatory Clause reads:

[N]otwithstanding any other provision of this lease to the contrary, Landlord and Tenant and all parties claiming under them agree and discharge each other *from all*

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claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises, or covered by insurance in connection with the property owned or activities conducted on the leased premises, regardless of the cause of the damage or loss

(Emphasis added).

The Exculpatory Clause shields Defendants from liability for “all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises . . . regardless of the cause of the damage or loss.” Similar to *Lexington*, the Exculpatory Clause clearly and explicitly operates as a waiver of negligence for any liability on the leased premises.

Additionally, Paragraph 8 of the lease required Plaintiffs to possess both property and liability insurance in clear and unambiguous terms. *Cf. New River Crushed Stone, Inc. v. Austin Powder Co.*, 24 N.C. App. 285, 210 S.E.2d 285 (1974) (validating an indemnification clause where the contract (1) involved private parties, (2) did not violate public policy, and (3) did not result from any gross inequality in bargaining power).³ Including an insurance requirement is evidence of the parties’ intent to relieve the other from any liability or damages, including damages related to negligence.

It is not within this Court’s discretion to redraft a private commercial real estate lease that is not contrary to public policy. Because the clear and unambiguous language of this commercial lease precludes recovery by Plaintiffs, I would affirm the trial court’s entry of summary judgment.

3. It is in the best interest of the tenant to seek insurance because “the likelihood of getting [a broad exculpatory clause] changed is slight. In these circumstances[,] the tenant should be protected by *adequate insurance*.” MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* 1181 (4th ed. 1997) (emphasis added).

IN THE COURT OF APPEALS

NCJS, LLC v. CITY OF CHARLOTTE

[255 N.C. App. 72 (2017)]

NCJS, LLC AND JAMES H. PLYLER, PETITIONERS

v.

CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, RESPONDENT

No. COA16-1096

Filed 15 August 2017

1. Zoning—zoning ordinance—dumpster screening requirement—standards of review—appellate record—meaningful review

Although the superior court erred in a zoning case by failing to identify and apply the proper standards of review to each issue separately, the Court of Appeals elected not to remand the case where the appellate record permitted a meaningful review of the dispositive issue of whether the City Board's interpretation and application of a zoning ordinance, posing a dumpster screening requirement, warranted reversal of its ultimate decision.

2. Zoning—zoning ordinance—dumpster screening requirement—nonconforming structures—land activity

The superior court and a City Board erred in a zoning case by concluding petitioner company's unscreened dumpsters on industrially zoned property were nonconforming structures subject to the nonconformance provisions of a zoning ordinance without determining whether petitioner's land activity triggered application of Section 12.303 of the ordinance's dumpster-screening requirement.

Appeal by petitioners from order entered 5 April 2016 by Judge Hugh Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 May 2017.

The Odom Firm, PLLC, by David W. Murray; and James H. Plyler, pro se, for petitioner-appellants.

Senior Assistant City Attorney Thomas E. Powers III and Senior Assistant City Attorney Terrie Hagler-Gray, for respondent-appellee.

ELMORE, Judge.

This is a zoning case about screening dumpsters. Petitioners NCJS, LLC and James H. Plyer (collectively "NCJS") own industrially zoned property in Charlotte. On the property sits a warehouse constructed in

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1970 that is divided into six leasable units. Currently abutting the warehouse are two leaseholder-owned dumpsters unscreened from public view. A 1984 amendment to the Charlotte Zoning Ordinance (CZO) required that dumpsters be screened on three sides by a fence. Section 12.303 of the CZO, which imposes the dumpster-screening requirement, provides that “the provision of this Section must be met at the time that land is developed or land and structures are redeveloped.”

After NCJS received a zoning notice of violation (NOV) for failing to screen its dumpsters, it appealed to the City of Charlotte’s zoning board of adjustment (“City Board”) (respondent), arguing that its property was neither developed nor redeveloped since enactment of the 1984 dumpster-screening amendment as required to trigger its application. After a hearing, the City Board voted three to two to affirm the zoning administrator’s decision and issued a written order demanding that NCJS screen its dumpsters. In its decision, the City Board determined that NCJS’s dumpsters were legally nonconforming structures under the CZO because they were unscreened and thus subject to the nonconformance provisions regulating nonconforming structures, which provides a nonconforming structure loses its nonconforming status when moved. Based on photographs of NCJS’s property that showed the dumpsters had moved to different locations against the warehouse, the City Board concluded its dumpsters lost their legal nonconformity and need to be screened. NCJS petitioned the superior court for certiorari review, challenging the City Board’s decision on several grounds. After a hearing, the superior court entered an order affirming the City Board’s decision. NCJS appealed.

On appeal, NCJS alleges several errors arising from the superior court’s order and the City Board’s decision. The dispositive issue, however, is whether the City Board misinterpreted and misapplied the CZO, such that its decision should be reversed. Because we hold the City Board misinterpreted the CZO by concluding that NCJS’s dumpsters were “nonconforming structures” without determining whether Section 12.303’s dumpster-screening requirement was triggered, and thus misapplied the CZO by subjecting NCJS’s dumpsters to the regulations governing nonconforming structures, which provides for the termination of a legal nonconformity when a nonconforming structure is moved, we reverse the superior court’s order affirming the City Board’s decision. Additionally, because the local zoning authority failed to satisfy its burden of proving the existence of a current zoning violation, we remand this case to the superior court for further remand to the City Board with the instruction to rescind the NOV issued against NCJS. In light of our disposition, we decline to address NCJS’s remaining arguments.

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I. Background

In 2006, NCJS purchased property located at 130 Stetson Drive in Charlotte, which is currently zoned as an I-1 industrial district. When NCJS's property was developed in 1970, it was subject to Mecklenburg County's zoning ordinance, which contained no dumpster-screening requirement. Sometime after 1970, the property came under the zoning jurisdiction of the City of Charlotte and subject to the CZO, which adopted screening requirements in 1972. In 1984, the City of Charlotte amended the CZO to specifically include dumpsters among the listed items requiring screening. Section 12.303 imposes the challenged dumpster-screening requirement and provides: "The provisions of this Section must be met at the time that land is developed or land and structures are redeveloped."

On 4 February 2015, a zoning administrator sent NCJS a letter, the zoning NOV, stating that it was violating the CZO because its dumpsters were unscreened. NCJS appealed to the City Board, which heard the matter on 31 March 2015. At the hearing, the zoning administrator argued that when the CZO's screening provision was amended in 1984 to include dumpsters, all unscreened dumpsters became "nonconforming structures" under CZO § 2.201 and thus were subject to the nonconformance provisions of CZO § 7.103 (regulating nonconforming structures), which provides for the termination of a legal nonconformity when a nonconforming structure is moved. The zoning administrator showed photographs of NCJS's property that revealed the following: in 2007, two dumpsters abutted the warehouse; in 2010, one dumpster had been removed from the property; in 2011, the remaining dumpster had been moved from one side of a garage entrance to the other; and in 2014, another dumpster had been added against the warehouse. Thus, the zoning administrator argued, because NCJS's dumpsters were nonconforming structures and had been moved, they lost their legal nonconformity and must now be screened.

NCJS argued that its property was grandfathered in from CZO § 12.303's dumpster-screening requirement because its property was developed in 1970, and neither its land nor its structures had been redeveloped. Thus, NCJS argued, because CZO § 12.303 contemplates dumpster-screening compliance when "land is developed or land and structures are redeveloped," neither of which occurred on its property since the 1984 amendment, Section 12.303's dumpster-screening requirement did not apply to its property.

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After the hearing was closed, one member of the City Board moved to uphold the zoning NOV, but it was not seconded. After further deliberation among members of the City Board, the hearing was reopened. After the hearing was closed for the second time, the City Board voted three to two to affirm the determination that NCJS's dumpsters needed to be screened. Following the hearing, the City Board issued a written order affirming the zoning administrator's decision to issue NCJS a zoning NOV and demanding that NCJS screen its dumpsters. In its decision, the City Board agreed with the zoning administrator's interpretation that all dumpsters existing after enactment of the 1984 dumpster-screening amendment were nonconforming structures subject to the nonconformance provisions regulating nonconforming structures. Thus, the City Board found, NCJS's dumpsters lost their legal nonconformity when they were moved and must now be screened in compliance with the CZO.

On 18 May 2015, NCJS petitioned the Mecklenburg County Superior Court for certiorari review of the City Board's decision. After a 24 February 2016 hearing, the superior court entered an order on 5 May 2016 affirming the City Board's decision. NCJS appeals from the superior court's order.

II. Analysis

On appeal, NCJS contends the trial court erred by (1) failing to reference any of the grounds alleged in its petition for certiorari review, failing to identify which review standard it applied to any ground raised and the application of that review, failing to make any findings or conclusions related to whether the City Board's interpretation of the CZO was correct; and (2) finding facts beyond those found by the City Board to justify the City Board's decision. NCJS also asserts (3) the City Board misinterpreted the CZO by concluding its unscreened dumpsters were nonconforming structures because its dumpsters are "permitted accessory uses or structures" under the CZO and neither triggering event occurred that would subject its property to Section 12.303's dumpster-screening requirement. NCJS asserts further that (4) the City Board misapplied its ordinance by subjecting the dumpsters to the nonconformance provisions regulating "nonconforming structures," which prohibits movement, rather than "nonconforming accessory uses and structures," which does not. Finally, NCJS asserts (5) the City Board's decision was not based on sufficient evidence and was arbitrary and capricious. Because we conclude that NCJS's third alleged error is dispositive and warrants reversal of the City Board's decision, we decline to address its remaining arguments.

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A. Standard of Review

We review a superior court's certiorari review of a municipal zoning board's quasi-judicial decision to determine whether the superior court: (1) " 'exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly.' " *CRLP Durham, LP v. Durham City/Cnty. Bd. of Adjustment*, 210 N.C. App. 203, 207, 706 S.E.2d 317, 320 (2011) (brackets omitted) (quoting *Union County Zoning Bd. of Adjustment*, 185 N.C. App. 582, 587, 649 S.E.2d 458, 464 (2007)).

On certiorari review, " 'the superior court sits as an appellate court, and not as a trier of facts,' " *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 189, 689 S.E.2d 576, 585 (2010) (quoting *Overton v. Camden Cnty.*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 160 (2002)), and its scope of review is limited to the following:

"(1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious."

Cary Creek Ltd. v. Town of Cary, 207 N.C. App. 339, 341–42, 700 S.E.2d 80, 82–83 (2010) (quoting *Wright v. Town of Matthews*, 177 N.C. App. 1, 8, 627 S.E.2d 650, 656 (2006)).

Generally, the petitioner's asserted errors dictate the scope of judicial review. " 'If a petitioner contends the Board's decision was based on an error of law, 'de novo' review is proper. However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the 'whole record' test.' " *Four Seasons Mgmt. Servs. Inc. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 75, 695 S.E.2d 456, 462 (2010) (quoting *Sun Suites Holdings, LLC v. Bd. of Aldermen of Town of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527–28, *disc. rev. denied*, 353 N.C. 280, 546 S.E.2d 397 (2000)).

[1] In its petition for certiorari review to the superior court, NCJS contended the City Board's decision:

(1) was in violation of the Petitioners' due process rights, (2) was in excess of the statutory authority conferred upon the

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City or the authority conferred upon the [City Board] by the City Ordinance, (3) was inconsistent with applicable procedures specified by statute or City Ordinance, (4) was erroneous as a matter of law, (5) was unsupported by substantial competent evidence in view of the entire record, and (6) was arbitrary and capricious.

“ ‘[A] court may properly employ both standards of review in a specific case.’ ” *Thompson v. Town of White Lake*, ___ N.C. App. ___, ___, 797 S.E.2d 346, 351 (2017) (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 15, 565 S.E.2d 9, 18 (2002)). “ ‘However, the standards are to be applied separately to discrete issues, and the reviewing superior court must identify which standard(s) it applied to which issues[.]’ ” *Id.* (quoting *Mann Media*, 356 N.C. at 15, 565 S.E.2d at 18). To secure meaningful appellate review, “ ‘the trial court . . . must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.’ ” *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17 (brackets omitted) (quoting *Sun Suites Holdings*, 139 N.C. App. at 272, 533 S.E.2d at 528).

Here, the superior court’s order provides that it “conducted a *de novo* review concerning questions of law and a ‘whole record’ test concerning the adequacy of the evidence,” without identifying which review standard it applied to which issue, and, rather than actually addressing in its order any issue raised in NCJS’s petition, the superior court made an additional finding beyond that found by the City Board to support the City Board’s decision, and then “concluded as a matter of Law that the Decision Letter was proper and correct and should be affirmed.”

Although the superior court’s order here was inadequate, “[r]emand is not automatic when ‘an appellate court’s obligation to review for errors of law can be accomplished by addressing the dispositive issue(s).’ ” *Morris Commc’ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 158, 712 S.E.2d 868, 872 (2011) (quoting *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 664, 599 S.E.2d 888, 898 (2004)). “Under such circumstances the appellate court can ‘determine how the trial court *should have* decided the case upon application of the appropriate standards of review.’ ” *Id.* at 158–59, 712 S.E.2d at 872 (brackets omitted) (quoting *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898). Because the appellate record permits us to meaningfully review the dispositive issue in this appeal—whether the City Board’s interpretation and application of the CZO warrants reversal of its ultimate decision—we elect not to remand this case to the superior court to identify and apply the proper review standard to each issue raised in

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NCJS's petition. *See Morris Commc'ns*, 365 N.C. at 159, 712 S.E.2d at 872–73 (electing not to remand where Court could “‘reasonably determine from the record’ whether [the landowner’s] challenge to the [Board of Adjustment’s] interpretation ‘warrant[s] reversal or modification’ of the [Board of Adjustment’s] ultimate decision”).

B. Dumpster-Screening Trigger

[2] NCJS contends the City Board misinterpreted the CZO by concluding its unscreened dumpsters were “nonconforming structures” because its dumpsters were legally conforming absent a determination that Section 12.303’s dumpster-screening requirement was triggered as to its property. We agree.

“‘Questions involving the interpretation of ordinances are questions of law,’ and in reviewing the trial court’s review of the Board of Adjustment’s decision, this Court applies a *de novo* standard and may freely substitute its judgment for that of the trial court.” *Fehrenbacher v. Cty. of Durham*, 239 N.C. App. 141, 150, 768 S.E.2d 186, 193 (2015) (quoting *Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 530–31, 439 S.E.2d 199, 201, *disc. rev. denied*, 336 N.C. 71, 445 S.E.2d 28 (1994)). “Under *de novo* review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment’s conclusions of law.” *See Morris Commc'ns*, 365 N.C. at 156, 712 S.E.2d at 871 (citing *Mann Media*, 356 N.C. at 13, 565 S.E.2d at 17).

“The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances.” *Four Seasons Mgmt. Servs.*, 205 N.C. App. at 76–77, 695 S.E.2d at 463 (quoting *Cogdell v. Taylor*, 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965)).

Statutory interpretation properly begins with an examination of the plain words of the statute. If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms. Thus, [w]hen 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. Therefore, a statute clear on its face must be enforced as written.

Lanvale Props., LLC v. Cnty. of Cabarrus, 366 N.C. 142, 154, 731 S.E.2d 800, 809–10 (2012) (internal citations omitted) (internal quotation marks omitted).

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To support its decision to uphold the zoning NOV issued against NCJS, the City Board made the following relevant findings and conclusions:

3. The site is zoned I-2 (general industrial).

....

5. The applicant is appealing the Zoning Administrator's interpretation that dumpsters located on the subject site must be screened on three sides from public view.

....

8. Per Section 9.1104(3) of the Zoning Ordinance, dumpsters are permitted accessory structures within industrial zoning districts.

9. Per Section [12].403(1) of the Zoning Ordinance, dumpsters must be screened from the public view from public streets.

10. The Zoning Ordinance in effect at the time the subject property was developed in 1970 did not specifically indicate that dumpsters must be screened from the public view from public streets.

11. A dumpster that lawfully existed on the effective date of when dumpsters were required to be screened from public view by the Zoning Ordinance (i.e. early 1980's) and does not comply with these regulations, are considered to be a nonconforming structure as defined by Section 2.201 of the Zoning Ordinance.

12. Per Section 7.103(6) of the Zoning Ordinance, a non-conforming structure shall not be moved unless it thereafter conforms to the standards of the zoning district in which it is located.

13. Based on aerials, the location of dumpsters have moved and the number of dumpsters have changed on the subject site following the effective date of when dumpsters were required to be screened from public view by the Zoning Ordinance (i.e. early 1980's). Therefore, any dumpster on the subject site must conform to the current screening standards of the Zoning Ordinance.

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14. Dumpsters, as nonconforming structures, lost their legal non-conformity when the dumpsters were moved and then moved again on the property.

NCJS specifically contends the City Board misinterpreted and misapplied the CZO by concluding (1) its “dumpsters were legally nonconforming” under Section 2.201, which (2) “lost their legal non-conformity by being moved” under Section 7.103(6).

The CZO defines a “nonconforming structure” as “[a]ny structure lawfully existing on the effective date of these regulations . . . which does not comply with these regulations or any amendment thereto.” CZO § 2.201. Section 9.1104 provides that “dumpsters” are permitted “accessory uses or structures” on industrially zoned property “subject to the regulations of Section 12.403.” CZO § 9.1104. Section 12.403 provides that dumpsters “shall be screened on three sides by a fence . . . in accordance with Section 12.303.” CZO § 12.403. Section 12.303, which imposes the dumpster-screening requirement, provides that “[t]he provisions of this Section must be met at the time that land is developed or land and structures are redeveloped.” CZO § 12.303.

The plain language of Section 12.303 indicates that its dumpster-screening requirement does not trigger unless “land is developed or land and structures are redeveloped.” Thus NCJS’s unscreened dumpsters could not fit Section 2.201’s definition of a “nonconforming structure” unless Section 12.303’s triggers have activated. Although the conditions precedent to trigger application of Section 12.303 are not ambiguous, this Court would interpret any doubts as to the applicability of a zoning regulation in favor of the landowner. *See, e.g., In re W.P. Rose Builders’ Supply Co.*, 202 N.C. 496, 500, 163 S.E. 462, 464 (1932) (“Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner.”). Accordingly, we hold that the proper interpretation of the CZO required the City Board to determine, as a condition precedent to concluding that NCJS’s unscreened dumpsters were nonconforming, that NCJS’s “land [was] developed or land and structures [were] redeveloped” after enactment of the 1984 dumpster-screening amendment.

A local governmental authority bears the burden of proving the existence of a current zoning violation. *See Shearl v. Town of Highlands*, 236 N.C. App. 113, 116–17, 762 S.E.2d 877, 881 (2014) (“[T]he burden of proving the existence of an operation in violation of the local zoning ordinance is on Respondent.” (citing *Cty. of Winston-Salem v. Hoots*

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Concrete Co., 47 N.C. App. 405, 414, 267 S.E.2d 569, 575 (1980)). Here, the zoning officer failed to assert that any activity on NCJS's property triggered application of Section 12.303's dumpster-screening requirement, and the City Board neither considered nor found whether a Section 12.303 trigger occurred that would bring NCJS's dumpsters out of compliance with the CZO. Rather, the City Board found that "the subject property was developed in 1970," made no findings addressing redevelopment, and implicitly concluded that all unscreened dumpsters were nonconforming structures that could lose their nonconformity when moved.

Because NCJS's dumpsters were permitted accessory uses or structures in its district and did not fail to comply with the CZO until Section 12.303's dumpster-screening requirement was triggered, its dumpsters fell outside Section 2.201's definition of a "nonconforming structure," and thus should not have been subject to Section 7.104's nonconformance provisions regulating nonconforming structures. Accordingly, we hold the City Board and the superior court misinterpreted and misapplied the CZO by concluding NCJS's dumpsters were nonconforming and subject to the nonconformance provisions regulating nonconforming structures without determining whether NCJS's land activity triggered application of Section 12.303's dumpster-screening requirement.

"Because [the Board of Adjustment's] interpretation of its [zoning] ordinance constituted an error of law, we reverse." *See Morris Commc'ns*, 365 N.C. at 162, 712 S.E.2d at 874 (reversing board's decision ordering landowner to remove relocated sign because board misinterpreted the term "work" as applied to sign permit's requirement landowner commence work on relocating sign within a certain timeframe). Since the local zoning authority failed to prove the existence of a current zoning violation, we conclude the appropriate remedy is to remand this case to the superior court for further remand to the City Board with instructions to rescind the 4 February 2015 zoning NOV issued against NCJS. In light of our disposition, we decline to address NCJS's remaining arguments.

III. Conclusion

The City Board and the superior court misinterpreted and misapplied the zoning ordinance by concluding that NCJS's unscreened dumpsters were "nonconforming structures" subject to the regulations governing nonconforming structures absent any determination of whether NCJS's property activity since 1984 triggered application of Section 12.303's dumpster-screening requirement. Accordingly, we reverse the superior

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court's order. Because the local zoning authority failed to prove the existence of a zoning violation, we remand this case to the superior court for further remand to the City Board to rescind the 4 February 2015 zoning NOV issued against NCJS.

REVERSED AND REMANDED.

Judges INMAN and BERGER concur.

THOMAS RIDER AND LINDA RIDER, PLAINTIFFS

v.

EDWIN HODGES D/B/A HODGES LAWN AND LANDSCAPE, DEFENDANT

No. COA17-110

Filed 15 August 2017

1. Contracts—breach of contract—landscaping—uncertain and indefinite arrangement—no meeting of minds—summary judgment

The trial court did not err by granting summary judgment in favor of defendant landscaper on a breach of contract claim for landscaping services where no contract was ever formed between the parties based on an uncertain and indefinite arrangement as to the price or scope of work to be completed on plaintiffs' property, and no meeting of the minds occurred. Further, plaintiff husband's affidavit contradicting his sworn deposition testimony was not considered.

2. Fraud—particularity—summary judgment—invoice—alleged promises

The trial court did not err by granting summary judgment in favor of defendant landscaper on a fraud claim for landscaping services where plaintiffs failed to allege a proper fraud claim under North Carolina law with particularity regarding both an invoice and alleged promises as required by N.C.G.S. § 1A-1, Rule 9(b).

3. Unfair Trade Practices—unfair and deceptive trade practices—landscaping—no contract for aggravating circumstances—invoicing—no proximate injury

The trial court did not err by granting summary judgment in favor of defendant landscaper on an unfair and deceptive trade

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practices claim under N.C.G.S § 75-1.1(a) for landscaping services where there was no contract between the parties to back up plaintiffs' claim of aggravating circumstances and any alleged acts regarding the invoicing did not cause proximate injury.

Appeal by plaintiffs from an order granting summary judgment in favor of defendant entered 17 November 2016 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 7 June 2017.

James W. Lee III, for the plaintiffs-appellants.

Northup McConnell & Sizemore, PLLC, by Robert E. Allen, for defendant-appellee.

MURPHY, Judge.

Thomas Rider (“Thomas”) and Linda Rider (“Linda”) (collectively “the Riders”) appeal from the trial court’s decision granting Edwin Hodges d/b/a Hodges Lawn and Landscape’s (“Hodges”) motion for summary judgment as to the Riders’ causes of action for: (1) breach of contract; (2) fraudulent billing; and (3) violation of the Unfair and Deceptive Trade Practices Act (“UDTPA”). The Riders argue that the trial court erred in granting the motion for summary judgment because genuine issues of material fact exist as to whether: (1) Hodges breached a valid contract; (2) Hodges committed fraudulent billing; and (3) Hodges engaged in unfair and deceptive trade practices. After careful review, we affirm the trial court’s grant of Hodges’ motion for summary judgment.

Background

In early July 2011, the Riders moved to the Oleta Falls area of Hendersonville, North Carolina. At some point prior to their move,¹ the parties arranged for Hodges to landscape the Riders’ property.² The Riders paid Hodges \$24,000 upfront “[t]o do landscaping,” in two separate payments — \$4,000 on 3 February 2011, and \$20,000 on 4 March 2011. In June of 2012, Hodges felt that his landscaping services were

1. Neither party was able to recall a specific date, but both parties agree it was between late 2010 and early 2011.

2. Hodges is independently contracted by the Oleta Falls Property Owners’ Association (“Oleta Falls POA”) to upkeep the common areas of the community. He has also completed private landscaping jobs for thirty-three Oleta Falls residents.

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completed and he ceased working on the Riders' property. Thomas claims that there were numerous issues with the landscaping. However, the Riders never complained about Hodges' work until 2015 when they filed this lawsuit.

Thomas contends that the Riders consistently asked Hodges for receipts or other documentation of his work expenditures throughout the landscaping process. However, the only documented request for Hodges' receipts occurred by email on 13 October 2013. Two or three days after this request, Hodges provided the Riders with an invoice ("the Invoice"). This was at least two years after the Riders claim the parties first entered into an arrangement. Both parties agree that the Invoice was created for use in the Riders' lawsuit against First Citizens Bank.

Despite Thomas' contention, Hodges claimed that the Riders first asked him to provide receipts for his work in 2013, and in total the Riders only asked for receipts "two, maybe three [times] including the [13 October 2013] email." Hodges further claimed that he offered the receipts each time the Riders wrote him a check, and again when he completed all of his work in 2012, but the Riders declined.

After the Riders filed this suit, both Thomas and Hodges were deposed on 23 June 2016 regarding their business dealings and the landscaping arrangement. In Thomas' deposition, he testified that Hodges agreed the cost of the landscaping "would be up to [\$24,000.]" In the same deposition, Thomas agreed that "there was never any firm agreement with regard to price." However, in his 27 October 2016 affidavit, filed in opposition to Hodges' motion for summary judgment, Thomas claims that Hodges "agreed to perform the specified landscaping work for [\$24,000]."

In contrast to Thomas' testimony, Hodges claimed in his deposition that he told the Riders it would cost between \$26,000 and \$28,000 to landscape their property. Hodges went on to explain that the Riders paid him \$24,000 because that was what they could afford for landscaping, and that "[i]t was understood that we would landscape everything we could with all the plants we could until [the Riders] ran out of money."

In addition to Thomas' inconsistent sworn testimony regarding price, the depositions also demonstrate that the parties never reached an agreement as to the scope of the work Hodges was to complete. In his deposition, Thomas claimed that he and Hodges spoke about the landscaping including: a flagpole, irrigation, re-grading part of a hill on the property, fencing, and plants. Thomas went on to admit that there was no "specific agreement," as to plans for irrigation, how much fencing

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would be built, how many or what type of plants would be provided, or how much mulch and top soil would be used. Thomas also admitted, “there was never a meeting of the minds,” and that he and Hodges had “no specific agreement about anything.”

The trial court entered an order granting summary judgment in Hodges’ favor. The Riders filed a timely notice of appeal.

Analysis

The Riders argue on appeal that the trial court erred in granting Hodges’ motion for summary judgment. We disagree and affirm the trial court’s decision.

We review an order granting summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). Summary judgment is only appropriate when the record shows “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 524, 649 S.E.2d at 385 (quotation omitted).

I. Breach of Contract

[1] The Riders argue the trial court erred in granting summary judgment on their claim for breach of contract because Hodges did not perform all of the landscaping work for which the parties contracted. We disagree. No contract ever formed because the arrangement was not certain and definite as to the price or scope of the work to be completed, and no meeting of the minds occurred.

“A contract for service must be certain and definite as to the nature and *extent of the service to be performed*, the place where and the person to whom it is to be rendered, and *the compensation to be paid*, or it will not be enforced.” *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 220, 108 S.E.2d 735, 737 (1921) (emphasis added). With regard to these essential terms “the parties must assent to the same thing in the same sense If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.” *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974) (internal quotation omitted). Similarly, “a valid contract exists only where there has been a meeting of the [parties’] minds as to all essential terms of the agreement.” *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995) (citation omitted).

The Riders’ breach of contract argument fails for two reasons. First, while both parties acknowledge a landscaping arrangement existed,

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there was never a meeting of the minds as to the scope of the work to be done. *See Croom*, 182 N.C. at 220, 108 S.E.2d at 737 (explaining that the extent of the services to be performed is an essential element of an enforceable contract for services). Here, Thomas' own testimony demonstrates the parties never specified the breadth of the work Hodges was to complete.

In his deposition, Thomas claims that after the Riders retained Hodges and paid him in full, Hodges "didn't agree to specifically do anything, just to get started on the landscape." Although certain topics such as irrigation were discussed, Thomas affirms that there was never a definitive meeting of the minds as to "any specific terms of the contract with regard to what work or materials [would] be performed [by Hodges.]" As a result, no meeting of the minds occurred regarding the extent of the services to be performed, which is essential for an enforceable contract for services to form.

Second, the Riders' claim that Hodges breached a contract also fails because the parties never reached a meeting of the minds with regard to the compensation Hodges was to be paid for his landscaping services. Compensation is an essential element to a contract for services. *Croom*, 182 N.C. at 220, 108 S.E.2d at 738. Here, there was no agreement as to price, and therefore there was no enforceable contract.

Thomas admits at numerous times that there was never a meeting of the minds with regard to price:

Q. Now, what was your understanding or expectation as to what Mr. Hodges['] overhead profit would be on this job?

[Thomas]: I had no idea what his overhead profit would be on the job. I -- in that same conversation I asked him, you know, I understand that you have to pick up the plants, and, you know, there's certain expenses involved in that, deliver them to the site. I don't have a problem with paying for any of that and your profit on doing those functions. But I'm going to need to know the price for a plant, what that overhead is including your pickup, delivery, profit, whatever is added into that and what the cost for planting is. Those were the three factors that I considered would go into supplying a landscape service.

Q. Sounds like there was never any firm agreement with regard to price?

...

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Q. Is that accurate?

[Thomas]: Well, there never was because none was ever put forth. I mean, it's hard for me to make a pronouncement on the price of a plant when I don't know what a plant costs.

Q. So I think you and Mr. Hodges never had agreement with regard to what the price of this landscaping work was going to be, is that accurate?

...

[Thomas]: We -- not a precise price, no.

While it is clear the Riders paid Hodges about \$24,000 “[t]o do landscaping,” Thomas also made clear that the parties were not sure how much they would ultimately pay Hodges:

Q. . . . Do you recall why you paid him a specific amount of \$24,000 as opposed to 26 or 29 or 20?

[Thomas]: Because he said it would be *up to that* to do the landscaping on the property.

(Emphasis added).

The only time that the Riders claimed a definite price existed was Thomas' 27 October 2016 affidavit filed in opposition to Hodges' motion for summary judgment. In the affidavit, he claims Hodges “agreed to perform the specified landscaping work for \$24,000.00[,]” contradicting his prior deposition. Although this affidavit alleges a price was agreed to, it does not create a genuine issue of material fact.

Even where the defendant's latest account of the underlying fact situation might, in other circumstances, be enough to defeat summary judgment “a nonmovant may not generate a conflict simply by filing an affidavit contradicting his own sworn testimony where the only issue raised is credibility[,]” and that “once [the movant] support[s] its summary judgment motion with the [nonmovant's] sworn testimony, [the nonmovant] can only defeat summary judgment on the issue of his intentional acts by producing evidence *other than his own affidavit or deposition contradicting his own testimony.*” *Allstate Ins. Co. v. Lahoud*, 167 N.C. App. 205, 211-12, 605 S.E.2d 180, 185 (2004).³ If not

3. *Allstate* examined and clarified *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E.2d 727 (1978), *aff'd per curiam by an equally*

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for this rule, “a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony[,]” which would “greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” *Wachovia Mortg. Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 9-10, 249 S.E.2d 727, 732 (1978), *aff’d per curiam by an equally divided court*, 297 N.C. 696, 256 S.E.2d 688 (1979) (citation omitted). Thus, as here, where a nonmovant relies solely on his own affidavit⁴ that contradicts his prior deposition testimony to create a genuine issue of material fact, we decline to allow the affidavit to create a genuine issue that would otherwise defeat summary judgment.

Since Thomas’ 27 October 2016 affidavit contradicts his sworn deposition testimony and was filed in response to a motion for summary judgment, we decline to consider it and hold that the parties never agreed upon price — an essential element of a contract. No contract existed for Hodges to breach and Hodges was entitled to judgment as a matter of law on the Riders’ breach of contract claim.

II. Fraud

[2] The Riders argue the trial court erred in granting Hodges’ motion for summary judgment on their fraud claim, arguing the material facts were in dispute as to whether they were induced to pay Hodges \$24,000: (1) by the Invoice; and (2) by alleged fraudulent promises. We disagree and affirm the trial court’s grant of summary judgment in favor of Hodges for this claim.

For the Riders’ fraud claim to survive summary judgment, Hodges’ conduct must satisfy all the elements of fraud: “(1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with the intent to deceive; (4) which does in fact deceive; (5) resulting in damage to the injured party.” *Forbis*, 361 N.C. at 526-27, 649 S.E.2d at 388 (quotation omitted). “[A]ny reliance on the allegedly false representations must be reasonable.” *Id.* at 527, 649 S.E.2d at 388 (citation omitted).

divided court, 297 N.C. 696, 256 S.E.2d 688 (1979), where we held that a party cannot defeat a motion for summary judgment by creating an issue of fact by filing an affidavit in response to the motion that contradicts his prior sworn testimony. *Id.* at 9, 249 S.E.2d at 732.

4. Only Thomas submitted an affidavit in opposition to Hodges’ motion for summary judgment. At no point did Linda verify the complaint, submit her own affidavit, or otherwise offer sworn testimony.

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Under Rule 9(b) of the North Carolina Rules of Civil Procedure, “[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Specifically, the particularity requirement for a fraud claim “is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations.” *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981). The Riders have failed to allege a proper fraud claim under North Carolina law with regard to both the Invoice and alleged promises for the reasons that follow.

A. Invoice

The Riders argue that the Invoice defrauded them because it contained intentionally inaccurate records of the labor and materials used on the property. We disagree, because the Invoice did not actually deceive the Riders, nor did they rely on it or face injury thereby. *See Forbis*, 361 N.C. at 526-27, 649 S.E.2d at 388 (stating that the elements of a proper fraud claim include actual deception of the intended party and damage to the deceived party). Thomas testified that he immediately recognized the information on the Invoice was incorrect, and that the Invoice was created more than two years after the Riders paid Hodges. No later payments were made based upon the Invoice. Further, both parties agree the Invoice was generated for the Riders’ use in another lawsuit, not for the purpose of billing the Riders for landscaping services.

These facts indicate that Hodges’ conduct does not satisfy the fourth or fifth elements of a proper fraud claim — that it actually deceived the intended party and caused them damage. The Riders cannot claim they were deceived by the Invoice if Thomas recognized it was false upon receiving it. Finally, since the Riders were not induced to pay Hodges more than the \$24,000 they had already given him, they cannot now claim that they were damaged by the Invoice’s alleged inaccuracies. The Riders have not alleged facts that satisfy a fraud claim as it relates to the Invoice. Thus, summary judgment was proper as to this aspect of the Riders’ fraud claim.

B. Alleged Promises

The Riders argue Hodges made promises that he never intended to fulfill to induce the Riders to pay him \$24,000. The Riders’ allegations of fraudulent promises fail as a matter of law.

The Riders claim Hodges induced them to enter into a contract by making fraudulent promises, stating in their complaint that Hodges “had

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no intention to satisfy his obligations,” and the Riders “did actually rely on [Hodges’] misrepresentation[s.]” The Riders do not detail any content of the allegedly fraudulent promises and have not met their pleading requirements under North Carolina Rule of Civil Procedure 9(b). *See Terry*, 302 N.C. at 85, 273 S.E.2d at 678 (specifying that all fraud claims must be pleaded with particularity). Therefore, summary judgment was proper as to this aspect of the Riders’ fraud claim.

Since the Riders failed to allege a proper fraud claim regarding either the Invoice or alleged fraudulent promises, the trial court did not err in granting summary judgment for Hodges as to this issue.

III. Unfair and Deceptive Trade Practices

[3] The Riders argue they were injured by Hodges’ use of unfair and deceptive trade practices in violation of N.C.G.S. § 75-1.1(a) (2015). They claim Hodges violated the UDTPA by: (1) inducing them into a contract he intended to breach; and (2) fraudulently billing them with an inaccurate invoice.⁵ We disagree and affirm the trial court’s granting of summary judgment in favor of Hodges.

“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce” are unlawful. N.C.G.S. § 75-1.1(a). For a plaintiff to establish a prima facie claim of unfair and deceptive trade practices that will survive summary judgment, he “must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, (3) which proximately caused injury to plaintiffs.” *Walker v. Fleetwood Homes Of N. Carolina, Inc.*, 362 N.C. 63, 71-72, 653 S.E.2d 393, 399 (2007) (quotation and citation omitted). Whether an act violates N.C.G.S. § 75-1.1 is a question of law. *Id.* at 71, 653 S.E.2d at 399 (quotation omitted).

A. Intentional Breach of the Contract

The Riders first argue that summary judgment should not have been granted on the UDTPA claim because “Hodges fraudulently induced [them] into entering into the contract even though Hodges had no intention of honoring the contract.” Breach of contract, even if intentional,

5. We consider no other potential arguments for the claim that Hodges’ conduct violated the UDTPA because the Riders did not raise any. It is an appellant’s responsibility to raise all relevant issues and arguments that they wish to be considered. Under North Carolina Rule of Appellate Procedure 28(6)(b), “[i]ssues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.” Thus we decline to examine Hodges’ business dealings with the Riders for unfair or deceptive trade practices beyond these two arguments.

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can only create a basis for an unfair and deceptive trade practices claim if substantial aggravating circumstances attend the breach. *Watson Elec. Constr. Co. v. Summit Cos., LLC*, 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003). Here, the Riders claim the aggravating circumstance is “Hodges’ conduct in soliciting funds for labor and materials[,] which were never going to be provided[.]”

We decline to review whether Hodges’ conduct qualifies as an aggravating circumstance attending a breach of contract because, as discussed in Section I, there was no contract for Hodges to breach because the agreement between Hodges and the Riders was not certain and definite as to the price or scope of the work to be completed, and no meeting of the minds occurred. Thus, as a matter of law, the act the Riders allege constituted an unfair or deceptive act or practice never occurred, as required to establish a prima facie claim for unfair and deceptive trade practices. *See e.g. Watson Elec. Constr. Co.*, 160 N.C. App. at 657, 587 S.E.2d at 95 (considering whether aggravating circumstances attended a breach of contract only after determining that a breach of contract occurred).

B. Fraudulent Billing

The Riders argue that if there was no contract, summary judgment still should not have been granted on the UDTPA claim because a finder of fact could find a violation of UDTPA based on the Riders’ fraudulent billing claim. The complaint describes this cause of action as:

26. The foregoing and succeeding paragraphs are hereby incorporated by reference and realleged as if fully set forth herein.

27. The actions of the Defendant in providing landscaping services and entering into landscaping contracts are in or affecting commerce.

28. The Defendant procured the Contract with the Plaintiffs, demanded payment from the Plaintiffs, accepted the Plaintiffs’ money, and submitted the fraudulent Invoice to the Plaintiffs with the intent to defraud the Plaintiffs, said actions constituting unfair and deceptive trade practices in violation of [N.C.G.S.] § 75-1.1 et seq.

29. The Defendant fraudulently represented to the Plaintiffs he would perform the services under the Contract and fraudulently represented to the Plaintiffs he had provided the labor and materials specified in the Invoice.

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30. The Plaintiffs . . . were actually damaged thereby.

Based on this complaint, a prima facie case of unfair and deceptive trade practices beyond the breach of contract claim does not exist because the alleged acts did not proximately cause injury to the Riders.

To the extent the UDTPA claim is based on the Invoice, the submission thereof or representation that the labor and materials therein were provided caused no proximate injury to the Riders because the Invoice was not generated for over two years after the Riders submitted the last payment for landscaping, and it was indisputably created for the Riders to use in a different lawsuit. The Riders argue on appeal that a UDTPA claim can also be based on “false representations” made “to induce the payment of \$24,000[]” or fraudulently billing against entrusted funds. However, these arguments were not addressed by the complaint and are made for the first time on appeal, and thus are not appropriate for us to now review. N.C. R. App. P. 10 (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.”)

Neither of the Riders’ allegations on the issue of unfair and deceptive trade practices sufficiently supports their claim that Hodges violated N.C.G.S § 75-1.1(a). The trial court did not err in granting summary judgment on this issue.

Conclusion

For the reasons stated above, we affirm the trial court’s order granting summary judgment for Hodges on the claims for breach of contract, fraudulent billing, and unfair and deceptive trade practices.

AFFIRMED.

Judges HUNTER, JR. and DAVIS concur.

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STATE OF NORTH CAROLINA

v.

ROY EUGENE BRYANT

No. COA16-1020

Filed 15 August 2017

1. Sentencing—prior record level—South Carolina conviction—criminal sexual conduct in the third degree—substantially similar to North Carolina offenses—second-degree forcible rape—second-degree forcible sexual offense

The trial court did not err in a second-degree sexual offense and second-degree rape case by calculating defendant's prior record level at VI based on its conclusion that defendant's prior South Carolina offense of criminal sexual conduct in the third degree was substantially similar to North Carolina's offenses of second-degree forcible rape and second-degree forcible sexual offense. Any violation of S.C. Code Ann. § 16-3-654 would also be a violation of either N.C.G.S. § 14-27.22 or § 14-27.27, and vice versa.

2. Sentencing—prior record level—South Carolina conviction—criminal sexual conduct with minors in the first degree—not substantially similar to North Carolina offenses—statutory rape of child by adult—statutory sexual offense with child by adult—harmless error

The trial court committed harmless error in a second-degree sexual offense and second-degree rape case by calculating defendant's prior record level VI based on its conclusion that defendant's 1996 South Carolina conviction for criminal sexual conduct with minors in the first degree was substantially similar to North Carolina's offenses of statutory rape of a child by an adult under N.C.G.S. § 14-27.23 and statutory sexual offense with a child by an adult under N.C.G.S. § 14-27.28, where there were disparate age requirements. The error did not affect defendant's prior record level calculation.

Judge BERGER concurring in part and dissenting in part in separate opinion.

Appeal by defendant from judgments entered 29 February 2016 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 22 March 2017.

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[255 N.C. App. 93 (2017)]

Attorney General Joshua H. Stein, by Assistant Attorney General Robert D. Croom, for the State.

Hollers & Atkinson, by Russell J. Hollers, III, for defendant-appellant.

CALABRIA, Judge.

Roy Eugene Bryant (“defendant”) appeals from judgments entered upon jury verdicts finding him guilty of second-degree sexual offense and second-degree rape. On appeal, defendant only challenges the sentence imposed by the trial court. Defendant contends that the court improperly calculated his prior record level, due to its erroneous conclusion that two of defendant’s prior South Carolina convictions were substantially similar to certain North Carolina offenses. After careful review, we conclude that defendant received a fair trial, free from prejudicial error.

I. Background

The State presented evidence that in the evening of 17 October 2014, defendant was a stranger to the victim and her boyfriend when he joined them as they walked to their apartment in downtown Winston-Salem, North Carolina. Once the victim was alone, defendant engaged in sexual conduct with her by force and against her will. On 18 October 2014, officers with the Winston-Salem Police Department arrested defendant for second-degree sexual offense and second-degree rape. A Forsyth County grand jury indicted defendant for these offenses on 1 June 2015. Trial commenced in Forsyth County Criminal Superior Court on 22 February 2016. On 26 February 2016, the jury returned verdicts finding defendant guilty. The jury also found, as an aggravating factor, that defendant committed the offenses while on pretrial release on another charge.

Following the verdicts, the trial court excused the jury to begin sentencing proceedings. The State submitted a copy of defendant’s Division of Criminal Information records regarding his prior convictions in North Carolina, South Carolina, and Florida. The State drafted a proposed prior record level worksheet, and defendant stipulated to its accuracy, “except for the class of any out-of-state conviction higher than a class I felony[.]”

In determining defendant’s prior record level, the State argued that two of defendant’s prior South Carolina convictions were substantially similar to certain North Carolina offenses. First, the State asserted that defendant’s 1991 conviction for criminal sexual conduct in the third degree was substantially similar to the North Carolina Class C felonies

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of second-degree forcible rape and second-degree forcible sex offense. Next, the State contended that defendant's 1996 conviction for criminal sexual conduct in the first degree was substantially similar to the North Carolina Class B1 felonies of statutory rape of a child by an adult and statutory sexual offense with a child by an adult. Although defendant disagreed with the State regarding substantial similarity, he stipulated that the 1991 and 1996 South Carolina convictions were both felony offenses.

After reviewing the relevant statutes from both jurisdictions, the trial court found that the State had proven by a preponderance of the evidence that the respective offenses were substantially similar. The court assigned defendant six points for his 1991 conviction and nine points for his 1996 conviction. *See* N.C. Gen. Stat. § 15A-1340.14(b)(1a)-(2) (2015) (instructing the trial court to assign a felony offender "6 points" "[f]or each prior felony Class B2, C, or D conviction" and "9 points" "[f]or each prior felony Class B1 conviction" that the court finds to have been proved).

Based on defendant's prior convictions, the trial court determined that he was a prior record level VI offender with 27 points. *See* N.C. Gen. Stat. § 15A-1340.14(c)(6) (providing that offenders with "[a]t least 18 points" are prior record level VI for felony sentencing purposes). Based on defendant's prior record level and the jury's finding of an aggravated factor, the trial court sentenced defendant to two consecutive terms of 182 to 279 months in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

II. Analysis

On appeal, defendant contends that the trial court improperly sentenced him at prior record level VI, due to the court's erroneous conclusion that two of defendant's prior South Carolina convictions were substantially similar to North Carolina offenses. We disagree.

"The trial court's determination of a defendant's prior record level is a conclusion of law, which this Court reviews *de novo* on appeal." *State v. Threadgill*, 227 N.C. App. 175, 178, 741 S.E.2d 677, 679-80, *disc. review denied*, 367 N.C. 223, 747 S.E.2d 538 (2013). A defendant need not object to the calculation of his prior record level at sentencing in order to preserve the issue for appellate review. *Id.* at 178, 741 S.E.2d at 679; N.C. Gen. Stat. § 15A-1446(d)(5), (18).

A felony offender's prior record level "is determined by calculating the sum of the points assigned to each of the offender's prior convictions"

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that the trial court finds to have been proven at the sentencing hearing. N.C. Gen. Stat. § 15A-1340.14(a). “The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction.” N.C. Gen. Stat. § 15A-1340.14(f). The State may prove the defendant’s prior convictions by any of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

Id.

Generally, felony convictions from jurisdictions outside of North Carolina are classified as Class I felonies and assigned two prior record points. N.C. Gen. Stat. § 15A-1340.14(e); N.C. Gen. Stat. § 15A-1340.14(b)(4). However,

[i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e). “[A] defendant may stipulate both that an out-of-state conviction exists and that the conviction is classified as a felony offense in the relevant jurisdiction.” *Threadgill*, 227 N.C. App. at 179, 741 S.E.2d at 680.

Substantial similarity “is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense.” *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014). “[F]or a party to meet its burden of establishing substantial similarity of an out-of-state offense to a North Carolina offense by the preponderance of the evidence, the party seeking the determination of substantial similarity must provide evidence of the applicable law.” *Id.* at 719, 766 S.E.2d at 333. “[A] printed copy of a statute of another state is admissible as evidence of the statut[ory] law of such state.” *State v. Morgan*,

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164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004) (remanding for resentencing where “[t]he State presented no evidence . . . that the 2002 New Jersey homicide statute was unchanged from the 1987 version under which [the d]efendant was convicted”).

A. Criminal Sexual Conduct in the Third Degree

[1] Defendant first contends that the trial court erred in determining that South Carolina’s offense of criminal sexual conduct in the third degree is substantially similar to North Carolina’s offenses of second-degree forcible rape and second-degree forcible sexual offense. We disagree.

At sentencing, defendant stipulated that on 19 November 1991, he was convicted in South Carolina of criminal sexual conduct in the third degree. The State presented the trial court with a copy of the 2014 version of the South Carolina statute,¹ which provides:

(1) A person is guilty of criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

(a) The actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances.

(b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery.

(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than ten years, according to the discretion of the court.

S.C. Code Ann. § 16-3-654. The term “sexual battery” means “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person’s body or of any object into the genital

1. As the State correctly observed at sentencing, in order to prove substantial similarity, the State was required to provide evidence of the South Carolina law that was in effect when defendant was convicted. *See Morgan*, 164 N.C. App. at 309, 595 S.E.2d at 812. However, the 2014 version that the State provided was sufficient due to its inclusion of statutory history demonstrating that the section has not been amended since its enactment in 1977.

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or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2015).²

The State contended that South Carolina's offense of criminal sexual conduct in the third degree is substantially similar to North Carolina's offenses of (1) second-degree forcible rape and (2) second-degree forcible sexual offense. North Carolina's second-degree forcible rape statute provides, in pertinent part:

(a) A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person:

(1) By force and against the will of the other person;
or

(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class C felony.

N.C. Gen. Stat. § 14-27.22(a)-(b). Second-degree forcible sexual offense has the same elements as second-degree forcible rape, except that "a sexual act" replaces "vaginal intercourse" as the underlying sexual conduct:

(a) A person is guilty of second degree forcible sexual offense if the person engages in a sexual act with another person:

(1) By force and against the will of the other person;
or

(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

2. The 2015 version of the definitional statute that the State provided to the trial court also included statutory history establishing that the section has not been amended since its passage in 1977.

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(b) Any person who commits the offense defined in this section is guilty of a Class C felony.

N.C. Gen. Stat. § 14-27.27. “Sexual act” means “cunnilingus, fellatio, anilingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.” N.C. Gen. Stat. § 14-27.20(4).

On appeal, defendant contends that “[a] violation of S.C. Code Ann. § 16-3-654 could be a violation of either N.C.G.S. § 14-27.22 or -27.27, but not both, because North Carolina’s rape statute only applies to vaginal intercourse and its sexual offense statute specifically excludes vaginal intercourse.” However, this seems to be a distinction without a difference. Second-degree forcible rape and second-degree forcible sexual offense have identical elements except for the underlying sexual conduct, and both offenses are Class C felonies in North Carolina. Furthermore, South Carolina’s definition of “sexual battery” includes vaginal intercourse as well as all conduct constituting a “sexual act” in North Carolina. Accordingly, any violation of S.C. Code Ann. § 16-3-654 would also be a violation of either N.C. Gen. Stat. § 14-27.22 or § 14-27.27, and vice versa. Therefore, the trial court did not err in determining that these offenses are substantially similar. *See State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008), *appeal dismissed and disc. review denied*, 363 N.C. 661, 685 S.E.2d 799 (2009) (“[T]he requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be ‘substantially similar.’”).

B. Criminal Sexual Conduct with Minors in the First Degree

[2] We do not reach the same conclusion regarding defendant’s 1996 South Carolina conviction for criminal sexual conduct with minors in the first degree, which the trial court determined is substantially similar to North Carolina’s offenses of statutory rape of a child by an adult, N.C. Gen. Stat. § 14-27.23, and statutory sexual offense with a child by an adult, N.C. Gen. Stat. § 14-27.28. We disagree.

A person commits the South Carolina offense of criminal sexual conduct with minors in the first degree “if the actor engages in sexual battery with the victim who is less than eleven years of age.” S.C. Code Ann. § 16-3-655(1) (1996). In North Carolina, “[a] person is guilty of statutory rape of a child by an adult if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years.” N.C. Gen. Stat. § 14-27.23(a). “A person is guilty of statutory

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sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years.” N.C. Gen. Stat. § 14-27.28(a). Both offenses are Class B1 felonies in North Carolina. N.C. Gen. Stat. §§ 14-27.23(b), -27.28(b).

Contrary to our previous determination, these offenses are not substantially similar due to their disparate age requirements. Although both of the North Carolina statutes require that the offender be “at least 18 years of age[,]” N.C. Gen. Stat. §§ 14-27.23(a), -27.28(a), a person of any age may violate South Carolina’s statute. *See* S.C. Code Ann. § 16-3-651(a) (defining “actor” as “a person accused of criminal sexual conduct”). Moreover, North Carolina’s statutes apply to victims “under the age of 13 years[,]” N.C. Gen. Stat. §§ 14-27.23(a), -27.28(a), while South Carolina’s statute protects victims who are “less than eleven years of age.” S.C. Code Ann. § 16-3-655(1). The North Carolina and South Carolina statutes thus apply to different offenders and different victims. Therefore, the offenses are not substantially similar. *See Sanders*, 367 N.C. at 719-20, 766 S.E.2d at 333-34 (holding that North Carolina’s offense of assault on a female is not substantially similar to Tennessee’s offense of domestic assault because, *inter alia*, the North Carolina offense “requires that (1) the assailant be male, (2) the assailant be at least eighteen years old, and (3) the victim of the assault be female[,]” while the Tennessee offense “does not require the victim to be female or the assailant to be male and of a certain age”). Accordingly, the trial court erred by assigning defendant nine points based on his 1996 South Carolina conviction for criminal sexual conduct with minors in the first degree.

Nevertheless, we hold that the trial court’s error was harmless. Defendant received 27 points for his prior convictions, which corresponds with a prior record level VI. Although the trial court erred by assigning defendant nine points for his 1996 South Carolina conviction, defendant stipulated that the offense was a felony. Assuming, *arguendo*, that the trial court had classified the offense as a Class I felony and assigned defendant two points on that basis, defendant would still have 20 total points. Since offenders with “[a]t least 18 points” are sentenced at prior record level VI pursuant to N.C. Gen. Stat. § 15A-1340.14(c) (6), the trial court’s error did not affect defendant’s prior record level calculation and was, therefore, harmless. *See State v. Adams*, 156 N.C. App. 318, 324, 576 S.E.2d 377, 382, *disc. review denied*, 357 N.C. 166, 580 S.E.2d 698 (2003).

Accordingly, we conclude that defendant received a fair trial, free from prejudicial error.

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NO PREJUDICIAL ERROR.

Judge HUNTER, JR. concurs.

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

BERGER, Judge, concurring in part, dissenting in part in separate opinion.

I concur with the majority opinion concerning the issue of substantial similarity of Defendant's South Carolina conviction for third degree sexual conduct with N.C. Gen. Stat. § 14-27.22 or N.C. Gen. Stat. § 14-27.27. However, because Defendant's South Carolina conviction for first degree sexual conduct with minors is substantially similar to N.C. Gen. Stat. § 14-27.23 and N.C. Gen. Stat. § 14-27.28, I would affirm the trial court's conclusion as to this issue, and respectfully dissent.

An out-of-state felony conviction is generally classified as a Class I offense for structured sentencing purposes. N.C. Gen. Stat. § 15A-1340.14(e) (2015). However,

[i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

Section 15A-1340.14(e). This Court has stated that "the requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is *not that the statutory wording precisely match*, but rather that the offense be 'substantially similar.' " *State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008) (emphasis added). There is no requirement that the statutes have to be identical.

The majority holds that "these offenses are not substantially similar due to their disparate age requirements[,] " citing *State v. Sanders*, 367 N.C. 716, 766 S.E.2d 331 (2014). However, the majority's focus on age would demand the offenses be identical for there to be substantial similarity.

The trial court correctly made the following findings and conclusions regarding Defendant's conviction for first degree sexual conduct with minors:

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THE COURT: Okay. And I note that the defendant is contesting that it should be a B1. The defendant, like the [conviction for third degree sexual conduct], asserts it should be a class I felony. However, for the reasons stated by the State, the [c]ourt finds that the State has proven by a preponderance of the evidence, in reviewing State's Exhibit 58,¹ that that particular South Carolina conviction is substantially similar to 14-27.23, statutory rape of a child and 14-27.28, statutory sex offense with a child. For all the reasons mentioned by the State –

And I should note that State's Exhibit 57, for the South Carolina offense the punishment for that particular class C felony was not more than ten years. While the punishment is not, per se, the determinative factor, it is one factor to consider and that is consistent, depending on the person's prior record level, of what he could receive for a class C felony in North Carolina for the corresponding North Carolina crimes.

Similarly[,] State's Exhibit 58 shows that someone convicted for the first-degree criminal sexual conduct with a minor less than 11 years, the punishment is not more than 30 years. That is consistent, although not identical, it is consistent with someone, depending on the prior record level, that is convicted of a B1 felony in North Carolina for the corresponding North Carolina crimes.

Court also finds although the age of the victim in the South Carolina case differs somewhat from that in North Carolina, the goal of both statutes is to punish either sexual offenses – well, either vaginal intercourse or sexual offenses with minors, and that's exactly what the North Carolina statute is designed to do as well. Again, the [c]ourt cites [*State v. Sapp*] in finding that the State has proven by a preponderance of the evidence that that particular conviction out of South Carolina is substantially similar to the two statu[t]es that I've cited for North

1. State's Exhibits 56, 57, and 58 were each related to Defendant's criminal history and convictions used on his prior record level worksheet. Exhibit 58 specifically included each of the North Carolina and South Carolina statutes utilized to determine whether Defendant's convictions were substantially similar.

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Carolina. The [c]ourt will assign the classification of that out-of-state conviction to be a B1 felony.

....

And again, for . . . each out-of-state conviction on the prior record level worksheet, the [c]ourt finds by a preponderance of the evidence that the offense is substantially similar to the North Carolina offenses that I've already itemized for the record, and that the North Carolina classification assigned to those particular out-of-state convictions is correct. The [c]ourt also finds that the State and defendant have stipulated in open court to the prior conviction points and record level except as to the class of any out-of-state conviction higher than a class I felony. The [c]ourt has already made those findings. The [court] also now, based on State's Exhibit Numbers 56, 57 and 58, incorporates all those exhibits in support of the [c]ourt's findings.

Moreover, the statutes at issue are substantially similar because the elements of the statutes target the same assailants, offense, and victims – assailants of any gender who engage in vaginal intercourse or sexual offenses with children. In fact, all child-victims who meet the age requirement for the South Carolina offense of first degree sexual conduct with minors, i.e., children eleven years old and younger, would meet the age requirement and could be classified as victims under N.C. Gen Stat. § 14-27.23 and N.C. Gen. Stat. § 14-27.28.

Defendant's South Carolina conviction for first degree sexual conduct with minors is substantially similar to N.C. Gen. Stat. § 14-27.23 and N.C. Gen. Stat. § 14-27.28, and I would affirm the trial court's classification of that offense as a B1 felony.

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[255 N.C. App. 104 (2017)]

STATE OF NORTH CAROLINA

v.

GUSS BOBBY CARTER, JR., DEFENDANT

No. COA16-854

Filed 15 August 2017

1. Evidence—lay opinion—visual identification—crack cocaine—chemical analysis

The trial court did not commit plain or prejudicial error in a drug case by allowing an agent's lay opinion testimony visually identifying a substance (crack cocaine) as a controlled substance where the State presented expert testimony, based on a scientifically valid chemical analysis, that the substance was a controlled substance.

2. Constitutional Law—effective assistance of counsel—failure to object—lay opinion testimony—crack cocaine

Defendant did not receive ineffective assistance of counsel in a drug case based on trial counsel's failure to object to an agent's lay opinion testimony visually identifying a substance that fell from defendant as crack cocaine. There was a chemical analysis and related expert opinion that the substance had unique chemical properties consistent with the presence of cocaine and defendant failed to establish a reasonable probability that there would have been a different result absent the alleged error.

Appeal by Defendant from judgment entered 23 February 2016 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 21 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tiffany Y. Lucas, for the State.

Mark Montgomery for Defendant-Appellant.

INMAN, Judge.

A trial court errs by allowing lay opinion testimony visually identifying a substance, crack cocaine, as a controlled substance. However, this error is not prejudicial when the State has presented expert testimony, based upon a scientifically valid chemical analysis, that the substance in question is a controlled substance.

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Guss Bobby Carter (“Defendant”) appeals from a judgment entered 23 February 2016 upon his convictions following a jury trial for possession of cocaine, possession of drug paraphernalia, possession of an open container of alcohol in the passenger area of a motor vehicle, and for attaining habitual felon status. Defendant argues that the trial court committed plain error by admitting the opinion testimony of an officer who visually identified a controlled substance. Defendant also argues he received ineffective assistance of counsel due to his trial counsel’s failure to object to the testimony. After careful review, we hold that Defendant has failed to demonstrate prejudice necessary to prevail on either argument.

Factual and Procedural Background

The evidence at trial tended to show the following:

On 3 October 2014, Special Agent Chris Kluttz (“Agent Kluttz”) of the North Carolina Department of Alcohol Law Enforcement (“ALE”) pulled over a Ford Taurus traveling erratically on Interstate 85 after he spotted an open beer can in the passenger area. There were four individuals in the vehicle; Defendant was sitting in the front passenger seat. Upon smelling alcohol and seeing open containers, Agent Kluttz asked the driver to step out of the vehicle. Agent Kluttz searched the driver and found a glass pipe in his right front pants pocket, and placed the driver in handcuffs.

Agent Kluttz then proceeded back to the vehicle and spoke briefly with Defendant before asking him to exit the vehicle. As Defendant stepped out, Agent Kluttz saw what he described as a “small baggie . . . of crack cocaine fall from [Defendant’s] person . . . to the pavement . . .” Agent Kluttz then placed Defendant under arrest.

Defendant was indicted on 2 February 2015 for felony possession of cocaine, possession of drug paraphernalia, and possession of an open container of alcohol in the passenger area of a motor vehicle. Defendant was subsequently indicted on 17 August 2015 for having attained habitual felon status. Defendant’s case was tried before a jury on 22 and 23 February 2016.

At trial, the State presented testimonial evidence from Agent Kluttz in which he repeatedly identified the substance that fell from Defendant as “crack cocaine.” Agent Kluttz based this identification on his training, experience working with the ALE, and his perceptions of the substance and packaging. Agent Kluttz was not tendered as an expert. The State introduced additional evidence in the form of a lab report and expert

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testimony by Jennifer McConnell (“McConnell”), a chemical analyst with the North Carolina State Crime Laboratory. McConnell testified that the results of her testing indicated that the substance in the bag was consistent with cocaine.

The jury found Defendant guilty of possession of cocaine, possession of drug paraphernalia, and possession of an open container of alcohol in the passenger area of a motor vehicle. Defendant pleaded guilty to having attained habitual felon status. The trial court consolidated the convictions and sentenced Defendant to an active prison term of 42 to 63 months. Defendant filed timely notice of appeal.

Analysis**I. Admissibility of Lay Opinion Testimony**

[1] Defendant contends that Agent Kluttz’s identification of the substance as crack cocaine was inadmissible lay opinion testimony because it was not based on a scientifically valid chemical analysis. While we agree that Agent Kluttz’s testimony was inadmissible, we hold that Defendant has failed to demonstrate plain error.

A. Standard of Review

Defendant did not preserve the issue of the admissibility of Agent Kluttz’s testimony at trial because he failed to lodge an objection when the challenged testimony was elicited. “Unpreserved error in criminal cases . . . is reviewed only for plain error.” *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citations omitted). To show plain error, “a defendant must demonstrate that a fundamental error occurred at trial.” *Id.* at 518, 723 S.E.2d at 334 (citation omitted). A fundamental error requires a defendant to establish prejudice, *i.e.*, that the error “had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* at 518, 723 S.E.2d at 334 (internal quotation marks and citations omitted).

B. Discussion

In a criminal case, the State must prove every element of a criminal offense beyond a reasonable doubt. *State v. Billinger*, 9 N.C. App. 573, 575, 176 S.E.2d 901, 903 (1970). In the context of a controlled substance case, “the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution.” *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010).

The North Carolina Supreme Court held in *Ward* that “[u]nless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance

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beyond a reasonable doubt, some form of scientifically valid chemical analysis is required.” *Id.* at 147, 694 S.E.2d at 747. The appellant in *Ward* challenged testimony by an expert in forensic chemistry who identified the substance in question as a controlled substance based only on a visual inspection. *Id.* at 139, 694 S.E.2d at 742-44. The Supreme Court held that the testimony was “lacking in sufficient credible indicators to support [its] reliability” *Id.* at 144, 694 S.E.2d at 745. In so holding, the Supreme Court rejected the State’s argument that such a deficiency should only affect the weight the jury assigned to the testimony. *Id.* at 147, 694 S.E.2d at 747. “Adopting that view would circumvent the fundamental issue at stake, that is, the reliability of the evidence, and would risk a greater number of false positive identifications.” *Id.* at 147, 694 S.E.2d at 747.

Ward followed *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009), in which the Supreme Court reversed a majority decision of this Court for “the reasons stated in the dissenting opinion,” resulting in a new trial for a defendant convicted of trafficking based upon the testimony of a law enforcement officer who visually identified the substance at issue as cocaine. The dissent, adopted by the Supreme Court, reasoned that by providing “procedures for the admissibility of [] laboratory reports” and “enacting such a technical, scientific definition of cocaine, it is clear that the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance.” *Llamas-Hernandez*, 189 N.C. App. 640, 652, 659 S.E.2d 79, 86-87 (2008), *rev’d per curiam*, 363 N.C. 8, 673 S.E.2d 658 (Steelman, J., concurring in part and dissenting in part) (citations omitted).

The *Ward* and *Llamas-Hernandez* decisions result in two general rules. First, the State is required to present either a scientifically valid chemical analysis of the substance in question or some other sufficiently reliable method of identification. *See State v. Hanif*, 228 N.C. App. 207, 212, 743 S.E.2d 690, 693 (2013) (holding that a trial court committed plain error by allowing testimony about the composition of a controlled substance based on a visual inspection when such testimony was the only evidence presented by the State identifying the substance in question); *see also State v. Woodard*, 210 N.C. App. 725, 731, 709 S.E.2d 430, 435 (2011) (holding that the State was not required to conduct a chemical analysis on the substance because the State’s evidence sufficiently established the identity of the stolen drugs). Second, testimony identifying a controlled substance based on visual inspection—whether presented as expert or lay opinion—is inadmissible. *See, e.g., State v. James*, 215 N.C. App. 588, 590, 715 S.E.2d 884, 886 (2011) (explaining

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that an officer's "visual identification testimony would be inadmissible because testimony identifying a controlled substance 'must be based on a scientifically valid chemical analysis and not mere visual inspection'" (quoting *Ward*, 364 N.C. at 142, 694 S.E.2d at 744); see also *State v. Meadows*, 201 N.C. App. 707, 712-13, 687 S.E.2d 305, 309 (2010) (holding that the trial court erred by admitting a police officer's lay testimony that he "collected what he believed to be crack cocaine" based on his visual identification of the substance).

However, the Supreme Court in *Ward* noted that its decision did not prohibit law enforcement officers from using visual identification of controlled substances for investigative purposes. *Id.* at 147-48, 694 S.E.2d at 747. Nor do we understand *Ward* or *Llamas-Hernandez* to prohibit testimony by an officer regarding visual identification of a controlled substance for the limited purpose of explaining the officer's investigative actions.

Here, Agent Kluttz, throughout his testimony, offered his lay opinion that the substance in question was crack cocaine. Our precedent prohibits such testimony if offered as substantive evidence. Because defense counsel did not object to the testimony, we have no way of knowing whether it was offered to establish the actual nature of the substance or merely to explain Agent Kluttz's subsequent actions in seizing the substance and arresting Defendant.

More importantly, the State introduced without objection testimony by McConnell, an expert in forensic testing for the presence or absence of controlled substances, as well as the results of McConnell's chemical analysis of the substance that Agent Kluttz saw drop from Defendant's person. McConnell testified that her chemical analysis involved mixing the substance with a reagent, viewing it through a microscope, and looking for crystals of a unique shape specific to cocaine. Based on the chemical analysis, McConnell formed the opinion that the substance in the baggie that fell to the pavement at Defendant's feet included an ingredient consistent with the presence of cocaine.

Given the expert testimony in this case based upon a scientifically reliable method, we cannot conclude that Agent Kluttz's testimony that he identified the substance on sight as crack cocaine had a probable impact on the jury's verdict of guilt. Accordingly, Defendant has failed to demonstrate prejudice and therefore failed to establish plain error.

Defendant also argues in passing in his briefs that there were holes in the procedures surrounding the chain of custody of the substance as it made its way to the North Carolina State Crime Laboratory for testing.

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We also recognize that at trial, Defendant sought to exclude the results of the State Crime Lab analysis by filing a motion *in limine*. However, Defendant does not challenge the trial court's admission of those results or the testimony by McConnell, and therefore we accept her testimony as properly before the trial court.

II. Ineffective Assistance of Counsel

[2] Defendant contends that his constitutional right to effective assistance of counsel was violated when his trial counsel failed to object to Agent Kluttz's lay opinion testimony visually identifying the substance that fell from Defendant as crack cocaine. We disagree.

Ineffective assistance of counsel claims are usually raised in post-conviction proceedings and not on direct appeal. *See, e.g., State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524-25 (2001). Such claims may be reviewed on direct appeal when the cold record reveals that no further factual development is necessary to resolve the issue. *Id.* at 166, 557 S.E.2d at 524-25 (citation omitted). The record here is sufficient to address the ineffective assistance claim, and in the interest of judicial economy we decide the merits.

To establish that he received ineffective assistance of counsel, a defendant must show not only that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" but also "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 686-87, 80 L.Ed.2d 674, 693 (1984). To meet this second prong, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L.Ed.2d at 698.

Here, in light of the chemical analysis and related expert opinion that the substance that fell from Defendant's person had unique chemical properties consistent with the presence of cocaine, Defendant has failed to establish a reasonable probability that if his trial counsel had objected, and if the trial court had excluded Agent Kluttz's visual identification testimony, the result of the proceeding would have been different. Accordingly, Defendant's argument is without merit.¹

1. Because Defendant cannot establish prejudice, we need not consider whether his trial counsel's performance was deficient.

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Conclusion

For the foregoing reasons, we hold that Defendant failed to establish that the trial court committed plain error by admitting Agent Kluttz's opinion testimony identifying the substance that fell from Defendant as cocaine, and that Defendant was not denied effective assistance of counsel.

NO ERROR.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
LARRY WAYNE GLIDEWELL, JR., DEFENDANT

No. COA16-1001

Filed 15 August 2017

1. Appeal and Error—appealability—writ of certiorari—defective notice of appeal

The Court of Appeals granted defendant's petition for writ of certiorari in a habitual misdemeanor larceny case and reached the merits of his arguments even though defendant gave defective notice of appeal.

2. Indictment and Information—habitual misdemeanor larceny—acting in concert jury instruction—allegation beyond essential elements of crime

The trial court did not err in a habitual misdemeanor larceny case by giving an acting in concert instruction even though it was not listed in the indictment. The alleged errors in the indictment did not prevent defendant from preparing his defense, and defendant was not at risk for a subsequent prosecution for the same incident. Further, the numerical discrepancies for the stolen items did not amount to error.

3. Aiding and Abetting—jury instruction on acting in concert—habitual misdemeanor larceny—sufficiency of evidence—present at the scene—common plan or purpose

The trial court did not err in a habitual misdemeanor larceny case by instructing the jury on the theory of acting in concert where

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the evidence allowed the jury to draw a reasonable inference that defendant was present at the scene of the crime, that defendant acted together with another person pursuant to a common plan or purpose, and that the other person did some of the acts necessary to constitute larceny.

Appeal by defendant from judgment entered 8 June 2016 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 8 March 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas H. Moore, for the State.

Mark L. Hayes for defendant-appellant.

BERGER, Judge.

Larry Wayne Glidewell, Jr. (“Defendant”) appeals from his conviction for habitual misdemeanor larceny. Defendant gave defective notice of appeal, but we grant his petition for writ of certiorari and reach the merits of his arguments. Defendant asserts that the trial court erred in giving an acting in concert jury instruction. First, Defendant argues that he was prejudiced by this instruction because it created a fatal variance between his indictment and the evidence supporting his conviction. Second, he argues that the State introduced insufficient evidence to warrant such an instruction. We review each argument in turn and find neither compel reversal of his conviction.

Factual and Procedural History

The evidence introduced by the State at trial tended to show that on June 11, 2015, Defendant and Darian Parks (“Parks”) walked into the Southern Pines Belk Department Store (“Store”) together. Both men removed several men’s shirts from their display in the Store’s Nautica section and concealed the shirts underneath their clothing. The men then exited the Store without paying.

As Defendant and Parks left the store, Brian Hale (“Hale”), the Store’s Loss Prevention Officer, followed the two men into the parking lot and observed them leave in a silver Chevrolet Malibu. After Defendant and Parks drove away, Hale returned to the Store and found a price tag for \$34.50 on the floor, which he deduced had been removed from one of the shirts. Hale and two of the Store’s loss prevention associates identified the men who stole the shirts on the Store’s surveillance camera

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video as Defendant and Parks. Hale also provided the Southern Pines Police with the make, model, and license plate number of the vehicle in which the men fled.

On January 4, 2016, a Moore County grand jury indicted Defendant for habitual misdemeanor larceny under N.C. Gen. Stat. § 14-72(b)(6). Parks, as co-defendant, pleaded guilty to the charges brought against him for this same set of operative facts prior to Defendant's trial.

On June 8, 2016, Defendant was tried before a jury in Moore County Superior Court. Before Defendant's jury was impaneled, Defendant knowingly and voluntarily admitted to four prior misdemeanor larcenies used by the State to elevate the present charge from misdemeanor larceny to a Class H felony of habitual misdemeanor larceny. At the close of the State's case-in-chief, Defendant presented no evidence and chose not to testify. After jury deliberations, Defendant was found guilty, sentenced to an active prison term of eleven to twenty-three months, and ordered to pay \$241.50 in restitution. The record indicates that Defendant gave no oral or written notice of appeal at trial.

Petition for Writ of Certiorari

[1] On the day following trial, June 9, 2016, Defendant's trial counsel gave oral notice of appeal. The trial court made appellate entries and appointed appellate counsel for Defendant. However, for notice of appeal in a criminal action to be effective, it must either be given orally at trial or be filed with the clerk of superior court and served on adverse parties within fourteen days after the court's entry of judgment. N.C.R. App. P. 4(a)(1) and (2) (2016). Because trial counsel's notice of appeal was neither given orally "at trial" nor filed with the clerk, it was defective. For this reason, on November 22, 2016, Defendant filed a petition for writ of certiorari asking this Court to consider the merits of his appeal.

In response to Defendant's petition, the State conceded it was aware of Defendant's intent to appeal and acknowledged review of Defendant's conviction was proper. Accordingly, we grant Defendant's petition for writ of certiorari and will review the merits of his appeal. *See* N.C.R. App. P. 21(a) (2016).

Analysis

Defendant appeals his conviction by asserting two assignments of error. First, Defendant argues the trial court created a fatal variance between the allegations in his indictment and the evidence supporting

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his conviction when it delivered an acting in concert instruction to the jury. Second, Defendant argues the acting in concert jury instruction should not have been given by the trial court because the State introduced insufficient evidence showing Defendant committed larceny in concert with another person. As explained below, we find neither argument has merit.

I. Fatal Variance

[2] In Defendant's first assignment of error, he asserts that a fatal variance was created when the trial court instructed the jury on a theory of acting in concert because the indictment with which Defendant was charged contained no indication that the State would proceed on this theory of criminal liability. Therefore, Defendant contends his conviction for habitual misdemeanor larceny should be vacated. We disagree.

A trial court, generally, commits prejudicial error when it "permit[s] a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Shipp*, 155 N.C. App. 294, 300, 573 S.E.2d 721, 725 (2002) (citation and quotation marks omitted). As a result, trial courts "should not give [jury] instructions which present . . . possible theories of conviction . . . either not supported by the evidence or not charged in the bill of indictment." *Id.* (citation and quotation marks omitted). "It is well established that a defendant must be convicted, if at all, of the particular offense charged in the indictment and that the State's proof must conform to the specific allegations contained therein." *State v. Henry*, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102 (2014), *disc. rev. denied*, ___ N.C. ___, 775 S.E.2d 852 (2015) (citation, quotation marks, and brackets omitted).

When allegations asserted in an indictment fail to "conform to the equivalent material aspects of the jury charge," our Supreme Court has held that a fatal variance is created, and "the indictment [is] insufficient to support that resulting conviction." *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986) (citation omitted). Furthermore, for "a variance to warrant reversal, the variance must be material," meaning it must "involve an essential element of the crime charged." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d, 453, 457 (2002) (citations omitted). The determination of whether a fatal variance exists turns upon two policy concerns, namely, (1) insuring "that the defendant is able to prepare his defense against the crime with which he is charged and [(2)] . . . protect[ing] the defendant from another prosecution for the same incident." *Id.* (citations omitted). However, "a variance . . . does not require reversal unless the defendant is prejudiced as a result." *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371, *disc. rev. denied*, 344 N.C. 636, 477 S.E.2d 53 (1996) (citation omitted).

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In cases addressing an acting in concert jury instruction, this Court has stated that acting in concert, as well as aiding and abetting, are “theories of criminal liability,” “theories of guilt,” “theories of culpability,” and “theories upon which to establish guilt.” *State v. Estes*, 186 N.C. App. 364, 372, 651 S.E.2d 598, 603 (2007), *disc. rev. denied*, 362 N.C. 365, 661 S.E.2d 883 (2008). A criminal indictment “must allege all of the essential elements of the crime sought to be charged[,]” and allegations which do not concern “the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.” *State v. Westbrook*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (citations and quotation marks omitted).

Therefore, “the allegation . . . that [a] defendant acted in concert . . . is an allegation beyond the essential elements of the crime charged and is . . . surplusage.” *Id.* See *Estes*, 186 N.C. App. at 372, 651 S.E.2d at 603 (holding that the prosecution’s variation of a theory of criminal liability, from that of acting in concert to aiding and abetting, did not constitute a substantial modification to the State’s original indictment because (1) the change only impacted surplusage to the principal criminal offense charged; and (2) the defendant was not rendered unable to prepare his own defense to the principal criminal offense). Furthermore, theories of criminal liability are not required to be included in an indictment. See *State v. Baskin*, 190 N.C. App. 102, 110, 660 S.E.2d 566, 573, *disc. rev. denied*, 362 N.C. 475, 666 S.E.2d 648 (2008).

In North Carolina, “[t]he essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner’s consent; and (4) with the intent to deprive the owner of the property permanently.” *State v. Sheppard*, 228 N.C. App. 266, 269, 744 S.E.2d 149, 151 (2013) (quoting *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002)). If the larceny was committed after four prior misdemeanor larceny convictions, it is a Class H felony without regard to the value of the property taken. N.C. Gen. Stat. § 14-72(a) and (b)(6) (2015).

Here, Defendant’s indictment for larceny alleged that he “unlawfully, willfully, and feloniously did steal, take, and carry away two shirts, the personal property of Belk, Inc., a corporation capable of owning property, such property having an approximate value of \$69.00.” The indictment contained each essential element of larceny.

After the close of evidence and before delivering the jury instructions, the trial court indicated it would give an acting in concert jury instruction. Defendant’s counsel raised a general objection to this instruction, preserving the issue for appeal, but was overruled. Directly after, the trial court instructed the jury:

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If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, *acting either by himself or acting together with another person*, took and carried away Belk, Inc.'s property without Belk, Inc.'s consent, knowing that he was not entitled to take it, and intended at that time to deprive the victim of its use permanently, it would be your duty to return a verdict of guilty.

(Emphasis added).

As seen above, the addition of a theory of liability to the jury instruction, specifically that “the defendant, *acting either by himself or acting together with another person*, took and carried away Belk, Inc.'s property,” failed to create a fatal variance between the indictment, which stated no theory of liability, and the jury instruction. The acting in concert theory of liability was not one of the “essential elements of larceny,” and it needed not be alleged in the indictment.

Defendant also argues that a fatal variance existed among his indictment, the jury instructions, and his jury verdict sheet because each held Defendant accountable for stealing a different number of shirts. However, two problems beset this argument. First, Defendant voiced no objection based upon this alleged variance at trial and posited no arguments for plain or fundamental error on appeal. *See State v. Gilbert*, 139 N.C. App. 657, 672-74, 535 S.E.2d 94, 103 (2000) (holding when a defendant fails to object to a verdict sheet's submission to the jury, the error is not considered prejudicial unless the error is fundamental); *State v. Turner*, 237 N.C. App. 388, 390-91, 765 S.E.2d 77, 80-81 (2014) (holding when a defendant fails to object to an indictment or jury instructions until after the jury returns its verdict at trial, this Court treats these issues as unpreserved and reviews them under the plain error standard, which requires they constitute a fundamental error to warrant reversal), *disc. rev. denied*, 368 N.C. 245, 768 S.E.2d 563 (2015); N.C.R. App. P. 10(a)(2) (2016) (establishing “[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict . . .”).

Second, neither the jury instruction nor the verdict sheet needed to have the number of items stolen. *See State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002) (holding “no requirement [mandates] that a written verdict contain each element of the offense to which it refers” (citations and quotation marks omitted)); *State v. McClain*, 282 N.C.

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396, 400, 193 S.E.2d 113, 115-16 (1972) (holding “[a]ny error or omission by the court in its review of the evidence in the charge to the jury must be . . . called to the attention of the court so that the court may have an opportunity to make the appropriate correction”); *see also* N.C. Gen. Stat. § 15A-1232 (2015) (establishing when a trial court instructs a jury, it must charge every essential element of the offense, but it is not required to “state, summarize, or recapitulate the evidence, or to explain the application of the law to the evidence”).

The alleged errors in the indictment did not prevent Defendant from preparing his defense, and Defendant was not and is not at risk for a subsequent prosecution for the same incident. *See Norman*, 149 N.C. App. at 594, 562 S.E.2d at 457. Furthermore, the numerical discrepancies to which Defendant points in his indictment, jury instructions, and verdict sheet did not amount to error. Accordingly, the alleged variance was not fatal. This assignment of error is without merit.

II. Sufficient Evidence to Support an Acting in Concert Jury Instruction

[3] Defendant next argues that the trial court erred when instructing the jury on the theory of acting in concert because no evidence supported that theory of liability. Specifically, Defendant contends the State’s evidence was insufficient to show that Defendant and Parks acted with a common purpose to commit larceny or that Defendant aided or encouraged Parks to commit larceny. Ultimately, Defendant asserts the evidence showed he was “simply present” when Parks committed larceny. We disagree.

“The prime purpose of a court’s charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.” *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974) (citations omitted). “Properly preserved challenges to the trial court’s decisions regarding jury instructions are reviewed *de novo* . . .” *State v. King*, 227 N.C. App. 390, 396, 742 S.E.2d 315, 319 (2013) (citation and quotation marks omitted).

Jury instructions are considered

contextually and in [their] entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by the instruction. Under

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such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Id. (citations omitted).

Under a theory of acting in concert, a jury can find a defendant guilty where “he is present at the scene and acting together with another or others pursuant to a common plan or purpose to commit the crime.” *State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367 (1994), *cert. denied*, ___ N.C. ___, 533 S.E.2d 475 (1999) (citations omitted). A jury instruction on the theory of “acting in concert is proper when the State presents evidence tending to show the defendant was present at the scene of the crime and acted together with another who [completed] acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.” *State v. Cody*, 135 N.C. App. 722, 728, 522 S.E.2d 777, 781 (1999) (citation and quotation marks omitted). Furthermore, when the State presents such evidence, “the judge *must* explain and apply the law of ‘acting in concert.’” *State v. Mitchell*, 24 N.C. App. 484, 486, 211 S.E.2d 645, 647 (1975) (emphasis added).

In the case *sub judice*, the trial court indicated at the close of evidence that it would give an acting in concert jury instruction. Defendant’s counsel raised a general objection to this instruction, preserving the issue for appeal, but was overruled. The trial court then instructed the jury, *inter alia*, on acting in concert as follows:

For a defendant to be guilty of a crime it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit larceny, each of them, if actually or constructively present, is guilty of the crime. A defendant is not guilty of a crime merely because the defendant is present at the scene, even though the defendant may silently approve of the crime or secretly intend to assist in its commission. To be guilty the defendant must aide or actively encourage the person committing the crime or in some way communicate to another person the defendant’s intention to assist in its commission.

Indeed, the evidence presented at trial tended to show Defendant was more than simply present at the scene of the larceny at issue. The State’s evidence illustrated that he acted together with Parks, who completed acts necessary to constitute larceny pursuant to a common plan

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or purpose. *See Cody*, 135 N.C. App. at 728, 522 S.E.2d at 781. Evidence also pointed out that Defendant rode with Parks in the same car to the Store; Defendant and Parks entered the Store together; Defendant and Parks looked over merchandise in the same section of clothing; Defendant and Parks were seen on surveillance video returning to the same area behind a clothing rack and stuffing shirts in their pants; and Defendant and Parks left the Store within seconds of each other and exited the Store's parking lot in the same vehicle driven by Parks.

We hold this evidence was sufficient to support a jury instruction on acting in concert to commit larceny. The evidence allowed the jury to conclude, or draw a reasonable inference, that Defendant was present at the scene of the crime, that Defendant acted together with Parks pursuant to a common plan or purpose, and that Parks did some of the acts necessary to constitute larceny. Defendant failed to meet his burden by showing that "the jury was misled or that the verdict was affected" as a result. *King*, 227 N. C. App. at 396, 742 S.E.2d at 319 (citation omitted). This assignment of error, like the first, is also without merit.

Conclusion

The trial court did not err by giving the acting in concert instruction. No fatal variance was created between the allegations in Defendant's indictment and evidence supporting his conviction. The State introduced sufficient evidence to warrant instructing the jury on an acting in concert theory of liability. Defendant received a fair trial, free from error.

NO ERROR.

Judges CALABRIA and HUNTER concur.

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STATE OF NORTH CAROLINA

v.

JAHRHEEL IKLE MAY

No. COA16-1121

Filed 15 August 2017

Sentencing—juvenile—life in prison without the possibility of parole—failure to make statutorily required findings of fact—no jurisdiction after notice of appeal

The trial court erred in a first-degree murder case by failing to make statutorily required findings of fact on the presence of mitigating factors under N.C.G.S. § 15A-1340.19B before sentencing a juvenile to life in prison without the possibility of parole. Further, the trial court lacked jurisdiction to make findings after defendant gave notice of appeal.

Judge STROUD concurs with separate opinion.

Appeal by defendant from judgment entered 16 July 2015 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 2 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

W. Michael Spivey for defendant-appellant.

BRYANT, Judge.

Where the trial court failed to make statutorily required findings of fact addressing statutory mitigating factors prior to sentencing juvenile defendant to life imprisonment without the possibility of parole, we vacate the sentence imposed and remand for a new sentencing hearing. Further, where the trial court had no jurisdiction to enter findings of fact after defendant gave notice of appeal, we vacate the order entered upon those findings.

On 25 February 2013, a Pitt County grand jury indicted defendant Jahrheel Ikle May on one count of first-degree murder and one count of armed robbery of Anthony Johnson. The matter came on for jury trial during the 13 July 2015 criminal session of Pitt County Superior Court, the Honorable W. Russell Duke, Jr., Judge presiding.

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The evidence admitted at trial tended to show that on 2 January 2013, sixteen-year-old defendant May discussed committing a robbery with his older cousin Demetrius Smith: breaking into the home of a “pill dude” who lived in the same Westpointe community of Greenville. Smith believed the “pill dude” had a lot of prescription medication pills. Around 8:00 p.m., Smith drove to defendant’s home, where defendant was sitting on the patio with two other men. Smith had intended to talk with defendant about the robbery, but stopped short of doing so. “[M]e and [defendant] were like, nah, we talking around too many people and we—we didn’t know if the [pill] dude was home or not so we were just like forget it instead of taking a chance.” But shortly afterwards, defendant said he needed to go to the store and borrowed Smith’s car for “[p]robably 15, 10 minutes.” Following his return, Smith heard sirens and asked defendant, “Did you do something with my car?” Defendant responded that he did not.

The evidence further showed that at about 8:20 p.m. that evening, two men were observed “tussling” in front of a vehicle parked on Westridge Court. Gunshots were fired. The larger of the two men crawled toward the door of a residence, while the smaller man entered the vehicle and drove away. Law enforcement officers soon found Anthony Johnson deceased outside the residence on Westridge Court. Two days later, defendant was arrested and charged with first-degree murder and armed robbery.

While in jail awaiting trial, defendant talked to an inmate about the events leading to Johnson’s death. At trial, the inmate testified on behalf of the State to conversations he had with defendant about the shooting, including details the police had not made public. Defendant presented no evidence.

Defendant was convicted of the first-degree murder of Johnson on the basis of malice, premeditation and deliberation, and on the basis of the felony murder rule. Defendant was also convicted of attempted robbery with a dangerous weapon.

At sentencing, several witnesses testified on defendant’s behalf: defendant’s guidance counselor; an assistant principal; a retired pastor, who was also a correctional officer; a principal of the middle school defendant attended; defendant’s mother; defendant’s father; and defendant’s grandmother. The witnesses testified consistently that defendant was a popular student at school, an athlete, “captain material,” “a good kid,” and an honors student taking advanced courses. The trial court entered judgment on 16 July 2015 as follows: On the charge of attempted armed robbery with a dangerous weapon, defendant was sentenced to a

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term of 64 to 89 months; on the charge of first-degree murder, defendant was sentenced to life imprisonment without the possibility of parole. The sentences were to be served consecutively. Immediately after judgment was entered on 16 July 2015, defendant gave oral notice of appeal.

Almost a month later, on 11 August 2015, the trial court entered an order making findings of fact based on N.C. Gen. Stat. § 15A-1340.19B to support its determination that defendant should be sentenced to life imprisonment without the possibility of parole, as opposed to a lesser sentence of life imprisonment with the possibility of parole.

On appeal, defendant argues the trial court erred by sentencing him to life imprisonment without the possibility of parole, where the trial court failed to make findings of fact and conclusions of law in support of the sentence. Defendant also brings forth several other arguments—e.g., that there was insufficient evidence that defendant was permanently incorrigible; that there was sufficient evidence to demonstrate defendant’s crime was the result of transient immaturity; and that the trial court failed to make findings as to all mitigating factors. However, based on our holding as to defendant’s first argument, we do not address the remaining ones.

Analysis

Defendant argues that the trial court erred by failing to make findings of fact on the presence of mitigating factors before sentencing him to life in prison without the possibility of parole, and further, the trial court lacked jurisdiction to make findings after defendant gave notice of appeal. We agree.

“The Eighth Amendment’s prohibition of cruel and unusual punishment ‘guarantees individuals the right not to be subjected to excessive sanctions.’ ” *Miller v. Alabama*, 567 U.S. 460, 469, 183 L. Ed. 2d 407, 417 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). “In *Miller* . . . , the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile’s special circumstances in light of the principles and purposes of juvenile sentencing.” *Montgomery v. Louisiana*, ___ U.S. ___, ___, 193 L. Ed. 2d 599, 610 (2016). In *Miller*, the Court reasoned that “*Roper* and *Graham* [*v. Florida*, 560 U.S. 48, 176 L.Ed.2d 825 (2010),] establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, ‘they are less deserving of the most severe punishments.’ ” *Miller*, 567 U.S. at 471, 183 L. Ed.

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2d at 418 (quoting *Graham*, 560 U.S. at ___, 176 L. Ed. 2d 825). “*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 619 (citation omitted).

In response to the *Miller* decision, our General Assembly enacted N.C. Gen. Stat. § 15A-1476 *et seq.* (“the Act”), entitled “An act to amend the state sentencing laws to comply with the United States Supreme Court Decision in *Miller v. Alabama*.” N.C. Sess. Law 2012-148. The Act applies to defendants convicted of first-degree murder who were under the age of eighteen at the time of the offense. N.C. Gen. Stat. § 15A-1340.19A.

State v. Lovette, 225 N.C. App. 456, 470, 737 S.E.2d 432, 441 (2013) (footnote omitted). Pursuant to General Statutes, section 15A-1340.19B (entitled “Penalty determination”), when a defendant is sentenced to life in prison for first-degree murder under some theory other than the felony murder rule, which compels a sentence of life in prison with parole, “the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in G.S. 14-17, or a lesser sentence of life imprisonment with parole.” N.C. Gen. Stat. § 15A-1340.19B(a)(2) (2015). In making its determination,

[t]he court shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole. The order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order.

Id. § 15A-1340.19C(a).¹ “This Court has held that ‘use of the language “shall” ’ is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error.” *State v. Antone*, 240 N.C. App.

1. Section 15A-1340.19B includes the following as mitigating factors that may be submitted to the trial court:

(1) Age at the time of the offense[;] (2) Immaturity[;] (3) Ability to appreciate the risks and consequences of the conduct[;] (4) Intellectual

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408, 410, 770 S.E.2d 128, 130 (2015) (quoting *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001)).

Here, on 11 August 2015—more than fourteen days after entry of judgment and defendant’s notice of appeal—the trial court entered an order making findings of fact pursuant to section 15A-1340.19B. However, “[t]he jurisdiction of the trial court with regard to the case is divested . . . when notice of appeal has been given and [the period for giving notice of appeal (fourteen days from entry of judgment in a criminal appeal)] has expired.” N.C. Gen. Stat. § 15A-1448(a)(3) (2015); *see also* N.C. R. App. P. 4(a)(2) (“Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by (1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court . . . within fourteen days after entry of the judgment . . .”). At that point, “the court is only authorized to make the record correspond to the actual facts and cannot, under the guise of an amendment of its records, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred.” *State v. Davis*, 123 N.C. App. 240, 243, 472 S.E.2d 392, 394 (1996) (quoting *State v. Cannon*, 244 N.C. 399, 404, 94 S.E.2d 339, 342 (1956)).

The trial court, in the instant case, erred by entering judgment sentencing defendant to life imprisonment without parole without making the statutorily required findings of fact. Further, because defendant gave immediate notice of appeal from the judgment, we hold the trial court was without authority to enter the 11 August 2015 order in a belated attempt at compliance with N.C. Gen. Stat. § 15A-1340.19B.² Thus, the trial court failed to comply with the statutory mandate of N.C. Gen. Stat. § 15A-1340.19B, amounting to reversible error. *See Antone*, 240 N.C. App. at 412, 770 S.E.2d 130–31 (vacating the order and judgment of the trial court and remanding for a new sentencing hearing where the trial court failed to set out findings in consideration of four mitigating factors enumerated in section 15A-1340.19B(c)). Accordingly, we vacate the 16 July 2015 judgment sentencing defendant to a term of life imprisonment without the possibility of parole, and we remand the matter for a

capacity[;] (5) Prior record[;] (6) Mental health[;] (7) Familial or peer pressure exerted upon the defendant[;] (8) Likelihood that the defendant would benefit from rehabilitation in confinement[; and] (9) Any other mitigating factor or circumstance.

N.C. Gen. Stat. § 15A-1340.19B(c) (2015).

2. We also note that the State concedes error by the trial court as the court lacked jurisdiction to make findings of fact after defendant had given notice of appeal.

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new sentencing hearing consistent with the statutory obligations in N.C. Gen. Stat. §§ 15A-1340.19B, -1340.19C. We also vacate the trial court's 11 August 2015 order as the court was without jurisdiction to enter the order at that time. *See Davis*, 123 N.C. App. at 243, 472 S.E.2d at 394.

The judgment of the trial court entered 16 July 2015 imposing a sentence of life imprisonment without parole is VACATED AND REMANDED, and the trial court order of 11 August 2015 is VACATED.

Judge DAVIS concurs.

Judge STROUD concurs with separate opinion.

STROUD, Judge, concurring.

I concur with the majority opinion but write separately to note concern about how our courts are addressing their discretionary determination of whether juveniles should be sentenced to life imprisonment without possibility of parole.

On its face, North Carolina General Statute § 15A-1340.19B seems quite clear:

(c) The defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:

- (1) Age at the time of the offense.
- (2) Immaturity.
- (3) Ability to appreciate the risks and consequences of the conduct.
- (4) Intellectual capacity.
- (5) Prior record.
- (6) Mental health.
- (7) Familial or peer pressure exerted upon the defendant.
- (8) Likelihood that the defendant would benefit from rehabilitation in confinement.
- (9) Any other mitigating factor or circumstance.

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N.C. Gen. Stat. § 15A-1340.19B (2015). But applying these factors has been difficult. Although the trial judge is required to find mitigating factors or the absence of mitigating factors to justify her decisions, and North Carolina General Statute § 15A-1340.19B(c) lists the factors which may be shown as mitigating factors, I am not sure that anyone understands what particular facts found within the factors should be considered as mitigating factors. For example, a trial court may find that a juvenile has done well in school; some may view this is a mitigating factor because it shows the juvenile's prior commitment to bettering himself and potential for improvement while others may view it as not mitigating as it demonstrates the juvenile has a high "[i]ntellectual capability" and thus a better "[a]bility to appreciate the risks and consequences of the conduct" than others his age might. *Id.* Likewise, should a trial court consider a juvenile's chaotic and violent upbringing as lacking any mitigating force, suggesting that he would not benefit from rehabilitation? Or should the trial court consider this as mitigating, since this sort of background may suggest that his behavior may have resulted from "familial or peer pressure exerted upon" him? *Id.*

The United States Supreme Court discussed exactly this sort of problem in *Miller*, as we noted in *Lovette*:

In *Miller*, in contrasting the cases of the two 14-year-old juveniles under consideration with juveniles in prior cases, the Supreme Court contrasted some of these characteristics of juveniles:

In light of *Graham's* reasoning, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a greater sentence than those adults will serve. In meting out the death penalty, the elision of all these

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differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

Both cases before us illustrate the problem. Take Jackson's in *Graham* first. As noted earlier, Jackson did not fire the bullet that killed Laurie Troup; nor did the State argue that he intended her death. Jackson's conviction was instead based on an aiding-and-abetting theory; and the appellate court affirmed the verdict only because the jury could have believed that when Jackson entered the store, he warned Troup that we ain't playin, rather than told his friends that I thought you all was playin. To be sure, Jackson learned on the way to the video store that his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point. All these circumstances go to Jackson's culpability for the offense. And so too does Jackson's family background and immersion in violence: Both his mother and his grandmother had previously shot other individuals. At the least, a sentencer should look at such facts before depriving a 14-year-old of any prospect of release from prison.

That is true also in Miller's case. No one can doubt that he and Smith committed a vicious murder. But they did it when high on drugs and alcohol consumed with the adult victim. And if ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten. Nonetheless, Miller's past criminal history was limited—two instances of truancy and one of second-degree criminal mischief. That Miller deserved severe punishment for killing Cole Cannon is beyond question. But once

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again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.

Miller, 567 U.S. at ___, 183 L.Ed.2d at 422–24 (citations, quotation marks, brackets, and footnote omitted). In this comparison, the Supreme Court demonstrates how a court might weigh the “hallmark features” in sentencing juveniles. *Id.* at ___, 183 L.Ed.2d at 422–24.

State v. Lovette, 233 N.C. App. 706, 720–21, 758 S.E.2d 399, 409–10 (2014) (ellipses omitted).

Many cases from this Court citing North Carolina General Statute § 15A-1340.19B illustrate the problem: For example, in *State v. James*, the trial court made extensive findings of fact regarding the juvenile, but this Court remanded for additional findings since the order did not clearly identify which factors were considered as mitigating and which it considered as “not mitigating”:

For example, and as pointed out by defendant, the trial court found in finding number twenty-three, defendant was once a member of the Bloods gang and wore a self-made tattoo of a B on his arm. Yet that finding further provided, as of October, 2005 defendant was no longer affiliated with the gang. He had been referred to the Charlotte Mecklenburg Police Department Gang of One program that worked with former gang members. This finding could be interpreted different ways—defendant was capable of rehabilitation or rehabilitative efforts had failed. Similarly, the trial court found in finding of fact number nine that at the time of the crime defendant was 16 years, 9 months old. While the finding makes clear that defendant was a juvenile, it is unclear whether defendant’s age is mitigating or not. In finding of fact number twenty-six, the trial court found that individuals around the age of 16 can typically engage in cognitive behavior which requires thinking through things and reasoning, but not necessarily self-control. In that same finding, however, the trial court also found, things that may affect an individual’s psycho-social development may be environment, basic needs, adult supervision, stressful and toxic environment, peer pressure, group behavior, violence, neglect, and physical and/or sexual abuse. The

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trial court's other findings show that defendant has experienced many of those things found by the trial court to affect development.

Instead of identifying which findings it considered mitigating and which were not, after making its findings, the trial court summarized its considerations in finding of fact thirty-four as follows:

The Court, has considered the age of the Defendant at the time of the murder, his level of maturity or immaturity, his ability to appreciate the risks and consequences of his conduct, his intellectual capacity, his one prior record of juvenile misconduct (which this Court discounts and does not consider to be pivotal against the Defendant, but only helpful as to the light the juvenile investigation sheds upon Defendant's unstable home environment), his mental health, any family or peer pressure exerted upon defendant, the likelihood that he would benefit from rehabilitation in confinement, the evidence offered by Defendant's witnesses as to brain development in juveniles and adolescents, and all of the probative evidence offered by both parties as well as the record in this case. The Court has considered Defendant's statements to the police and his contention that it was his co-defendant who planned and directed the commission of the crimes against the victim, the Court does note that in some of the details and contentions the statement is self-serving and contradicted by physical evidence in the case. In the exercise of its informed discretion, the Court determines that based upon all the circumstances of the offense and the particular circumstances of the Defendant that the mitigating factors found above, taken either individually or collectively, are insufficient to warrant imposition of a sentence of less than life without parole.

This finding in no way demonstrates the absence or presence of any mitigating factors. It simply lists the trial court's considerations and final determination.

___ N.C. App. ___, 786 S.E.2d 73, 83-84 (2016) (citations, quotation marks, ellipses, and brackets omitted), *appeal dismissed and disc.*

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review allowed, ___ N.C. ___, 796 S.E.2d 789, *disc. review allowed*, ___ N.C. ___, 797 S.E.2d 6 (2017).

This Court remanded a similar order to that in James in *State v. Antone*, ___ N.C. App. ___, 770 S.E.2d 128 (2015). Compare James, ___ N.C. App. ___, 786 S.E.2d at 83-84. After making brief findings of fact, including some recitations of testimony, regarding the juvenile's life, characteristics, and circumstances of the crime, the trial court determined there were "insufficient mitigating factors to find life with parole," and then this Court determined

that the trial court's findings of fact and order fail to comply with the mandate set forth in N.C. Gen. Stat. § 15A-1340.19C that requires the court to include findings on the absence or presence of any mitigating factors. The trial court's order makes cursory, but adequate findings as to the mitigating circumstances set forth in N.C. Gen. Stat. § 15A-1340.19B(c)(1), (4), (5), and (6). The order does not address factors (2), (3), (7), or (8). In the determination of whether the sentence of life imprisonment should be with or without parole, factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor.

240 N.C. App. 408, 412, 770 S.E.2d 128, 130 (2015).

I would note that the order on appeal in this case, although entered without jurisdiction and requiring remand for that reason, bears a striking resemblance to the orders in *James* and *Antone* in that it makes findings of fact regarding the defendant's life and upbringing but does not identify any particular factor as a mitigating or not mitigating factor. Compare *James*, ___ N.C. App. at ___, 786 S.E.2d at 83-84; *Antone*, 240 N.C. App. at 412, 770 S.E.2d at 130. The order also finds that "the killing . . . involved the shooting of the victim numerous times including one shot in the victim's back[,]” and it appears the trial court considered this as not mitigating, because it is the only finding listed after the trial court noted “[t]here are no further mitigating factors or circumstances.” But the circumstances of the crime are not listed as one of the potential *mitigating* factors and “aggravating” factors are not part of the analysis under North Carolina General Statute § 15A-1340.19B. See N.C. Gen. Stat. § 15A-1340.19B.

Indeed, North Carolina General Statute § 15A-1340.19B identifies only potential mitigating factors, so factors can either be mitigating or not mitigating factors. *See id.* There is no consideration of what we may

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in other contexts consider as “aggravating factors,” so a factor which the trial court considers to support life imprisonment without the possibility of parole is referred to as a factor which is “not mitigating” instead of an aggravating factor. *See generally id.* This is an important distinction, although the negative phraseology which may be required to describe a factor that is “not mitigating” – but is also not “aggravating” – can be quite awkward. “Aggravating factors” apply in other situations of sentencing adults and typically must be determined by a jury based upon *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). *See also* N.C. Gen. Stat. § 15A-1340.16; *State v. McQueen*, 181 N.C. App. 417, 422, 639 S.E.2d 131, 134 (2007) (“In response to the ruling in *Blakely*, the North Carolina General Assembly enacted a procedure for aggravating factors to be proven to a jury under N.C.G.S. § 15A-1340.16.”) North Carolina General Statute § 15A-1340.19B is only dealing with the terrible and thankfully rare situation where a juvenile has committed such an atrocious crime he faces the possibility of life imprisonment without parole. *See generally* N.C. Gen. Stat. § 15A-1340.19B. North Carolina General Statute § 15A-1340.19B does not seem to envision much if any weight for the horrific nature of the crime, as would be appropriate in adult sentencing where both mitigating and aggravating factors are weighed. *Contrast* N.C. Gen. Stat. §§ 15A-1340.16; -1340.19B. Here, only mitigating factors or the lack thereof should be considered in the sentencing analysis. *See* N.C. Gen. Stat. § 15A-1340.19B.

Again, I would caution that almost all of the cases subject to North Carolina General Statute § 15A-1340.19B arose from heinous and shocking crimes; by definition, all are first degree murders, based on factors other than felony murder, *see id.*, committed by minors. *See* N.C. Gen. Stat. § 15A-1340.19A (2015). If the facts of the particular crime are treated as a factor which bears much weight in the analysis, then life imprisonment without the possibility of parole will be the rule and not the exception. But under *Miller*, life imprisonment without parole for juveniles should be the exception, not the rule:

But given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects

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irreparable corruption. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Miller v. Alabama, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407, 424 (2012) (citations, quotation marks, and footnote omitted).

Furthermore, the Supreme Court has noted that a juvenile's past disadvantages should be an important factor in determining his culpability, noting that in a prior case:

a 16-year-old shot a police officer point-blank and killed him. We invalidated his death sentence because the judge did not consider evidence of his neglectful and violent family background (including his mother's drug abuse and his father's physical abuse) and his emotional disturbance. We found that evidence particularly relevant—more so than it would have been in the case of an adult offender. We held: Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability.

Id. at 2467, 183 L. Ed. 2d at 422 (citation, quotation marks, and brackets omitted). Of course, imposition of a sentence of life imprisonment with the possibility of parole is still not a guarantee that a defendant will ever be released, and no one can predict how a juvenile may change, for better or worse, over the passing decades of his life.¹ As the United States Supreme Court noted, it is a "rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 2469, 183 S.E.2d at 424.

Both trial courts and appellate courts normally consider only the case before the court and not how that case may compare to other similar cases. And I do not know the statistics regarding the percentages of juveniles who have been eligible to be sentenced to life imprisonment without the possibility of parole who have actually received this sentence instead of the possibility of parole. I do not know the statistics regarding

1. North Carolina General Statute § 15A-1340.19A provides that a sentence of "life imprisonment with parole" requires that "the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole." N.C. Gen. Stat. § 15A-1340.19A (quotation marks omitted).

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the percentages of juveniles who have been eligible to be sentenced to life imprisonment without the possibility of parole who have actually received this sentence instead of the possibility of parole, but according to *Miller*, that percentage should be very small. *Id.* Convictions of juveniles for first degree murder are rare, and within that pool of eligible juveniles who have committed these crimes, sentences of imprisonment for life without the possibility of parole should be “uncommon” as well, if our courts are to comply with the law as set forth by the United States Supreme Court. *Id.*

STATE OF NORTH CAROLINA
v.
MONTANELLE DEANGELO POSEY

No. COA16-937

Filed 15 August 2017

Probation and Parole—error in revocation of probation—mootness—willful violation—missed curfew—enhanced sentencing for subsequent offenses

Defendant’s appeal from a judgment revoking his probation and activating his suspended sentence was dismissed as moot even though the trial court lacked jurisdiction to revoke probation under the Justice Reinvestment Act. The pertinent offenses occurred prior to 1 December 2011, but defendant had already served his time and would not suffer future collateral consequences from the trial court’s error. N.C.G.S. § 15A-1340.16(d)(12a), providing for enhanced sentencing for subsequent offenses, was actually triggered by the trial court’s finding that defendant was in willful violation of his probation for missing curfew.

Judge ZACHARY dissenting.

Appeal by Defendant from judgment entered 20 December 2012 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 17 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Heather A. Haney, for the State.

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Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.

DILLON, Judge.

Montanelle Deangelo Posey (“Defendant”) appeals from a judgment revoking his probation and activating his suspended sentence. After careful consideration, we conclude Defendant’s appeal is moot and, therefore, dismiss his appeal.

I. Background

Defendant was placed on 36 months of supervised probation, beginning after his release from incarceration, for certain crimes he committed prior to April 2011.

While on probation, a trial court found that Defendant had not been at his residence during a mandatory curfew on two occasions in 2012, and that these absences constituted willful violations of a condition of his probation and that these violations constituted *absconding* supervision. The trial court entered judgment finding Defendant in willful violation of his probation, revoking his probation on the basis of absconding and activating his suspended sentence. Defendant appealed.

II. Appellate Jurisdiction

As an initial matter, Defendant concedes that his notice of appeal was defective for failure to satisfy multiple procedural requirements for giving notice of appeal as set out in N.C. R. App. P. 4. In recognition of these defects, Defendant has filed a petition for writ of *certiorari* contemporaneously with the filing of his appellate brief requesting that this Court review the trial court’s judgment revoking his probation. In our discretion, we allow Defendant’s petition for writ of *certiorari*.

III. Analysis

The State concedes that the trial court lacked jurisdiction to revoke Defendant’s probation under the Justice Reinvestment Act, as the offenses he committed for which he was placed on probation occurred prior to 1 December 2011.

The State only argues that the appeal is moot as Defendant has served his time.

A pending appeal from a judgment that has been fully effectuated is generally moot because a subsequent appellate decision “cannot have

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any practical effect on the existing controversy.” *In re A.K.*, 360 N.C. 449, 452, 628 S.E.2d 753, 755 (2006) (quotation marks and citation omitted). However, before an appeal is dismissed for mootness, “it is necessary to determine whether collateral legal consequences of an adverse nature may result.” *State v. Black*, 197 N.C. App. 373, 375, 677 S.E.2d 199, 201 (2009). If so, the appeal is not moot. *A.K.*, 360 N.C. at 452, 628 S.E.2d at 755.

Here, Defendant contends that he may suffer collateral consequences as a result of the trial court’s alleged error in the event he is subsequently convicted of a new crime. Defendant points to N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2015), which provides that, for sentencing purposes, an aggravating factor is found where “[t]he defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence” As such, a result of the trial court’s alleged error in revoking Defendant’s probation is that Defendant may receive an enhanced sentence if he is ever convicted of a subsequent offense.

We conclude that Defendant’s argument is misplaced. Specifically, Defendant makes no argument that the trial court had erred in finding him in willful violation of his probation, the factor that triggers N.C. Gen. Stat. § 15A-1340.16(d)(12a). Rather, Defendant only argues that the trial court erred in revoking his probation based on the application of the Justice Reinvestment Act, which did not take effect until after Defendant violated his probation. However, the fact that Defendant’s probation was revoked, in and of itself, does not trigger the application of N.C. Gen. Stat. § 15A-1340.16(d)(12a). The only part of the trial court’s judgment which could have any future detrimental effect is the finding that Defendant was in willful violation of his probation, a finding that Defendant does not challenge. And, clearly, the trial court acted within its authority in entering its finding of willfulness, notwithstanding that it may have erroneously applied N.C. Gen. Stat. § 15A-1340.16(d)(12a). Specifically, the conditions of Defendant’s probation included a mandatory curfew; Defendant was cited for violating this curfew; the trial court had the jurisdiction to hold its hearing to consider Defendant’s violation; and the trial court found that Defendant violated his curfew and that the violation was willful. Therefore, since Defendant will not suffer future collateral consequences stemming from the trial court’s error *in revoking his probation*, we conclude that Defendant’s appeal is moot.

DISMISSED.

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Judge BERGER concurs.

Judge ZACHARY dissenting by separate opinion.

ZACHARY, Judge, dissenting:

In this case the trial court's revocation judgment was entered only upon a finding that defendant had absconded supervision. The trial court, however, lacked the statutory authority to revoke defendant's probation on the basis of absconding and, as a result, the revocation judgment was erroneous as a matter of law. Should this erroneous judgment remain in place, it could subject defendant to future adverse collateral legal consequences. For these reasons, the instant appeal is not moot and the revocation judgment should be vacated. Accordingly, I dissent from the majority opinion.

The general rule is that "this Court will not hear an appeal when the subject matter of the litigation . . . has ceased to exist." *In re Swindell*, 326 N.C. 473, 474, 390 S.E.2d 134, 135 (1990) (citation and quotation marks omitted). When a defendant has been released from custody, "the subject matter of [that] assignment of error has ceased to exist and the issue is moot." *Id.* at 475, 390 S.E.2d at 135. But " '[w]hen the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance.' " *State v. Black*, 197 N.C. App. 373, 375-76, 677 S.E.2d 199, 201 (2009) (quoting *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977)). Pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2015), a trial court may sentence a defendant to a term in the aggravated range upon proof that:

The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration.

Although it concedes that defendant's probation was erroneously revoked on the basis of absconding, the State asserts, and the majority agrees, that this appeal is moot because defendant has failed to argue

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that the trial court erred in finding that defendant willfully violated the terms of his probation. According to the majority, it is this finding that may trigger subsection 15A-1340.16(d)(12a)'s aggravating factor in the future, not the revocation itself. Yet the majority fails to recognize that the revocation judgment was entered *only* upon a finding that defendant absconded supervision. As explained below, defendant was not subject to the absconding condition set forth in N.C. Gen. Stat. § 15A-1343(b)(3a), and the trial court lacked statutory authority to enter the revocation judgment in the first instance.

In 2011, our General Assembly enacted the Justice Reinvestment Act ("JRA"), which

modified our probation statutes in two important ways. First, the JRA made the following a regular condition of probation: "Not to abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer." *See* N.C. Gen. Stat. § 15A-1343(b)(3a) (2011). Second, the JRA revised N.C. Gen. Stat. § 15A-1344 to provide that a trial court may only revoke probation if the defendant commits a criminal offense [under N.C. Gen. Stat. § 15A-1343(b)(1)] or "absconds" as defined by the revised Section 15A-1343(b)(3a). *See* N.C. Gen. Stat. § 15A-1344(a) (2011).

State v. Hunnicutt, 226 N.C. App. 348, 354, 740 S.E.2d 906, 910-11 (2013). Under the JRA, the new absconding provision was made applicable only to offenses committed on or after 1 December 2011. *Id.* at 355, 740 S.E.2d 906 at 911. However, "the limited revoking authority remained effective for probation violations occurring on or after 1 December 2011." *Id.* at 355, 740 S.E.2d 906 at 911. "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." *State v. Johnson*, __ N.C. App. __, __, __ S.E.2d __, __, No. COA16-734, 2017 WL 3027266, at *4 (July 18, 2017) (recognizing that "[t]his irregularity in the statutes is colloquially referred to as a 'donut hole.'").

In the present case, defendant admitted to violating several conditions of his probation, but he specifically challenged the absconding allegation. In announcing its ruling at the end of the revocation hearing, the trial court did not find that defendant had admitted any violations; instead, the court found only that defendant "ha[d], in fact, absconded" and activated his sentence on that basis.

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The revocation judgment was then entered on a pre-printed form, “Judgment and Commitment Upon Revocation of Probation-Felony,” AOC Form CR-607 Rev. 12/12, which includes a section labeled “FINDINGS” with various optional subsections. The trial court checked finding No. 5(a), indicating that the court revoked defendant’s probation “for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a).” Because in none of the violation reports filed does the probation officer allege that defendant violated subdivision 15A-1343(b)(1), the trial court did not make a finding that defendant had committed a new criminal offense. In addition, the trial court did not check finding No. 5(b), which is used when a defendant’s probation is revoked for violation of a condition of his probation after serving two prior periods of confinement in response to violations under subsection 15A-1344(d2). Considering the trial court’s oral and written findings together, defendant’s probation was necessarily revoked based upon a finding that he had absconded supervision in violation of subsection 15A-1343(b)(3a).

As defendant committed the underlying offenses prior to 1 December 2011, he was not subject to the JRA’s absconding condition of probation enacted in subsection 15A-1343(b)(3a). The trial court, therefore, lacked statutory authority to revoke defendant’s probation based on the finding that he had absconded supervision. The appropriate disposition on appeal would normally be to reverse the revocation judgment and “remand to the trial court for entry of an appropriate judgment for Defendant’s admitted probation violations consistent with the provisions of N.C. Gen. Stat. § 15A-1344.” *State v. Nolen*, 228 N.C. App. 203, 206, 743 S.E.2d 729, 731 (2013) (holding that, given the changes produced by the JRA and the date of the defendant’s underlying offenses, the trial court erred in revoking his probation on the basis of absconding). However, given that defendant has already served his full sentence, that option is unavailable in this case. If this Court fails to address the issue raised by defendant on appeal, the revocation of probation will remain on his criminal record. If defendant is convicted of another offense within the next ten years, his record will establish that defendant “has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation.” The majority posits a distinction between a defendant whose probation was revoked and one who is found to be in willful violation of probation. This proposed distinction is meaningless, given that a defendant’s probation may not be revoked absent a finding of willful violation of the conditions

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of probation. Defendant's exposure to the possibility of an aggravated sentence is clearly a collateral consequence of our failure to review his appeal.

Accordingly, I would vote to reach the merits of defendant's appeal and to vacate the revocation judgment. *See Black*, 197 N.C. App. at 377, 677 S.E.2d at 202 (recognizing that the judgment revoking the defendant's probation could be used as an aggravating factor in a subsequent sentencing hearing pursuant to subdivision 15A-1340.16(d)(12a)).

STATE OF NORTH CAROLINA

v.

MARCUS MARCEL SMITH, DEFENDANT

No. COA16-1229

Filed 15 August 2017

1. Search and Seizure—protective sweep—apartment rooms—immediately adjoining place of arrest

The trial court did not err in a possession of a firearm by a felon case by concluding officers had authority to conduct a protective sweep of all rooms in defendant's apartment where the sole purpose was to determine whether there were any other occupants in the apartment that could launch an attack on the officers. All of the rooms, including defendant's bedroom where a shotgun was found, were part of the space immediately adjoining the place of arrest.

2. Search and Seizure—motion to suppress—protective sweep—plain view doctrine—incriminating nature not immediately apparent

The trial court erred in a possession of a firearm by a felon case by denying defendant's motion to suppress a shotgun seized from defendant's apartment while officers executed arrest warrants issued for misdemeanor offenses. Although the officers had authority to conduct a protective sweep of the apartment, the seizure of the shotgun could not be justified under the plain view doctrine where the incriminating nature of the shotgun was not immediately apparent.

Judge ARROWOOD dissenting.

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On certiorari review of judgment entered 12 April 2016 by Judge John O. Craig III in Forsyth County Superior Court. Heard in the Court of Appeals 7 June 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adrian W. Dellinger, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

ELMORE, Judge.

Three police officers entered defendant's apartment to execute arrest warrants issued for misdemeanor offenses. While two officers made the in-home arrest, the other officer conducted a protective sweep of defendant's apartment, leading to the discovery and seizure of a stolen shotgun. Defendant moved to suppress the shotgun as evidence obtained through an unlawful search and seizure, arguing that the officer lacked authority to conduct the protective sweep, and the seizure could not be justified under the "plain view" doctrine. The trial court denied defendant's motion to suppress. After the ruling, defendant pleaded guilty to possession of a firearm by a felon and, pursuant to defendant's plea arrangement, the court dismissed the charge of possession of a stolen firearm.

We allowed defendant's petition for writ of certiorari to review the trial court's order denying his motion to suppress. Upon review, we hold that (1) the officer was authorized to conduct the protective sweep, without reasonable suspicion, because the rooms in the apartment—including the bedroom where the shotgun was found—were areas "immediately adjoining the place of arrest from which an attack could be immediately launched," *Maryland v. Buie*, 494 U.S. 325, 334, 110 S. Ct. 1093, 1098, 108 L. Ed. 2d 281, 286 (1990); and (2) because the officer lacked probable cause to believe that the shotgun was contraband "without conducting some further search of the object," " 'its incriminating nature [was not] immediately apparent' " and "the plain-view doctrine cannot justify its seizure," *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d 334, 345 (1993) (quoting *Horton v. California*, 496 U.S. 128, 136, 110 S. Ct. 2301, 2308, 110 L. Ed. 112, 123 (1990)) (citing *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987)). Reversed.

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I. Background

In January 2015, Officer Paier assumed a caseload of low-risk supervisees including defendant, who was on probation for impaired driving. During a routine absconder check, Officer Paier discovered outstanding arrest warrants against defendant for absconding probation and failing to appear at a scheduled court date. He verified defendant's current address and relayed the information to dispatch. Officer Joyce of the Kernersville Police Department assembled a squad, consisting of Officers Stokes, Ziglar, and Castle, to execute the arrest warrants.

On 1 April 2015, at approximately 11:00 p.m., the officers arrived at defendant's apartment complex. Officer Stokes staged with a K-9 in a back hallway of the multi-unit building, while the other officers approached the front door of defendant's unit. When Officer Joyce knocked, defendant opened the door cautiously, in his underwear, and confirmed his identity. Officers Ziglar and Castle entered the apartment and immediately placed defendant in custody as Officer Joyce, wearing a mounted body camera, conducted a protective sweep of the other rooms.

The front door of the apartment leads directly into the living room. The living room opens up on the back right corner, opposite the doorway, leading directly into the kitchen. A short hallway, spanning only a few feet, runs perpendicular in between the living room and the kitchen. The hallway is visible from the front door and more closely resembles the center of a four-way intersection, connecting every room inside the apartment: The living room and kitchen to the south, a bathroom to the east, an empty bedroom to the north, and defendant's bedroom to the west.

Officer Joyce stated that he conducted the sweep for the officers' safety, only searching areas where individuals might be hiding. During the sweep, he saw a shotgun leaned up against a wall in the entryway of defendant's bedroom. The bedroom door was open and the shotgun was visible, in plain view, from the hallway. Officer Joyce walked past the shotgun to check defendant's bedroom, confirming there were no other occupants in the apartment. The entire sweep took less than two minutes.

After completing the sweep, Officer Joyce secured the shotgun "to have it in our control and also check to see if it was stolen." Once he confirmed the shotgun was unloaded, he carried it into the living room, where defendant stood near the front door, his hands cuffed behind his back, surrounded by Officers Ziglar and Castle. Officer Joyce placed the shotgun on a couch, used his flashlight to examine the receiver, and then turned over the shotgun to expose its serial number, which

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he immediately called into Communications. When Communications reported the shotgun stolen, the officers seized the weapon.

II. Discussion

Defendant argues that the trial court erred in denying his motion to suppress. Our review of a trial court's denial of a suppression motion is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

A. The Protective Sweep

[1] Defendant first challenges the protective sweep of his apartment. "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 1094, 108 L. Ed. 2d 276, 281 (1990), cited in *State v. Bullin*, 150 N.C. App. 631, 640, 564 S.E.2d 576, 583 (2002). To be lawful, the sweep must be "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Buie*, 494 U.S. at 327, 110 S. Ct. at 1094, 108 L. Ed. 2d at 281. In *Buie*, the U.S. Supreme Court articulated two scenarios in which police officers may conduct a protective sweep. First, incident to an arrest, officers may, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334, 110 S. Ct. at 1098, 108 L. Ed. 2d at 286. Second, when an officer has "articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger." *Id.*

The trial court concluded that the protective sweep of the apartment was valid under the first prong of *Buie*. Defendant argues, however, that Officer Joyce was not authorized to conduct a protective sweep of the bedroom, where the shotgun was found, because the bedroom was not "immediately adjoining the place of arrest from which an attack could be immediately launched."

Our appellate courts have not specifically addressed which areas might qualify as "immediately adjoining the place of arrest," but decisions

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from the federal courts are instructive. In *United States v. Lauter*, 57 F.3d 212 (2d Cir. 1995), the police executed an arrest warrant against the defendant in his small, basement apartment. *Id.* at 213. The apartment consisted of two small, adjacent rooms. *Id.* After arresting the defendant in the front room, the officers conducted a protective sweep of the back room, where they discovered a shotgun protruding from underneath a bed. *Id.* at 213–14. The defendant moved to suppress the shotgun, arguing that the protective sweep was impermissibly broad. *Id.* at 214, 216. Upholding the sweep under the first prong of *Buie*, the court reasoned that “the back room was ‘immediately adjoining’ the area in which [the defendant] was arrested,” and the police action “was well within the scope of a permissible protective sweep, particularly in light of the small size of the apartment.” *Id.* at 216–17 (citing *United States v. Robinson*, 775 F. Supp. 231, 235 (N.D. Ill. 1991)).

Likewise, in *United States v. Thomas*, 429 F.3d 282 (D.C. Cir. 2005), the defendant challenged the scope of a protective sweep inside his one-bedroom apartment. *Id.* at 286. The front door of the apartment opened immediately into a hallway, where the defendant was arrested. *Id.* at 284, 287. To the left was a living room, and to the right were “doorways off the hallway leading to the kitchen, bathroom, and bedroom.” *Id.* at 284. The court concluded that the bedroom, fifteen feet from the apartment’s entrance, was “immediately adjoining the place of arrest” because “every room swept ‘could be immediately accessed from the hallway’ ” and “the entrance to the bedroom was a straight shot down the hallway from the spot where [the defendant] was arrested.” *Id.* at 284–85, 287. Although the defendant maintained that the living room and front hallway were the only “immediately adjoining spaces,” the court declined to define the concept so narrowly:

The safety of the officers, not the percentage of the home searched, is the relevant criterion. . . . If an apartment is small enough that all of it “immediately adjoin[s] the place of arrest” and all of it constitutes a space or spaces “from which an attack could be immediately launched,” . . . then the entire apartment is subject to a limited sweep of spaces where a person may be found.

Id. at 287–88 (alteration in original) (citations omitted) (quoting *Buie*, 494 U.S. at 327, 334, 110 S. Ct. at 1094, 1098, 108 L. Ed. 2d at 281, 286).

Guided by the foregoing decisions, we agree with the trial court’s conclusion that Officer Joyce had authority to conduct a protective sweep of the rooms in the apartment. As the courts findings indicate, and as the video footage shows, defendant was in the living room when

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Officers Ziglar and Castle entered and placed him in handcuffs. Officer Joyce proceeded, “without any significant delay or hesitation,” to conduct a sweep of the remaining rooms “for the sole purpose of determining whether there were any other occupants in the apartment that could launch an attack on the officers.” Every room in the apartment was connected by the short hallway, and the apartment was “small enough that a person hiding in any area outside of the living room could have rushed into the living room without any warning.” Based on the size and layout of the apartment, the trial court properly concluded that “[a]ll of the rooms”—including defendant’s bedroom where the shotgun was found—“were part of the space immediately adjoining the place of arrest and from which an attack could have been immediately launched.”

B. Seizure of the Shotgun

[2] Next, defendant challenges the seizure of the shotgun. The trial court denied defendant’s motion to suppress because Officer Joyce was permitted to conduct “a quick protective sweep of the apartment and the shotgun was in plain view.” Defendant argues that the seizure cannot be justified under the plain view doctrine because the incriminating nature of the shotgun was not immediately apparent. Relying on the U.S. Supreme Court’s decision in *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987), defendant also contends that Officer Joyce conducted an unlawful search, without probable cause, by manipulating the shotgun to reveal its serial number.

Although warrantless searches are presumptively unreasonable, there are circumstances in which “ ‘police may seize evidence in plain view without a warrant.’ ” *Horton v. California*, 496 U.S. 128, 134, 110 S. Ct. 2301, 2306, 110 L. Ed. 2d 112, 121 (1990) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S. Ct. 2022, 2037, 29 L. Ed. 2d 564, 582 (1971)). The plain view doctrine allows an officer to seize evidence without a warrant if:

- (1) the officer views the evidence from a place where he has [a] legal right to be, (2) it is immediately apparent that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause, and (3) the officer has a lawful right of access to the evidence itself.

State v. Alexander, 233 N.C. App. 50, 55, 755 S.E.2d 82, 87 (2014) (citing *State v. Nance*, 149 N.C. App. 734, 740, 562 S.E.2d 557, 561–62 (2002)); see also *Horton*, 496 U.S. at 136–37, 110 S. Ct. at 2308, 110 L. Ed. 2d at 123; *State v. Mickey*, 347 N.C. 508, 516, 495 S.E.2d 669, 674, cert. denied,

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525 U.S. 853, 119 S. Ct. 131, 142 L. Ed. 2d 106 (1998). The burden rests with “the State to establish all three prongs of the plain view doctrine.” *State v. Graves*, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999).

The “immediately apparent” requirement is “ ‘satisfied if the police have probable cause to believe that what they have come upon is evidence of criminal conduct.’ ” *State v. Wilson*, 112 N.C. App. 777, 782, 437 S.E.2d 387, 389–90 (1993) (quoting *State v. White*, 322 N.C. 770, 777, 370 S.E.2d 390, 395, cert. denied, 488 U.S. 958, 109 S. Ct. 399, 102 L. Ed. 2d 387 (1988)); see also *State v. Carter*, 200 N.C. App. 47, 54, 682 S.E.2d 416, 421 (2009). “Probable cause exists where the facts and circumstances within [the officer’s] knowledge and of which [he] had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Brinegar v. United States*, 338 U.S. 160, 175–76, 69 S. Ct. 1302, 1310–11, 93 L. Ed. 1879, 1890 (1949) (citation omitted) (internal quotation marks omitted), quoted in *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984). A seizure is valid only “when the objective facts known to the officer meet the standard required.” *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641–42 (1982) (citations omitted); see also *Devenpeck v. Alford*, 543 U.S. 146, 152, 125 S. Ct. 588, 593, 160 L. Ed. 2d 537, 544 (2004) (“Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the [] officer at the time” (citation omitted)). “If . . . the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object,” then “its incriminating nature [is not] immediately apparent” and “the plain-view doctrine cannot justify its seizure.” *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 2137, 124 L. Ed. 2d 334, 345 (1993) (alteration in original) (citations omitted) (internal quotation marks omitted).

Observing the shotgun in plain view did not provide Officer Joyce with authority to seize the weapon permanently. The State’s evidence at the suppression hearing failed to establish that, based on the objective facts known to him at the time, Officer Joyce had probable cause to believe the weapon was contraband or evidence of a crime. The officers were executing arrest warrants issued for misdemeanor offenses and were not aware that defendant was a convicted felon. Before the seizure, Officer Joyce asked the other officers in the apartment if defendant was a convicted felon, which they could not confirm. Officer Joyce testified that it was Officer Stokes who informed him of defendant’s status, but Officer Stokes never entered the apartment, and Officer Joyce could not recall when he learned defendant was a convicted felon:

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[PROSECUTOR:] So at what point during this encounter—you know he's on probation. You've got him in custody. You see a shotgun in there which you're going to seize for protection reasons. But at what point did you also become suspicious that the defendant might be a convicted felon and not be allowed to possess that weapon because of his status as a felon or a probation—being on probation?

[OFFICER JOYCE:] I believe Officer Stokes had that information stating that he was a felon. And at that—Officer Stokes, I believe, was the one that made me aware of that.

[PROSECUTOR:] Okay. So at some point you made the determination that he was a convicted felon?

[OFFICER JOYCE:] Correct.

[PROSECUTOR:] All right. Do you know at what point that occurred in this, you know, scheme? You've got a lot going on. But at what point that occurred for you.

[OFFICER JOYCE:] For me, I really—I really don't know. It may be before or it may be after. The only thing I remember was the gun was stolen.

[PROSECUTOR:] How did you determine it was stolen?

[OFFICER JOYCE:] I read the serial number to Communications, and they advised it was stolen out of Guilford County.

Defense counsel elicited the same testimony from Officer Joyce on cross-examination:

[DEFENSE COUNSEL:] And I believe it was your testimony that you said Officer Stokes had the information about Mr. Smith having a felony conviction. Is that correct?

[OFFICER JOYCE:] I believe—I believe it was Officer Stokes.

. . . .

[DEFENSE COUNSEL:] And would it surprise you that [Officer Stokes] said, during further investigation of Mr. Smith, it was then determined he was a previously convicted felon?

[OFFICER JOYCE:] I knew at some point we found out he was a felon.

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[DEFENSE COUNSEL:] But it was your testimony you couldn't remember if it was before or after you seized the gun?

[OFFICER JOYCE:] Correct. I just know the gun was stolen.

The dissent argues that, even if the officers did not know defendant had been convicted of a felony, they did know defendant was on probation for committing some offense. Thus, the dissent reasons, it was “immediately apparent that the shotgun was contraband” because a ban on possessing firearms is a “regular condition” of probation. But the law does not *require* a sentencing judge to impose the regular conditions of probation on every probationer. *See* N.C. Gen. Stat. § 15A-1343(b) (2015). And there is no evidence to suggest the officers knew the specific terms of defendant's probation, including whether the terms of defendant's probation prohibited him from possessing firearms, at any time during the warrant service.¹ The incriminating character of the shotgun became apparent only upon some further action by the officers.

When “unrelated to the objectives of the authorized intrusion,” even the slight movement of an object, “which expose[s] to view [its] concealed portions,” is impermissible. *Arizona v. Hicks*, 480 U.S. 321, 325, 107 S. Ct. 1149, 1152, 94 L. Ed. 2d 347, 354 (1987). In *Hicks*, while searching for weapons in the defendant's apartment, one of the officers noticed two sets of expensive stereo equipment that “seemed out of place.” *Id.* at 323, 107 S. Ct. at 1152, 94 L. Ed. 2d at 353. Suspecting that the equipment was stolen, the officer maneuvered some of the stereo components to reveal their serial numbers, which he then read, recorded, and reported by phone to police headquarters. *Id.* When headquarters confirmed that the equipment was stolen, the officer seized it immediately. *Id.* The U.S. Supreme Court concluded that moving the equipment “constitute[d] a ‘search’ separate and apart from the search . . . that was the lawful objective of [the officer's] entry into the apartment.” *Id.* at 324–25, 107 S. Ct. at 1152, 94 L. Ed. 2d at 353–54. By taking action “unrelated to the objectives of the authorized intrusion,” the officer “produce[d] a new invasion of [the defendant's] privacy unjustified by the exigent circumstances that validated the entry.” *Id.* at 325, 107 S. Ct. at 1152, 94 L. Ed. 2d at 354. As to the reasonableness of the search, the Court held that it could not be justified under the plain view doctrine because the officer lacked probable cause: “A dwelling-place search, no less than a dwelling-place seizure, requires probable cause, and there is no reason in theory or practicality

1. Defendant's probation officer was not present during the warrant service.

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why application of the ‘plain view’ doctrine would supplant that requirement.” *Id.* at 328, 107 S. Ct. at 1154, 94 L. Ed. 2d at 356.

As in *Hicks*, where the officer manipulated the stereo equipment to expose its serial number, here Officer Joyce took similar steps to uncover the serial number on the shotgun. After moving the weapon into the living room, he placed it on the couch, shined his flashlight on the receiver momentarily, and then turned the shotgun over to expose the serial number, which he immediately called into Communications. As *Hicks* instructs, such action constitutes a search, separate and apart from the lawful objective of the entry, even though it “uncovered nothing of any great personal value to [defendant]—serial numbers rather than . . . letters or photographs.” *Hicks*, 480 U.S. at 325, 107 S. Ct. at 1152–53, 94 L. Ed. 2d at 354.

The search cannot be justified under the plain view doctrine because the shotgun’s incriminating nature was not immediately apparent. There is no evidence in the record to indicate that Officer Joyce had probable cause—or even reasonable suspicion—to believe the shotgun was stolen. It was only after the unlawful search that he had reason to believe the shotgun was evidence of a crime. *See Graves*, 135 N.C. App. at 220, 519 S.E.2d at 773 (concluding that the State failed to present any evidence that the officer “recognized or even suspected that the brown paper wads contained contraband before he picked them up and before he unraveled them”); *cf. State v. Price*, 233 N.C. App. 386, 402, 757 S.E.2d 309, 319 (2014) (concluding that the “immediately apparent” requirement was met where the “defendant, while holding his rifle, admitted that he was a convicted felon”); *United States v. Malachese*, 597 F.2d 1232, 1234–35 (8th Cir. 1979) (concluding that a pistol, seized temporarily for the officers’ safety, became contraband subject to seizure when an officer learned from two other detectives searching the premises that the defendant had a prior felony conviction).

III. Conclusion

Although Officer Joyce had authority to conduct a protective sweep of the apartment, the seizure of the shotgun cannot be justified under the plain view doctrine. Based on the evidence presented at the suppression hearing, the State failed to show that the incriminating nature of the shotgun was immediately apparent. Because the shotgun is evidence obtained through an unlawful search and seizure, the trial court erred in denying defendant’s motion to suppress.

REVERSED.

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Judge DIETZ concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I agree with the majority that the sweep of the defendant's apartment was lawful. However, I disagree that the warrantless seizure of the shotgun in plain view was unlawful. For that reason, I respectfully dissent.

As the majority points out,

[u]nder the plain view doctrine, a warrantless seizure is lawful if (1) the officer views the evidence from a place where he has legal right to be, (2) it is immediately apparent that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause, and (3) the officer has a lawful right of access to the evidence itself.

State v. Alexander, 233 N.C. App. 50, 55, 755 S.E.2d 82, 87 (2014). The majority opinion establishes that the first and third prongs of the test are satisfied. Therefore, the sole issue to be determined is whether the second prong of the test is satisfied.

The majority concludes that the incriminating nature of the shotgun was not immediately apparent because (1) the State's evidence failed to establish that Officer Joyce knew defendant was a convicted felon at the time he seized the shotgun; and (2) Officer Joyce did not know the shotgun was stolen until a further search of the shotgun. While the majority's analysis is not incorrect, I conclude that regardless of whether Officer Joyce knew that defendant was a felon or knew that the shotgun was stolen, it was immediately apparent that the shotgun was contraband.

Contraband includes “[g]oods that are unlawful to . . . possess.” *Black's Law Dictionary* 317 (7th ed. 1999). On 4 April 2012, defendant was placed on supervised probation under the regular terms and conditions of probation. Pursuant to the provisions of N.C. Gen. Stat. § 15A-1343(b)(5) (2015), “[a]s a regular condition[] of probation, a defendant must . . . [p]ossess no firearm” Thus, under the regular terms and conditions of probation, the shotgun was contraband.

Given that the officers were serving a warrant for a probation violation, it was immediately apparent that the shotgun was contraband. Therefore, I would uphold the warrantless seizure of the shotgun under the plain view doctrine and affirm the trial court's order.

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STATE OF NORTH CAROLINA

v.

PHILLIP VOLTZ, IV, DEFENDANT

No. COA16-1164

Filed 15 August 2017

1. Criminal Law—joinder of charges—assault inflicting serious injury—second-degree sexual offense—assault by strangulation—felonious breaking or entering—intimidating a witness—exclusion of voir dire testimony—relevancy of evidence

The trial court did not err in an assault inflicting serious injury, second-degree sexual offense, assault by strangulation, felonious breaking or entering, and intimidating a witness case by joining charges from 15 May 2015 and 2 January 2016 for a single trial even though defendant contended portions of a witness's voir dire testimony was improperly excluded and would have raised doubt as to whether defendant was the perpetrator of the crimes of breaking or entering and intimidating a witness. The testimony was not relevant to the 2 January 2016 charges and would have been inadmissible to suggest that another person committed them.

2. Jury—written jury instructions after oral instructions—felonious breaking or entering—no conflicting instructions

The trial court did not err in an assault inflicting serious injury, second-degree sexual offense, assault by strangulation, felonious breaking or entering, and intimidating a witness case by providing the jury with written instructions on the charge of felonious breaking or entering that were similar to the trial court's earlier oral instructions. The jury requested a written copy and clarification upon certain points of law, and the trial court recognized a need to clarify the instructions.

3. Burglary and Unlawful Breaking or Entering—felonious breaking and entering instruction—no plain error

The trial court did not commit plain error by its instructions on felonious breaking and entering where defendant raised no objection to either the oral instruction or the written instruction, and in fact, affirmatively agreed to the clarification included in the written instruction on the felonious breaking or entering charge. Further, the jury did not need a formal definition of the term "assault" to understand its meaning and to apply that meaning to the evidence.

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Appeal by defendant from judgments entered 2 September 2016 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 20 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Stuart M. Saunders, for the State.

Richard Croutharmel for Defendant.

TYSON, Judge.

Phillip Voltz, IV (“Defendant”) appeals from judgments entered after a jury found him guilty of assault inflicting serious injury, second-degree sexual offense, assault by strangulation, felonious breaking or entering, and intimidating a witness. We affirm in part, and find no plain error in part.

I. Background

Jessica Tony (“Tony”) invited Defendant to the apartment she shared with B.A. and B.A.’s two-year-old daughter on the evening of 12 May 2015. Defendant brought a six-pack of beer with him. Tony, Defendant, and B.A. sat on the porch drinking and talking. Defendant and B.A. had not met prior to that evening. At around 12:30 a.m., B.A.’s daughter woke up and began to cry. Tony left to check on the child, and eventually fell asleep with her. When B.A. found Tony asleep, she told Defendant he needed to leave. Defendant responded he could not leave because he did not want to drive drunk, so B.A. told him he could sleep on the couch. B.A. retired to her bedroom.

As B.A. was preparing for bed, Defendant entered B.A.’s bedroom and informed her “that [they] were going to have sex.” B.A. “told [Defendant] no,” and Defendant pushed B.A. onto the bed, got on top of her, and choked her for a few seconds. Defendant forced B.A. to put her hands over her head, pulled off her shirt, ripped off her bra, and inserted his fingers into her vagina while choking her with one hand.

During a struggle, B.A. managed to fight off Defendant. B.A. then stood up on the bed, swung her right hand and hit Defendant in the eye, causing him to fall backwards. Defendant exclaimed “[l]ook what you did to my face,” pulled B.A. down from the bed, threw her against the wall, and began to choke her again. B.A. was able to reach the bedroom door, open it, and push Defendant off of her. Defendant again grabbed B.A., and the pair fell to the floor in the doorway of the bedroom. The

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struggle continued into the hallway, during which Defendant picked B.A. up by her legs and slammed her to the floor three times.

Hearing the commotion, Tony came out of her bedroom, screamed, and asked what was going on. Tony testified that B.A. “kept yelling that [Defendant] raped her[.]” B.A. testified she told Tony to call the police. B.A. eventually managed to get away from Defendant.

As B.A. explained at trial,

I ran into the bar area of my kitchen and grabbed the hammer and told [Defendant] that he needed to get out, and so I followed at a safe distance behind him as he went out the door and then he turned around and grabbed the hammer away from me and slashed it at my arm and told me that he would see me again.

The police responded to the scene, but Defendant had left before they arrived. Defendant was indicted on 15 June 2015 on charges of assault inflicting serious injury, second-degree sexual offense, and assault by strangulation (collectively, the “13 May 2015 charges”).

About eight months later, Kerissa Eller (“Eller”), B.A.’s neighbor, was washing dishes in her kitchen on 2 January 2016 when a man wielding a knife broke into her home. The man repeatedly asked “[w]here the f–k is [B.A.’s first name]?” Eller assumed the man meant B.A. Eller testified that after the man repeated the question a few times, he stopped, looked around, exclaimed “[o]h s–t,” and ran out. Eller called the police. The police showed Eller a photographic lineup, which included a photo of Defendant, but Eller was unable to identify anyone in the lineup. Defendant was indicted on 7 March 2016 on charges of felony breaking or entering, felony stalking, and intimidating a witness (collectively, the “2 January 2016 charges”).

Prior to trial, the State moved to join the 13 May 2015 and the 2 January 2016 charges for a single trial. Defense counsel objected to the motion. After considering arguments by Defendant and the State, the trial court ruled, “after hearing all the arguments and reviewing the case law,” joinder “[was] proper in this matter[.]”

Defendant’s trial began on 29 August 2016. During Eller’s testimony, the trial court conducted *voir dire* to determine whether to admit portions of her testimony regarding B.A.’s character. In her *voir dire* testimony, Eller described B.A. as someone who created drama by, for example, “not keeping up with her dog.” Eller further testified B.A. “always [had] . . . eight or nine cars in and out of [the apartment

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complex] all day.” Also during *voir dire*, the following colloquy occurred between Defendant’s counsel and Eller:

[Defendant’s counsel:] And what kind of people do you see always going in and out of [B.A.’s] house?

[Eller:] I don’t really know how to describe it. It’s just lots of cars, lots of black men mostly. And there is a couple white girls that come in and out a lot but they’re always arguing with the people they’re with too, so I just try to stay to myself.

[Defendant’s counsel:] So is it fair to say you see [B.A.] arguing a lot with the variety of people?

[Eller:] Yes.

Eller further testified during *voir dire* that she had observed B.A. arguing with men in the yard outside of the apartment complex, and she could occasionally hear B.A. loudly arguing with men inside of B.A.’s apartment, which was a considerable distance away. Following *voir dire*, the trial court ruled that Eller’s testimony would be limited to describing statements B.A. made to Eller about the events surrounding the alleged attack, but Eller was not permitted to testify about B.A.’s “propensity for violence” or about the “people coming in and out.”

After all of the evidence was presented, the trial court instructed the jury regarding each of the charged offenses. With respect to the charge of felonious breaking or entering, the trial court gave the following oral instruction in open court:

[Defendant] has been charged with felonious breaking or entering into another’s building without her consent with the intent to commit a felony. For you to find the defendant guilty of this offense the State must prove four things beyond a reasonable doubt.

First, that there was either a breaking or an entry by [Defendant]. Coming into the apartment of [Eller], . . . with a knife would be a breaking or entering.

Second, the State must prove that it was a building that was broken into or entered.

Third, that the tenant did not consent to the breaking or entering.

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And forth, that at the time of the breaking or entering the defendant intended to commit *the felony of assault*.

(emphasis added). The trial court further instructed the jury if it found “from the evidence beyond a reasonable doubt that on or about the alleged date [Defendant] broke into or entered a building without the consent of the tenant, intending at that time to commit *a felony of assault*,” it would be the jury’s duty “to return a verdict of guilty of felonious breaking or entering.”

After the trial court had fully instructed the jury as to all offenses, the jury began deliberations. The next morning, and outside the presence of the jury, the trial judge stated that he “want[ed] to mention something . . . that [he] added” to the jury instruction on felonious breaking or entering. With regard to the fourth element of felonious breaking or entering, the trial court judge explained:

At the time of the breaking or entering [Defendant] intended to commit the felony of felonious assault. That was what I read to [the jury]. The footnote after that [in the pattern jury instructions] says that the crime – the crime that [Defendant] allegedly intended to commit should be briefly defined. Failure to define the crime may constitute reversal [sic] error.

The trial judge stated it was his intention to provide the jury with alternate jury instructions that defined felony assault. Both the State and Defendant’s counsel reviewed the proposed alternate instructions, and each agreed to them.

When the jury was present in the courtroom, the trial judge told the jury the following:

I’ve prepared for you sort of at your request a copy of everything that I read to you – all yesterday. . . . [I]t’s the whole charge from the beginning to end. . . . [Y]ou said you wanted the law yesterday afternoon, and I read it to you, but overnight I had time to fix the whole thing that I read to you from beginning to end. So I’m going to give you a copy of what’s called the judge’s charge, just one copy. *But it’s everything I read to you from beginning to end, okay?* . . . I’m exercising the [c]ourt’s discretion to give you a written copy of the charge, the oral charge, that I read to you yesterday afternoon, okay? So you’ll have a written copy of that with you in the jury room.

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(emphasis supplied). The written copy of the jury instructions given to the jury was identical to the oral instructions given the previous day, quoted above, but replaced the fourth element of the charge of breaking or entering with the following:

And Fourth, that at the time of breaking or entering, [Defendant] intended to commit the felony of felonious assault. A felony assault would be Assault with a Deadly Weapon with Intent to Kill, Inflicting Serious Bodily Injury. Or an attempt to commit Assault with a Deadly Weapon with Intent to Kill, Inflicting Serious Bodily Injury.

(emphasis omitted). The jury then resumed deliberations.

Defendant was convicted of assault inflicting serious injury, second-degree sexual offense, assault by strangulation, felonious breaking or entering, and intimidating a witness, but was acquitted on the charge of felonious stalking. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015) and N.C. Gen. Stat. § 15A-1444(a) (2015).

III. Issues

Defendant argues the trial court erred by: (1) granting the State's motion for joinder of the two separate sets of charges; and (2) providing the jury with written jury instructions on the charge of felonious breaking or entering that materially differed from the trial court's earlier oral instructions.

IV. Joinder of Offenses

[1] Defendant argues the trial court erred by allowing joinder of the 15 May 2015 and 2 January 2016 charges. "Whether joinder of offenses is permissible under [N.C. Gen. Stat. § 15A-926(a)] is a question addressed to the discretion of the trial court which will only be disturbed if the defendant demonstrates that joinder deprived him of a fair trial." *State v. Wilson*, 108 N.C. App. 575, 582, 424 S.E.2d 454, 458 (1993).

Defendant argues that portions of Eller's *voir dire* testimony at trial was inadmissible character evidence as to the 13 May 2015 charges, but was essential testimony for the 2 January 2016 charges. Defendant asserts, had Eller's testimony regarding B.A.'s arguments with "lots of black men" been admitted, that testimony would have raised doubt whether Defendant was the perpetrator of the crimes of breaking or entering and intimidating a witness.

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Defendant argues the identity of the person who broke into Eller's apartment was at issue because Eller was not able to identify Defendant's photo in a lineup, and that "it was likely any number of other black men with whom B.A. had a volatile relationship with" could have mistakenly broken into Eller's apartment looking for B.A. Because the trial court did not allow the admission of this testimony, Defendant argues, he was denied the opportunity to create reasonable doubt in the jurors' minds and, therefore, the trial court erred in joining the two sets of charges for trial. *See State v. Huff*, 325 N.C. 1, 23, 381 S.E.2d 635, 647 (1989) ("If consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated." (citations omitted)), *vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990).

Eller's *voir dire* testimony was not relevant to the 2 January 2016 charges and would have been inadmissible to suggest that another person committed them. "[W]here the evidence is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant." *State v. May*, 354 N.C. 172, 176, 552 S.E.2d 151, 154 (2001) (citation omitted). "Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt." *Id.* (citation omitted). Evidence that tends to show "nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded." *State v. Brewer*, 325 N.C. 550, 564, 386 S.E.2d 569, 576 (1989) (citation omitted).

In the present case, Eller's *voir dire* testimony, that B.A. had "lots of black men" as visitors to her apartment, and she had frequent disagreements with those visitors, fails to point to any specific person, who may have committed the 2 January 2016 offenses. Rather, Eller's testimony would be sheer speculation of the identity of another pool of suspects with whom she had disagreements, and this testimony does not show that any person other than Defendant "actually did commit the offense and that therefore [Defendant] did not do so[.]" *Id.*

Further, Eller's testimony was not inconsistent with Defendant's guilt, as required to be admissible under our Supreme Court's decision in *May*. Whomever B.A. chose to have as visitors to her apartment, and the volatility, if any, of her relationship with those visitors is not connected to the State's theory that Defendant mistakenly broke into Eller's home brandishing a deadly weapon while looking for B.A. Eller's testimony was not inconsistent with Defendant's guilt and "too remote to be

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relevant.” *Id.* The trial court did not err in excluding Eller’s testimony concerning the 2 January 2016 charges. Defendant has failed to show error in joining the 15 May 2015 and 2 January 2016 charges on that basis. Defendant’s arguments are overruled.

V. Jury Instructions

[2] Defendant argues the trial court erred by providing the jury with written jury instructions on the charge of felonious breaking or entering, which conflicted and materially differed from the trial court’s earlier oral instructions. Defendant further argues the trial court plainly erred by failing to define “the felony of assault.” We disagree.

A. General Standard of Review for Jury Instructions

“Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*.” *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) (citation omitted). “This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]” *State v. McGee*, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014) (citation omitted).

Generally, “an error in jury instructions is prejudicial and requires a new trial *only if* there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (emphasis supplied) (citations and internal quotation marks omitted).

B. Conflicting Instructions upon a Material Point

Our courts have recognized the principle in criminal and civil cases, “that when there are conflicting instructions upon a material point, there must be a new trial since the jury is not supposed to be able to distinguish between a correct and incorrect charge.” *State v. Carver*, 286 N.C. 179, 183, 209 S.E.2d 785, 788 (1974); *see State v. Pope*, 163 N.C. App. 486, 490-91, 593 S.E.2d 813, 817 (2004) (“It is true that [a]n erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated.” (citations and internal quotation marks omitted)); *Jones v. Morris*, 42 N.C. App. 10, 13, 255 S.E.2d 619, 621 (1979). In order to demonstrate prejudice, the appealing party must show both that the instructions conflicted and varied on a material point(s). *See, e.g., Jones*, 42 N.C. App. at 13, 255 S.E.2d at 621.

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This principal *only* applies where the instructions are *conflicting* and the conflict impacts material points. *State v. Stevenson*, 327 N.C. 259, 265, 393 S.E.2d 527, 530 (1990). Where the instructions are “not internally contradictory, but [were], at most, incomplete at one important point,” the instructions are not conflicting such that a new trial is automatically required. *Id.* at 266, 393 S.E.2d at 530 (holding instructions were not conflicting where the court initially properly instructed on the elements of first-degree murder, but later omitted an element in the final mandate).

Our Supreme Court has held no conflicting instructions occurred where “the complaint [was] not of two inconsistent statements of the law,” and any “confusion, assuming it to exist, was completely clarified in the other portions of the charge.” *State v. Schultz*, 294 N.C. 281, 284-85, 240 S.E.2d 451, 454 (1978); *see also State v. Roseboro*, 344 N.C. 364, 378, 474 S.E.2d 314, 321-322 (1996) (holding the omission of an element of larceny in the body of the jury charge “did not create internally contradictory instructions,” because the final jury mandate included all elements of larceny).

Here, the trial court’s initial oral instructions to the jury on the charge of felonious breaking and entering stated, in part, “that at the time of the breaking or entering the defendant intended to commit the felony of assault.” After deliberations commenced, the jury foreman submitted a question to the trial court requesting “copies of the laws[,] what the judge read,” and specifically asked for clarification on what constitutes a second degree sexual offense and serious injury. That evening the trial court orally re-instructed the jury on the second degree sex offense and serious injury. The trial court further indicated, based upon the jury’s request, he was inclined to give a copy of the entire charge to the jury the next morning.

The next morning, outside the presence of the jury, the trial judge noted to counsel that he wanted to add to the definition of “the felony of assault” in the felonious breaking and entering instruction in the written instructions to be given to the jury. The trial judge gave each attorney a copy of the suggested additional language. Each attorney expressly agreed to the additional instructions and stated no objection.

The written copy of the jury instructions as delivered stated, in part:

And Fourth, that at the time of breaking or entering, [Defendant] intended to commit the felony of felonious assault. A felony assault would be Assault with a Deadly Weapon with Intent to Kill, Inflicting Serious Bodily Injury.

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Or an attempt to commit Assault with a Deadly Weapon with Intent to Kill, Inflicting Serious Bodily Injury. (emphasis omitted).

Defendant contends the trial court's oral and written instructions contain conflicting language to warrant a new trial. We disagree. The instructions were "not internally contradictory, but [were], at most incomplete at one important point." *Stevenson*, 327 N.C. at 266, 393 S.E.2d at 530; *Roseboro*, 344 N.C. at 378, 474 S.E.2d at 321-322. Recognizing the oral instruction *may* have been insufficient, the trial court provided the additional language contained in the written instructions, simply to further define "the felony of assault," to clarify the fourth element of felony breaking and entering.

The trial court may clarify its instructions where and after the trial court recognizes the original instructions may have been confusing, or where the jury requests clarifying or additional instructions on a charge. *See State v. Harris*, 315 N.C. 556, 563, 340 S.E.2d 383, 388 (1986); *State v. Rogers*, 299 N.C. 597, 603-05, 264 S.E.2d 89, 93-94 (1980).

Defendant cannot materially distinguish the cases cited by the State, which allow the trial court to clarify the oral instructions either upon the request of counsel, the jury, or upon the trial court's own realization of potential error. *Harris*, 315 N.C. at 563, 340 S.E.2d at 388; *Rogers*, 299 N.C. at 603-05, 264 S.E.2d at 93-94.

Defendant asserts the trial court did not explicitly mention the change in the felonious breaking and entering instruction to the jury. This argument ignores the fact that "[o]ur system of trial by jury is 'based upon the assumption that the trial jurors are men [and women] of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so.'" *State v. King*, 343 N.C. 29, 45, 468 S.E.2d 232, 242 (1996) (quoting *State v. Ray*, 212 N.C. 725, 729, 194 S.E. 482, 484 (1938)).

The jury requested a written copy of instructions and clarification upon certain points of law. The trial court recognized a need to clarify the instructions of the felonious breaking and entering charge. The attorneys for both parties had an opportunity to review the written instructions and both counsel approved the additional language. Once the written instructions were given to the jurors, there was no objection and no requests from either counsel or the jury for further clarification. Based upon the record before us, Defendant has failed to show that any differences between the trial court's oral and written instructions rise to the level of "conflicting instructions" to the jury "upon a material point" to warrant a new trial. *Carver*, 286 N.C. at 183, 209 S.E.2d at 788.

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C. Plain Error Analysis

[3] Because the jury instructions were not conflicting on a material point to award Defendant a new trial, we address whether the trial court's instructions on felonious breaking and entering constitute plain error.

1. Standard of Review

When a defendant fails to object to the jury instructions, this Court reviews for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012); N.C. R. App. 10(a)(2). To demonstrate plain error, the appealing party must not only show an error occurred in the jury instruction, but also must show prejudice and “that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334; see also *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (holding the error must be “so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached”).

Only in rare cases will improper instructions “justify reversal of a criminal conviction when no objection has been made in the trial court” to award a new trial. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted).

Defendant raised no objection to either the oral instruction or the written instruction, and, in fact, affirmatively agreed to the clarification included in the written instruction on the felonious breaking or entering charge. As such, our review is limited to plain error of any alleged error in the jury instructions

2. Analysis

Defendant was charged with felonious breaking or entering. The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. N.C. Gen. Stat. § 14-54(a) (2015); *State v. Litchford*, 78 N.C. App. 722, 338 S.E.2d 575 (1986) (holding the trial court did not plainly error by omitting the third element of felonious breaking or entering in its final mandate to the jury where the previous instructions included all essential elements of the charge).

Here, the trial court announced he intended to add clarifying language in the written jury instructions based upon review of a footnote in the North Carolina Pattern Jury Instruction for felonious breaking or entering. This footnote states “[t]he crime that [defendant] allegedly intended

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to commit should be briefly defined. Failure to define the crime *may* constitute reversible error.” N.C.P.I. Crim. 214.30 (emphasis supplied).

It is true that the failure of the trial court to define the crime that the defendant allegedly intended to commit *may* be reversible error. Compare *State v. Foust*, 40 N.C. App. 71, 71, 251 S.E.2d 893, 894 (1979); *State v. Elliot*, 21 N.C. App. 555, 556, 205 S.E.2d 106, 107 (1974); *with State v. Simpson*, 299 N.C. 377, 383, 261 S.E.2d 661, 664 (1980); *State v. Lucas*, 234 N.C. App. 247, 257-58, 758 S.E.2d 672, 679-80 (2014). However, our Supreme Court in *Simpson* limited its previous holdings. *Simpson*, 299 N.C. at 382, 261 S.E.2d at 664.

In *Simpson*, the defendant was charged with burglary in the first degree, which like felonious breaking or entering, requires the defendant to have the intent to commit a felony. *Id.* In the instructions to the jury, the trial court noted “the defendant intended to commit larceny” but did not further define what constitutes a larceny for the jury. *Id.* at 382-83, 261 S.E.2d at 664. The Supreme Court stated “[a]ssuming *arguendo* that the court’s failure to define larceny was erroneous, . . . we hold that such failure was not prejudicial on the facts of this case.” *Id.* at 383, 261 S.E.2d at 664.

The Court explained:

Defendant was on trial for burglary—not larceny. Intent to commit larceny is the *felonious intent* supporting the charge of burglary. In this context, the court in defining felonious intent used the word “larceny” as a shorthand statement of its definition, *i.e.*, to steal, take and carry away the goods of another with the intent to deprive the owner of his goods permanently and to convert same to the use of the taker. In the instant case, the jury did not need a formal definition of the term “larceny” to understand its meaning and to apply that meaning to the evidence. The use of the word “larceny” as it is commonly used and understood by the general public was sufficient in this case to define for the jury the requisite felonious intent needed to support a conviction of burglary. There is no reasonable possibility that failure to define “larceny” contributed to defendant’s conviction or that a different result would have likely ensued had the word been defined.

Id. at 383-84, 264 S.E.2d at 665; *see also Lucas*, 234 N.C. App. at 247, 758 S.E.2d at 672 (holding the failure to further define larceny did not constitute plain error based upon the Supreme Court’s ruling in *Simpson*.).

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In this case, after realizing the oral instruction on felonious breaking or entering may not have been sufficient, the trial court further defined what constituted a felonious assault in the written instructions given to the jury. Presuming, *arguendo*, the trial court erred in its charge to the jury on felonious breaking or entering, under plain error review, Defendant has not shown prejudice or that the error was “so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.” *Bagley*, 321 N.C. at 213, 362 S.E.2d at 251.

The felonious breaking and entering charge was based upon evidence that Defendant entered Eller’s home on 2 January 2016. Eller lived in the duplex next door to B.A. Eller and a police officer testified concerning the event. The evidence tends to show that, Eller had just put her baby down and was washing dishes when a man burst through her door. The man was holding a knife. He began cursing at Eller, and said, “where the f--k is [B.A.]?” Eller testified the man “was really close to [her] daughter, so [she] was freaking out” and scared “because [she] couldn’t get to her [daughter] before he could.” Eller testified after asking where B.A. was several times, the man then stopped, looked around, said “[o]h, s--t,” and ran out the door.

Eller called 911. When the police arrived she described the man as thin, black, with long dreadlocks and a mark she believed was under his left eye. She testified the man was wearing a blue jersey. The police showed Eller a lineup, which included a photo of Defendant, but she was unable to identify anyone.

Defendant was not charged with assault, but with felonious breaking or entering with intent to commit an assault therein. Based upon the evidence presented and under plain error review, we are “satisfied that ‘the jury did not need a formal definition of the term [assault] to understand its meaning and to apply that meaning to the evidence.’” *Lucas*, 234 N.C. App. at 257, 758 S.E.2d at 679 (quoting *Simpson*, 299 N.C. at 384, 261 S.E.2d at 665).

The primary purpose of a charge is to aid the jury in arriving at a correct verdict according to law. *Lewis v. Watson*, 229 N.C. 20, 47 S.E.2d 484 (1948). “The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved.” *State v. Friddle*, 223 N.C. 258, 261, 25 S.E.2d 751, 753 (1943). The trial court’s charge on felonious breaking or entering was sufficient to enable the

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jury, in its deliberations, to arrive at a verdict with a correct understanding of the law relative to this charge. *See Simpson*, 299 N.C. at 383, 261 S.E.2d at 664.

VI. Conclusion

For the reasons stated, the trial court did not err in joining the 15 May 2015 and 2 January 2016 charges for a single trial. That portion of the trial court's order is affirmed. We do not find a conflict upon a material point exists in trial court's oral and written instructions such that Defendant is entitled to a new trial.

Defendant has failed to demonstrate the court committed plain error in the instructions to the jury on felonious breaking and entering. We affirm in part, and find no plain error in part. *It is so ordered.*

AFFIRMED IN PART; NO PLAIN ERROR IN PART.

Chief Judge McGEE and Judge DILLON concur.

STATE OF NORTH CAROLINA
v.
JAMES ERIC WEST, DEFENDANT

No. COA16-918

Filed 15 August 2017

Evidence—second-degree sexual offense—denial of cross-examination—prosecuting witness's sexual history—Rape Shield law—Rule 403

The trial court did not abuse its discretion in a second-degree sexual offense case by denying defendant's cross-examination of a prosecuting witness regarding his admission of sexually assaulting his sister when he was a child where it occurred more than a decade earlier and involved no factual elements similar to the underlying charge. The evidence of prior sexual behavior was protected by the Rape Shield law under N.C.G.S. § 8C-1, Rule 412 and the probative value of the evidence of the witness's sexual history was substantially outweighed by its potential for unfair prejudice under N.C.G.S. § 8C-1, Rule 403.

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Appeal by Defendant from judgment entered 9 June 2016 by Judge Beecher R. Gray in Durham County Superior Court. Heard in the Court of Appeals 21 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert M. Curran, for the State.

Marilyn G. Ozer for Defendant-Appellant.

INMAN, Judge.

When a trial court properly determines, pursuant to Rule 403 of the North Carolina Rules of Evidence, that the probative value of evidence about a prosecuting witness's sexual history is substantially outweighed by its potential for unfair prejudice, the trial court does not err by excluding the evidence, regardless of whether it falls within the scope of the North Carolina Rape Shield law.

James Eric West ("Defendant") appeals from judgment entered against him following a jury conviction finding him guilty of second degree sexual offense. Defendant argues the trial court erred by denying his ability to cross-examine the prosecuting witness regarding his admitted commission of a sexual assault when he was a child. After careful review, we conclude the exclusion was not error.

Factual and Procedural History

The evidence at trial tended to show the following:

On 26 December 2014, Defendant and D.S.¹ were living at the Durham Rescue Mission. Defendant, age 48 at the time of the incident, had been working on the maintenance crew, and D.S., age 20 at the time of the incident, approached him to discuss joining the crew. D.S. spoke with Defendant about his background, including his childhood. D.S. told Defendant that he had been removed from his biological family around the age of three to five after being sexually abused by his brother. Defendant asked D.S. if he was a virgin, and D.S. responded that he was.

Later that evening, after dinner, D.S. and Defendant met in a maintenance shed at the Mission. D.S. was lying down suffering from a headache when Defendant pulled down D.S.'s pants and performed unwanted oral sex on him. D.S. tried without success to rebuff Defendant's advances.

1. To preserve the privacy of the victim of a sexual assault, we hereinafter refer to him as D.S. See *State v. Gordon*, __ N.C. App. __, __ n.1, 789 S.E.2d 659, 661 n.1 (2016).

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After the sexual assault ended, Defendant told D.S. not to report what happened.

D.S. and Defendant left the maintenance shed and walked in different directions; D.S. went to his dorm room and reported the incident to a roommate. Police were called to investigate and D.S. recounted the incident. D.S. also told one officer that he had been sexually abused around the age of three to five by his brother and was removed from his home. D.S. told another officer that he had sexually assaulted his half-sister when he was around eight or nine years old and was thereafter placed in a facility until he reached eighteen years of age.

Officers informed Defendant that D.S. had accused him of forcing unwanted oral sex upon him. Defendant denied the allegations and consented to a cheek swab to test his DNA. Forensic analysis found a presence of Defendant's DNA in a penile swab from D.S.

Defendant was indicted on 4 May 2015 on one count of second degree kidnapping and one count of second degree sexual offense. In a pre-trial hearing, the State, *inter alia*, dismissed the second degree kidnapping charge and moved to exclude or limit evidence of D.S.'s sexual history, specifically, D.S.'s statements to police that he had sexually assaulted his half-sister when he was younger. Defense counsel asserted that the statement was admissible for impeachment because it was inconsistent with D.S.'s previous statements to police about how and when he was removed from his home as a child. The trial court tentatively limited defense counsel to questions about D.S.'s inconsistent statements to police, but ruled defense counsel would not be allowed to question D.S. about the prior sexual assault or D.S.'s statement to police about the prior assault.

Following D.S.'s direct testimony, the trial court held an *in camera* hearing to settle the issue about the admissibility of D.S.'s sexual history. After *voir dire* testimony from D.S. and arguments of counsel, the trial court ruled that D.S.'s statement about sexually assaulting his sister was evidence of prior sexual behavior protected by the Rape Shield law and was also inadmissible because any probative value was substantially outweighed by the likelihood of unfair prejudice and confusion of the jury. On cross-examination, defense counsel obtained D.S.'s admission that he had told one police officer that he was removed from the family home "at or near birth due to sexual abuse" and had told another officer that he was taken from the family home at age eight or nine.

On 3 June 2016, the jury returned a verdict finding Defendant guilty of second degree sexual offense. The trial court entered judgment and

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sentenced Defendant in the mitigated range for a Class C felony with a prior record level one offender, to a minimum of 44 months and a maximum of 113 months. The trial court also ordered Defendant to register as a sex offender for 30 years.

Defendant timely appealed.

Analysis

Defendant argues that a prior sexual assault committed by a prosecuting witness is not protected by North Carolina's Rape Shield law and should therefore not have been excluded pursuant to Rule 412 of the North Carolina Rules of Evidence. We need not address this issue, because the trial court properly excluded the evidence based upon Rule 403 after evaluating its relevancy and balancing its probative value against its potential for unfair prejudice.

1. Standard of Review

We review a trial court's decision to exclude evidence pursuant to Rule 403 for abuse of discretion. *State v. Lloyd*, 354 N.C. 76, 108, 552 S.E.2d 596, 619 (2001) ("The decision whether to exclude relevant evidence under Rule 403 lies within the sound discretion of the trial court, and its ruling may be reversed for abuse of discretion only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." (internal quotation marks and citations omitted)).

2. Evidence of Prior Sexual Conduct

Rule 412 of the North Carolina Rules of Evidence—North Carolina's Rape Shield law—provides in pertinent part:

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant

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as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C. Gen. Stat. § 8C-1, Rule 412 (2015). Our Supreme Court has held that North Carolina’s Rape Shield law is “nothing more then [sic] than a codification of this jurisdiction’s rule of relevance as that rule specifically applies to the past sexual behavior of rape victims.” *State v. Fortney*, 301 N.C. 31, 37, 269 S.E.2d 110, 113 (1980). North Carolina’s previous Rape Shield law, and subsequently Rule 412, “was not intended to act as a barricade against evidence which is used to prove issues common to all trials.” *State v. Younger*, 306 N.C. 692, 697, 295 S.E.2d 453, 456 (1981). Nor was it meant to be the “sole gauge for determining whether evidence is admissible in rape cases.” *Id.* at 698, 295 S.E.2d at 456.

When a defendant in a rape case seeks to admit evidence regarding a prosecuting witness’s prior sexual conduct, and that evidence does not fall within an enumerated exception of Rule 412, the evidence is not *per se* inadmissible. *State v. Martin*, 241 N.C. App. 602, 610, 774 S.E.2d 330, 336 (2015). Rather, a trial court should “look[] beyond the four categories to determine whether the evidence was, in fact, relevant . . . and, if so, conduct a balancing test of the probative and prejudicial value of the evidence under Rule 403” *Id.* at 610, 774 S.E.2d at 336 (citations omitted).

Evidence of prior sexual conduct is relevant when it affects an issue that is common to all trials, *e.g.*, a witness’s inconsistent statement about his or her sexual history. *Younger*, 306 N.C. at 697, 295 S.E.2d at 456 (“Inconsistent statements are, without a doubt, an issue common to all trials.”). Rule 403 of the North Carolina Rules of Evidence permits a trial court to exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” N.C. Gen. Stat. § 8C-1, Rule 403. A proper determination of the probative and prejudicial effect of certain evidence entails “an *in-camera* hearing in which the court can hear and evaluate the arguments of counsel before making a ruling.” *Younger*, 306 N.C. at 697, 295 S.E.2d at 456.

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Here, when considering whether to admit the evidence of D.S.'s prior sexual conduct, the trial court properly held an *in camera* hearing. The trial court heard arguments from counsel and *voir dire* testimony from D.S. concerning his history. Following this testimony, the trial court concluded that "any probative value in [the evidence was] outweighed by the prejudicial value[, and would] . . . only serve to confuse the jury"

Our review of the record supports the trial court's exclusion of the evidence pursuant to Rule 403. The sexual behavior defense counsel sought to question D.S. about occurred more than a decade earlier, and involved no factual elements similar to the events underlying the charge for which Defendant was on trial. The evidence—an eight- or nine-year-old boy sexually assaulting his half-sister—is disturbing and highly prejudicial. When and why D.S. was taken from his family home as a child are facts of remote relevance to the offense charged. Other evidence presented by the State, including expert testimony that Defendant's DNA matched a genital swab taken from D.S. shortly after the alleged assault—despite Defendant's denial that any sexual encounter occurred—also rendered D.S.'s inconsistent statements about remote facts less relevant to the contested factual issues at trial.

Defendant argues that the trial court's exclusion of evidence concerning D.S.'s childhood sexual assault of his half-sister not only kept jurors from learning the conflicting details of D.S.'s statements about when and why he was taken from his home as a young child, but also kept jurors from hearing evidence that D.S. was not a virgin at the time of the alleged offense, contrary to his statement to Defendant that he was a virgin. This argument has been made in a previous case without success. In *State v. Autry*, 321 N.C. 392, 364 S.E.2d 341 (1988), the Supreme Court upheld a trial court's ruling excluding evidence that the prosecuting witness was not a virgin:

[T]he State did not ask, and the victim did not in fact testify, as to whether she was a virgin. On the contrary, the victim testified only to what defendant asked her and to what she told defendant in response to his question on the night of the crime. The State clearly elicited this testimony, not to establish before the jury whether the victim was a virgin, but to lay a proper foundation for the additional evidence of defendant's statement of his announced intent

Id. at 397-98, 364 S.E.2d at 345. Here, the State did not present D.S.'s statement to Defendant as evidence that D.S. was a virgin, but rather as evidence of the conversation between D.S. and Defendant preceding

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the alleged sex offense to prove Defendant's knowledge and intent. The fact that Defendant asked D.S. if he was a virgin, regardless of D.S.'s response, was probative of Defendant's intent in meeting D.S. at the shed where the sexual offense occurred.

While the issue of a prosecuting witness's credibility is always relevant, the temporal remoteness of the sexual history and the relationship, or lack thereof, to the specific acts alleged in the trial, the remote relevance of the prosecuting witness's prior inconsistent statements, and the relative strength of other evidence unrelated to the prosecuting witness's credibility support the trial court's ruling that the low probative value of the evidence was substantially outweighed by its high potential for prejudice and confusion.

Conclusion

For the foregoing reasons, based upon the record evidence and the authorities cited, we affirm the trial court's determination to exclude evidence that the State's prosecuting witness committed a sexual assault when he was a child.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
KWANISSDA WILLIAMS

No. COA16-1048

Filed 15 August 2017

1. Evidence—motion to suppress all evidence—officer stop—summary dismissal of motion—testimony not required—affidavit—reasonable suspicion

The trial court did not err in a resisting a law enforcement officer and assault inflicting serious bodily injury on a law enforcement officer case by failing to hear sworn testimony before denying defendant's motion to suppress all evidence obtained pursuant to an officer's stop. Testimony is only required under N.C.G.S. § 15A-977(d) if the trial court first determines it cannot dispose of the motion summarily. Further, defendant's affidavit gave rise to a reasonable

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suspicion that she had been trespassing at a shelter, and that an officer detained her as the only means of ascertaining her identity for the purposes of “trespassing” her from the shelter.

2. Police Officers—resisting an officer—motion to dismiss—sufficiency of evidence—reasonable articulable suspicion—ascertaining identity of trespasser at shelter—discharging duty as an officer

The trial court did not err by denying defendant’s motions to dismiss the charges of resisting an officer where an officer had a reasonable articulable suspicion to stop and detain defendant for trespassing at a shelter. The officer was discharging or attempting to discharge his duty as an officer at the time defendant resisted him.

3. Police Officers—assault inflicting serious bodily injury on a law enforcement officer—motion to dismiss—sufficiency of evidence—bite on arm—permanent or protracted condition causing extreme pain—serious permanent injury

The trial court erred by denying defendant’s motion to dismiss the charge of assault inflicting serious bodily injury on a law enforcement officer where the evidence was insufficient to support a finding that defendant’s bite of an officer’s arm resulted in a permanent or protracted condition that caused extreme pain, or caused serious permanent injury.

Appeal by Defendant from judgment entered 9 May 2016 by Judge Lisa C. Bell in Superior Court, Gaston County. Heard in the Court of Appeals 3 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristine M. Ricketts, for the State.

Mary McCullers Reece for Defendant.

McGEE, Chief Judge.

Kwanissda Williams (“Defendant”) appeals her convictions on charges of resisting a law enforcement officer (“resisting”) and assault inflicting serious bodily injury on a law enforcement officer (“AISBI”). Defendant contends the trial court erred by denying her pretrial motion to suppress and her motions to dismiss. We hold that the trial court erred in denying Defendant’s motion to dismiss the charge of AISBI, reverse, and remand for entry of judgment on assault of a law enforcement officer inflicting physical injury, but otherwise find no error.

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I. Background

Officer Josh Smith (“Officer Smith”) of the Gastonia Police Department was performing patrol duties on the evening of 11 June 2014. He received a “trespass call” from dispatch to respond to an incident at Power in the Word Ministries, a local homeless shelter (“the shelter”) at approximately 9:45 p.m. The police dispatcher relayed that a woman “was refusing to leave the [shelter].”

When Officer Smith arrived at the shelter, he made contact with the woman who “was in charge that night” (“shelter representative”).¹ The shelter representative “pointed out [Defendant], wh[o] was down the street,” and told Officer Smith “that they wanted to trespass her.”² Officer Smith testified:

Usually when a business wants to trespass someone they’ll want to make sure they have all their information, their name, date of birth, in case they want to – if they come back they can go obtain a warrant for trespassing, which is second-degree trespass. And a lot of times we’ll go and we’ll try and get that information.

The shelter representative identified Defendant as “Kwani,” and Defendant was seen walking down the street away from the shelter.

Officer Smith pulled up alongside Defendant in his police vehicle, approximately 200 yards from the shelter, with the intent to investigate and potentially “trespass” Defendant from the shelter. Officer Smith “got out of [his vehicle], and began speaking with” Defendant. Officer Smith noticed that Defendant was “clearly agitated at the event,” and seemed uncomfortable speaking with him. Officer Smith testified that Defendant was

[p]acing back and forth, you know, when I was trying to speak with her she had her voice raised, agitated. I actually had to tell her, hey, come back and speak with me, you know, they are wanting to trespass you and I need to speak with you and get some information from you.

Officer Smith testified that, when he asked Defendant her name, she hesitated, but then stated that her name was “Brenda Smith,” which conflicted with the name “Kwani” that had been provided by the shelter

1. Officer Smith did not remember the name of the woman in charge.

2. Officer Smith was not familiar with Defendant before this interaction.

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representative. Officer Smith asked Defendant where she was from and again she hesitated, then said “Florida.” Officer Smith testified that, based on his training and experience, he believed Defendant’s hesitation and demeanor indicated she had given him false information, and he confronted Defendant about whether she had given him a false name. Officer Smith testified he informed Defendant that he needed to obtain her information in order to “trespass” her from the shelter and once she provided that information, she would be free to go.

Officer Smith testified Defendant became more agitated and began to walk away from him, back toward the shelter, yelling: “Jesus, Jesus.” Officer Smith testified that he “requested another officer,” and told Defendant “until I can positively identify you I’m going to detain you.” Defendant responded by saying “f_ck you” to Officer Smith. At that point, Officer Smith requested that Defendant put her hands behind her back, saying: “I’m going to detain you until I figure out who you are.” Officer Smith placed his hands on Defendant to begin putting her in handcuffs, but she pulled away from him and continued walking in the direction of the shelter. Officer Smith then informed Defendant she was under arrest for resisting a police officer, but Defendant continued to walk away from him. At this time, “[i]nstead of using anything [Officer Smith] decided just to take [Defendant] to the ground gently by just the leg sweep. [He] grabbed her about her shoulders, and . . . [placed his] foot, and . . . just guided her to the ground. And that’s whe[n] the assault began.”

Officer Smith and Defendant both landed on the pavement, with Officer Smith’s arm next to Defendant’s head. Officer Smith testified that, at that point, Defendant bit him in the middle of his left forearm and he experienced “instant . . . significant pain[,]” during which time Defendant was “tugging and pulling” on Officer Smith’s arm so that he was “seeing the skin get stretched beyond what it usually gets stretched.” However, the skin on Officer Smith’s arm was not removed, and the muscle underneath was not exposed. Officer Smith began “to knee” Defendant and applied pressure to Defendant’s jaw in order to get her to release her bite, which Defendant eventually did, but Defendant then bit Officer Smith’s arm again. At that point, Officer Smith struck Defendant in her face with his elbow three times, which caused Defendant to release her bite. Officer Smith estimated the incident lasted thirty to forty-five seconds, and testified that no back-up arrived before the end of the incident. Once Officer Smith was able to break free from Defendant, he jumped on top of her, and “[a]t this point [his] secondary officers had showed up” and they were able to subdue Defendant.

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Emergency Medical Services (“EMS”) arrived at the scene. Officer Smith testified that his arm was red and bleeding from a wound about an “inch in circumference[.]” Officer Smith testified that, in addition to the bite mark, he sustained “a couple scratches . . . on the side of [his] face” that required no medical attention. Once EMS arrived at the scene, Officer Smith testified they “just disinfected [the bite wound], really.” Officer Smith engaged in the following colloquy at trial:

Q. Were you then directed to, by either EMS or your supervisor, to go to the hospital for treatment?

A. Yes, ma’am.

Q. Is that part of the standard procedure, or treatment procedure, or exposure procedure?

A. Yes, ma’am.

Q. And did you receive any further treatment at the hospital?

A. Yes, ma’am. Any time we get exposed, whether it be needles, bites, stuff like that, we have go through a procedure through the hospital. They draw your blood initially to see if there’s anything already there. They also do random drug testing. And while there I believe I got a Tetanus shot. And was basically sent home.

Q. And did you go home or go back on duty?

A. I went to the station in order to do paperwork.

Officer Smith’s wound did not require stitches, but he was provided a prescription for a “prophylactic” and checked every three months for a nine-month period to insure he had not contracted any disease, which he did not. The following day, Officer Smith returned to work.

Photos taken “a day or so” after the incident were introduced into evidence and showed that Officer Smith’s “forearm [was] swollen from the bite mark compared to [his] left. [He] believe[d] there [was] a second [photo] . . . comparing both [his] arms somewhere, maybe.” Additional photographs of Officer Smith’s injury were introduced, including one where he had “put some ointment on” the injury to facilitate healing, and that photo “show[ed] bruising to begin.” Three days after the incident, Officer Smith took photographs of his injury that depicted “bruising of [his] entire forearm.” Officer Smith took additional photographs over the next few weeks that showed “some healing” followed by the injury being

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“scabbed over,” and finally “the beginning scarring, and healing.” Officer Smith testified the bite left a permanent “discoloration of [his] skin on [his] forearm . . . in the shape of a [one-inch diameter] bite mark.”

Defendant was indicted on 7 July 2014 for assault on a law enforcement officer inflicting serious bodily injury and resisting, delaying, and obstructing a law enforcement officer. Defendant filed a pretrial motion to suppress all evidence obtained pursuant to the 11 June 2014 stop, arguing that Officer Smith lacked reasonable suspicion to detain her, which the trial court denied by order entered 13 April 2016. At trial, Defendant made a motion to dismiss at the close of the State’s evidence and at the close of all the evidence, both of which the trial court denied.

A jury convicted Defendant on 15 April 2016 of resisting and AISBI. Defendant was sentenced to ten to twenty-one months’ imprisonment. Defendant appeals.

II. *Motion to Suppress*

Defendant argues the trial court erred because it failed to hear sworn testimony before denying her motion to suppress as required by N.C. Gen. Stat. § 15A-977(d) (2015). We disagree.

A. Standard of Review

Defendant contends the trial court’s error involved an error in interpreting N.C.G.S. § 15A-977(d). “An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*.” *State v. Skipper*, 214 N.C. App. 556, 557, 715 S.E.2d 271, 272 (2011) (citation and quotation marks omitted). “Under *de novo* review, this Court ‘considers the matter anew and freely substitutes its own judgment for that of the [trial court].’” *State v. Ward*, 226 N.C. App. 386, 388, 742 S.E.2d 550, 552 (2013) (citation omitted) (alteration in original).

B. Analysis

[1] N.C.G.S. § 15A-977 sets forth the requirements for a motion to suppress evidence in superior court. The motion must state the grounds upon which it is made and must be accompanied by an affidavit containing supporting facts. N.C.G.S. § 15A-977(a). The trial court may “summarily deny the motion to suppress evidence if:”

- (1) The motion does not allege a legal basis for the motion; or
- (2) The affidavit does not as a matter of law support the ground alleged.

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N.C.G.S. § 15A-977(c). If the motion is not summarily determined, then the trial court must make a determination after a hearing, which must include testimony given under oath. N.C.G.S. § 15A-977(d). As our Supreme Court has noted, summary resolution of motions to suppress is encouraged:

As we noted in *Holloway*, the official commentary to section 15A-977 explains that the statute “is structured ‘to produce in as many cases as possible a summary granting or denial of the motion to suppress. The defendant must file an affidavit as to the facts with his motion.’” Read in isolation, this language could suggest that the affidavit has some evidentiary purpose; however, the Court in *Holloway* omitted the following portion of the official commentary, which states:

[T]he State may file an answer denying or admitting facts alleged in the affidavit. If the motion cannot be otherwise disposed of, subsection (d) provides for a hearing at which testimony under oath will be given.

....

Considered as a whole, the text of the statute and the official commentary make clear that the information presented in a section 15A-977(a) affidavit is *designed to assist the trial court in determining whether defendant’s allegations merit a full suppression hearing*. See [N.C.G.S.] § 15A-977(c)(2) (stating that the trial court “may summarily deny the motion to suppress evidence if . . . [t]he affidavit does not as a matter of law support the ground alleged”). The statute does not say that the affidavit may be considered as evidence *at that hearing*. In contrast, the text of section 15A-977(d) states that the facts supporting the trial court’s decision to grant or deny a defendant’s suppression motion will be established at the suppression hearing on the basis of “testimony” given “under oath.” In this respect, the section 15A-977(a) affidavit functions merely as a procedural prerequisite *to secure the summary granting, or avoid the summary denial, of the motion to suppress*.

State v. Salinas, 366 N.C. 119, 125–26, 729 S.E.2d 63, 67–68 (2012) (emphasis added) (citations omitted). The trial court is only required to

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hear sworn testimony when it does not summarily decide a motion to suppress. N.C.G.S. § 15A-977(a)-(d).

Defendant filed her motion to suppress the morning of her trial, and the trial court heard arguments of counsel for both Defendant and the State. Defendant argued that Officer Smith's detention of Defendant was not an investigatory stop and, even if it was, it was not supported by reasonable suspicion. Neither Defendant nor the State requested to put on evidence; they simply argued why the law, as applied to the facts alleged, supported their differing positions. Therefore, the trial court did not hear any testimony before denying Defendant's motion.

Defendant argues the trial court's failure to hear sworn testimony before denying her motion to suppress resulted in insufficient competent evidence to support its ruling that the stop was lawful. Defendant's argument ignores the fact that testimony is only required if the trial court first determines it cannot dispose of the motion summarily. N.C.G.S. § 15A-977(a)-(d). We find that the trial court summarily denied Defendant's motion and, therefore, a full hearing with sworn testimony was not required.

In order for Officer Smith to lawfully detain Defendant to investigate an alleged second-degree trespass, there needed to have been evidence from which a reasonable officer in Officer Smith's position could articulate a reasonable suspicion that Defendant was in violation of the relevant part of the following statute:

(a) Offense. – A person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another:

(1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person[.]

N.C. Gen. Stat. § 14-159.13 (2015).

Though Defendant's affidavit in support of her motion to suppress could not have been used as substantive evidence had the trial court conducted a N.C.G.S. § 15A-977(d) suppression hearing, the trial court was *required* to consider Defendant's affidavit in support of her motion to suppress in order to determine whether to summarily deny her motion. *Salinas*, 366 N.C. at 125–26, 729 S.E.2d at 67–68. The affidavit in support of Defendant's motion to suppress included the following:

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1. On Wednesday, June 11, 2014, just before 10 pm, a call for service was received related to a Civil Disturbance at [the shelter]. The caller alleged a female was refusing to leave the [shelter].

2. Officer [Smith] responded to the request and arrived at the location within 3 minutes[.]

3. According to Officer Smith, he first made contact at the [shelter], where he was advised the female had left the premises.

4. Officer Smith then drove down the street and located the female described in the call and identified by the [shelter representative] walking on foot, away from the [shelter.]

5. Officer Smith exited his patrol vehicle and told the female to come speak with him in reference to the alleged trespassing.

6. The female was [] Defendant[.]

[Officer Smith spoke with Defendant, who then attempted to walk away from Officer Smith and questioned why he was asking for her identification. Officer Smith informed Defendant of the request to trespass her from the shelter.]

. . . .

13. [Defendant] questioned the necessity of giving this information to Officer [Smith], and began to walk away again.

14. Officer Smith believed [Defendant] then gave the name “Brenda Smith,” but he acknowledged he already knew [] Defendant [] to be “[Kw]ani” from the information provided by the [shelter] during his contact with them.

15. Officer Smith then accused [Defendant] of giving him a fake name and told [her] she [was] not free to leave and was being detained . . . so he could handcuff her while he ascertained her identity.

Defendant’s affidavit clearly laid out alleged facts giving rise to a reasonable suspicion that Defendant had been trespassing at the shelter, and that Officer Smith detained Defendant as the only means of ascertaining her identity for the purposes of “trespassing” her from the shelter. Based upon the facts as set forth in Defendant’s affidavit, Officer Smith’s detention of Defendant was proper, and the trial court did not

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err in dismissing Defendant's motion to suppress without a full suppression hearing. *Salinas*, 366 N.C. at 125, 729 S.E.2d at 67–68 (“[T]he information presented in a section 15A–977(a) affidavit is designed to assist the trial court in determining whether defendant’s allegations merit a full suppression hearing. *See* [N.C.G.S.] § 15A–977(c)(2) (stating that the trial court ‘may summarily deny the motion to suppress evidence if . . . [t]he affidavit does not as a matter of law support the ground alleged’).”). The information presented in Defendant’s N.C.G.S. § 15A-977(a) affidavit was sufficient to allow the trial court to determine that Defendant’s allegations did not merit a full suppression hearing because Defendant’s “affidavit d[id] not as a matter of law support the ground alleged” for suppression. N.C.G.S. § 15A-977(c)(2).

The fact that the trial court allowed the attorneys to argue did not convert the trial court’s summary decision into a full N.C.G.S. § 15A-977(d) hearing. Arguments by counsel are not evidence and can, in this matter, be considered surplusage. *See State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004) (citation omitted) (“ ‘it is axiomatic that the arguments of counsel are not evidence’ ”).

Moreover, though the trial court was not required to make any findings of fact when it summarily denied Defendant’s motion, to the extent that it did so, “ ‘irrelevant findings in a trial court’s decision do not warrant a reversal of the trial court.’ ” *State v. Hernandez*, 170 N.C. App. 299, 305, 612 S.E.2d 420, 424 (2005) (citations omitted). Pursuant to the foregoing, we hold the trial court’s summary denial of Defendant’s motion to suppress did not violate N.G.G.S. § 15A-977(d) and the trial court did not err in failing to hear sworn testimony before denying Defendant’s motion.

III. *Motions to Dismiss*

Defendant argues the trial court erred in denying her motions to dismiss the charges of resisting and AISBI because the State failed to present sufficient evidence that Officer Smith was acting lawfully in discharging a duty of his office, and that the State failed to present sufficient evidence that Officer Smith incurred a serious bodily injury. We agree in part and disagree in part.

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) (citation omitted). “The standard of review for a motion to dismiss in a criminal case is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein,

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and (2) of defendant's being the perpetrator of such offense." *State v. Irons*, 189 N.C. App. 201, 204, 657 S.E.2d 733, 735 (2008) (citation and internal quotation marks omitted).

The evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Burke, 185 N.C. App. 115, 118, 648 S.E.2d 256, 258-59 (2007) (citation and internal quotation marks omitted). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations and quotation marks omitted).

B. Analysis

1. *Resisting an Officer*

[2] The elements of obstruction or delay of an officer are as follows: (1) "the victim was a public officer;" (2) "the defendant knew or had reasonable grounds to believe that the victim was a public officer;" (3) "the victim was discharging or attempting to discharge a duty of his office;" (4) "the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office;" and (5) "the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse." *State v. Dammons*, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (2003).

Defendant challenges the third element of obstruction of an officer, arguing that Officer Smith was not discharging a lawful duty at the time he stopped Defendant because Officer Smith did not have a reasonable, articulable suspicion that Defendant had committed a crime. Having held above that the trial court did not err in finding that Officer Smith had a reasonable articulable suspicion upon which to stop and detain Defendant, we further hold that Officer Smith was discharging or attempting to discharge his duty as an officer at the time Defendant resisted him. This argument is without merit.

2. *Assault Inflicting Serious Bodily Injury on an Officer*

[3] "[A] person is guilty of a Class F felony if the person assaults a law enforcement officer . . . while the officer is discharging or attempting to

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discharge his or her official duties and inflicts serious bodily injury on the officer.” N.C. Gen. Stat. § 14-34.7(a) (2015). “Serious bodily injury” is defined by statute as

bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-32.4(a) (2015).

To convict a defendant, there must be substantial evidence of the elements set forth in the jury instructions. *State v. Rouse*, 198 N.C. App. 378, 382, 679 S.E.2d 520, 524 (2009). Whether a “serious bodily injury” has occurred:

depends upon the facts of each case and is generally for the jury to decide under appropriate instructions. A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious. Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury.

State v. Williams, 150 N.C. App. 497, 502, 563 S.E.2d 616, 619 (2002) (citation omitted). In the case before us, the trial court instructed the jury that “[s]erious bodily injury is an injury that creates or causes serious permanent disfigurement, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ.” Because the trial court limited its instruction concerning serious bodily injury to the above, we do not consider any other potential definitions of “serious bodily injury.” *See Id.* at 503, 563 S.E.2d at 620 (“we are limited to that part of the definition set forth in the trial court’s instructions to the jury”).

Further, the State agrees with Defendant that no evidence was presented showing permanent or protracted loss or impairment of a bodily member or organ. Because we agree with the State that no instruction on “permanent or protracted loss or impairment of the function of any bodily member or organ” was warranted, we consider only whether sufficient evidence supported a finding that Defendant’s actions against Officer Smith resulted in a permanent or protracted condition causing extreme pain; or serious, permanent disfigurement.

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a. Permanent or protracted condition that causes extreme pain

In *State v. Williams*, this Court considered whether the State presented sufficient evidence that a victim suffered serious bodily injury, defined by the trial court to the jury as “an injury that creates or causes a permanent or protracted condition that causes extreme pain.” *Williams*, 150 N.C. App. at 503, 563 S.E.2d at 620. The victim in *Williams* suffered a broken jaw that was wired shut for two months, during which he lost thirty pounds, and the injury caused approximately \$6,000.00 in damage to his teeth. *Id.* Evidence was also presented that the victim’s ribs were broken and that he suffered continuing back spasms that affected his breathing and caused him to visit the emergency room twice. *Id.* Finally, a physician testified that the victim’s injuries “would cause a person ‘quite a bit’ of pain and discomfort.” *Id.* at 503-04, 563 S.E.2d at 620. Based on these facts, this Court held “a reasonable juror could find this evidence sufficient to conclude that [the victim’s] injuries created a ‘protracted condition that caused extreme pain’ ” and thus the trial court did not err in denying the defendant’s motion to dismiss. *Id.* at 504, 563 S.E.2d at 620.

In the present case, the facts do not support a conclusion that Officer Smith suffered “a permanent or protracted condition that cause[d] extreme pain.” *Id.* Unlike in *Williams*, no medical testimony was presented as to the painful or permanent effects of Officer Smith’s injury, nor were the effects of his injury as clearly severe as in *Williams*. Officer Smith testified he experienced “instant . . . significant pain” when Defendant bit him, and that he “could actually feel and see the skin being pulled away from [his] muscle.” Immediately afterwards, the bite injury was red and bleeding, and Officer Smith obtained medical attention, which involved disinfecting the wound and providing prophylactic medication, but did not require stitches or any other invasive medical treatment. After he was treated at the hospital, Officer Smith returned to the police station to complete paperwork, and was able to return to police work the next day. There was evidence that the bite caused swelling and bruising that apparently resolved in approximately one month’s time, but there was no evidence that the injury continued to cause Officer Smith significant pain subsequent to his treatment at the hospital.

While the bite itself was no doubt painful, there was insufficient evidence presented to the jury that the bite resulted in a “permanent or protracted condition causing extreme pain.” Officer Smith’s experience is not analogous to the injuries in *Williams*. Officer Smith does not state that he continued to have significant pain; rather, he experienced swelling and bruising in the following days and weeks. Furthermore, Officer Smith’s ability to leave the hospital and return to the police

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station to complete paperwork, plus the fact that he returned to work the following day, demonstrates that his pain was not protracted, much less permanent. Thus, we find that the evidence in the present case was insufficient to support a finding that Defendant's bite resulted in "a permanent or protracted condition that cause[d] extreme pain." *Williams*, 150 N.C. App. at 503, 563 S.E.2d at 620.

We find the facts in the present case more analogous to a 2009 opinion, *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009) ("*Williams II*").

With respect to [the victim] M.L.W., the State's evidence tended to show that . . . defendant . . . hit M.L.W. so hard that she fell to the ground. Defendant began kicking M.L.W. in the ribs; then picked her up by her neck and squeezed while he swung her body. She passed out.

Id. at 182–83, 689 S.E.2d at 424. Based upon these facts, this Court held:

While M.L.W. received a vicious beating, . . . and her ribs were still "sore" five months after the assault, in order to meet the statutory definition, the victim must experience "extreme pain" in addition to the "protracted condition." N.C. Gen. Stat. § 14–32.4(a). The State presented no evidence of extreme pain. Therefore, the trial court erred in denying defendant's motion to dismiss the charge of an assault upon M.L.W. inflicting serious bodily injury, and we must reverse his conviction of that offense[.]

Id. at 184, 689 S.E.2d at 425 (citations omitted). While it may readily be inferred that the victim in *Williams II* suffered "extreme pain" during the course of the "vicious beating," this Court required something more than the pain obviously associated with the infliction of the injury itself. *Id.* We hold that, while Officer Smith received a vicious bite, the evidence does not show that Officer Smith continued to experience "extreme pain" in addition to any "protracted condition." *Id.*

b. Serious, permanent disfigurement

The State further argues that Officer Smith suffered serious, permanent disfigurement because a bite-mark shaped "discoloration" remained on his forearm approximately two years after the incident. In support, the State argues that " 'disfigurement' is defined as '[t]o mar or spoil the appearance or shape of.'" *State v. Downs*, 179 N.C. App. 860, 861-62, 635 S.E.2d 518, 519-520 (2006) (finding substantial evidence of serious permanent disfigurement where the victim suffered severe facial swelling, scalp abrasion, a fractured nose, and the loss of a tooth); *see*

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also id. at 861-62, 635 S.E.2d at 520 (“the fact remains that [the victim] suffered the permanent loss of his own live, natural tooth”). The State further argues that this Court has found a “scar amounts to permanent disfigurement.” *Williams II*, 201 N.C. App. at 169-170, 689 S.E.2d at 416 (finding one of the victims’ injuries sufficient to conclude she suffered a serious bodily injury where she suffered a cracked pelvic bone, broken rib, torn ligaments in her back, and a deep cut over her left eye that never properly healed and left a scar).

The State contends that any lasting mark or scar should be considered sufficient evidence of serious bodily injury, but this reasoning would create a bright-line rule at odds with a jury’s fact-based determination. As this Court has noted, “the element of ‘serious bodily injury’ requires proof of more severe injury than the element of ‘serious injury[.]’ ” *State v. Hannah*, 149 N.C. App. 713, 719, 563 S.E.2d 1, 5 (2002). This Court further stated in *Hannah*:

A review of the case law would suggest that our courts have found *serious injury* in situations that may not rise to the level of *serious bodily injury* as defined under N.C.G.S. § 14–32.4, for example: shards of glass in the arm and shoulder of a victim of a drive-by shooting into the victim’s vehicles, coupled with an officer’s observation that the victim was shaken, *State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994); a bullet that pierced through the shoulder of the victim, creating two holes in his upper body, *State v. Streeter*, 146 N.C. App. 594, 553 S.E.2d 240 (2001); gunshot wound which resulted in multiple broken bones of the victim’s arm, *State v. Washington*, 142 N.C. App. 657, 544 S.E.2d 249 (2001); stab wound to the back and shoulder, *State v. Grigsby*, 351 N.C. 454, 526 S.E.2d 460 (2000); and a broken wrist, chewed fingers and a gash in the head, *State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563.

Id. at 718, 563 S.E.2d at 5. While each case must be considered on its own facts, clearly, based upon the above cases, the presence of a minor scar or other mild disfigurement alone cannot be sufficient to support a finding of “serious bodily injury.” *Id.*

Thus, it is necessary to analyze all of the facts presented, rather than just the discoloration on Officer Smith’s forearm. As discussed previously, Officer Smith’s injury was mild enough to allow him to return to the police station to complete paperwork that same night. Unlike the injuries in *Downs* and *Williams II*, the totality of Officer Smith’s injuries

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do not rise to “serious bodily injury” even though the incident resulted in a bite-shaped discoloration, or scar, on his forearm. Accordingly, the evidence as a whole was not sufficient to support a finding that Defendant’s bite resulted in “serious permanent disfigurement.”

Pursuant to the foregoing, we find there was insufficient evidence to support the “serious bodily injury” element. The trial court erred in denying Defendant’s motion to dismiss the charge of assault on a law enforcement officer inflicting serious bodily injury, and we reverse that conviction. However, the jury was also instructed on the lesser-included offense of assault on a law enforcement officer inflicting physical injury.

(c) Unless covered under some other provision of law providing greater punishment, a person is guilty of a Class I felony if the person does any of the following:

(1) Assaults a law enforcement officer . . . while the officer is discharging or attempting to discharge his or her official duties and inflicts physical injury on the officer.

. . . .

For the purposes of this subsection, “physical injury” includes cuts, scrapes, bruises, or other physical injury which does not constitute serious injury.

N.C. Gen. Stat. § 14-34.7(c)(1). The jury clearly found that Officer Smith sustained a “physical injury” when it convicted Defendant of assault on a law enforcement officer inflicting serious bodily injury. We hold that the evidence supports this charge, and remand to the trial court for entry of a judgment as upon a verdict of guilty of assault on a law enforcement officer inflicting physical injury, and for resentencing. *See State v. Wilkins*, 208 N.C. App. 729, 733, 703 S.E.2d 807, 811 (2010).

IV. Conclusion

For the foregoing reasons, we find Defendant received a trial free from error on the charge of resisting an officer, but we reverse Defendant’s conviction for assault on a law enforcement officer inflicting serious bodily injury, and remand for resentencing on the Class I felony charge of assault on a law enforcement officer inflicting physical injury.

NO ERROR IN PART; REVERSED IN PART, AND REMANDED.

Judges HUNTER, JR. and ZACHARY concur.

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STATE OF NORTH CAROLINA

v.

ASAIAH BEN YISRAEL

No. COA16-873

Filed 15 August 2017

1. Drugs—possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—quantity of drugs—admitted possession—surrounding circumstances—evidence recovered

The trial court did not err by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana based on only 10.88 grams of marijuana being recovered. Although the amount found on defendant's person and inside the vehicle's console might not be sufficient, standing alone, to support an inference that defendant intended to sell or deliver marijuana, defendant's admitted possession, together with other surrounding circumstances and evidence recovered, were sufficient.

2. Drugs—possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—packaging of illegal drugs

The trial court did not err in a drugs case by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana where an officer testified regarding the packaging of the three bags of 10.88 grams of marijuana into two larger plastic bags of remnant marijuana and one dime size bag of marijuana. The packaging and possession of both "sellable" and "unsellable" marijuana was evidence raising an inference that the jury could determine defendant had the intent to sell marijuana.

3. Drugs—possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—large quantity of un sourced cash

The trial court did not err in a drugs case by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana where the uncontroverted evidence showed that defendant, twenty years old, was carrying a large amount of cash (\$1,504.00) on his person and was on the grounds of a high school while possessing illegal drugs. Large amounts of cash on defendant's person supported an inference that he had the intent to sell or deliver.

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4. Drugs—possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—stolen and loaded handgun in vehicle

The trial court did not err in a drugs case by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana where a stolen and loaded handgun was also recovered from inside the glove compartment of a vehicle in addition to 10.88 grams of marijuana in the car. The Court of Appeals has previously recognized, as a practical matter, that firearms are frequently involved for protection in illegal drug trade. Further, neither our Supreme Court or Court of Appeals has ever recognized the Wilkins factors regarding packaging of the marijuana and cash recovered from defendant as exclusive for determining intent.

Chief Judge McGEE dissenting.

Appeal by defendant from judgment entered 13 April 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 20 April 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

TYSON, Judge.

Asaiah Ben Yisrael ("Defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of possession with intent to sell or deliver marijuana. We find no error.

I. Background

Raleigh Police Officer Dennis Brandenburg was employed as the school resource officer at Enloe Magnet High School. On 30 October 2015 at approximately 10:00 a.m., Officer Brandenburg observed a white Chevrolet Impala vehicle pull into the front entrance of the school and illegally park in the fire lane. Officer Brandenburg recognized the vehicle as belonging to Malik Jones ("Jones"), a former Enloe student, who had previously been banned from the school's grounds for marijuana possession.

Officer Brandenburg believed Jones was driving the vehicle. He pulled in behind the vehicle and activated the blue lights on his marked patrol car. Officer Brandenburg approached the car and intended to

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ask Jones why he was illegally present on school property after being banned. When he reached the driver's side, Officer Brandenburg saw Defendant was the driver and was alone in the car. Officer Brandenburg did not recognize Defendant. Defendant, who was twenty years old, told Officer Brandenburg that he did not possess a driver's license, but presented an identification card.

At trial, Jones testified he had allowed Defendant to borrow his car the night before so that Defendant could "go out." Jones had allowed Defendant to borrow his car on four or five prior occasions.

While speaking with Defendant, Officer Brandenburg noticed a strong odor of marijuana emanating from inside the vehicle. The odor of marijuana prompted Officer Brandenburg to detain Defendant and search both him and the car.

Officer Brandenburg recovered \$1,504.00 in cash and a small "dime bag" of marijuana from inside Defendant's pockets. The officer explained a "dime bag" is normally a gram of marijuana. The "dime bag" of marijuana was packaged in a cut corner of a plastic bag, which, according to Officer Brandenburg, is how a "dime bag" is normally sold. A small amount of marijuana is placed into each corner of a "baggie," and the corners are tied off and cut.

Officer Brandenburg also found two larger bags of marijuana in the center console of the Impala. Subsequent analysis of the three bags of marijuana determined that the weight of the "dime bag" was 0.69 grams, and the weight of the two larger bags was 4.62 grams and 5.57 grams.

Officer Brandenburg recovered no empty baggies or scales from inside the car or from Defendant. Jones' driver's license was also found in the center console. Officer Brandenburg also recovered a loaded .40-caliber Glock handgun in the glove compartment, which was later determined to have been stolen. Jones testified at Defendant's trial and denied he owned the drugs or the stolen and loaded handgun found inside his car.

Defendant was indicted and tried upon charges of felonious possession with intent to sell or deliver marijuana and felonious possession of a weapon on educational property. Prior to trial, Defendant conceded he possessed the two bags of marijuana recovered from the center console of the vehicle. When questioned by the trial court during a *Harbison* hearing, Defendant stated he understood and agreed with defense counsel's decision to concede this fact before the jury. See *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed.

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2d 672 (1986). In his initial brief before this Court, Defendant argued insufficient evidence was presented that he constructively possessed the marijuana recovered from the center console. Defendant subsequently filed a reply brief and expressly withdrew this argument due to the stipulation he had entered at the *Harbison* hearing.

The jury returned a verdict of not guilty on the charge of possession of a weapon on educational property, but found Defendant guilty of possession with intent to sell or deliver marijuana. The trial court sentenced Defendant to a suspended term of six to seventeen months' imprisonment and placed him on supervised probation for twenty-four months. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Possession with Intent to Sell or Deliver Marijuana

Defendant argues the trial court erred by denying his motion to dismiss. Defendant asserts the State failed to present sufficient evidence of his intent to sell or deliver marijuana and the evidence shows the marijuana in Defendant's possession was for personal use. 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). "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 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "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) (emphasis supplied).

B. Evidence of Defendant's Intent to Sell or Deliver

"The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance

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must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance.” *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citing N.C. Gen. Stat. § 90-95(a)(1)).

While intent [to sell or deliver] may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred. [T]he intent to sell or [deliver] may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant’s activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia. Although quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver, it must be a substantial amount.

State v. Wilkins, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809-10 (2010) (citations and internal quotation marks omitted).

On numerous occasions, this Court has applied these four and other related factors to determine whether the evidence was sufficient to permit the jury to infer the defendant possessed a controlled substance with the intent to sell or deliver and overcome the defendant’s motion to dismiss.

1. Quantity of Illegal Drugs

[1] In some cases, the amount of the controlled substance recovered, standing alone, is sufficient to allow the jury to find the defendant possessed the requisite intent to sell or deliver. *See, e.g., State v. Morgan*, 329 N.C. 654, 660, 406 S.E.2d 833, 836 (1991) (one ounce or 28.3 grams of cocaine “was sufficient evidence to support the inference that defendant intended to deliver or sell the cocaine”); *cf. State v. Wiggins*, 33 N.C. App. 291, 294-95, 235 S.E.2d 265, 268 (evidence insufficient to support an inference the defendant intended to sell or deliver where 215.5 grams of marijuana was seized without evidence of any packaging paraphernalia related to rolling or weighing), *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977).

Here, a total of 10.88 grams of marijuana was recovered from Defendant’s person and inside the vehicle’s console. The two baggies inside the console contained a total of 10.19 grams, while the “dime bag” recovered from inside Defendant’s pocket contained .69 grams of marijuana. The amount of marijuana found on Defendant’s person and inside the vehicle’s console might not be sufficient, standing alone, to support an inference that Defendant intended to sell or deliver marijuana. *See*

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Wilkins, 208 N.C. App. at 731-32, 703 S.E.2d at 810 (Because the quantity of marijuana “alone is insufficient to prove that defendant had the intent to sell or deliver[,] . . . we must examine the other evidence presented in the light most favorable to the State.”). Defendant’s admitted possession, together with other surrounding circumstances and evidence recovered, were sufficient to overcome Defendant’s motion to dismiss and permit the jury to infer Defendant had the intent to sell or deliver marijuana.

2. Packaging of Illegal Drugs

[2] The 10.88 grams of marijuana was packaged in three plastic bags. The two bags recovered from the center console contained a similar amount of marijuana (4.62 and 5.57 grams), and were considerably larger than the “dime bag” found upon Defendant’s person. Officer Brandenburg testified one gram of marijuana, or a “dime bag,” has a street value of twenty to twenty-five dollars.

The dissenting opinion cites the testimony of Officer Brandenburg, and discusses the “quality” of marijuana contained in the two bags found in the center console. Officer Brandenburg testified:

They were in larger bags, and if memory serves me right, they were more of what I would consider remnant marijuana, from where – if you were to bag up the dime bags, this would be the remnant stuff that didn’t have as many buds and stuff in it as the regular marijuana, or the sellable marijuana.

Officer Brandenburg also testified the marijuana in the two larger bags “would typically need to be divided up into smaller bags to be sold.”

The dissenting opinion concludes the clear implication of Officer Brandenburg’s testimony was that the “remnant marijuana” he found in the console was “not of a quality typically offered for sale.” The equal or stronger implication of Officer Brandenburg’s testimony is that Defendant possessed marijuana for sale. Marijuana that is not “sellable” is unlikely to be “useable.” It seems that an individual who purchases marijuana from a dealer solely for personal use would have no reason to possess the remnant or “unsellable” marijuana. The presence of two larger bags of marijuana containing “remnant” marijuana suggests the bags had been obtained in bulk and partially picked through for packaging “regular” or “sellable” marijuana. Defendant also possessed a dime bag of marijuana, which is how Officer Brandenburg testified that marijuana is packaged to sell. The packaging and possession of both the “sellable” and “unsellable” marijuana is evidence which raises an

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inference and from which the jury could determine Defendant had the intent to sell marijuana.

3. Large Quantity of Unsourced Cash

[3] While the amount and packaging of the marijuana arguably might raise an issue whether Defendant possessed for personal use or the intent to sell or deliver, these factors are for the jury to decide and are not solely determinative of whether the charge was properly submitted to the jury. The uncontroverted evidence also shows Defendant, twenty years old, was carrying a large amount of cash (\$1,504.00) on his person and was on the grounds of a high school while possessing illegal drugs. The cash found upon Defendant was also presented as evidence for the jury to view, and the prosecutor stated during his closing argument that the denominations of the cash consisted of ten, twenty, and one-hundred dollar bills.

The presence of cash is another factor that case precedents require us to consider to determine whether possession of illegal drugs with the intent to sell or deliver may be inferred. *Id.* at 731, 703 S.E.2d at 809-10; *see also State v. Alston*, 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988) (holding the large amount of cash on the defendant's person supported an inference that the defendant had the intent to sell or deliver the 4.27 grams of cocaine packaged in twenty separate envelopes).

4. Stolen and Loaded Handgun

[4] A stolen and loaded handgun was also recovered from inside the glove compartment of the vehicle. Jones denied any connection to the handgun. While the presence or possession of a firearm is not specifically listed as a *Wilkins* factor to determine intent to sell or deliver a controlled substance, *see Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 809-10, this Court has specifically recognized: "As a practical matter, firearms are frequently involved for protection in the illegal drug trade." *State v. Smith*, 99 N.C. App. 67, 72, 392 S.E.2d 642, 645 (1990), *cert. denied*, 328 N.C. 96, 402 S.E.2d 824 (1991).

The dissenting opinion does not recognize the presence of the stolen and loaded firearm in the glove compartment of the vehicle Defendant was driving as relevant to our consideration of whether Defendant's intent can be inferred, and views the packaging of the marijuana and cash recovered from Defendant as the only pertinent factors. Neither the Supreme Court of North Carolina nor this Court has ever recognized the factors set forth in *Wilkins* as exclusive.

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This Court has specifically determined “the presence of a gun was relevant to the possession [of cocaine with intent to manufacture, sell, or deliver] and trafficking charges.” *State v. Boyd*, 177 N.C. App. 165, 171, 628 S.E.2d 796, 802 (2006); *see also State v. Willis*, 125 N.C. App. 537, 543, 481 S.E.2d 407, 411 (1997) (recognizing the “common-sense association of drugs and guns”).

On numerous occasions our federal courts have also recognized the nexus between the presence or use of a firearm and the intent to sell or deliver controlled substances. *See, e.g., United States v. White*, 969 F.2d 681, 684 (8th Cir. 1992) (“Because a gun is ‘generally considered a tool of the trade for drug dealers, [it] is also evidence of intent to distribute.’” (quoting *United States v. Schubel*, 912 F.2d 952, 956 (8th Cir. 1990))); *United States v. Rush*, 890 F.2d 45, 49-52 (7th Cir. 1989) (A loaded firearm found in a car defendant was approaching when arrested was relevant to show possession of heroin with intent to distribute, because the weapon was a “tool of the trade,” and was an “essential part of the crime of possession with intent to distribute.”); *United States v. Dunn*, 846 F.2d 761, 764 (D.C. Cir. 1988) (A loaded firearm found on the couch near the defendant was a “tool of the narcotic trade,” and supported inference of intent to distribute where defendant constructively possessed drugs recovered from inside the house.).

The presence of a stolen and loaded handgun, a “tool of the trade for drug dealers,” inside the vehicle and readily accessible to Defendant, is certainly relevant to and is another factor the court should consider in determining whether Defendant had the intent to sell or deliver an illegal substance. *White*, 969 F.2d at 684; *Boyd*, 177 N.C. App. at 171, 628 S.E.2d at 802. The registered owner of the vehicle testified neither the drugs nor the stolen and loaded firearm belonged to him.

Despite our precedents, the dissenting opinion does not consider the additional presence of the stolen and loaded firearm as an intent factor and cites this Court’s decision in *Wilkins* to vote to reverse the jury’s verdict. In *Wilkins*, the defendant possessed 1.89 grams of marijuana, contained within three separate “tied off” bags. *Wilkins*, 208 N.C. App. at 730, 703 S.E.2d at 809. The defendant also carried \$1,264.00 in cash. *Id.* The defendant testified that he had purchased the marijuana for personal use. *Id.* He further testified that approximately \$1,000.00 of the cash recovered was money his mother had given him for a cash bond because he was “on the run,” and the remaining \$264.00 was from a check he had cashed. *Id.*

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This Court considered the amount and packaging of the marijuana and the presence of explained cash on the defendant's person, and determined the evidence was insufficient to permit the jury to determine whether the defendant intended to sell or deliver the marijuana. *Id.* at 732-33, 703 S.E.2d at 810.

Wilkins is distinguishable from the facts and circumstances before us. In *Wilkins*, the defendant possessed only a small fraction of the amount of marijuana that Defendant possessed here, and the value of the marijuana was only thirty dollars. *Id.* at 732, 703 S.E.2d at 810. Here, no legitimate source is in the record for the \$1,504.00 multi-denominations of cash recovered from Defendant's person and introduced before the jury.

The dissenting opinion also cites *State v. Nettles*, 170 N.C. App. 100, 612 S.E.2d 172, *disc. review denied*, 359 N.C. 640, 617 S.E.2d 286 (2005). In that case, officers found 1.2 grams of crack cocaine, consisting of four or five rocks, rolled in a napkin under the floor mat of a vehicle parked in the defendant's yard. *Id.* at 104, 612 S.E.2d at 175. The defendant was inside the house with \$411.00 in cash on his person. *Id.* This Court determined the evidence was insufficient to show intent to sell or deliver the cocaine. *Id.* at 108, 612 S.E.2d at 177.

This Court explained that the defendant was not carrying a large amount of cash; the defendant stated the source of the cash was part of the money he had received from cashing his social security check; the officers could not state whether the money was in the defendant's pocket or wallet; and, the officers did not discover any other money on the premises. *Id.* at 107, 612 S.E.2d at 176-77. Here, Defendant was carrying a significantly larger amount of cash, consisting of ten, twenty, and hundred-dollar bills, with the marijuana and a stolen and loaded handgun.

The following cumulative factors were present in this case, which distinguish it from *Wilkins* and *Nettles*: (1) possessing illegal drugs on high school grounds where Defendant was not a student; (2) possessing "unsellable" remnant marijuana in two larger bags near a "dime bag" of "sellable" marijuana; (3) driving a vehicle owned by Jones, who had been banned from the school for possession of drugs; (4) driving the vehicle without a driver's license; (5) illegally parking the vehicle in a fire lane near the school's entrance at 10:00 a.m.; and, (6) with the presence of a stolen and loaded handgun inside the vehicle.

The presence of the stolen and loaded firearm in this case is relevant to ruling on Defendant's motion to dismiss, even though the jury returned a verdict of not guilty of possessing a weapon on educational

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property. We review the totality of the evidence on Defendant's motion to dismiss in the light most favorable to the State to determine its sufficiency to submit the charge to the jury. *Rose*, 339 N.C. at 192, 451 S.E.2d at 223. The jury's ultimate determination on the separate crime is not relevant to whether the trial court properly denied Defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana and submitted the charge to the jury.

"In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury[.]" *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

This quantity of illegal drugs and its packaging, together with Defendant's access to Jones' vehicle since the previous evening; his illegal presence on high school grounds; the large amount of unsourced cash on Defendant's person; and the stolen and loaded handgun is sufficient to support a reasonable inference that Defendant intended to sell or deliver the marijuana he admittedly possessed, when reviewed in the light most favorable to the State. Jones, the owner of the vehicle, denied ownership of either the marijuana or the handgun. Defendant's argument is overruled. The trial court's ruling on Defendant's motion to dismiss is affirmed.

IV. Conclusion

The cumulative evidence, properly viewed in the light most favorable to the State, is sufficient for the trial court to submit and permit the jury to consider the intent element of possession with intent to sell or deliver marijuana. The trial court did not err and correctly denied Defendant's motion to dismiss.

We find no error in the denial of Defendant's motion to dismiss, the jury's conviction, or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judge DILLON concurs.

Chief Judge McGEE dissents with separate opinion.

McGEE, Chief Judge, dissenting.

Because I believe "[t]he evidence in this case, viewed in the light most favorable to the State, indicates that [D]efendant was a drug user,

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not a drug seller[,]” *State v. Wilkins*, 208 N.C. App. 729, 733, 703 S.E.2d 807, 811 (2010), I respectfully dissent.

I do not believe the evidence constituted substantial evidence of the intent to sell element of possession with intent to sell or deliver (“PWISD”). Specifically, (1) the amount of marijuana recovered was *de minimis*, and suggestive of possession for personal use rather than intent to sell; (2) the undisputed testimony was that the vast majority of the marijuana was not of typically “sellable” quality; (3) the packaging was likewise more consistent with personal use; (4) Defendant did not have scales, baggies, or other paraphernalia to prepare the marijuana for sale; (5) there was no testimony indicating that Defendant’s actions were suggestive of an intent to sell marijuana; (6) the cash recovered, though some evidence of an intent to sell, was not of such quantity to overcome the lack of additional supporting evidence, and there was no testimony explaining the relevance of the cash to any intent to sell; (7) the gun recovered from the glove compartment was introduced as evidence in support of the possession of a firearm on educational property charge, not in support of PWISD, and there was no testimony linking the gun to any intent to sell; (8) even considering the gun, the totality of the evidence is more suggestive of possession for personal use than for sale; and (9) the additional factors relied upon by the majority opinion have minimal to no relevance to the contested issue.

I. *Facts*

In addition to the facts included in the majority opinion, I also note the following. Officer Brandenburg testified that he saw Jones’ Impala “pull[] into the main entrance, what we call the car loop, the car pool loop, of the school, which goes right to the front entrance of the school.” The Impala parked in the “fire lane” of the car pool loop, which Officer Brandenburg testified was “very common.” Officer Brandenburg determined that Defendant, and not car owner Jones, was the sole occupant. Officer Brandenburg did not know Defendant prior to this interaction and he testified Defendant said he was there to pick up a friend, a student at Enloe. Officer Brandenburg knew the student, and saw him looking out of the school at Defendant while Defendant was detained.

Though Defendant did indicate during the *Harbison* hearing that he was going to admit to possession of all the marijuana, Defendant did *not* admit at trial or in closing that he was guilty of possessing the 10.19 grams recovered from the center console of Jones’ vehicle. Defendant’s attorney, apparently having changed his trial strategy, argued in his opening statement that Defendant was “guilty of one thing and that’s for having

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a dime bag of marijuana in his pocket.” In closing, Defendant’s attorney argued that “[Defendant] just has his own one bag for personal use. And that’s what is called possession of marijuana. So we would ask you to find him guilty of possession of marijuana.” Defendant moved to dismiss the charges against him at the close of the State’s evidence and all the evidence, specifically focusing on the absence of sales-related paraphernalia, such as “baggies” and “scales.” For the purposes of Defendant’s motion to dismiss, I assume Defendant possessed the entire 10.88 grams of marijuana recovered from both his person and the Impala. The trial court denied Defendant’s motions.

II. *Analysis*

We must determine whether there was substantial evidence that Defendant had the intent to sell marijuana. As noted by the majority opinion, intent to sell can be inferred from “(1) the packaging, labeling, and storage of the controlled substance, (2) the defendant’s activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia.” *Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 809–10 (citation omitted). These factors (“*Wilkins* factors”) seem to have first appeared in their current form in *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005), an opinion that examined earlier case law. In prior opinions, the presence of firearms was not considered in the intent to sell analyses, even when firearms were recovered. *See State v. Smith*, 99 N.C. App. 67, 73–74, 392 S.E.2d 642, 646 (1990); *State v. King*, 42 N.C. App. 210, 212–13, 256 S.E.2d 247, 248–49 (1979).

Traditionally, the three *Wilkins* factors that appear to have been most influential have been the amount of the substance, its packaging, and the presence of paraphernalia used in portioning and packaging the substance for sale. *See King*, 42 N.C. App. at 212–13, 256 S.E.2d at 248–49; *State v. Sanders*, 171 N.C. App. 46, 48, 50 and 56–57, 613 S.E.2d 708, 710, 711 and 715, *aff’d per curiam*, 360 N.C. 170, 622 S.E.2d 492 (2005) (suspiciously packaged diazepam, marijuana residue in multiple locations, “plastic baggies with corners ripped off,” scales, evidence defendant was not personally using diazepam, and other evidence recovered not sufficient to prove intent when there was no officer testimony stating certain evidence was “indicative of an intent to sell rather than personal use”); *State v. Roseboro*, 55 N.C. App. 205, 210, 284 S.E.2d 725, 728 (1981) (“while the quantity of cocaine was small, there was evidence of the presence of drug paraphernalia (two sets of scales, one beside a pouch of cocaine, and an abundance of Ziploc bags) sufficient for the charge of possession with intent to sell to go to the jury”).

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The evidence in a number of these cases was stronger than in the present case, and I note that in *Sanders*, our Supreme Court affirmed the majority opinion's analysis *per curiam*, including the importance of testimony demonstrating evidence presented at trial is more suggestive of an intent to sell than personal use. In the present case, there was no such testimony, and the State and the majority opinion primarily rely on factors not contained in *Wilkins* or other binding precedent. I do not contend the *Wilkins* factors are exclusive, but I do believe they have been established as more relevant to our analysis than other potential evidence.

A. Quantity

In order for the amount of a controlled substance to be considered a relevant factor in determining an intent to sell, "it must be a substantial amount." *Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 810 (quotation marks and citation omitted). The closer the amount of a controlled substance approaches the amount required for a trafficking conviction, the more relevant is the amount in suggesting an intent to sell. *State v. Morgan*, 329 N.C. 654, 659-60, 406 S.E.2d 833, 836 (1991) (citations omitted).¹ N.C. Gen. Stat. § 90-95(h)(1) sets out the smallest quantity of marijuana required for a charge of "trafficking in marijuana[,] which amount is in excess of ten pounds. Defendant in this case was found to have been in possession of 10.88 grams of marijuana — approximately 0.38 ounces or 0.024 pounds. Ten pounds equals approximately 4,536 grams, or about 417 times the 10.88 grams recovered from Defendant's person and Jones' Impala. Defendant possessed 0.0024% of the requisite amount of marijuana for trafficking. This Court has deemed an amount of cocaine that was relatively much *greater* than the amount of marijuana recovered in the present case as a "*de minimis*" amount:

defendant possessed four to five crack cocaine rocks which weighed 1.2 grams, or .04% of the requisite amount for trafficking. Therefore, under our Supreme Court's holding in *Morgan*, it cannot be inferred that defendant had an intent to sell or distribute from such a *de minimis* amount

1. The majority opinion cites *Morgan* for the statement that "one ounce or 28.3 grams of cocaine 'was sufficient to support the inference that defendant intended to deliver or sell the cocaine[.]'" I note that according to *Morgan*: "The General Assembly has determined that twenty-eight grams of cocaine evinces an intent to distribute that drug on a large scale. N.C.G.S. § 90-95(h)(3) (1990). As in *Williams*, we are satisfied that the full ounce defendant had conspired with Mr. Queen to possess 'was a substantial amount and was more than an individual would possess for his personal consumption.'" *Morgan*, 329 N.C. at 660, 406 S.E.2d at 836 (citations omitted). For trafficking purposes, one ounce of cocaine is equivalent to ten pounds of marijuana. See N.C. Gen. Stat. § 90-95(h)(1) (2015).

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alone. The State was required to present either direct or circumstantial evidence of an intent to sell.

Nettles, 170 N.C. App. at 106, 612 S.E.2d at 176 (citation omitted). In the present case, Defendant possessed 0.0024% of the requisite amount of marijuana for trafficking. For purposes of the trafficking statutes, as compared to the amount of cocaine recovered in *Nettles*, the amount of marijuana recovered in the present case is over sixteen times less than the amount of cocaine recovered in *Nettles* – 10.88 grams of marijuana must be considered *de minimis*. *Id.*; see also *State v. Wiggins*, 33 N.C. App. 291, 294–95, 235 S.E.2d 265, 268 (1977) (citations omitted) (215.5 grams of marijuana, “without some additional evidence, is not sufficient to raise an inference that the marijuana was for the purpose of distribution”). 10.88 grams of marijuana was clearly insufficient “to raise an inference that the marijuana was for the purpose of distribution.” *Id.*

The majority opinion attempts to compare the amount of marijuana recovered in the present case to that recovered in certain other cases, such as *Wilkins*. The relevant issue is not whether the amount of marijuana recovered *in the present case* was more or less than the amount of marijuana recovered in some other case wherein insufficient evidence of intent to sell was found; the issue is whether the amount recovered in the present case was substantial enough to provide some evidence of intent to sell. Since the amounts found in *Wilkins*, *Nettles*, and the present case are all *de minimis*, the amounts recovered do not support a finding of an intent to sell. I find no relevant difference between the 1.89 grams of marijuana involved in *Wilkins*, 208 N.C. App. at 730, 703 S.E.2d at 809, and the 10.88 grams recovered in the present case, as both are *de minimis*, and substantially less than has been determined by this court to be consistent with personal use. See *Wiggins*, 33 N.C. App. at 294–95, 235 S.E.2d at 268.

In its attempt to distinguish this case from *Wilkins*, the majority opinion notes that the value of the marijuana in *Wilkins* was approximately \$30.00.² However, the value of the marijuana is directly tied to the amount of the marijuana. The evidence in this case shows only that Defendant possessed a small amount of marijuana, consistent with personal use. See *Nettles*, 170 N.C. App. at 107–08, 612 S.E.2d at 177; *State v. Turner*, 168 N.C. App. 152, 158-59, 607 S.E.2d 19, 24 (officer testified ten rocks of crack cocaine, weighing 4.8 grams, with value of \$150.00 to

² The true value of all the marijuana recovered in the present case was not established at trial.

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\$200.00, was more than personal consumption amount; this Court held that testimony was insufficient to support intent to sell).

B. Packaging

The majority opinion focuses almost exclusively on this dissent's discussion of the "quality" of the marijuana as testified to by Officer Brandenburg in its "packaging" analysis. However, this dissenting analysis is primarily focused elsewhere, and I would reach the same conclusion even assuming *arguendo* that all the marijuana was of "sellable" quality. This Court has analyzed the packaging prong of PWISD as follows:

"The method of packaging a controlled substance, as well as the amount of the substance, may constitute evidence from which a jury can infer an intent to distribute." *State v. Williams*, 71 N.C. App. 136, 139, 321 S.E.2d 561, 564 (1984) (holding that the trial court did not err in denying defendant's motion to dismiss where "[t]he evidence at trial showed that the [27.6 grams of] marijuana . . . was packaged in seventeen separate, small brown envelopes known in street terminology as 'nickel or dime bags'"); see also *In re I.R.T.*, 184 N.C. App. 579, 589, 647 S.E.2d 129, 137 (2007) ("*Cases in which packaging has been a factor have tended to involve drugs divided into smaller quantities and packaged separately.*"); *State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31, 35 (2004) (finding an intent to sell or deliver where defendant possessed 5.5 grams of cocaine separated into 22 *individually wrapped pieces*); *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005). The State has not pointed to a case, nor have we found one, where the division of such a small amount of a controlled substance constituted sufficient evidence to survive a motion to dismiss. Moreover, the [small amount of marijuana] *was divided into only three separate bags*. While small bags may typically be used to package marijuana, it is just as likely that defendant was a consumer who purchased the drugs in that particular packaging from a dealer. Consequently, we hold that the separation of [the small amount] of marijuana into three small packages, worth a total of approximately \$30.00, does not raise an inference that defendant intended to sell or deliver the marijuana.

Wilkins, 208 N.C. App. at 732, 703 S.E.2d at 810 (citation omitted) (emphasis added); see also *Morgan*, 329 N.C. at 659, 406 S.E.2d at 835.

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The cases cited in *Wilkins* involved defendants found in possession of large numbers of pre-packaged smaller units of contraband ready for individual sale. In order for the number of pre-packaged units to support an inference of an intent to sell, it must be a number large enough to suggest the units were not purchased for personal use. For example, in an unpublished opinion, this Court held that 10.98 grams of marijuana, packaged in *thirteen* individual bags, was insufficient to prove intent to sell. *In re N.J.*, 230 N.C. App. 140, 752 S.E.2d 255 (2013) (unpublished) (there was insufficient evidence to determine if marijuana was possessed for personal use, or sale, where juvenile admitted that he possessed *thirteen individually wrapped bags of marijuana*, weighing a total of 10.98 grams).

In the present case, as in *Wilkins*, the marijuana was only divided into three bags, but one was a single “dime bag” found in Defendant’s pocket, while the other two were “relatively small” plastic bags found in the center console of the car. There were no additional empty bags or containers into which this marijuana could have been divided for sale, nor any scale with which to measure the marijuana for sale. Officer Brandenburg testified that he had arrested people pursuant to his duties as a school resource officer, and that typically it was the small “dime-sized” bags that were brought on school grounds for sale, and that “[n]ormally [the] dime-sized bag[s] [are found] inside of another bag or a capsule. Recently . . . medical capsules has been the new way to do it. But they’ll be the little dime bag inside bigger packages.” Officer Brandenburg also responded: “Yes, ma’am” when he was asked: “[W]hen you talk about the dime bags and how they – when they’re sold they will be inside some larger container, there would often be multiple packages of dime bags in that larger container[.]” The following colloquy occurred between Defendant’s attorney and Officer Brandenburg:

Q. Because a drug seller will take – will have larger bags of marijuana, put them in a smaller bag, reweigh them – weigh them on a scale to determine the correct amount of marijuana is being sold and then sell it to someone, correct?

A. That’s what I’ve heard, yes, ma’am.

Q. Okay. So in that sense, if you see plastic – a box of plastic baggies in the car and you see scales in the car, you assume it’s indicative of drug selling, correct?

A. Yes, ma’am.

Q. And you did not see a scale or a plastic – a box full of plastic baggies in this car, correct?

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A. I do not remember seeing that, no, ma'am.

....

Q. [T]hose two big bags would typically need to be divided up into smaller bags to be sold, correct?

A. Yes, ma'am.

Q. And to do that you would need multiple plastic baggies and scales, correct?

A. That would be correct.

In Officer Brandenburg's opinion, the marijuana recovered from the console was not "regular" or "sellable marijuana" and, even had it been "sellable," no scales were found in the car with which to divide the marijuana, nor was any separate packaging found in the car with which to re-package the marijuana for sale. *See Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 177 (evidence not substantial in part because there was no "drug paraphernalia typically used in the sale of drugs found on the premises"). In short, "[t]here was *no testimony* that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs." *Id.* at 107, 612 S.E.2d at 176 (emphasis added).

Assuming, *arguendo*, that the quality of the marijuana is an appropriate factor to consider in the packaging analysis, the majority opinion, adopting the State's argument on appeal, states: "The packaging and possession of both the 'sellable' and 'unsellable' marijuana is evidence which raises an inference and from which the jury could determine Defendant had the intent to sell marijuana." The majority opinion reaches this conclusion based upon its contentions that: "Marijuana that is not 'sellable' is unlikely to be 'useable[;]'" a person "would have no reason to possess the remnant or 'unsellable' marijuana[;]" and that the presence of the "larger bags of marijuana containing 'remnant' marijuana suggests the bags had been obtained in bulk and partially picked through for packaging 'regular' or 'sellable' marijuana." There was no testimony supporting this reasoning, and no such argument was made to the trial court or the jury. *Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711; *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176. Further, two bags of marijuana containing 4.62 and 5.57 grams of marijuana constitute a *de minimis* amount wholly consistent with personal use, not "bulk" purchases. Marijuana of all qualities can be used, and would be unlikely to be thrown out; however "remnants" would be difficult to sell. The absence of scales and additional baggies suggests that to the extent the larger bags had been

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“partially picked through,” it was to obtain the higher quality marijuana for personal use, and not for the purpose of repackaging and sale.

Even assuming, *arguendo*, the larger bags had been picked through at some earlier time to obtain the quality marijuana for sale, if the remaining marijuana in the larger bags was not “sellable” at the time Defendant was arrested, that would only constitute evidence that Defendant – or someone – had possessed that marijuana in the *past* with the intent to sell it, and did sell it. However, “unsellable” marijuana is, by definition, not indicative of a *present* intent to sell that particular *unsellable* marijuana. Though the State could have attempted to do so, Defendant was not indicted for having already sold the marijuana.

C. Cash

This Court had stated that “unexplained cash is only one factor that can help support the intent element.” *Wilkins*, 208 N.C. App. at 732, 703 S.E.2d at 810 (citation omitted). In both *Wilkins* and the present case, reasonably large amounts of cash were recovered – \$1,264.00 and \$1,504.00, respectively. “As with a large quantity of drugs, we determine that the presence of cash, alone, is insufficient to infer an intent to sell or distribute.” *I.R.T.*, 184 N.C. App. at 589, 647 S.E.2d at 137. In a case cited by the majority opinion “[t]he police . . . searched defendant’s person, and seized large rolls of currency totaling \$10,638.00” along with cocaine. *State v. Alston*, 91 N.C. App. 707, 708, 373 S.E.2d 306, 308 (1988). This Court justified holding that the evidence in *Alston* was sufficient to support a conclusion that the defendant had the intent to sell cocaine as follows:

State’s evidence showed that there was, at the most, 4.27 grams of cocaine³ contained in the envelopes found in the building. The cocaine was packaged, however, in twenty separate envelopes. Even where the amount of a controlled substance is small, the method of packaging is evidence from which the jury may infer an intent to sell. The cash [\$10,638.00] found on defendant’s person also supports such an inference.

3 Although this Court treated the amount of cocaine in *Alston* as “small,” 4.27 grams constituted approximately 15.00% of the amount required for the lowest grade of “trafficking” cocaine, as opposed to the amount of marijuana found in the present case, which was 0.0024% of the amount required for a trafficking charge. N.C.G.S. § 90-95(h)(3)(a.). For trafficking purposes, the amount of cocaine involved in *Alston* was 6,250 times greater than the amount of marijuana involved in this case.

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Alston, 91 N.C. App. at 711, 373 S.E.2d at 310 (citation omitted). Neither the amount of the drugs, the packaging, nor the cash recovered in the present case are similar to those factors in *Alston*. The majority opinion argues that because the amount of cash recovered in *Nettles* was less than that recovered in the present case, *Nettles* is distinguishable. However, this Court in *Wilkins* analogized the facts before it with those in *Nettles* as follows:

The present case is *similar to Nettles* where this Court held that possession of a small amount of crack cocaine along with \$411.00 and a safety pin, which is typically used to clean a crack pipe, was insufficient to support a charge of possession with intent to sell or deliver. This Court held that “[v]iewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller.” We believe the totality of the circumstances in this case compels the same conclusion. Defendant possessed a *very small amount of marijuana* that was *packaged in three small bags* and he had *\$1,264.00 in cash* on his person. The evidence in this case, viewed in the light most favorable to the State, indicates that defendant was a drug user, not a drug seller.

Wilkins, 208 N.C. App. at 733, 703 S.E.2d at 810–11 (citations omitted) (emphasis added). The implication in *Wilkins* is that if \$411.00 was not “a large amount of cash” for the purposes of determining an intent to sell, then neither was \$1,264.00. In line with *Wilkins*, I do not believe that the difference in the amounts of cash recovered in *Nettles* and the present case constitutes a strong distinguishing factor between the two cases.

The majority opinion further attempts to distinguish *Nettles* on the bases that in that case “the officers could not state whether the money was in the defendant’s pocket or wallet,” and no other money was discovered on the premises. I see no relevance attached to whether the cash in *Nettles* was recovered from the defendant’s wallet or pocket, and there is *no difference* concerning whether cash was recovered from any additional locations, since in neither *Nettles* nor the present case was any additional cash recovered. *See State v. Barnhart*, 220 N.C. App. 125, 127–28, 724 S.E.2d 177, 179 (2012) (citations omitted) (emphasis added) (“When reviewing a challenge to the denial of a defendant’s motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines ‘whether the State presented substantial evidence in support of each element of the charged offense.’ ‘Substantial evidence is

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relevant evidence that a reasonable person might accept as adequate, or would consider *necessary to support a particular conclusion.*' ”).

Further, the majority opinion attempts to distinguish *Wilkins* and *Nettles* from the present case by drawing a distinction between “explained” cash and “unexplained” cash. The majority opinion states that “no legitimate source is in the record for the \$1,504.00 multi-denominations of cash recovered from Defendant’s person and introduced before the jury[,]” whereas in *Wilkins* and *Nettles* the defendants gave innocent explanations for possessing relatively large amounts of cash. No such distinction between explained and unexplained cash is made in these opinions, and any such distinction is irrelevant when reviewing the trial court’s denial of a motion to dismiss based upon insufficient evidence. The majority opinion relies on language in the fact section of *Wilkins* to support its assertion that this Court factored “the presence of *explained* [‘legitimate source’] cash on the defendant’s person” in reaching its conclusion that the defendant’s motion to dismiss should have been granted. (Emphasis added). However, in the analysis portion of the opinion, this Court *did not address the defendant’s testimony concerning the provenance of the cash*, instead reasoning:

In addition to the packaging, we must also consider the fact that defendant was carrying \$1,264.00 in cash. “However, *unexplained cash* is only one factor that can help support the intent element.” Upon viewing the evidence of the packaging and the cash “cumulatively,” we hold that the evidence is insufficient to support the felony charge.

Id. at 732–33, 703 S.E.2d at 810 (citations omitted) (emphasis added).

Initially, contrary to the majority opinion’s characterization of the cash in *Wilkins* as “explained cash,” this Court in *Wilkins* clearly characterized the \$1,264.00 as “unexplained cash” in its PWISD analysis. *Id.* For the purposes of a motion to dismiss, any large amount of cash found on a defendant is unexplained, regardless of what the defendant says, unless there is uncontroverted evidence establishing the provenance of the cash. Appropriately, this Court in *Wilkins* did *not* consider the defendant’s explanation of how he had come by the \$1,264.00, and it treated this cash as “unexplained” because this Court was *required* to treat the \$1,264.00 as “unexplained cash.” Factoring the defendant’s self-serving testimony explaining why he was carrying a large amount of cash would be violative of our standard of review on a motion to dismiss, as *Wilkins* recognized. *Id.* at 732, 703 S.E.2d at 810 (“we must examine the other evidence presented in the light most favorable to the

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State”). The same standard of review applies to the fact, noted in the majority opinion, that the defendant in *Wilkins* “testified that he had purchased the marijuana for personal use.” The defendant’s testimony in this regard was irrelevant in *Wilkins*, and has no relevance in attempting to distinguish the facts of *Wilkins* from the facts of the present case.

Further, in *Wilkins* the \$1,264.00 was recovered in denominations of “60 \$20.00 bills, one \$10.00 bill, nine \$5.00 bills, and nine \$1.00 bills.” *Wilkins*, 208 N.C. App. at 730, 703 S.E.2d at 809. These are smaller denominations consistent with what a drug dealer might accumulate when selling packages of marijuana. In the present case, the majority opinion contends that the cash recovered from Defendant “consist[ed] of ten, twenty, and hundred-dollar bills[.]” However, contrary to the assertions of the State and the majority opinion, there is *no record evidence* of the denominations comprising the \$1,504.00 recovered from Defendant. There was no testimony about the denominations of the bills, nor what denominations commonly indicate drug sales. In its closing argument, the State contended the “\$1500 [was comprised of] twenties, hundreds, tens, small denominations, big denominations[.]” However, the State’s closing argument is not record evidence. *State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004) (citation omitted) (“ ‘it is axiomatic that the arguments of counsel are not evidence’ ”).

The majority opinion’s attempt to distinguish *Nettles* fails for the same reasons discussed above. I do not believe this Court considered the defendant’s explanation of where the cash came from in its analysis and, as stated above, it would have been inappropriate for it to have done so. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). I also note that Officer Brandenburg testified that he *never asked* Defendant where the \$1,504.00 came from. “[G]iven the fact that neither the amount of marijuana nor the packaging raises an inference that [D]efendant intended to sell the drugs, the presence of [\$1,504.00] as the only additional factor is insufficient to raise the inference.” *Wilkins*, 208 N.C. App. at 733, 703 S.E.2d at 810.

D. Non-*Wilkins* factors

The majority opinion relies heavily on evidence not related to the factors set forth in *Wilkins* and, while I do not dispute that non-*Wilkins* factors may be relevant to an intent to sell analysis, I do not believe they generally carry the same weight. The majority opinion states:

The following cumulative factors were present in this case, which distinguish it from *Wilkins* and *Nettles*:

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(1) possessing illegal drugs on high school grounds where Defendant was not a student; (2) possessing “unsellable” remnant marijuana in two larger bags near a “dime bag” of “sellable” marijuana; (3) driving a vehicle owned by Jones, who had been banned from the school for possession of drugs; (4) driving the vehicle without a driver’s license; (5) illegally parking the vehicle in a fire lane near the school’s entrance at 10:00 a.m.; and, (6) with the presence of a stolen and loaded handgun inside the vehicle.

I believe the factors in *Wilkins* have been primarily relied upon in intent to sell cases because they either relate directly to the controlled substance itself – packaging, labeling, storage, quantity; or constitute evidence that is inextricably associated with sale or delivery of the controlled substance – the actions of the defendant (such as suspicious hand-to-hand transactions), *see, e.g., State v. Stokley*, 184 N.C. App. 336, 337, 646 S.E.2d 640, 642 (2007); suspiciously large amounts of cash (which is often found on people who have been selling significant amounts of illegal drugs), *see, e.g., Alston*, 91 N.C. App. at 708, 711, 373 S.E.2d at 308, 310; and, most importantly, drug paraphernalia used for preparing the drugs for sale (such as scales for weighing and multiple bags or other containers for individual packaging), *see, e.g., State v. Williams*, __ N.C. App. __, __, 774 S.E.2d 880, 889 (2015).

I presume the majority opinion’s additional factors are not included among the *Wilkins* factors because this Court has determined that, generally, the probative value of non-*Wilkins* factors in determining intent to sell or deliver is less than that of the chosen factors. Concerning the additional “factor” relied upon by the majority opinion that *Jones* had been banned from Enloe for drug possession, as supporting evidence of *Defendant’s* criminal intent, is improper. Endorsing this approach would essentially allow the State to present prior bad act evidence of a *third party* as proof that *the defendant acted in conformity with the third party’s prior bad act*. See N.C. Gen. Stat. § 1A-1, Rule 402(b) (2015). The fact that a defendant is not in possession of a valid driver’s license is not relevant in determining the defendant’s intent to sell marijuana. Concerning the fact that Defendant had stopped the car in a fire lane, absent evidence that this behavior had been observed in relationship to prior drug transactions at Enloe, or similar evidence, it is also irrelevant. The fire lane was directly in front of the school, and part of the “car pool lane” where students were regularly picked up. Officer Brandenburg testified that people regularly parked in that fire lane and, when they did so, he would ask them to move if they were still in their vehicles, as

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Defendant was. The State did not rely on any of these alleged “factors” in its prosecution of Defendant for PWISD. There was no testimony that any of this evidence was indicative of, or related to, any intent to sell, nor were any of these “factors” argued to the jury as such. *Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711; *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176.

Concerning Defendant’s presence on school property, the testimony of both Officer Brandenburg and Jones supports Defendant’s statement to Officer Brandenburg that he was in the car pool lane because he was going to pick up his friend Wilson, a student at Enloe. Officer Brandenburg, who personally knew Wilson, testified that when he was outside with Defendant: “I could see [Wilson] through the main door windows of the school looking out at us.” Jones testified that after Defendant was arrested, Defendant told him he went to Enloe to pick up Wilson. There was no evidence that Defendant’s behavior was inconsistent with that of other visitors to the school, and Officer Brandenburg testified to no suspicious activity on the part of Defendant from which he could infer an intent to sell marijuana. *See Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176 (“Defendant’s actions were not similar to the actions of a drug dealer.”). Defendant did not interact with *anyone* before he was approached by Officer Brandenburg, and the fact that Defendant was not a student at Enloe does not show an intent to sell.

Again, the State neither solicited evidence, nor argued to the jury, that *any* of the above non-*Wilkins* factors supported an inference that Defendant had the intent to sell. *Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711; *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176. Further, the State did not attach any significance to the above evidence in its argument on appeal concerning intent to sell.

Concerning the handgun recovered from the glove compartment of Jones’ car, I do not contend that recovery of a weapon can never be relevant to PWISD, I simply do not believe its relevance in the present case, combined with the other relevant evidence, was sufficient to survive Defendant’s motion to dismiss. The State neither presented testimony suggesting that the presence of the gun in the glove compartment of Jones’ Impala was indicative of an intent to sell on Defendant’s part, nor made any such argument to the jury. If the jury considered the gun in its intent to sell deliberation, it would have had to have done so on its own initiative, which could have been improper. *See State v. Mitchell*, 336 N.C. 22, 29-30, 442 S.E.2d 24, 28 (1994); *Smith*, 99 N.C. App. at 71-72, 392 S.E.2d at 645. Because the State did not present testimony in support of

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this argument, nor make this argument to the jury, I presume the jury acted appropriately.⁴

The majority opinion, in arguing for greater relevance of the handgun in our analysis, relies in part on a statement in *Smith*: “As a practical matter, firearms are frequently involved for protection in the illegal drug trade.” *Smith*, 99 N.C. App. at 72, 392 S.E.2d at 645. It is important to place this quote in context. In *Smith*, upon searching the two defendants’ residence, officers found, *inter alia*, four “nickel” bags of marijuana; rolling papers; “a bag of marijuana in a photograph holder;” \$355.00; 0.22 grams of cocaine in a “bottle labeled ‘manitol[;]’ ” a box of plastic baggies; “seventeen individual baggies” with 2.1 grams of cocaine divided between them, all located in a larger bag; three pistols; and “some scales.” *Smith*, 99 N.C. App. at 70, 392 S.E.2d at 644.

One of the defendants in *Smith* was “charged with felonious possession of a firearm by a convicted felon.” *Id.* at 69, 392 S.E.2d at 643. Both the defendants were charged with PWISD. *Id.* “The trial court granted defendant Smith’s motion to sever the firearm possession charge” from the PWISD charges. *Id.* Therefore, the three pistols recovered from the residence *were not introduced as evidence of intent to sell* in the PWISD portion of the trial. However, at the PWISD portion of the trial an officer testified that three guns were found in the residence. The defendants in *Smith* first argued that admission of this testimony “was irrelevant and unduly prejudicial” during the PWISD portion of the trial. *Id.* at 71, 392 S.E.2d at 644. In deciding the defendants’ first argument, this Court first held the defendants’ argument was not properly preserved, then further reasoned:

We think that the testimony concerning the guns was relevant to “illustrate the circumstances surrounding [defendant Crawford’s] arrest.” *We also cannot say that it is totally irrelevant to . . . the charges of possession with intent to sell or deliver cocaine or marijuana. As a practical matter, firearms are frequently involved for protection in the illegal drug trade.*

4. In light of Defendant’s acquittal for possessing a firearm on educational property, we now know that the jury did not improperly consider the gun in its intent to sell analysis. I do not contend that the not guilty verdict on the charge of possession of a firearm was relevant to Defendant’s motion to dismiss the PWISD charge. The jury’s ultimate determination that the State had not proved Defendant possessed the gun in the glove compartment cannot serve to retroactively support Defendant’s motion to dismiss.

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We recognize the highly inflammatory nature of raising the issue of firearms before the jury, and that the probative value of the testimony concerning the guns may have been outweighed by the possibility of undue prejudice. In this case, however, if there was error in admitting the testimony, it was harmless to the defendants since the evidence against them was ample.

Smith, 99 N.C. App. at 71–72, 392 S.E.2d at 645 (citations omitted) (emphasis added).

This analysis was *solely* limited to whether the defendants were *prejudiced* by the admission of the gun evidence during the PWISD portion of the trial, and had *no connection* to the defendants' second argument, which concerned *the sufficiency of the evidence* to support PWISD. Further, this Court in *Smith* recognized that evidence of the presence of firearms in a trial for PWISD could be "highly inflammatory" and "that the probative value of the testimony concerning the guns may have been outweighed by the possibility of undue prejudice." *Id.* at 72, 392 S.E.2d at 645. The portion of the analysis cited by the majority opinion is also *dicta*. In the part of its opinion where this Court addressed the defendants' argument that the State has failed to present sufficient evidence of intent to sell, the recovery of the firearms was *not* considered, *nor even mentioned*. *Id.* at 73, 392 S.E.2d at 646.⁵

In the present case, Defendant's charge of possession of a firearm on educational property was not severed from his charge of PWISD, so the jury was not prevented from hearing evidence of the gun recovered from the glove compartment of Jones' Impala prior to deliberating the PWISD charge. However, the questions, testimony, and arguments made at trial indicate the evidence of the firearm was presented solely in support of the charge of possession of a firearm on educational property, and not in support of PWISD. *See Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711 (emphasis added) ("In particular, the dissent points out that the thirty diazepam pills were found inside a cellophane cigarette package inside a plastic bag. However, *no officer testified that the packaging of the*

5. I note that this Court has, in the past, improperly stated that *Smith* includes a firearm related holding relevant to PWISD. *See State v. Boyd*, 177 N.C. App. 165, 171, 628 S.E.2d 796, 802 (2006) ("See *State v. Smith*, . . . (holding that trial court could properly determine that evidence of a gun was relevant to the charge of possession with intent to sell or deliver cocaine because "[a]s a practical matter, firearms are frequently involved for protection in the illegal drug trade)"). There is no such holding in *Smith*, however the majority opinion relies on this language from *Boyd* in support of its argument.

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pills was indicative of an intent to sell rather than personal use.”). There is no evidence that the trial court considered the gun at all when it denied Defendant’s motion to dismiss the PWISD charge. It appears, as in *Smith*, that the State presented the gun evidence solely in support of the possession of a firearm charge. Because this argument *was not made at trial*, Defendant had no opportunity to object to it and argue that the jury should be prohibited from considering the evidence of the gun in its intent to sell deliberations, pursuant to N.C. Gen. Stat. § 1A-1, Rule 403, or for any other reason.

The State’s arguments in closing made in support of the intent prong of PWISD indicate that the gun had *not* been introduced as evidence of Defendant’s intent to sell:

In this case you can look at the denominations of currency in [D]efendant’s pocket,⁶ the evidence that you’ve heard testimony of with relation to the street value of these drugs Those are things that you can all – you can add together and say that those are circumstantial pieces of evidence that showed his intent to sell and deliver the marijuana.

The fact that he is out of school, the fact that he is out of school at 10:00 in the morning on a Friday as a 20-year-old man who is not enrolled there, not a student there and says he’s there to pick up someone else who they tried to locate and can’t.⁷ What can you infer from that? Was he really there to pick somebody up, or was he there to do something else?

. . . .

In this case you’re looking at the circumstances under which this evidence was recovered to determine what you think [Defendant]’s intent was, if he, in fact, possessed it.

. . . .

6. Again, because there is no record evidence of the denominations, we cannot consider the State’s characterization of the cash recovered on appeal.

7. Officer Brandenburg’s testimony was that while he was detaining Defendant at the school, he saw Wilson, the friend Defendant claimed he was picking up, and that they seemed to communicate in some manner at a distance, but that when Officer Brandenburg later tried to locate the friend at the school, he could not.

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But [the marijuana was] packaged individually. If you're using for yourself, why have them in separate bags, *the separate packaging, the cash*, the location of the items. Those are things that you can look at and draw inferences from to conclude [D]efendant's intent, that his intent was to distribute marijuana. It could very well be that his intent was to distribute marijuana that day at the school. He said he was there to pick somebody up.

The State, in closing, did not argue any relevance related to the amount of marijuana recovered, the gun, or that the cash was "unexplained."

The majority opinion also cites *Boyd* and *State v. Willis*, 125 N.C. App. 537, 481 S.E.2d 411 (1997) in support of its argument for the relevance of the gun recovered from Jones' Impala. As noted above, the "holding" in *Smith* upon which the *Boyd* Court relied does not exist. Further, *Boyd* stands for the proposition that *on the facts of that case*, the gun was relevant to PWISD, and that the trial court did not *abuse its discretion* in ruling that the probative value of the gun was not outweighed by its prejudicial effect. *Boyd*, 177 N.C. App. at 171-72, 628 S.E.2d at 802-03. The trial court in the present case was never asked to make any rulings pursuant to Rules 401 or 403, presumably because the gun *was never presented as evidence in support of PWISD*, the trial was not bifurcated, and the gun was clearly relevant and probative with respect to Defendant's possession of a firearm charge.

Willis did not involve any issue of intent to sell. This Court mentioned the "common-sense association of drugs and guns" in its analysis concerning whether the officers in that case were justified in conducting a more thorough search of the defendant, because the defendant had just left a known drug house, was acting nervously, and the "sudden lunge of [the defendant's] hand into the interior of his jacket during the [initial] pat-down" put the officers in reasonable concern for their safety. *Willis*, 125 N.C. App. at 543, 481 S.E.2d at 411. Based upon this reasoning, this Court held: "At that point, the situation became fluid and volatile, and Detective Sholar reacted reasonably and proportionately in searching and emptying the jacket pocket." *Id.* at 543-44, 481 S.E.2d at 412. That drug dealers are known to sometimes carry weapons is not in dispute. This fact does not make every firearm found in proximity to a defendant automatically relevant or admissible in a PWISD trial.

The majority opinion cites federal cases in support of its argument that "[d]espite our precedents, the dissenting opinion does not consider the additional presence of the stolen and locked firearm as an intent

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factor.” Initially, the majority opinion has cited only one North Carolina precedent, *Boyd*, that considered the presence of a gun as an intent factor. The federal cases are not binding precedent in the matter before us. Further, I reiterate that I do consider firearms as *potential* “intent factors,” but based upon North Carolina precedent, I do not believe it is *per se* proper to consider possession of a firearm in every PWISD case, nor do I believe possession of a firearm should generally be given the same weight as the established *Wilkins* factors. Finally, because the State did not introduce the gun recovered from Jones’ Impala as evidence of Defendant’s intent to sell, Defendant had no opportunity to make a Rule 403 objection.

“Quality” is not a *Wilkins* factor, but in the proper case I believe it can be considered in an intent to sell analysis. Concerning the quality of the marijuana in the present case, I rely on the uncontroverted testimony of Officer Brandenburg. As the majority opinion acknowledges concerning the two bags of marijuana found in the console, Officer Brandenburg testified:

They were in larger bags, and if memory serves me right, *they were more of what I would consider remnant marijuana*, from where – if you were to bag up the dime bags, *this would be the remnant stuff that didn’t have as many buds and stuff in it as the regular marijuana, or the sellable marijuana.*

Officer Brandenburg’s testimony implies that the “remnant marijuana” he found in the console was not “regular” or “sellable marijuana.” At a minimum, his testimony strongly implies that the “remnant marijuana” recovered from the console was not of a quality typically offered for sale. However, I would still vacate Defendant’s conviction if the *de minimis* 10.19 grams of marijuana was in fact quality “sellable marijuana” and not low-quality “remnant stuff.”

E. *Totality of the Evidence*

The majority opinion devotes a significant portion of its analysis attempting to distinguish the facts in the present case from those in *Wilkins* and *Nettles* by focusing on individual differences between specific factors, and I have already addressed a number of those arguments. However, it is the totality of the evidence in each case that must be considered, and I do not rely solely on *Wilkins* in support of my “vote to reverse the jury’s verdict.” This Court considered *Wilkins* and *Nettles* in a very recent unpublished opinion, *State v. Carter*, __ N.C. App. __, __ S.E.2d __, 2017 WL 3027550 (2017) (unpublished), and then vacated

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the defendant's conviction for PWISD. I find the facts and reasoning in *Carter* relevant to our analysis. In *Carter*, police recovered from the defendant 0.63 grams of methamphetamine in five separate baggies "or .0225% of the minimum amount to presumptively constitute trafficking[.]" "two unlabeled pill bottles containing fifty-two (52) tablets of oxycodone," \$431.00, a syringe, and two cell phones. *Id.* at *1-3. This court in *Carter* compared the facts before it to those in *Wilkins* and *Nettles*:

We find the evidence at hand *substantially similar* to that in *Wilkins* and *Nettles*. *The State presented no evidence* that the 0.63 grams of methamphetamine, a very small amount, possessed by Defendant "was more than a drug user normally would possess for personal use." *No evidence was presented that the manner in which the methamphetamine was packaged [five separate baggies] was more consistent with Defendant intending to sell rather than having previously used the methamphetamine.* The \$431.00 found on Defendant was almost two-thirds less than the \$1,264.00 found *insufficient in Wilkins* to support an inference of intent to sell.⁸ There was no evidence of other drug paraphernalia consistent with an intent to sell methamphetamine *such as weighing scales, chemicals, or empty plastic baggies.*⁹

Id. at *3 (emphasis added).

I find the evidence before us substantially similar to that in *Carter*, and would likewise find it "substantially similar to that in *Wilkins* and *Nettles*." *Id.* The amount of drugs recovered in *Nettles* and *Carter* was relatively *greater* than that recovered in the present case, though I would characterize the amounts recovered in all four cases as *de minimis*. The amount of cash recovered in each instance was significant, but not highly unusual. "There was no testimony that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs [in any of the four cases]." *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176.

8. \$431.00 is slightly *more* than the amount of money recovered in *Nettles*.

9. In a footnote, this Court in *Carter* stated: "We note that the detectives found two cell phones when they searched Defendant. However, the State made no argument in its brief on appeal concerning the significance of Defendant's possession of these cell phones; and, therefore, we do not consider their significance either." *Carter*, 2017 WL 3027550 at *3, n. 1. I would note, in the present case, the State did not argue the significance of a number of the facts relied upon by the majority opinion, and I do not believe we should consider them.

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Paraphernalia was found with the drugs in *Nettles* and *Carter*, but “[t]here was no evidence of other drug paraphernalia consistent with an intent to sell . . . such as weighing scales, chemicals, or empty plastic baggies.” *Carter*, 2017 WL 3027550 at *3. No paraphernalia, consistent with an intent to sell or not, was found in *Wilkins* or the present case. The only potentially relevant difference that I can find between the facts in *Wilkins*, *Nettles*, *Carter*, and the present case, is the gun recovered from the glove compartment of Jones’ Impala. However, for all the reasons discussed above, I do not believe the recovery of this gun serves to transmute this case from one lacking substantial evidence of an intent to sell into one including it.

III. Conclusion

At trial, the State presented evidence that Defendant was in possession of \$1,504.00 and a small amount of marijuana, packaged in a manner consistent with personal use. The State also argues on appeal that we should consider the firearm recovered from the Impala, even though this evidence was not presented to the jury as evidence of any intent to sell. “The State points to no other [relevant] evidence or circumstances that in any way suggest that [D]efendant had an intent to sell or deliver the [marijuana].” *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24. “[W]hen the evidence is . . . sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.” *Id.* at 158–59, 607 S.E.2d at 24 (citation omitted). This is true even if “the suspicion so aroused by the evidence is strong.” *State v. Dulin*, __ N.C. App. __, __, 786 S.E.2d 803, 807 (2016) (citation omitted). I do not find the suspicion aroused by the evidence in the present case to be strong. I reach the same conclusion when fully considering the gun recovered from the glove compartment of Jones’ Impala, and assuming the marijuana recovered from the center console was all “sellable.”

The jury was also instructed on the lesser-included offense of possession of marijuana, Defendant admitted at trial that he possessed the marijuana, and the jury necessarily found that Defendant possessed the marijuana by convicting him of PWISD. “Consequently, [I would] vacate [D]efendant’s sentence [of PWISD] and remand for entry of a judgment ‘as upon a verdict of guilty of simple possession of marijuana.’” *Wilkins*, 208 N.C. App. at 733, 703 S.E.2d at 811 (citation omitted).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 AUGUST 2017)

BARBEE v. WHAP, P.A. No. 16-1154	Forsyth (14CVS4177)	Affirmed
DAVIS v. DAVIS No. 16-1159	Rowan (13CVD664)	Affirmed
GRISSOM v. COHEN No. 16-1177	Mecklenburg (07CVD314)	Reversed and Remanded
MEZA v. BCR JANITORIAL SERVS., INC. No. 16-944	N.C. Industrial Commission (893252)	Affirmed
NICHOLS v. UNIV. OF N.C. AT CHAPEL HILL No. 16-1117	Office of Admin. Hearings (16OSP6127)	Affirmed
STATE v. ALEXANDER No. 17-96	Buncombe (14CRS87408)	No prejudicial error.
STATE v. BONHAM No. 17-141	Forsyth (15CRS56356) (16CRS467)	NO PREJUDICIAL OR PLAIN ERROR
STATE v. BOULWARE No. 17-22	Mecklenburg (15CRS214094-95) (15CRS214099)	No Error
STATE v. GRAHAM No. 17-66	Iredell (15CRS53352)	No Error
STATE v. GRIFFIN No. 17-195	Beaufort (14CRS51682)	AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR NEW RESTITUTION HEARING.
STATE v. LINDSEY No. 17-218	Buncombe (15CRS93851-52)	Affirmed
STATE v. LINEBERGER No. 17-201	Catawba (14CRS4711) (14CRS54897) (14CRS54900) (14CRS54905)	Reversed and Remanded

STATE v. LOCKETT No. 16-1091	Mecklenburg (12CRS253254)	No Error
STATE v. METTLER No. 17-47	Forsyth (14CRS62057-58)	NO ERROR IN PART; VACATED IN PART; REMANDED WITH INSTRUCTIONS.
STATE v. MORRIS No. 17-121	Brunswick (15CRS53759) (16CRS20)	Affirmed; Remanded for correction of clerical errors.
STATE v. PETERSON No. 17-150	Forsyth (14CRS59028)	No Error
STATE v. RIOS No. 17-249	Mecklenburg (05CRS238682)	Affirmed
STATE v. ROLLAND No. 17-168	Mecklenburg (12CRS246706) (12CRS246707) (12IFS013038)	Dismissed
STATE v. SAYRE No. 17-68	Forsyth (14CRS111-112) (14CRS54508) (14CRS54510-13) (14CRS54515)	Affirmed
STATE v. SELLERS No. 17-252	Forsyth (13CRS50254-55) (13CRS50262-67) (13CRS50269-70) (13CRS50559-63)	Affirmed; Remanded for correction of clerical errors.
STATE v. SIMMONS No. 16-1065	Surry (12CRS1110-11)	VACATED IN PART AND REMANDED
STATE v. SMITH No. 17-306	New Hanover (15CRS59701) (16CRS1906)	No Error
STATE v. STEPHENS No. 16-714	Duplin (12CRS51892)	No Error
STATE v. WEBB No. 16-1228	Forsyth (13CRS61500)	No Error

STATE v. WILSON
No. 16-1212

Forsyth
(15CRS52586)

Reversed and Vacated.

STATE v. YARBOROUGH
No. 17-177

Onslow
(15CRS56078-79)

NO ERROR AT TRIAL;
JUDGMENT
REVERSED AND
REMANDED FOR
RESENTENCING.

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[255 N.C. App. 217 (2017)]

PHILLIP BRASWELL, PLAINTIFF

v.

BRANDON MEDINA, JOHN W. DENTON, MICHAEL A. WHITLEY, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES; THE CITY OF ROCKY MOUNT, N.C. AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA17-33

Filed 5 September 2017

1. Appeal and Error—preservation of issues—claims not addressed in principal brief

Claims not addressed in the appellant's brief were abandoned.

2. Civil Rights—42 U.S.C. § 1983—malicious prosecution

In a claim under 42 U.S.C. § 1983 for malicious prosecution, the complaint adequately alleged lack of probable cause for the underlying arrest and prosecution on the charge of obtaining property by false pretenses. Plaintiff had borrowed money from family members to invest in the stock market, then lost the money in an economic crash, but the evidence possessed by the officers actually exculpated plaintiff.

3. Civil Rights—42 U.S.C. § 1983—malicious prosecution—causation—decision of prosecutors and grand jury

In a 42 U.S.C. § 1983 claim for malicious prosecution, the intervening decision of the prosecutor or the grand jury in the underlying criminal prosecution did not immunize the officers from liability.

4. Malicious Prosecution—prosecution for false pretenses—probable cause fabricated

The trial court erred by dismissing plaintiff's claims for malicious prosecution for false pretenses arising from loans from relatives and stock market investments. Plaintiff alleged that the prosecuting officers not only lacked probable cause but also concealed and fabricated evidence in order to cause him to be prosecuted.

5. Obstruction of Justice—civil claim—actions in underlying criminal case

The trial court properly dismissed plaintiff's obstruction of justice claims that arose from a prosecution for false pretensions following loans from relatives and stock market losses. Plaintiff sought to hold the prosecuting officers civilly liable for obstruction of justice solely for their actions taken in the course of his criminal

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prosecution, not for obstruction of plaintiff's ability to obtain a legal remedy.

6. Constitutional Law—state constitutional claim—adequate remedy—action against city—immunity claim not resolved

The dismissal of defendant's state constitutional claim against the City of Rocky Mount was premature where the City had raised immunity claims that had not been adjudicated, so that it was not clear whether plaintiff would have an adequate state remedy.

Appeal by plaintiff from order entered 24 August 2016 by Judge Allen Baddour in Nash County Superior Court. Heard in the Court of Appeals 17 May 2017.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand, for plaintiff-appellant.

Poyner Spruill LLP, by J. Nicholas Ellis, for defendants-appellees Medina, Denton, Whitley, and the City of Rocky Mount.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David J. Adinolfi II, for defendant-appellee State of North Carolina.

DAVIS, Judge.

In this appeal, we consider whether the plaintiff's complaint stated valid claims for relief both under 42 U.S.C. § 1983 and North Carolina common law based on his allegations that the defendants caused him to be arrested and indicted without probable cause by concealing and fabricating evidence. Plaintiff Phillip Braswell appeals from the trial court's order granting the motions to dismiss of Brandon Medina, John W. Denton, Michael A. Whitley and the City of Rocky Mount (collectively the "Rocky Mount Defendants") and the State of North Carolina pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. For the following reasons, we affirm in part and reverse in part.

Factual and Procedural Background

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

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After working at a Ford dealership for 19 years, Braswell left that job to become a self-employed investor in 1997. Braswell's uncle, William Greene, subsequently loaned Plaintiff \$10,000 in 1998 for investment purposes. The loan was memorialized by an agreement in which Braswell agreed to repay the loan at an interest rate of 10%. Between 1998 and 2009, this loan was extended or "rolled over" each year by agreement between Mr. Greene and Braswell. At no time was Braswell a licensed investment advisor, and he did not hold himself out to be one.

Between 1998 and 2006, Mr. Greene made additional loans to Braswell.¹ Braswell's aunt, Ola Beth Greene, also lent him money during this time period.

In August or September of 2009, the Greenses requested repayment of one of the loans, and Braswell responded that he "did not have the money, but he was working on it." In December of that year, Braswell explained to the Greenses that he could not repay the loans because their money had been "lost along with [Braswell's] own money in a collapse of investment markets that finance experts called a 'global financial meltdown.' "

On 4 February 2010, the Greenses reported the loss of these funds — which they claimed totaled \$112,500 — to Officer Medina of the Rocky Mount Police Department. Officer Medina subsequently secured a search warrant for Braswell's home, which was executed on 9 February 2010. During the search, Officer Medina seized computers; thumb drives; tax returns for the years 2003 through 2008; financial statements from RBC, Bank of America, First South, Fidelity Investments, and MBNA; delinquency notices; and two blank Fidelity Investments checkbooks.

These records revealed that Braswell's account with Fidelity Investments had contained over \$100,000 in early 2008, but by the end of that year "the financial crisis had taken its toll on [Braswell's] investments and the account had essentially no value." None of the records "seized from [Braswell's] home tended to show that [he] had done anything with the money he received from the Greenses other than invest it in legitimate financial institutions."

Officer Medina proceeded to arrest Braswell pursuant to an arrest warrant he had obtained. After being read his *Miranda* rights, Braswell gave the following statement to Officer Medina:

I began investing in stocks to try to make a living in late 1998. I had mentioned to my uncle, Willie Greene, that

1. At some point, the interest rate on the loans was reduced to 6%.

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I could pay him higher interest than a CD so he started investing some money with me too. I took this money and invested [in] stocks along with my own. I did real well for a while but then things started to change. I started losing money. I began to borrow from real estate [] my mom owned with her permission to recoup my losses. . . . Eventually I had lost my money along with my mom's and my uncle's and aunt's. In May 2008, I had an accident [from] which I was expecting a settlement. I haven't received the settlement yet, but between that [and] work I was expecting to make some or all of what I . . . owed my uncle and aunt. They had been rolling over their investments with me and I thought I would have several years to come up with the money. In September 2009, Willie said that he wanted to cash in one of his investments. I asked him to wait a while and I was going to try to come up with money but didn't. My aunt asked me on December 8, 2009 about their investments and I told them that I had lost their money. I had taken my money that I borrowed from my mom's property and some other money she had to try to invest to rectify the situation. But sadly it went from bad to worse when I had lost that too.

(Brackets and ellipses in original.)

In addition to this statement, Braswell “provided [Officer] Medina [with] records, documents and electronically stored information proving that he invested his and the Greenes’ funds in legitimate financial institutions.” Nevertheless, Officer Medina instituted criminal proceedings against Braswell, which ultimately resulted in a grand jury indicting him on 5 April 2010 on the charge of obtaining property by false pretenses in excess of \$100,000.

Specifically, the indictment alleged that Braswell “unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, obtain \$112,500.00 in U.S. Currency from William Irvin Green [sic] and Ola Beth Green [sic], by means of a false pretense which was calculated to deceive and did deceive” — the false pretense being that the “property was obtained by [Braswell] guaranteeing a six percent return on all invested monies from William Irvin Green [sic] and Ola Beth Green [sic], *when in fact [Braswell] did not invest the monies into legitimate financial institutions.*” (Emphasis added.)

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Braswell was held in pre-trial detention until his trial on 6 February 2012. He was convicted and sentenced to 58 to 79 months imprisonment. On appeal, this Court vacated his conviction, explaining as follows:

[T]he “false pretense” or “false representation” which [Braswell] allegedly made to the Greenses consisted of a statement that [Braswell] was borrowing money from the Greenses for investment-related purposes despite the fact that he did not actually intend to invest the money that he received from them in any “legitimate financial institution.” A careful review of the record developed at trial reveals the complete absence of any support for this allegation.

State v. Braswell, 225 N.C. App. 734, 741, 738 S.E.2d 229, 234 (2013).

We noted that the State did not present any records seized from the search of Braswell’s home showing that he had failed to invest the Greenses’ money in legitimate financial institutions and observed that “the fact that [Braswell]’s account with Fidelity Investments contained \$100,000 in early 2008 suggests that he did, in fact, make investments with such institutions.” *Id.* Moreover, we explained, “the State offered no direct or circumstantial evidence tending to show that, instead of investing the money he borrowed from the Greenses, [Braswell] converted it to his own use.” *Id.* at 742, 738 S.E.2d at 234.

On 24 March 2016, Braswell filed a civil lawsuit in Nash County Superior Court from which the present appeal arises. In his complaint, Braswell alleged, in pertinent part, that

[o]n 5 April 2010, Defendants Medina, Denton, and . . . Whitley[] fabricated probable cause to mislead a Nash County grand jury into returning a bill of indictment charging [Braswell] with felony obtaining property by false pretenses. At the time they caused the indictment to issue, Medina, Denton, and Whitley knew they did not have probable cause to believe [Braswell] committed that or any other crime.

Braswell alleged federal claims under 42 U.S.C. § 1983 against Officers Medina, Denton, and Whitley (collectively the “Officers”) in their individual capacities.² Additionally, Braswell asserted state law

2. Although Braswell’s complaint focuses heavily on the actions of Officer Medina, it also includes allegations against Officers Denton and Whitley in connection with their

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claims against the Rocky Mount Defendants for malicious prosecution, obstruction of justice, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. Finally, his complaint contained claims against the City and the State of North Carolina for violations of the North Carolina Constitution.

On 6 April 2016, the State filed a motion to dismiss pursuant to Rules 12(b)(1) and (6). The Rocky Mount Defendants filed a motion to dismiss on 15 April 2016 seeking dismissal of all of Braswell's claims against them pursuant to Rule 12(b)(6). Following a hearing before the Honorable Allen Baddour on 5 August 2016, the trial court issued an order on 24 August 2016 dismissing this entire action pursuant to Rule 12(b)(6). Braswell filed a timely notice of appeal.³

Analysis

[1] As an initial matter, we conclude that Braswell has abandoned any challenges to the trial court's dismissal of his claims against the Rocky Mount Defendants for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress because he failed to address the dismissal of these claims in his principal brief on appeal. *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.").⁴

Accordingly, we consider only whether the trial court erred in dismissing Braswell's § 1983 claims; state law claims for malicious prosecution and obstruction of justice; and claim under the North Carolina Constitution.

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

alleged participation in the fabrication and concealment of evidence that led to Braswell's prosecution. Moreover, the Rocky Mount Defendants' arguments on appeal do not differentiate between the three officers. We therefore utilize this same approach in our legal analysis of Braswell's claims.

3. Braswell has not appealed from the portion of the trial court's order dismissing his claim against the State of North Carolina.

4. While Braswell's reply brief does contain arguments relating to his intentional infliction of emotional distress and negligence claims, this Court has made clear that "under 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 and cannot revive the issue via reply brief." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 79, 772 S.E.2d 93, 96 (2015).

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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).

I. Claims Under 42 U.S.C. § 1983

[2] *Section 1983* provides a private right of action against any person 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. "A malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort" of malicious prosecution. *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) (citation and quotation marks omitted). In order to state a § 1983 claim premised upon a malicious prosecution theory, "a plaintiff must allege that the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in [the] plaintiff's favor." *Id.*

It is undisputed that Braswell has pled facts in his complaint establishing that he was seized pursuant to legal process and that the criminal proceedings terminated in his favor. The Officers argue, however, that Braswell failed to state valid claims under § 1983 because (1) probable cause existed to support his arrest; and (2) the actions of the prosecutor and the grand jury in seeking and issuing the indictment constituted a break in the causal chain such that the Officers cannot be deemed to have *caused* an illegal seizure. We address each argument in turn.

A. Probable Cause

"Probable cause exists when the information known to the officer is sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Dickens*, 346 N.C. 26,

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36, 484 S.E.2d 553, 558 (1997) (citation and quotation marks omitted). Here, Braswell has sufficiently alleged in his complaint that the Officers lacked probable cause to believe he had committed the crime of obtaining property by false pretenses. As reflected in the indictment, the theory of criminal liability was that Braswell obtained \$112,500 from the Greenes “by means of a false pretense which was calculated to deceive and did deceive” and that the false pretense was that he would provide the Greenes with “a six percent return on all invested monies . . . when in fact [Braswell] did not invest the monies into legitimate financial institutions.”

In our decision vacating Braswell’s conviction, we held that “[a] careful review of the record developed at trial reveals the *complete absence of any support* for this allegation.” *Braswell*, 225 N.C. App. at 741, 738 S.E.2d at 234 (emphasis added). Moreover, all that matters for purposes of applying the Rule 12(b)(6) standard is that Braswell has *alleged* sufficient facts showing the absence of probable cause. Specifically, he asserted the following in his complaint:

49. On 5 April 2010, Defendants Medina, Denton, and upon information and belief, Defendant Whitley, fabricated probable cause to mislead a Nash County grand jury into returning a bill of indictment charging [Braswell] with felony obtaining property by false pretenses. At the time they caused the indictment to issue, Medina, Denton, and Whitley knew they did not have probable cause to believe [Braswell] committed that or any other crime.

In addition, the complaint alleged that

[t]o conceal the absence of evidence of [Braswell]’s alleged false pretense or fraudulent intent, Officer Medina fabricated probable cause – by manufacturing false inculpatory evidence and concealing exculpatory evidence in order to mislead judicial officials into authorizing the arrest and pretrial detention of [Braswell], to mislead prosecutors to authorize a felony indictment for obtaining property in excess of \$100,000 by false pretenses, to mislead the grand jury into issuing said indictment, and to mislead prosecutors into maintaining felony criminal proceedings against [Braswell] and ultimately convicting him.

As demonstrated by these and other allegations in Braswell’s complaint, the crux of his § 1983 claims is that evidence possessed by the Officers — including records seized from Braswell’s home — actually

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exculpated rather than inculpated Braswell by showing that he had, in fact, invested large sums of money into legitimate financial institutions. In light of these allegations, we are satisfied that Braswell's complaint adequately alleged a lack of probable cause for his arrest and prosecution on the charge of obtaining property by false pretenses. *See, e.g., Simpson v. Sears, Roebuck & Co.*, 231 N.C. App. 412, 417, 752 S.E.2d 508, 510 (2013) (reversing trial court's dismissal of plaintiff's malicious prosecution claim because her "allegations, which we are required to treat as true, [were] sufficient to withstand a motion to dismiss."); *Enoch v. Inman*, 164 N.C. App. 415, 419, 596 S.E.2d 361, 364 (2004) (reversing trial court's granting of motion to dismiss because the "allegations, including the factual details summarized above, [were] sufficient to support a § 1983 claim . . .").⁵

B. Causation

[3] The Officers next argue that Braswell failed to plead facts sufficient to satisfy the causation prong of a § 1983 claim grounded in a theory of malicious prosecution. They contend that the intervening decision by the district attorney to submit a bill of indictment to the grand jury and the grand jury's decision to issue an indictment insulate the Officers from liability by interrupting the causal chain.

It is true that "acts of independent decision-makers (*e.g.*, prosecutors, grand juries, and judges) *may* constitute intervening superseding causes that break the causal chain between a defendant-officer's misconduct and a plaintiff's unlawful seizure." *Evans*, 703 F.3d at 647 (emphasis added). However, it is well established that even once the prosecutor has submitted a bill of indictment to a grand jury and the grand jury has indicted the defendant, "police officers may be held to have caused the seizure and remain liable to a wrongfully indicted defendant under certain circumstances." *Id.*

5. We likewise reject the Officers' argument that the dismissal of Braswell's claims was proper on the theory that Braswell invested the Greenes' funds "without a dealer's license" in violation of N.C. Gen. Stat. § 78A-36. Section 78A-36 makes it "unlawful for any person to transact business in this State as a dealer or salesman unless he is registered under this Chapter." N.C. Gen. Stat. § 78A-36(a) (2015). N.C. Gen. Stat. § 78A-2 defines "dealer" as "any person engaged in the business of effecting transactions in securities for the account of others or for his own account." N.C. Gen. Stat. § 78A-2(2) (2015). However, Braswell was not charged with violating N.C. Gen. Stat. § 78A-36. The issue of whether Braswell failed to invest the Greenes' money in legitimate financial institutions — which was the theory upon which the indictment was based — is separate and distinct from the issue of whether Braswell was in compliance with N.C. Gen. Stat. § 78A-36.

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The intervening acts of a grand jury have never been enough to defeat an otherwise viable malicious prosecution claim, whether or not the grand jury votes a true bill or even returns an indictment ultimately determined to be deficient as a matter of law. And though an indictment by a grand jury is generally considered *prima facie* evidence of probable cause in a subsequent civil action for malicious prosecution, this presumption may be rebutted by proof that the defendant *misrepresented, withheld, or falsified evidence*.

. . . .

As with the grand jury, . . . the public prosecutor's role in a criminal prosecution will not necessarily shield a complaining witness from subsequent civil liability where the witness's testimony is knowingly and maliciously false.

White v. Frank, 855 F.2d 956, 961-62 (2d Cir. 1988) (internal citation and quotation marks omitted and emphasis added); *see also Evans*, 703 F.3d at 647-48 (“[O]fficers may be liable when they have lied to or misled the prosecutor; failed to disclose exculpatory evidence to the prosecutor; or unduly pressured the prosecutor to seek the indictment[.]” (internal citations and quotation marks omitted)); *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988) (“An independent intermediary breaks the chain of causation unless it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant.”); *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (“[A] prosecutor’s decision to charge, a grand jury’s decision to indict, a prosecutor’s decision not to drop charges but to proceed to trial — none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision.”).

Accordingly, in cases where law enforcement officers conceal or fabricate evidence in order to falsely show that probable cause exists to prosecute a criminal defendant, the intervening decision of the prosecutor or grand jury will not immunize the officers from liability on a malicious prosecution claim under § 1983. As shown above, Braswell’s complaint in the present case sufficiently pled facts in support of such a theory.⁶

6. We are not persuaded by the Officers’ reliance on *Massey v. Ojaniit*, 759 F.3d 343 (4th Cir. 2014), in support of their argument that Braswell failed to allege sufficient details so as to establish causation. In *Massey*, the plaintiff alleged that the defendant police

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C. Qualified Immunity

We also reject the Officers' assertion that dismissal of Braswell's § 1983 claims was appropriate pursuant to the qualified immunity doctrine. "The defense of qualified immunity shields government officials from personal liability under § 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Toomer v. Garrett*, 155 N.C. App. 462, 473, 574 S.E.2d 76, 86 (2002) (citation and quotation marks omitted).

Braswell's right to be free from a seizure and prosecution lacking in probable cause and based upon the deliberate concealment or fabrication of evidence was clearly established at the time of Braswell's arrest, and a reasonable officer would have been aware of that right. *See Webb v. United States*, 789 F.3d 647, 667 (6th Cir. 2015) ("It is well established that a person's constitutional rights are violated when evidence is knowingly fabricated and a reasonable likelihood exists that the false evidence would have affected the decision of the jury. A reasonable police officer would know that fabricating probable cause, thereby effectuating a seizure, would violate a suspect's clearly established Fourth Amendment right to be free from unreasonable seizures." (internal citation, quotation marks, and brackets omitted)); *Wilkins v. DeReyes*, 528 F.3d 790, 805 (10th Cir. 2008) ("[I]t of course has long been clearly established that knowingly arresting a defendant without probable cause, leading to the defendant's subsequent confinement and prosecution, violates the Fourth Amendment's proscription against unreasonable searches and seizures.").

The cases that the Officers rely upon in their brief on this issue are clearly inapposite as they involve determinations made at the *summary judgment* stage that there was, in fact, probable cause to seize the plaintiffs. *See, e.g., Durham v. Horner*, 690 F.3d 183, 189 (4th Cir. 2012)

officers fabricated information that led to the plaintiff's illegal arrest, prosecution, and conviction. *Id.* at 347. The Fourth Circuit found the plaintiff's allegations of causation to be lacking, however, because the record showed that probable cause existed to arrest the plaintiff even *after* the piece of fabricated evidence was excluded from consideration. *See id.* at 357 (explaining that "[t]hough [the plaintiff] alleges that [the officers] deliberately supplied fabricated evidence, he has not pleaded facts adequate to undercut the grand jury's probable cause determination. That is, . . . even removing the fabricated statement . . . , there still existed sufficient probable cause to arrest [the plaintiff]." (quotation marks and brackets omitted)). In the present case, conversely, Braswell's complaint alleged facts showing that his prosecution was a *direct result* of the fabrication and concealment of evidence by the Officers. Therefore, *Massey* is distinguishable on its face.

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(explaining that “the prosecution was plainly supported by probable cause” and plaintiff failed to “put forward any evidence to show that [the defendant officer] acted maliciously or conspired . . . to mislead the grand jury”); *Porterfield v. Lott*, 156 F.3d 563, 570 (4th Cir. 1998) (“Since there were sufficient indicia of probable cause to arrest [the plaintiff], as we have indicated already, it follows that there were sufficient indicia of probable cause to seek a warrant.”).

Here, conversely, the facts alleged in the complaint — which we are required to accept as true in this appeal — were that the Officers fabricated and concealed evidence in order to bring about Braswell’s indictment despite the absence of probable cause to believe he was guilty of the crime for which he was charged. Thus, the Officers are not entitled to qualified immunity at this stage of the litigation.

* * *

For these reasons, we conclude that Braswell has stated valid claims under 42 U.S.C. § 1983. The trial court’s dismissal of these claims therefore constituted error.

II. State Law Claims**A. Malicious Prosecution**

[4] In order to state a common law claim for malicious prosecution under North Carolina law,

the plaintiff must demonstrate that the defendant (1) instituted, procured or participated in the criminal proceeding against the plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of the plaintiff.

Moore v. Evans, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citation, quotation marks, and brackets omitted). “[A] grand jury’s action in returning an indictment is only prima facie evidence of probable cause and . . . as a result, the return of an indictment does not as a matter of law bar a later claim for malicious prosecution.” *Turner v. Thomas*, 369 N.C. 419, 445, 794 S.E.2d 439, 445 (2016).

As shown above, Braswell’s complaint alleged facts showing that (1) the Officers initiated or participated in the criminal proceeding against him; (2) they lacked probable cause to believe he committed the offense of obtaining property by false pretenses; (3) they acted with malice; and (4) the prosecution was terminated in Braswell’s favor. “‘Malice’ in a malicious prosecution claim may be shown by offering evidence that

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defendant was motivated by personal spite and a desire for revenge or that defendant acted with reckless and wanton disregard for plaintiffs' rights." *Lopp v. Anderson*, __ N.C. App. __, __, 795 S.E.2d 770, 780 (2016) (citation and quotation marks omitted). Moreover, "[m]alice can be inferred from the want of probable cause alone." *Id.* at __, 795 S.E.2d at 779 (citation and quotation marks omitted).

Here, Braswell has adequately alleged malice by pleading facts showing that the Officers not only lacked probable cause to believe he was guilty of the crime for which he was ultimately charged but also concealed and fabricated evidence in order to cause him to be prosecuted for that offense. Accordingly, Braswell has properly stated claims for malicious prosecution against the Rocky Mount Defendants under North Carolina law, and the trial court erred in dismissing these claims. See *Chidnese v. Chidnese*, 210 N.C. App. 299, 310, 708 S.E.2d 725, 734 (2011) ("Treating these allegations as true, these facts can be construed to state that [the defendant] procured a criminal prosecution against plaintiff with malice and without probable cause, and that the prosecution terminated favorably for the plaintiff, satisfying all of the elements of malicious prosecution." (citation omitted)).

B. Obstruction of Justice

[5] Braswell next argues that the trial court improperly dismissed his claims for obstruction of justice. We disagree.

North Carolina's appellate courts have recognized that "[a]t common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983). This articulation of common law obstruction of justice first appeared in North Carolina caselaw in our Supreme Court's *Kivett* decision. In that case, which concerned an appeal from a judicial discipline proceeding, the Court held that the respondent judge's attempt to prevent a grand jury from convening in order to investigate suspected criminal conduct on his part "would support a charge of common law obstruction of justice." *Id.*

North Carolina is one of a small minority of jurisdictions that also recognizes a *civil* cause of action for obstruction of justice. This tort was first recognized by our Supreme Court in *Henry v. Deen*, 310 N.C. 75, 310 S.E.2d 326 (1984), a wrongful death action brought by the administrator of the decedent's estate alleging that his medical providers had negligently rendered care to him. The plaintiff also asserted that the defendants had created false entries in the decedent's medical chart and concealed his genuine medical records. *Id.* at 87, 310 S.E.2d at 334.

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These actions, the plaintiff argued, rendered the defendants liable for civil conspiracy because their actions were intended “to prevent the plaintiff from discovering the negligent acts of the defendants” *Id.* at 79, 310 S.E.2d at 329-30.

On appeal from the trial court’s dismissal of the plaintiff’s civil conspiracy claim, the Supreme Court held that the plaintiff had properly alleged a claim for civil conspiracy based upon the underlying wrongful act of obstruction of justice.⁷ *Id.* at 87, 310 S.E.2d at 334. The Court explained that the defendants’ alleged concealment and fabrication of evidence, “if found to have occurred, would be acts which obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstructing public justice.” *Id.*

Our decision in *Grant v. High Point Regional Health System*, 184 N.C. App. 250, 645 S.E.2d 851 (2007), applied *Henry* in a similar context. In that case, the executrix of the decedent’s estate alleged that the defendant hospital was liable for obstruction of justice for destroying the decedent’s medical records because that action “effectively precluded [the plaintiff] from obtaining the required Rule 9(j) certification and thus effectively precluded [the plaintiff] from being able to successfully prosecute a medical malpractice action against [the defendant].” *Id.* at 255, 645 S.E.2d at 855 (quotation marks and ellipses omitted).

We reversed the trial court’s dismissal of this claim, holding that “such acts by [the defendant], if true, would be acts which obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstructing public justice.” *Id.* at 255, 645 S.E.2d at 855 (citation and quotation marks omitted). In so holding, we explicitly rejected the defendant’s argument that *Henry* was inapplicable

7. The Court explained that a civil conspiracy cause of action must be predicated upon an underlying tort:

In civil actions for recovery for injury caused by acts committed pursuant to a conspiracy, this Court has stated that the combination or conspiracy charged does no more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under the proper circumstances the acts of one may be admissible against all. The gravamen of the action is the resultant injury, and not the conspiracy itself. To create civil liability for conspiracy there must have been a wrongful act resulting in injury to another committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the objective.

Henry, 310 N.C. at 86-87, 310 S.E.2d at 334 (internal citations omitted).

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on the theory that the plaintiff's claim in *Henry* had been based on civil conspiracy rather than obstruction of justice. We explained that "in *Henry*, the wrongful acts necessary to prove conspiracy were the acts constituting obstruction of justice. Accordingly, as the acts constituting obstruction of justice underlying the civil conspiracy in *Henry* were similar to [the defendant's] alleged actions in the present case, *Henry* is persuasive." *Id.* (internal citation omitted).

We also had occasion to consider a civil obstruction of justice claim in *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 588 S.E.2d 20 (2003). The plaintiff in *Broughton* sued the News and Observer ("N&O") and certain N&O employees alleging, *inter alia*, that the defendants were liable for obstruction of justice because they had published an article about the plaintiff's ongoing divorce proceeding with her husband. *Id.* at 22, 588 S.E.2d at 23-24. On appeal, we affirmed the trial court's entry of summary judgment in the defendants' favor as to that claim on the ground that the plaintiff "presented no evidence that her [divorce case] was in some way judicially prevented, obstructed, impeded or hindered by the acts of defendants. There is no evidence as to the disposition of that action or any showing that the newspaper articles adversely impacted that case." *Id.* at 33, 588 S.E.2d at 30.

Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4 (2001), involved an underlying medical malpractice lawsuit against two physicians in which the jury found one of them liable. After that trial had concluded, the other physician sent a letter to all of the doctors at the hospital where he worked in which he provided the names and addresses of the jurors who had — as the letter stated — "found a doctor guilty." *Id.* at 397, 544 S.E.2d at 6. Several of those jurors proceeded to file a lawsuit of their own alleging that the doctor's act of sending the letter constituted obstruction of justice. *Id.* at 398, 544 S.E.2d at 6.

We reversed the trial court's dismissal of this claim, explaining that the plaintiffs' "complaint sufficiently alleges a cause of action for common law obstruction of justice in that it alleges (1) defendant alerted health care providers to the names of the jurors in retaliation for their verdict; (2) this retaliation was designed to harass plaintiffs; and (3) defendant's conduct was meant to obstruct the administration of justice in Rowan County." *Id.* at 409, 544 S.E.2d at 13.

Our decision in *Blackburn v. Carbone*, 208 N.C. App. 519, 703 S.E.2d 788 (2010), is particularly instructive in analyzing the scope of the obstruction of justice tort in North Carolina. In that case, the plaintiff alleged that the defendant physician was liable for obstruction of justice

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on the ground that he had prepared an inaccurate medical report — which he subsequently failed to correct — for use in a lawsuit that the plaintiff had brought against a third party relating to an automobile accident. *Id.* at 520, 703 S.E.2d at 790. The plaintiff claimed that the physician’s act had forced him to settle the lawsuit for an amount considerably less than the actual damages he had incurred. *Id.* at 520, 703 S.E.2d at 791. The trial court entered summary judgment against the plaintiff and dismissed his obstruction of justice claim. *Id.* at 521, 703 S.E.2d at 791.

On appeal, we summarized the caselaw from our appellate courts recognizing a civil claim for obstruction of justice as follows:

In *Henry* and *Grant*, allegations that the defendants had destroyed certain medical records and created other false medical records for the purpose of defeating a medical negligence claim were held to be sufficient to state a claim for common law obstruction of justice. *Henry*, 310 N.C. at 88, 310 S.E.2d at 334-35 (stating that, “where, as alleged here, a party deliberately destroys, alters or creates a false document to subvert an adverse party’s investigation of his right to seek a legal remedy, and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie”); *Grant*, 184 N.C. App. at 255-56, 645 S.E.2d at 855 (stating that allegations that “Defendant destroyed the medical records of the decedent” so as to “effectively preclude Plaintiff from obtaining the required Rule 9(j) certification” and prevent “Plaintiff from being able to successfully prosecute a medical malpractice action against . . . Defendant . . . and others” “stated a cause of action for common law obstruction of justice”). Similarly, this Court has held that “Plaintiff’s complaint sufficiently alleged a cause of action for common law obstruction of justice in that it alleges (1) defendant alerted health care providers to the names of the jurors who returned a verdict against another health care provider in a medical negligence case in retaliation for their verdict; (2) this retaliation was designed to harass plaintiffs; and (3) defendant’s conduct was meant to obstruct the administration of justice.” *Burgess*, 142 N.C. App. at 409, 544 S.E.2d at 13. As a result, any action intentionally undertaken by the defendant for the purpose of obstructing, impeding, or hindering the plaintiff’s ability

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to seek and obtain a legal remedy will suffice to support a claim for common law obstruction of justice.

Id. at 526-27, 703 S.E.2d at 795 (brackets omitted and emphasis added).⁸

In the present case, the Rocky Mount Defendants contend that no “court in North Carolina ha[s] ever recognized a common-law obstruction of justice civil claim based on a police officer’s actions in a criminal proceeding.” In his attempt to show the viability of such a claim, Braswell relies primarily upon our decision in *Jones v. City of Durham*, 183 N.C. App. 57, 643 S.E.2d 631 (2007). However, *Jones* is readily distinguishable from the present case.

In *Jones*, the plaintiff bought a lawsuit against a police officer alleging that he had negligently struck her with his car while responding to an unrelated call for assistance from another officer. *Jones v. City of Durham*, 168 N.C. App. 433, 435, 608 S.E.2d 387, 389, *aff’d*, 360 N.C. 81, 622 S.E.2d 596 (2005), *opinion withdrawn and superseded on reh’g and decision rescinded in part based upon dissenting opinion*, 361 N.C. 144, 638 S.E.2d 202 (2006). Among the causes of action contained in her suit against the officer was a claim for obstruction of justice based upon the officer’s alleged destruction of dashboard camera footage of the accident. The trial court granted partial summary judgment for the officer but did not dismiss the obstruction of justice claim. *Id.* at 434, 608 S.E.2d at 388.

In the plaintiff’s initial appeal to this Court, we determined that all of the plaintiff’s claims should be dismissed. *Id.* at 443, 608 S.E.2d at 392. However, the Supreme Court reversed our decision, and upon remand to this Court, we affirmed the trial court’s denial of the defendant’s motion to dismiss the obstruction of justice claim, explaining that “the evidence would allow a jury to conclude that a camera in [the defendant’s] police car had made a videotape recording of the accident, and that the videotape was subsequently misplaced or destroyed.” *Jones*, 183 N.C. App. at 59, 643 S.E.2d at 633.

Jones is distinguishable from the present case in that it involved allegations that the defendant officer had obstructed justice by destroying evidence related to a *civil* negligence claim that the plaintiff

8. We ultimately affirmed the dismissal of the plaintiff’s obstruction of justice claim in *Blackburn* because, among other reasons, he had failed to show that the defendant acted intentionally and “for the purpose of deliberately obstructing, impeding or hindering the prosecution of [the plaintiff’s] automobile accident case.” *Blackburn*, 208 N.C. App. at 529, 703 S.E.2d at 796.

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had asserted against him. *Id.* Accordingly, *Jones* fits squarely within the line of cases discussed above that allow a plaintiff to sue under an obstruction of justice theory when the defendant has improperly obstructed, impeded, or hindered a “plaintiff’s ability to seek and obtain a legal remedy[.]” *Blackburn*, 208 N.C. App. at 527, 703 S.E.2d at 795.

Here, conversely, Braswell seeks to hold the Officers civilly liable on an obstruction of justice theory *not* for their obstruction of his ability to obtain a legal remedy but rather solely for their actions taken in the course of his criminal prosecution. While torts such as malicious prosecution and false arrest allow law enforcement officers to be held liable for their wrongful acts while conducting a criminal investigation, neither this Court nor our Supreme Court has ever enlarged the scope of the obstruction of justice tort so as to encompass claims based on acts occurring solely in the course of an officer’s criminal investigation that are unrelated to a plaintiff’s ability to seek and obtain a legal remedy. On these facts, we conclude that the trial court properly dismissed Braswell’s obstruction of justice claims.

C. Claim Under North Carolina Constitution

[6] Finally, Braswell argues that the trial court erred in dismissing his claim against the City alleging that his rights under the North Carolina Constitution were violated by his arrest and prosecution. Our Supreme Court has explained that “in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution.” *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). “[A]n adequate remedy must provide the possibility of relief under the circumstances.” *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009).

The City argues that the dismissal of Braswell’s state constitutional claim was proper because Braswell “made no allegation [for which] he does not have an adequate state remedy.” This Court has held that where a defendant has raised immunity defenses that have not yet been adjudicated — thus creating uncertainty regarding whether a plaintiff will, in fact, have an adequate state remedy — dismissal of the plaintiff’s state constitutional claim at the pleadings stage is premature.

In *Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 745 S.E.2d 316 (2013), we addressed this issue as follows:

As long as Defendants’ sovereign immunity defense remains potentially viable for any or all of Plaintiffs’

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wrongful discharge-related claims, . . . Plaintiffs' associated North Carolina constitutional claims are not supplanted by those claims. This holding does not predetermine the likelihood that plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case. Rather, it simply ensures that an adequate remedy must provide the possibility of relief under the circumstances.

Id. at 15, 745 S.E.2d at 326 (citation and quotation marks omitted).

Here, in the third affirmative defense contained in its answer, the City has asserted governmental immunity as a bar to Braswell's tort claims. The merits of this immunity defense have not yet been resolved. If it is ultimately determined that governmental immunity *does* shield the City from all of these claims, then Braswell would not possess an adequate remedy under state law apart from his claim under the North Carolina Constitution. *See, e.g., Craig*, 363 N.C. at 340, 678 S.E.2d at 355 ("Plaintiff's common law cause of action for negligence does not provide an adequate remedy at state law when governmental immunity stands as an absolute bar to such a claim.").

Therefore, because it is not yet clear at this stage of the litigation whether Braswell will have an adequate state law remedy, the dismissal of his state constitutional claim against the City was premature. Accordingly, we reverse the trial court's dismissal of that claim.

Conclusion

For the reasons stated above, we affirm the trial court's dismissal of Braswell's claims for obstruction of justice, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress as well as his claim against the State under the North Carolina Constitution. We reverse the trial court's dismissal of his § 1983 claims, common law malicious prosecution claims, and claim against the City under the North Carolina Constitution. We remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges HUNTER, JR. and MURPHY concur.

**CONLEYS CREEK LTD. P'SHIP v. SMOKY MOUNTAIN COUNTRY CLUB
PROP. OWNERS ASS'N**

[255 N.C. App. 236 (2017)]

CONLEYS CREEK LIMITED PARTNERSHIP, A NORTH CAROLINA LIMITED PARTNERSHIP, AND
MARSHALL CORNBLUM, PLAINTIFFS

AND

MICHAEL CORNBLUM, MADELINE CORNBLUM, M&D CREEK, INC., A NORTH CAROLINA
CORPORATION, CORNDERMAY PARTNERS, BY AND THROUGH ITS GENERAL PARTNERS, M&D
CREEK, INC. AND OTHER UNKNOWN PARTNERS, AND SMCC CLUBHOUSE, LLC, A NORTH CAROLINA
LIMITED LIABILITY COMPANY, COUNTERCLAIM DEFENDANTS

v.

SMOKY MOUNTAIN COUNTRY CLUB PROPERTY OWNERS ASSOCIATION, INC., A
NORTH CAROLINA NONPROFIT CORPORATION, DEFENDANT, COUNTERCLAIMANT

WILLIAM SPUTE, RONALD SHULMAN, AND CLAUDETTE KRIZEK, DEFENDANTS

AND

ROBERT YOUNG, DEFENDANT IN COUNTERCLAIM OF SMCC CLUBHOUSE

No. COA16-647

Filed 5 September 2017

1. Real Property—condos—status of ownership

A homeowners association was entitled to an order declaring that a 1999 Declaration recorded by the developer established a form of property ownership not recognized in North Carolina, and an order dismissing the association's counterclaim was reversed. While North Carolina's Condominium Act requires that the common areas be owned by the unit owners in common, here the homeowners association owned the common areas.

2. Real Property—condos—reformation of Declaration provisions—necessary parties

A homeowners association's counterclaim seeking reformation of its Declaration provisions was properly dismissed. Any reformation order would necessarily affect the ownership interests of condo unit owners in certain common areas and they were necessary parties. Without all necessary parties, there was no authority to decide the reformation claim.

3. Real Property—condos—dispute with homeowners association—clubhouse dues

The trial court's dismissal of claims by a homeowners association against the developer concerning clubhouse dues was affirmed. The trial court concluded that the claims were time barred, but in fact the one-year limitation relied on by the trial court concerned

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amendments to an existing Declaration, not to a new declaration. Whether labelled an “amendment” or not, the declaration at issue here merged two former communities into a single planned community, which the Planned Community Act treats as terminating the former declarations and establishing a new declaration.

4. Real Property—condos—clubhouse dues

In an action arising from the refusal of a homeowners association to collect and remit clubhouse dues to the developer after the homeowners association had gained control of the development, the argument that the association had no duty to collect the clubhouse dues was rejected. The Legislature did not intend N.C.G.S § 47F-3-102 to limit the power of a planned community’s association, but to provide additional powers if the declaration is silent on the point. Here, the 1999 Declaration specifically authorized the Association to assess clubhouse dues. Moreover, N.C.G.S. § 47F-3-102 authorized the imposition of charges for services provided to lot owners, such as providing access to and maintaining a clubhouse amenity.

5. Real Property—condos—clubhouse—contractual obligation

The question of whether a homeowners association was obligated to pay clubhouse dues to the developer under a Declaration was contractual in nature and not a matter of real or personal covenants.

6. Real Property—condos—association and developer—clubhouse dues—breach of contract—breach of covenant of good faith

Summary judgment for a homeowners association was reversed in a dispute arising from the association’s refusal to collect clubhouse dues from homeowners and pay them to the developer. The declaration clearly obligated the association and the evidence clearly created a genuine issue or material fact regarding the developer’s breach of contract and good faith claims.

7. Real Property—condos—homeowners association and developer—clubhouse dues—civil conspiracy

The trial court properly granted summary judgment for a homeowners association on the developer’s civil conspiracy claim arising from a dispute over clubhouse dues. There was no allegation that the association conspired with any third party regarding the dues. The association, as a corporation, cannot conspire with itself.

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8. Real Property—condos—homeowners association and developer—breach of fiduciary duty

The trial court correctly dismissed a counterclaim by a homeowners association against the members of a family who constituted the developer (excepting two members of the family who were an officer and director of the association). The developer's relationship with the homeowners association was contractual and parties to a contract do not become each other's fiduciaries. However, the officers and directors of the association owed a fiduciary duty to the association.

9. Unfair Trade Practices—condos—homeowners association and developer—clubhouse dues

The trial court erroneously dismissed a homeowners association's counterclaim for unfair and deceptive practices arising from a dispute with the developer. The purported misconduct took place while the developer controlled the association and was more properly classified as having taken place within a single entity rather than in commerce.

10. Appeal and Error—mootness—claim for equitable accounting

An issue concerning an equitable accounting between a homeowners association and a developer was moot where the parties had agreed via a consent order that financial records would be disclosed.

Appeal by Smoky Mountain Country Club Property Owners Association from two orders entered in Swain County Superior Court: (1) order entered 30 July 2015 by Judge Tanya T. Wallace and (2) order entered 26 January 2016 by Judge Marvin P. Pope, Jr. Cross-appeal by SMCC Clubhouse, LLC, from summary judgment order entered 26 January 2016 by Judge Marvin P. Pope, Jr., in Swain County Superior Court. Heard in the Court of Appeals 8 June 2017.¹

Sigmon Law, PLLC, by Mark R. Sigmon and Sanford L. Steelman, Jr., for Conleys Creek Limited Partnership, Marshall Cornblum, Michael Cornblum, Madeline Cornblum, M&D Creek, Inc., Corndermay Partners, Counterclaim Defendants/Plaintiffs-Appellees, and SMCC Clubhouse, LLC, Counterclaim Defendant/Cross-Appellant.

1. This matter was originally heard in this Court on 1 December 2016. We filed an opinion on 4 April 2017. However, we withdrew that opinion. Shortly thereafter, Judge McCullough, who was on the original panel, resigned from this Court. This matter was heard again on 8 June 2017, with Judge Stroud replacing Judge McCullough on the panel.

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*James W. Kilbourne, Jr., for Smoky Mountain Country Club
Property Owners Association, Inc., Defendant-Counter
claimant/Appellant.*

DILLON, Judge.

Smoky Mountain Country Club (the “Planned Community”) is a residential planned community located in Swain County. This matter involves a dispute between the Planned Community’s developer (the “Developer”) and the Planned Community’s homeowners association (the “Association”). The Developer consists of members of the Cornblum family and entities they control and are listed above the “v.” in the caption. The Association includes the homeowners association and certain members of its board of directors and are listed below the “v.” in the caption.

I. Factual Background

The Planned Community is located on 195 acres (the “Property”). It was established in 1999 pursuant to a declaration (the “1999 Declaration”) recorded by the Developer. Prior to 1999, the Developer had developed two residential communities on different portions of the Property. The Planned Community consolidated these communities along with the Property’s undeveloped portions into a new single community.

The Association’s board was initially controlled by the Developer. This dispute arose shortly after the homeowners gained control of the board in 2014.

II. Procedural Background

Shortly after the homeowners took control of the Association board, the board voted to disregard certain provisions in the 1999 Declaration. In response to the board action, the Developer commenced this action against the Association. The Association responded by asserting a number of counterclaims against the Developer. In a series of orders, the trial court has dismissed a number of the claims and counterclaims from which this appeal arises.

On appeal, the Association seeks review of two orders in which the trial court dismissed its counterclaims against the Developer. The Developer seeks review of a summary judgment order which dismissed many of its claims against the Association.²

2. All other claims which have been pleaded in this matter have been dismissed and are not subject to this appeal.

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III. Analysis

[1] In its brief, the Association contests trial court rulings concerning three different areas of dispute. The Developer's cross-appeal contests a trial court ruling concerning one of these areas. We address each area of dispute in turn.

A. Status of the Planned Community's Condo Units

The first area of dispute concerns the legal status of the Planned Community's condominium-style residential units which were established, developed, and sold by the Developer in accordance with the 1999 Declaration.

Specifically, the Planned Community includes single-family residences and townhomes, separated from adjacent residences by vertical property boundaries. The Planned Community also includes multi-story buildings with residences (the "condo units") located on each floor. Each condo unit is separated by vertical boundaries from other condo units on the same floor and by horizontal boundaries from condo units located on different floors.

Pursuant to the 1999 Declaration, each condo unit owner acquired an interest in real estate which does not fit the technical definition of "condominium" found in our Condominium Act. More specifically, the condo unit owners own the air space and interior walls within their respective units, but the Association owns the common areas of the condo buildings and condo building lots. In contrast, the Condominium Act states that property is not a "condominium" as defined by that Act *unless* the common areas are owned by the unit owners, in common, rather than owned by an association. N.C. Gen. Stat. § 47C-1-103(7) ("Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.").³

Based on the inconsistency between the 1999 Declaration and the Condominium Act, the Association sought (1) a declaratory judgment stating that the form of ownership held by the Planned Community's condo unit owners is illegal under North Carolina law and (2) a reformation of the provisions of the 1999 Declaration concerning the condo units to conform with our Condominium Act.

3. In everyday parlance, the word "condominium" or "condo" sometimes refers to an individual condo unit. In the Condominium Act, however, the word "condominium" refers to the entire condominium community, which contains all of the units and common areas.

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The trial court granted the Developer's Rule 12(b)(6) motions with respect to these counterclaims, without stating its reasoning. For the reasons stated below, we reverse the trial court's dismissal of the Association's declaration counterclaim. We affirm, however, the trial court's dismissal of the Association's reformation counterclaim.

1. Declaratory Counterclaim—Validity of Form of Ownership

The condo units established by the 1999 Declaration – where the common areas within the condo buildings and condo building lots are owned by the Association and *not* by the condo unit owners in common – would be permissible *under the common law*:

At common law, the holder of a fee simple also owned the earth beneath and the air above – “*cujus est solum, ejus usque ad coelum et ad inferos*”.⁴ This law applies in North Carolina. Plaintiffs concede that air rights are thus a part of land ownership, but they argue that absent specific authority, the holder of a fee simple may not divide his fee horizontally. . . . It appears[,] [however,] to be the general rule that *absent some specific restraint*, the holder of a fee simple may divide his fee in any manner he or she chooses.

Cheape v. Chapel Hill, 320 N.C. 549, 563, 359 S.E.2d 792, 800 (1987) (emphasis added) (internal citations omitted). The General Assembly, however, has abrogated the common law by establishing a “specific restraint” against the form of ownership established by the 1999 Declaration through the passage of the Planned Community Act. Specifically, the Planned Community Act *requires* that residential real estate with horizontal boundaries and located within a planned community “shall” meet the definition of “condominium” as set forth in the Condominium Act, as explained below.

In 1985, thirteen years before enacting the Planned Community Act, the General Assembly enacted the Condominium Act. By its terms, the Condominium Act regulates those properties which fit the Act's definition of “condominium.” Properties with horizontal boundaries which do not fit the Act's definition of “condominium” are not expressly

4. Translation of italicized Latin phrase in the quote is “whoever's is the soil, it is theirs all the way to Heaven and all the way to hell.”

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forbidden by the Act; rather, such properties are simply not subject to the provisions of the Act.⁵

In 1998, thirteen years after the Condominium Act became law, the General Assembly passed the Planned Community Act to govern planned communities. The Planned Community Act allows properties within a planned community to have horizontal boundaries but forbids the type of ownership established by the 1999 Declaration. Specifically, the North Carolina Comment to N.C. Gen. Stat. § 47F-1-101 expresses the General Assembly's intent that residences within a planned community which has horizontal boundaries must be a "condominium" as defined by the Condominium Act:

It is understood and intended that any [planned community] development which incorporates or permits horizontal boundaries or divisions between the physical portions of the planned community designated for separate ownership or occupancy *will be created under and governed by the North Carolina Condominium Act* and not this Act.

N.C. Gen. Stat. § 47F-1-101 cmt. 2 (emphasis added.)⁶

Based on the foregoing, we conclude that the Association is entitled to an order declaring that the 1999 Declaration establishes a form of property ownership in the Planned Community's condo units not recognized in North Carolina. Therefore, we reverse the order of the trial court dismissing the Association's counterclaim and remand the matter to enter judgment for the Association on this counterclaim. Such judgment, of course, would not affect the rights of those not parties to this action.

2. Reformation Claim

[2] The Association's counterclaim seeking reformation of the 1999 Declaration provisions relating to the condo units was properly

5. The "Official Comment" to N.C. Gen. Stat. § 47C-1-103 states that "unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium. . . . Such projects may have many of the attributes of condominiums, but they are not covered by [the Condominium] Act"). N.C. Gen. Stat. § 47C-1-103 cmt. 5.

6. The North Carolina Comment is not technically part of the Act's statutory language. However, the General Assembly authorized that the comments be printed with the Act. Specifically, Section 2 of the session law which enacted the Planned Community Act states that the General Assembly's "Revisor of Statutes shall cause to be printed with this act all relevant portions of the official comments to the [Act] and all explanatory comments of the drafters of this act, as the Revisor deems appropriate." North Carolina Planned Community Act of October 15, 1998, ch. 199, sec. 2, 1998 N.C. Sess. Laws at 691.

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dismissed. Any reformation order would necessarily affect the ownership interests of these condo unit owners in certain common areas; and, therefore, they are necessary parties. *See NCDOT v. Fernwood Hill*, 185 N.C. App. 633, 636-37, 649 S.E.2d 433, 436 (2007); *NCDOT v. Stagecoach Village*, 174 N.C. App. 825, 622 S.E.2d 142 (2005); N.C. Gen. Stat. § 1A-1, Rule 19(a)(2015). Also, any reformation order would decide whether the condo units would be subject to a single condominium association or whether each condo building would be governed by a separate association. Without all necessary parties, the trial court and this Court lack the authority to decide the reformation claim. *See Rice v. Randolph*, 96 N.C. App. 112, 113, 384 S.E.2d 295, 297 (1989). Therefore, we affirm Judge Pope's order dismissing the Association's reformation counterclaim.⁷

We note that the Planned Community Association may own the common elements of the Planned Community at large. The common elements of the condominium portion of the Planned Community, however, may not be owned by the Association but must be held in common by the condo unit owners in common. The condo unit owners are still part of the Planned Community and subject to the 1999 Declaration pertaining to common elements of the Planned Community, *see* N.C. Gen. Stat. § 47F-1-103 (providing that real estate comprising a condominium may be part of a planned community), notwithstanding the fact that they are also subject to a condominium association, *see* N.C. Gen. Stat. § 47C-3-101 (requiring that a condominium association be organized where a condominium is established).

B. The Clubhouse Dispute

[3] The second dispute between the Developer and the Association concerns the Planned Development's clubhouse amenity (the "Clubhouse"). Pursuant to the 1999 Declaration, ownership of the Clubhouse remains with the Developer in perpetuity, never to be turned over to the Association; and the Association is required in perpetuity to assess dues (the "Clubhouse Dues") from the homeowners and remit them to the Developer. Specifically, the 1999 Declaration provided as follows:

Declarant shall grant to the Association and the Owners
... a perpetual nonexclusive right to use the [Clubhouse],

7. Our holding should not be construed as an opinion that the property rights of the owners of the condominium-styled residences are, at present, unmarketable. *See* N.C. Gen. Stat. § 47F-2-103(d) ("Title to a lot and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this Chapter. Whether a substantial failure to comply with this Chapter impairs marketability shall be determined by the law of this State relating to marketability.")

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and each Owner, in consideration thereof, shall pay the Clubhouse Dues to the Association, and the Association shall pay all of the Clubhouse Dues collected . . . to Declarant. The obligation of each Owner to pay Clubhouse Dues to the Association shall be absolute for the entire period of time that such Owner is an Owner . . . , and shall not be dependent on such Owner's actual use of the [Clubhouse]. The Association shall bill and collect the Clubhouse Dues from each Owner . . . [and] shall pay the total collected amount of Clubhouse dues to Declarant.

After control of the Association's board was assumed by the homeowners, the board voted to stop honoring this obligation to assess and collect the Clubhouse Dues for the Developer.

In this action, the Developer and the Association have asserted a number of claims and counterclaims regarding the Clubhouse Dues, all of which have been dismissed in a series of orders by the trial court.

For the reasons below, we conclude that the Planned Community Act does not forbid the arrangement established in the 1999 Declaration, whereby (1) the Developer retains ownership of the Clubhouse amenity; (2) the Association is authorized to assess dues from its homeowners to pay the Developer for the right to use the amenity; and (3) the Association is obligated to assess its homeowners for the Clubhouse Dues and remit them to the Developer. (We note that the Planned Community Act does allow that when homeowners take control of an association board from the developer, the association may relieve itself of obligations made on its behalf by the developer, where it is found that the arrangement was "not bona fide or was unconscionable[.]" N.C. Gen. Stat. § 47F-3-105.) We address the Association's counterclaims and the Developer's claims concerning the Clubhouse dispute in turn below.

1. Association Clubhouse Dispute Counterclaims

The Association asserted four prayers for relief relating to the Clubhouse dispute which were dismissed by the trial court. For the reasons stated below, we affirm the dismissal as to three of these prayers for relief, but not based on the legal reasoning of the trial court.⁸

8. The Association has not made any argument on appeal regarding the dismissal of the fourth prayer for relief and is therefore abandoned. Developer contends that the Association's failure to contest the dismissal of one prayer for relief prevents the Association from arguing its other claims. We disagree. While it is true that Rule 28 of

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The trial court's legal justification for dismissing the Association's claims concerning the Clubhouse dispute was that the claims were time-barred by N.C. Gen. Stat. § 47F-2-117(b). This statute provides that "[n]o action to challenge the validity of an *amendment* [to a declaration] adopted pursuant to this section may be brought *more than one year* after the amendment is recorded." N.C. Gen. Stat. § 47F-2-117(b) (2015) (emphasis added).

We conclude that G.S. 47F-2-117(b) *does not apply* to the 1999 Declaration and that, therefore, the trial court erred by relying on this statute as its justification for dismissing the claims.⁹ Specifically, one-year time limit contained in G.S. 47F-2-117(b) – by its plain language – only applies to challenges to “amendments” to an existing declaration, not to challenges to the declaration itself. Here, though, the 1999 Declaration was not an “amendment” of the prior declarations recorded by the Developer concerning the Property. Rather, the 1999 Declaration was a *new* declaration, and the prior declarations recorded by the Developer governing the predecessor communities developed on the Property were terminated.

Specifically, the Planned Community Act does not view the process by which communities subject to separate declarations are merged into one community as an *amendment* to the former declarations. Rather, the Act treats this process as a *merger* which essentially terminates the former planned communities/declarations and establishes a *new planned community* subject to a new declaration.¹⁰ See N.C. Gen. Stat. § 47-2-121 (2015).

We note that the 1999 Declaration refers to itself as an “amendment.” However, it also states that the *two* prior declarations “shall be . . . of

our Appellate Rules provides that *issues* not presented in a party's brief are deemed abandoned, N.C. R. App. P. 28(b)(6), this does not affect the party's right to appeal “[f]rom any final judgment of a superior court[.]” N.C. Gen. Stat. § 7A-27(b)(1)(2015).

9. We need not – and do not – reach the issue of whether G.S. 47F-2-117(b) is, in fact, a statute of repose.

10. Under the Act, a merger requires the approval of the same percentage of owners which must approve a termination, not the lower percentage needed to approve an amendment. See N.C. Gen. Stat. § 47F-2-121. And under the Act, a termination (and therefore a merger) requires the approval of 80% of the owners. See N.C. Gen. Stat. § 47F-2-118. Here, it appears that one of the two former communities approved the merger with 99% of the vote and the other with 75% of the vote. We note that neither party has made any argument concerning the validity of the adoption of the 1999 Declaration, and all parties have been acting for almost two decades as if the 1999 Declaration was validly approved.

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no further force and effect for any purpose whatsoever, and [shall be] replaced in their entirety by the [1999] Declaration.” Whether labelled as an amendment or not, it is clear that the 1999 Declaration “merged or consolidated” two former planned communities “into a single planned community.” See N.C. Gen. Stat. § 47F-2-121(a).

Notwithstanding its reliance on G.S. 47F-2-117(b), we conclude that the trial court properly dismissed the Association’s counterclaims concerning the Clubhouse Dues dispute, though for a different reason, as explained below.

a. Clubhouse Dues

[4] The Association prayed for (1) a declaration that “the Association has no duty under the law to collect Clubhouse Dues from owners and that any such duty stated in the Declaration is null and void[,]” and (2) the repayment of “all Clubhouse Dues improperly collected and paid [to the Developer].”

The Association argues in its brief that the Planned Community Act does not authorize it to collect dues from its homeowners to pay to a third party for use of property that is not part of the Planned Community. The Association essentially argues that the Act, specifically N.C. Gen. Stat. § 47F-3-102(10),¹¹ only allows an association to assess dues for “common elements” and that the Clubhouse is *not* a common element.

We conclude that the Association’s argument is unpersuasive for two reasons. First, N.C. Gen. Stat. § 47F-3-102, which enumerates certain powers enjoyed by planned community’s associations, is not the sole source of authority for an association. Indeed, the Act states that *it is the declaration* of a planned community which “form[s] the basis for the legal authority for the planned community to act” so long as the declaration is “not inconsistent with the provisions of [the Act].” N.C. Gen. Stat. § 47F-2-103(a). And here, the 1999 Declaration has expressly authorized the Association to assess its homeowners the Clubhouse Dues.

We conclude that that the General Assembly did not intend N.C. Gen. Stat. § 47F-3-102 to *limit* the power of a planned community’s association. Rather, its plain language – which begins with “[u]nless . . .

11. The Association did not plead or argue any other theory. For instance, it did not contend that the Declaration was valid but that the Association had the right to terminate its obligation to collect the Clubhouse Dues based on N.C. Gen. Stat. § 47F-3-105 (2015), which allows an association to terminate any contractual obligation put in place by a declarant that is not *bona fide* or is unconscionable to the owners within the planned community.

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the declaration expressly provides to the contrary, the association may . . .” – indicates that the General Assembly intended for N.C. Gen. Stat. §47F-3-102 to provide power to an association *in addition* to those already provided to it by its declaration, provided that the declaration is silent regarding said powers. Further, the Association has not pointed to any other provision in the Act which prevents a declaration from authorizing an association to enter into a contract with a third party (here, the Developer) to provide an amenity for the homeowners and to assess the homeowners for the costs associated with the contract. Therefore, since the 1999 Declaration specifically authorizes the Association to assess its homeowners for the Clubhouse Dues, and since the Act does not proscribe the granting of this power to an association, we overrule the Association’s argument.

Second, presuming that N.C. Gen. Stat. § 47F-3-102 is controlling, this section authorizes the Association to collect the Clubhouse Dues. For instance, N.C. Gen. Stat. § 47F-3-102(10) states that, unless otherwise prohibited by the declaration, a planned community association has the power to “[i]mpose and receive any payments, fees or charges” not only for the use of “common elements” but also “for services provided to lot owners[.]” Though the Clubhouse is not a “common element” of the Planned Community, see N.C. Gen. Stat. § 47F-1-103(4) (defining a common element as “any real estate within a planned community owned or leased by the association”), G.S. 47F-3-102 also empowers an association to assess dues for “services.” And, here, the Developer’s role of providing access to and maintaining a clubhouse amenity is a “service.”

b. Real and Personal Covenants

[5] The Association argues that we are bound by *Midsouth Golf, LLC v. Fairfield*, 187 N.C. App. 22, 652 S.E.2d 378 (2007) and other cases to conclude that the obligations imposed in the 1999 Declaration for the payment of Clubhouse Dues are *personal* covenants rather than *real* covenants, and are therefore unenforceable by the Developer in this case. We disagree.

Midsouth Golf is one of three opinions from our Court involving a residential community and a golf course amenity owned by a third party. Those appeals dealt with covenants contained within declarations which essentially required the developer and its successors to maintain a golf course amenity for the homeowners and for the homeowners to pay dues for the amenity. In a series of three decisions, panels of our Court

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held that (1) the covenant which created the homeowners' obligation to pay the dues was a personal covenant, and therefore, was unenforceable against those who bought homes from the original owners and (2) despite this holding, any successor to the developer had a continuing obligation to maintain the golf courses amenity, even if only one homeowner chose to continue paying the dues. *See id.*; *Fairfield v. Midsouth Golf*, 215 N.C. App. 66, 715 S.E.2d 273 (2011); *Waterford v. Midsouth Golf*, 215 N.C. App. 394, 716 S.E.2d 87 (2011). These three opinions from our Court are discussed in the opinion issued in a subsequent federal proceeding involving the bankruptcy of the successor to the developer who owned the golf course-amenity owner. *See In re Midsouth Golf*, 549 B.R. 156, 169 (2016). Of significance, bankruptcy judge noted that our Court, in determining that the association had the right to enforce the covenant, applied the law of contract, and not the law of real and personal covenants: "Those covenants specifically identify the property owners' association [] as an entity authorized to enforce the provisions therein against the property owner[.] As between those parties and in that context, the inquiry is a basic matter of contract law. Whether the [] covenant was 'real' or 'personal' was both immaterial to and wholly outside the scope of the [North Carolina Court of Appeals'] analyses." *Id.*

In the present action, the Developer has not sued the homeowners themselves to enforce any covenant. Indeed, the homeowners are not parties. Rather, the Developer has asserted claims against the Association to enforce the Association's obligation under the 1999 Declaration to pay money to the Developer. This obligation is contractual in nature, and whether this obligation is real or personal is irrelevant to our analysis, since the Association is the original party expressly obligated under the 1999 Declaration. *See id.*

We make no ruling regarding the obligation of the homeowners themselves to pay Clubhouse Dues to the Association, as they are not parties to this action. We only note that homeowners within a planned community are generally obligated to respect not only real covenants governing their property, but also to pay any dues which are assessed by their association.

2. Developer's Clubhouse Dispute Claims

Developer, through its entity which owns the Clubhouse, has asserted four claims against the Association relating to the Association's refusal to continue assessing Clubhouse Dues. Judge Pope granted the

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Association's summary judgment motion on all four claims.¹² Developer appealed. We affirm in part and reverse and remand in part.

a. Breach of Contract and the Covenant of Good Faith
and Fair Dealing

[6] The first claim asserted by the Developer was for breach of contract and breach of the covenant of good faith and fair dealing, based on the Association's decision not to honor its obligation in the 1999 Declaration to assess and remit Clubhouse Dues. We hold that the Developer met its burden to survive summary judgment; and, therefore, we reverse that portion of the order granting summary judgment on the claim.

The terms of the 1999 Declaration clearly establish obligations which are contractual in nature between the owner of the Clubhouse and the Association:

Declarant shall grant to the Association and the [homeowners] a perpetual nonexclusive right to use the Clubhouse Use Facilities, and each Owner, in consideration thereof, shall pay the Clubhouse Dues to the Association, and the Association shall pay all of the Clubhouse Dues collected from Owners to Declarant.

. . . The Association shall bill and collect the Clubhouse Dues from each Owner on a current basis, and . . . shall pay the total collected amount of Clubhouse Dues to Declarant.

The language of the 1999 Declaration clearly obligates the Association to bill and collect Clubhouse dues and to pay the total collected amount of Clubhouse Dues to the Declarant. The fact that the original Declarant does not currently hold title to the Clubhouse because title was transferred to another Developer-controlled entity is irrelevant. The 1999 Declaration provides that its provisions and all of its covenants would be "binding upon Declarant, its successors and assigns[.]"

"When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties

12. Developer has made no argument on appeal regarding the trial court's grant of summary judgment on its claim for libel *per se*, and therefore we regard this claim as abandoned. *See* N.C. R. App. P. 21.

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elected to omit.” *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962).

The Developer produced evidence tending to show that the Association sent a message to its homeowners that the Association “would no longer bill for or collect Clubhouse Dues,” that monthly payments “would no longer include Clubhouse Dues,” and that members of the Association were “not required” to belong to the Clubhouse and “may opt out if they so desire.” The evidence clearly creates a genuine issue of fact regarding the Developer’s breach of contract and good faith claims. Of course, at trial the Association may bring forth evidence that conflicts with the Developer’s evidence or which shows that the provisions in the 1999 Declaration are not “bona fide” or are “unconscionable.” *See* N.C. Gen. Stat. § 47F-3-105.¹³

b. Civil Conspiracy and Unfair or Deceptive Acts or Practices

[7] The Developer asserted a claim for civil conspiracy against the Association and its members. In order to establish a claim for civil conspiracy, a party must allege (1) the existence of a conspiracy, (2) wrongful acts done by certain of the alleged conspirators in furtherance of that conspiracy, and (3) injury as a proximate result of the conspiracy. *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008). The doctrine of intra-corporate immunity provides that because “at least two persons must be present to form a conspiracy, a corporation cannot conspire with itself, just as an individual cannot conspire with himself.” *State ex rel. Cooper v. Ridgeway*, 84 N.C. App. 613, 625, 646 S.E.2d 790, 799 (2007), *rev’d on other grounds*, *State ex rel. Cooper*, 362 N.C. 431, 666 S.E.2d 107 (2008).

Here, we conclude that the trial court properly granted summary judgment for the Association on Developer’s civil conspiracy claim because the Association, as a corporation, cannot conspire with itself. *See id.* There is no allegation that the Association conspired with any third party regarding the Clubhouse Dues. We further affirm the trial court’s grant of summary judgment dismissing the Developer’s claim for

13. We note that the Condominium Act provides that a condominium association may terminate *any* “contract or lease between the association and a declarant” *even if* the contract is not found to be unconscionable. N.C. Gen. Stat. § 47C-3-105. The General Assembly, though, did not see fit to include this additional protection for planned community associations in the Planned Community Act. Here, any dispute regarding the provisions of the 1999 Declaration is governed by the Planned Community Act, and not the Condominium Act, notwithstanding that there are condo units located within the Planned Community.

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damages for unfair or deceptive acts or practices, as this claim is based on the alleged civil conspiracy.

C. Association Counterclaims

The third area of dispute challenged in this appeal concerns a number of counterclaims asserted by the Association against members of the Cornblum family for alleged self-dealing. We address each counterclaim in turn.

1. Breach of Fiduciary Duty

[8] In its third counterclaim, the Association sought damages for breach of fiduciary duty by Michael Cornblum, Carolyn Cornblum and the Cornblum-controlled entity which served as the declarant (the “Declarant”) in the 1999 Declaration.¹⁴ We affirm the dismissal as to the Association’s counterclaim against the Declarant. However, we reverse as to Michael Cornblum and Carolyn Cornblum.

“A claim for breach of fiduciary duty requires the existence of a fiduciary duty.” *Governors Club, Inc. v. Governors Club Ltd. P’ship*, 152 N.C. App. 240, 247, 567 S.E.2d 781, 786 (2003).

We agree with the Developer that the trial court properly dismissed this counterclaim because its relationship with the Association was contractual. *See Highland Paving Co., LLC v. First Bank*, 227 N.C. App. 36, 43, 742 S.E.2d 287, 292-93 (2013) (“[P]arties to a contract do not thereby become each other’s fiduciaries[.]”). A declarant is not required to put the interests of the association ahead of its own in every instance when it sets up a planned community, as generally would be required of a fiduciary. Indeed, a declarant is allowed to reserve rights to itself and enter into contractual relationships between itself and the association.

However, while serving as *directors* and *officers* of the Association, Michael and Carolyn Cornblum certainly *did* owe a fiduciary duty to the Association. *See Governors Club*, 152 N.C. App. at 248, 567 S.E.2d at 786-87 (citing *Underwood v. Stafford*, 270 N.C. 700, 703, 155 S.E.2d 211, 213 (1967) (stating that under North Carolina Law, “directors of a corporation generally owe a fiduciary duty to the corporation”); *see also Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983).

14. The first two counterclaims concern the legal status of the condominium-style units addressed in section III.A. of this opinion.

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N.C. Gen. Stat. § 55–8–30 requires a corporate director to discharge his or her duties as a director: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation. N.C. Gen. Stat. § 55-8-30(a)(1)-(3) (2015); *see also* N.C. Gen. Stat. § 55-8-42(a) (2015) (“An *officer* . . . shall discharge his duties . . . in a manner *the officer* reasonably believes to be in the best interests of the corporation.”) (emphasis added). “Allegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1) (2003).” *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66–67, 614 S.E.2d 328, 335 (2005) (citing *Tyson v. N.C.N.B.*, 305 N.C. 136, 142, 286 S.E.2d 561, 565 (1982)); *see* N.C. Gen. Stat. § 1-52(1) (2015).

The Association’s counterclaim alleges that Carolyn Cornblum was an officer until 2014 and that Michael Cornblum was a director until 2014. The Association makes a number of allegations which, if true, tend to show that the Cornblums acted in their own interests and not in the best interests of the Association within the applicable limitations period. Accordingly, we hold that the trial court improperly dismissed the Association’s counterclaim for breach of fiduciary duty as to Michael and Carolyn Cornblum.

2. Unfair and Deceptive Trade Practices

[9] In its fourth counterclaim, the Association sought damages based on allegations that Michael Cornblum, Carolyn Cornblum, Madeline Cornblum and the Declarant committed unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 (2015). We affirm in part, and reverse in part.

Our Supreme Court has instructed that a claim under N.C. Gen. Stat. § 75-1.1 “does not extend to a business’s internal operations, but rather extend to acts between a business with another business(es) or a business with a consumer(s).” *White v. Thompson*, 364 N.C. 47, 52-53, 691 S.E.2d 676, 679-80 (2010). Here, as in *Thompson*, the bad acts alleged by the Association “did not occur in . . . dealings with [other market participants].” *Thompson*, 364 N.C. at 54, 691 S.E.2d at 680. The purported misconduct by the Cornblum family was alleged to have taken place while members of the Cornblum family were controlling directors of the Association. Even taken as true, most of the allegations regarding the actions of the Declarant and the members of the Cornblum family

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are more properly classified as occurring within a single entity rather than “within commerce.” *Id.*

We do note that some of the bad acts alleged by the Association deal with the Cornblum’s marketing of the condo units in violation of North Carolina law. These acts were arguably “within commerce.” However, none of the past or present condo unit owners are parties. Thus, we state no opinion and do not rule upon the issue of whether individual homeowners, who are not parties to this action, could state a valid Chapter 75 claim against the Cornblums.

Therefore, we conclude that the trial court properly dismissed the Association’s claim for unfair and deceptive trade practices.

3. Breach of Covenant of Good Faith and Fair Dealing

In its fifth counterclaim, the Association sought damages based on an alleged breach of the covenant of good faith and fair dealing by the Declarant. To state a valid claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must plead that the party charged took action “which injure[d] the right of the other to receive the benefits of the agreement,” thus “depriv[ing] the other of the fruits of [the] bargain.” *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228-29, 333 S.E.2d 299, 305 (1985).

We conclude that the Association’s fifth counterclaim should not have been dismissed. The counterclaim does allege a contractual relationship, established in the Declaration itself. The Association alleged that “[the Declarant] imposed upon the owners [within the Planned Community] a declaration whose terms and provisions must be in good faith and fair dealing.” We conclude that this counterclaim does state a claim for which relief could be granted, and, on this point, we reverse the order of the trial court.

4. Accounting

[10] In its final counterclaim, the Association sought an equitable accounting of the Association’s income and expenses and collection history during all periods of Declarant control. We dismiss this portion of the appeal as moot. We base our dismissal on the parties’ agreement via a consent order that the Declarant would deliver all “books and records relating to the Association” in their custody or control. The consent order provided that these “books and records” would include financial records of the Association, including a schedule of all funds receivable for the payment of assessments. A determination on this counterclaim

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would have no practical effect in light of the consent order. *See Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) (“A case is ‘moot’ when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.”).

IV. Conclusion

We reverse Judge Wallace’s order dismissing the Association’s counterclaim seeking a declaration regarding the legal status of the Planned Community’s condominium-style residences, and we direct the trial court on remand to enter judgment for the Association on this counterclaim, consistent with this opinion. We, however, affirm Judge Wallace’s order dismissing the Association’s counterclaim seeking reformation of the 1999 Declaration, based on the Association’s failure to join all necessary parties as explained in this opinion. On remand, the trial court may, in its discretion, allow the Association for leave to amend to join necessary parties and to re-assert its reformation claim.

We affirm the trial court’s order dismissing the Association’s counterclaims relating to the Clubhouse dispute. We reverse the trial court’s summary judgment on Developer’s claim for breach of contract and breach of the covenant of good faith and fair dealing, and remand for further proceedings not inconsistent with this opinion. We affirm that summary judgment order as to the Developer’s other claims.

We reverse Judge Pope’s dismissal of the Association’s third counterclaim for breach of fiduciary duty against Michael Cornblum and Carolyn Cornblum, and remand for further proceedings not inconsistent with this opinion. We dismiss the Association’s appeal of Judge Pope’s dismissal of its counterclaim seeking an accounting, as moot. Judge Pope’s dismissal of the remainder of the Association’s counterclaims in that order is affirmed.

**AFFIRMED IN PART, DISMISSED IN PART, REVERSED IN PART,
AND REMANDED.**

Judges STROUD and TYSON concur.

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[255 N.C. App. 255 (2017)]

WINSLOW FORBES, PLAINTIFF

v.

CITY OF DURHAM, NORTH CAROLINA, AND JOSE L. LOPEZ, SR. IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE FOR THE CITY OF DURHAM, AND THOMAS J. BONFIELD, IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS CITY MANAGER FOR THE CITY OF DURHAM, DEFENDANTS

No. COA16-964

Filed 5 September 2017

1. Employer and Employee—wrongful retaliation—summary judgment

The trial court properly granted summary judgement for the City of Durham in a claim for employment retaliation under Title VII by a police officer passed over for promotion. While the officer contended that his comments to the police chief about perceived racial discrimination by African American officers were protected activities that caused the adverse action of changing the hiring process and passing him over for promotion, there must be a direct link connecting the comments to the promotion decision that is more than speculation. Moreover, a non-retaliatory reason for the promotion decision could be demonstrated.

2. Employer and Employee—retaliation claim—42 U.S.C. § 1981

A retaliation claim for reporting acts of discrimination can be brought under 42 U.S.C. § 1981. Even though section 1981 does not explicitly include retaliation, precedent state that it is a an integral part of preventing racial discrimination.

3. Employer and Employee—retaliation—42 U.S.C. § 1981 and § 1983 claims

The trial court properly granted summary judgment for Durham a police officer's claim under 42 U.S.C. § 1983 that rose from his being passed over for promotion, allegedly in retaliation for mentioning the perception of racial discrimination by African-American officers to the police chief. Plaintiff did not direct the appellate courts to any policy or regulation that caused or encouraged the retaliation.

4. Employer and Employee—retaliation against police officer—city manager—summary judgment

Summary judgment was properly granted against a police officer on a retaliation claim against a city manager arising from

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the police officer being passed over for promotion. The allegations and forecasted evidence did not support a claim against the city manager for the police chief's promotion decision that was made months before the conversation with the city manager.

5. Employer and Employee—retaliation—police chief—promotion decision

Summary judgment was properly granted for a police chief on claims under 42 U.S.C. § 1981 and 1983 by one of his officers who was passed over for promotion. Plaintiff lacked sufficient evidence of a connection between his protected actions and the decision to pass him over for promotion.

6. Employer and Employee—retaliation—being passed over for promotion

Summary judgment was properly granted for a police chief, a city manager, and the City of Durham on a claim under the North Carolina Constitution arising from plaintiff being passed over for promotion, allegedly in retaliation for reporting racial concerns. Plaintiff did not provide support for his argument that there was a claim available under Article I, Section 19 of the State Constitution.

Judge MURPHY concurs in the result only.

Appeal by plaintiff from order entered on or about 11 July 2016 by Judge Henry W. Hight in Superior Court, Durham County. Heard in the Court of Appeals 9 March 2017.

Edelstein & Payne, by M. Travis Payne and Sean Cecil, for plaintiff-appellant.

Kennon Craver, PLLC, by Joel M. Craig and Henry W. Sappenfield; and Office of the City Attorney, by Kimberly M. Rehberg, for defendant-appellees.

STROUD, Judge.

Plaintiff Winslow Forbes ("plaintiff") appeals from the trial court's order granting summary judgment for defendants City of Durham ("defendant City of Durham"), Jose L. Lopez, Sr. ("defendant Lopez"), and Thomas J. Bonfield ("defendant Bonfield") and dismissing all of his claims with prejudice. On appeal, plaintiff argues that he has demonstrated several genuine disputes of material facts and that the

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trial court should not have granted summary judgment on any of his retaliation claims. After review, we disagree and find the trial court did not err in granting summary judgment on all of plaintiff's claims.

Background

Plaintiff joined the City of Durham Police Department in 1988. He was promoted to Corporal around 1997, Sergeant around 1999, and Lieutenant around 2001. Defendant Lopez became Chief of Police in 2007. Defendant Lopez promoted plaintiff to Captain in 2009, and a little more than a year later, on 13 August 2010, he appointed him to Assistant Chief.

Plaintiff was considered for a promotion to Deputy Chief on two occasions: first, in May 2012, when he and Assistant Chief Larry Smith were considered for an open Deputy Chief position. Defendant Lopez ultimately selected Assistant Chief Smith for the promotion. Plaintiff "believed that both he and [Assistant Chief] Smith were well-qualified candidates." Nevertheless, afterwards, plaintiff told defendant Lopez that "there were many black officers who were qualified for promotion, but Chief Lopez had consistently promoted non-black officers over equally or better-qualified black officers." Plaintiff also allegedly told defendant Lopez that "many black officers had a perception of discrimination[.]" Defendant Lopez "responded in a defensive and angry tone." Plaintiff alleged in his complaint that it appeared to him that defendant Lopez "was angry about the suggestion that even a *perception* of discrimination might exist."

Plaintiff alleged that after this conversation, defendant Lopez did not take any action to address either actual or perceived racial discrimination and that he then began treating plaintiff differently than similarly-situated white colleagues. For example, plaintiff described a situation involving a black male Lieutenant under his command and a white male subordinate officer who received a coaching and counseling memo from the Lieutenant for violating a department policy and then complained to a white male Sergeant in Internal Affairs. The Lieutenant told plaintiff he had previously been treated unfairly by this Sergeant and he was concerned he would once again be treated unfairly during this investigation. Plaintiff requested another Internal Affairs officer be assigned to this investigation; afterwards, defendant Lopez decided plaintiff would not be allowed to review the investigative file, in contrast to the typical process where each individual in the chain of command above the person under investigation can review the file and determine whether or not they agree with Internal Affairs' conclusions. Plaintiff told defendant Lopez he felt he was being treated differently than white commanding officers in similar circumstances.

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In 2013, another Deputy Chief retired, leaving a position available. Plaintiff alleges that he was the only remaining candidate for promotion based on the Review Panel's assessments approximately six months earlier. Plaintiff alleges that "[t]he usual and customary practice of the Police Department has been to promote the next individual on the list of qualified applicants from the Review Panel, provided that the list is not more than eighteen months old." But on 18 February 2013, defendant Lopez informed plaintiff that he intended to conduct a new process for the open Deputy Chief position. "Plaintiff believes that [defendant] Lopez made this decision on the basis of race, and in retaliation for [p]laintiff's opposition to race discrimination within the Police Department."

Plaintiff filed a complaint with Human Resources on 28 February 2013, alleging race discrimination and retaliation by defendant Lopez. Plaintiff applied for the open Deputy Chief position and was interviewed by the Review Panel in March 2013. Defendant Lopez informed plaintiff on 21 March 2013 that he had selected Assistant Chief Anthony Marsh – a black male – for the Deputy Chief position over plaintiff. Plaintiff alleged in part that Chief Lopez "failed to promote him to Deputy Chief in retaliation for his opposition to race discrimination by Chief Lopez."

Plaintiff told defendant Lopez both via email and verbally that he believed the promotion process "had been unfair, discriminatory, and retaliatory." On 25 March 2013, defendant Lopez gave plaintiff a coaching and counseling memo in response to his claims of discriminatory and retaliatory practices. Plaintiff filed a supplemental complaint with Human Resources regarding the memo. Defendant City of Durham then hired a consultant to investigate plaintiff's allegations. Human Resources contacted plaintiff on 7 June 2013 and informed him that "the consultant found his allegations of race discrimination to be 'not substantiated' but had been 'unable to determine' whether retaliation had occurred."

Plaintiff further alleged that on 2 July 2013, defendant Lopez made a "racially offense remark in the presence of his Executive Committee and several other City employees." Defendant Lopez was preparing for a press conference regarding recent shootings in Durham; he pointed out that all of the recent shooting victims were African-American and had been involved in criminal activity. He also stated that all known suspects were African-American. "Plaintiff felt that this remark was offensive because the race of the victims should not be relevant to law enforcement officials." An Assistant Chief pointed out that one of the shooting victims was a black lawyer who was an innocent bystander and not involved in any criminal activity; defendant Lopez responded by stating that "the lawyer deserved to get shot because he was a public defender."

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Plaintiff perceived this remark as racially motivated and highly offensive. On 16 July 2013, he met with defendant Bonfield, who was employed by the City of Durham as City Manager, and reported defendant Lopez's remark. Defendant Bonfield assured plaintiff he took the allegation seriously and that it would be investigated. Defendant Lopez held a press conference on 6 September 2013 and stated that he did not recall making the remark, but he could not be certain that he had not.

Plaintiff filed his complaint on or about 29 July 2014. Plaintiff's complaint contained several causes of action for race discrimination and retaliation, including: (1) under Title VII against defendant City of Durham; (2) under 42 U.S.C. § 1981 against defendant City of Durham and defendants Lopez and Bonfield in both their official and individual capacities; (3) under 42 U.S.C. § 1983 against defendant City of Durham and defendants Lopez and Bonfield in both their official and individual capacities; and (4) under the North Carolina Constitution against defendant City of Durham and defendants Lopez and Bonfield in their official capacities.

Defendants City of Durham and Bonfield jointly filed an answer, and defendant Lopez filed a motion to dismiss and answer of his own. On or about 29 May 2015, defendants filed a motion for summary judgment "as to all claims against them in this matter." The motion included an affidavit from defendant Lopez, and defendants argued:

The pleadings in this matter, the attachments thereto, the deposition testimony, the discovery responses in this matter, and the affidavit [of defendant Lopez] . . . demonstrate the absence of a genuine issue of material fact and that [d]efendants are entitled to judgment as a matter of law dismissing all claims against them.

The trial court held a hearing on the motion on 14 June 2016 and entered an order on or about 11 July 2016 granting defendants' motion for summary judgment and dismissing plaintiff's claims with prejudice. Plaintiff timely appealed to this Court.

Discussion

I. Standard of Review

On appeal from summary judgment, the applicable standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. We review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact.

Smith v. Harris, 181 N.C. App. 585, 587, 640 S.E.2d 436, 438 (2007) (citations, quotation marks, and brackets omitted).

Plaintiff argues that he has demonstrated genuine issues of material fact in relation to the pre-textual nature of defendants' justifications for the adverse actions at issue. We will address these issues in relation to each of the underlying claims for which plaintiff has raised arguments on appeal.

II. Retaliation claim under Title VII

[1] Plaintiff first argues that the trial court erred in dismissing his retaliation claim under Title VII against defendant City of Durham.¹ Under Title VII:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C.A. § 2000e-3(a).

1. Plaintiff has not raised any issues on appeal in relation to the discrimination component of any of his claims; his appeal solely focuses on the retaliation component. Unfortunately, defendants' brief only addresses the discrimination component of this first claim, so it is entirely unhelpful with this first issue.

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This Court has previously set forth the burden of proof in a claim for retaliation under Title VII:

A. Burden of Proof in Title VII Cases

According to the North Carolina Supreme Court, the claimant carries the initial burden of proof in Title VII cases. In addition, a prima facie showing of retaliatory discharge requires a plaintiff to show: (1) he engaged in some protected activity, such as filing an EEO complaint; (2) the employer took adverse employment action against plaintiff; and (3) that the protected conduct was a substantial or motivating factor in the adverse action (a causal connection existed between the protected activity and the adverse action). Petitioner must prove “but for” causation instead of “motivating factor” in his prima facie case of retaliatory acts in violation of Title VII.

After plaintiff presents a prima facie case of retaliation, the burden shifts to the defendant to show it would have taken the same action even in the absence of protected conduct. Defendant must articulate a legitimate nondiscriminatory reason for its action. A legitimate reason overcomes the presumption of discrimination from plaintiff’s prima facie showing if it has a rational connection with the business goal of securing a competent and trustworthy work force.

If defendant shows a legitimate reason that overcomes the presumption, plaintiff then has to show that the reason was only a pretext for the retaliatory action. Therefore, a plaintiff retains the ultimate burden of proving that the adverse employment action would not have occurred had there been no protected activity engaged in by the plaintiff.

Employment Sec. Comm’n v. Peace, 128 N.C. App. 1, 9-10, 493 S.E.2d 466, 471-72 (1997) (citations, quotation marks, and brackets omitted), *aff’d in part, disc. review improvidently allowed in part, and dismissed in part*, 349 N.C. 315, 507 S.E.2d 272 (1998). *See also University of Texas Southwestern Med. Cntr. v. Nassar*, ___ U.S. ___, ___, 186 L. Ed. 2d 503, 523, 133 S. Ct. 2517, 2533 (2013) (“Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e-2(m). This requires proof that

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the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”).

In this case, plaintiff contends that the following constitute protected activities and meet the first element: the various occasions when plaintiff verbally raised concerns to defendant Lopez regarding perceived racial discrimination against African-American officers, including during the first week defendant Lopez became Chief of Police; the series of written complaints regarding discrimination and retaliation that plaintiff filed with Human Resources beginning in February 2013; the filing of an EEOC charge in August 2013; and the filing of plaintiff’s complaint in this underlying matter in July 2014. Plaintiff argues that the adverse action was defendant Lopez’s decision to have a new Review Panel process, instead of using the list generated by the prior Review Panel, and his promotion of Assistant Chief Marsh over plaintiff in March 2013. Accordingly, plaintiff argues that there are “at least material issues of fact that must go to the jury regarding whether the decision to not promote [plaintiff] constitutes retaliation.” And plaintiff notes our prior case law holding that when the state of mind of the defendant is at issue, summary judgment is rarely proper. *See, e.g., Valdese Gen. Hosp., Inc. v. Burns*, 79 N.C. App. 163, 165, 339 S.E.2d 23, 25 (1986) (“Summary judgment is rarely proper when a state of mind such as intent or knowledge is at issue.”); *see also Robertson v. Hartman*, 90 N.C. App. 250, 253, 368 S.E.2d 199, 201 (1988) (“This Court has held that where there is a need to ‘find facts’ then summary judgment is not an appropriate device to employ, provided those facts are material.” (Citation omitted)).

But before we even get to this portion of plaintiff’s argument, we have to look at the bigger picture. Plaintiff is appealing from the trial court’s order that granted defendants’ motion for summary judgment and dismissed all of plaintiff’s claims. In doing so, the trial court concluded that “there is no genuine issue of material fact” and that defendants were “entitled to judgment as a matter of law.” The trial court dismissed plaintiff’s claims for discrimination, and plaintiff has not challenged the trial court’s ruling on these claims on appeal. Plaintiff only appeals the trial court’s dismissal of his retaliation claims.

We agree with the trial court that there are not any genuine issues of material fact in this case. All parties seem to generally be on the same page regarding the events leading up to defendant Lopez’s hiring decision when he selected Assistant Chief Marsh – also a black male – over plaintiff. The issue is whether that decision was motivated by a retaliatory basis. To determine that, we must apply the framework above.

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Even assuming that plaintiff correctly identified protected activities and an adverse action on the part of defendant Lopez, as required for the first and second elements, plaintiff struggles to demonstrate a causal connection between the activities and the adverse action at issue. Many of the activities plaintiff mentions took place after defendant Lopez decided to have a new Review Panel and the hiring decision had been made. Defendant Lopez informed plaintiff that he intended to conduct a new process for the open Deputy Chief position on 18 February 2013 and informed plaintiff that he had selected Assistant Chief Marsh for the Deputy Chief position on 21 March 2013. Plaintiff's EEOC complaint and his underlying complaint in this matter were not filed until August 2013 and July 2014 respectively. Plaintiff cannot show how his filing of the EEOC complaints months later could have impacted defendant Lopez's hiring decision which had already been made. As for the series of written complaints plaintiff filed with Human Resources beginning in February 2013, defendant Lopez explained in his affidavit that he was not informed of the fact that plaintiff had filed anything with Human Resources until 27 March 2013, 37 days after he had announced the new Review Panel process and six days after he notified plaintiff that he had chosen Marsh for the position.

The only remaining protected activities that could have been tied to the hiring decision were the "multiple occasions [plaintiff] verbally raised with [defendant] Lopez what he and other African-American officers perceived to be racial discrimination on [defendant] Lopez's part." Plaintiff notes that such comments were even made during the first week defendant Lopez was employed as Chief, which would have occurred back in 2007 – before defendant Lopez promoted plaintiff to Captain in 2009 and before defendant Lopez promoted him to Assistant Chief in 2010. Plaintiff has not, however, shown any direct link between his comments to defendant Lopez years and months prior to when defendant Lopez decided on how the promotion decision would be made and his decision to hire Assistant Chief Marsh rather than plaintiff for the Deputy Chief position. Any such connection must be more than mere speculation. *See, e.g., Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 237, 382 S.E.2d 874, 882 (1989) ("The direct causal connection between the protected activity and termination present in each of these cases is not evident in the case presently before the Court. This Court is not unmindful that circumstantial evidence is often the only evidence available to show retaliation against protected activity. Nevertheless, the causal connection must be something more than speculation; otherwise, the complaining employee is clothed with immunity for future misconduct and is 'better off' for having filed the complaint rather than

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being no ‘worse off.’” (Citations omitted)). Plaintiff failed to forecast sufficient evidence connecting his prior comments to defendant Lopez to the ultimate decision made to promote Assistant Chief Marsh.

Furthermore, even assuming that plaintiff can demonstrate that his verbal complaints of discrimination to defendant Lopez were connected to defendant Lopez’s alleged adverse action of instituting a new Review Panel and not hiring him for the Deputy Chief position, defendant Lopez can demonstrate a non-retaliatory reason for the alleged adverse action, as Assistant Chief Marsh was also qualified for the Deputy Chief position. Defendant Lopez explained in his affidavit that since he had become Chief of Police, it had been his practice when filling open positions to use a promotion committee to consider and rate the candidates and then make the ultimate decision himself. He stated that he did not like to rely too much on seniority when making decisions, and that at the time he was deciding between plaintiff and Assistant Chief Marsh, the assessment panel rated both candidates as above average, but Marsh was rated slightly higher. The panel spoke highly of both candidates, but “were more complimentary of Marsh.” While plaintiff has raised issue with some of defendant Lopez’s alleged specific justifications for why he felt Marsh was better qualified than plaintiff – including a claim that it “had to do with the day-to-day manner in which Chief Marsh presented himself and the work product he produced” – plaintiff has not challenged the Review Panel’s evaluation of Assistant Chief Marsh’s qualifications as “above average” or that his rating was a bit higher than plaintiff’s. Nor has plaintiff even alleged that the Review Panel itself made its evaluations improperly or with any sort of retaliatory motivation. Thus, since defendants have articulated “a legitimate nondiscriminatory reason” for the promotion of Marsh instead of plaintiff which “has a rational connection with the business goal of securing a competent and trustworthy work force,” they have “overcome[] the presumption of discrimination from plaintiff’s prima facie showing[.]” *Peace*, 128 N.C. App. at 10, 493 S.E.2d at 472 (citations and quotation marks omitted).

As noted above, plaintiff claims that even the decision to have a new Review Panel to evaluate candidates was retaliatory, in addition to the hiring decision itself. Plaintiff claims “[t]he usual and customary practice of the Police Department has been to promote the next individual on the list of qualified applicants from the Review Panel, provided that the list is not more than eighteen months old.” Plaintiff also alleged in his complaint that this customary practice for handling promotions was part of a written policy created by defendant Lopez, yet also noted that while “[p]ursuant to said policy, a promotion list expires after eighteen

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months, . . . it may be extended for a longer period of time by Defendant Lopez at his discretion.” Thus, although this may have been a customary practice in the past, plaintiff has not presented any evidence that this practice was required by any official rules or policies adopted by the Police Department, or that defendant Lopez did not have full discretion to revise the policy – which plaintiff acknowledges was created by defendant Lopez from the outset. Defendant Lopez has presented a “legitimate nondiscriminatory reason” for the use of the new Review Panel to evaluate candidates, and plaintiff does not suggest any sort of impropriety by the Review Panel. *Id.*

Since defendants have shown “a legitimate reason that overcomes the presumption, plaintiff then has to show that the reason was only a pretext for the retaliatory action. Therefore, a plaintiff retains the ultimate burden of proving that the adverse employment action would not have occurred had there been no protected activity engaged in by the plaintiff.” *Id.* (citations, quotation marks, and brackets omitted). Plaintiff argues that the “justifications” given by defendant Lopez for his decision to promote Assistant Chief Marsh rather than plaintiff “are just not believable.” We disagree. As noted above, Marsh’s qualifications and the panel’s evaluation of Assistant Chief Marsh and plaintiff are undisputed. Plaintiff can claim only that despite Assistant Chief Marsh’s qualifications and the Review Panel’s independent process of evaluating both plaintiff and Marsh, we should simply not “believe” that Lopez’s hiring decision was not motivated by retaliation. Despite thousands of pages of deposition testimony and discovery, plaintiff cannot point to any evidence which shows that Lopez’s decision “would not have occurred had there been no protected activity engaged in by the plaintiff.” *Id.* (citation and quotation marks omitted). Plaintiff’s forecast of evidence does not show any material factual dispute that would support a conclusion that the hiring decision would not have occurred “but for” retaliation. *See id.* at 9, 493 S.E.2d at 472.

III. 42 U.S.C. §§ 1981 and 1983 Retaliation Claims

[2] Next, plaintiff argues that the trial court should not have dismissed his retaliation claims against defendant City of Durham and defendants Lopez and Bonfield in their individual and official capacities under 42 U.S.C. §§ 1981 and 1983 because he asserted valid claims that should have been allowed to proceed to trial. Plaintiff notes in his brief that he “will accept for purposes of the summary judgment motion, that the Section 1981 and 1983 claims are merged[.]” Plaintiff notes further that while “[o]n its face, Section 1981 relates to racial discrimination in the making and enforcement of contracts it has been held to provide

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a remedy against racial discrimination in employment.” Additionally, plaintiff argues that “[e]ven though the language of Section 1981 does not expressly state that a claim for retaliation is covered, the Supreme Court has made clear that it is an integral part of preventing racial discrimination,” and thus “a retaliation claim for reporting acts of discrimination can be brought under Section 1981.” *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445, 170 L. Ed. 2d 864, 869, 128 S. Ct. 1951, 1954 (2008) (“The basic question before us is whether the provision [of 42 U.S.C. § 1981(a)] encompasses a complaint of retaliation against a person who has complained about a violation of another person’s contract-related ‘right.’ We conclude that it does.”).

a. Defendant City of Durham

[3] In order to succeed in a Section 1983 claim against defendant City of Durham, plaintiff would have to produce evidence of the City’s direct culpability and causation; defendant Lopez’s alleged discriminatory intent cannot be imputed to defendant City of Durham. *See, e.g., May v. City of Durham*, 136 N.C. App. 578, 584, 525 S.E.2d 223, 229 (2000) (“[T]o make out a claim against a municipality directly, a plaintiff must do more than establish liability through respondeat superior, but must show that the ‘official policy’ of the municipal entity is the moving force of the constitutional violation.” (Citation and quotation marks omitted)). Plaintiff does not meet this burden. Plaintiff has not directed this Court to any specific policy statement, ordinance, regulation, or other official policy of defendant City of Durham that caused or encouraged the alleged retaliation. Accordingly, we hold that the trial court did not err in granting summary judgment on plaintiff’s claims against defendant City of Durham.

b. Defendant Bonfield

[4] Similarly, we hold that the trial court also did not err in dismissing plaintiff’s Section 1981 and 1983 claims against defendant Bonfield in both his individual and official capacity. Plaintiff makes no specific arguments on appeal in relation to any of the defendants, and as to defendant Bonfield in particular any alleged retaliation was too far removed to be imputed in any way to him.

Plaintiff’s only allegation related to defendant Bonfield in the complaint relates to his reaction to defendant Lopez’s comment in July 2013, four months after the promotion decision occurred. Plaintiff met with defendant Bonfield on 16 July 2013 to report defendant Lopez’s remark and defendant Bonfield “assured Plaintiff that he took such allegations seriously and would investigate the matter.” Even assuming

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the facts to be true -- and no one seems to dispute that this conversation occurred on that date -- these allegations and the forecasted evidence do not support any sort of Section 1981 or 1983 claim against defendant Bonfield for involvement in defendant Lopez's promotion decision that was made months before the conversation.

Plaintiff notes that defendant Bonfield "has authority to establish and implement policies and procedures for investigation and action with regard to complaints of unlawful employment actions toward City employees." He also claims that defendant Bonfield had "ultimate authority to override decisions made by Defendant Lopez, when such decisions are made for unlawful discriminatory or retaliatory reasons." But as discussed above, plaintiff has failed to forecast sufficient evidence to support his claim against defendant Lopez himself, so there is no showing of a need to override Lopez's decision. At most, plaintiff's evidence shows generally how defendant Bonfield would have been informed of complaints regarding defendant Lopez, but asserts nothing actionable by defendant Bonfield that could uphold a claim against him in this matter. We therefore find the trial court did not err in granting summary judgment on plaintiff's Section 1981 and 1983 claims against defendant Bonfield both in his individual and official capacity.

c. Defendant Lopez

[5] Finally, plaintiff argues that the trial court should not have dismissed his Section 1981 and 1983 claims against defendant Lopez, both in his individual and official capacities. Our analysis here ultimately mirrors that which we have explained above in relation to plaintiff's Title VII claims. *See, e.g., Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 686, 504 S.E.2d 580, 584 (1998) ("The models and standards developed in jurisprudence under Title VII of the Civil Rights Act of 1964 . . . also apply to claims under § 1981." (Citation omitted)). Plaintiff's claim cannot survive summary judgment because he both lacks sufficient evidence of a connection between his engagement in protected actions and defendant Lopez's decision to hire Assistant Chief Marsh over him -- the alleged adverse employment action -- and because defendant Lopez has given a legitimate, nondiscriminatory reason for his promotion decision that plaintiff cannot overcome or show is simply a pretext for discrimination.

IV. North Carolina Constitutional Retaliation Claim

[6] Finally, plaintiff argues that his retaliation claims under Article I, Section 19 of the North Carolina Constitution against defendant City of Durham and defendants Lopez and Bonfield in their official capacities should not have been dismissed.

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Article I, Section 19 states:

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

Plaintiff argues that this Court should apply the “same logic and rationale” that makes racial discrimination by a public entity illegal to the need to prevent retaliation, and thus “there is surely a claim for retaliation available under Article I, Section 19 of the Declaration of Rights [of the North Carolina Constitution.]” Plaintiff, however, fails to provide any further support for this claim, and we conclude that it fails for the reasons we have already stated above in relation to his Title VII and Section 1983 claims. Accordingly, we hold the trial court did not err in dismissing these claims.

Conclusion

In sum, we conclude that plaintiff has failed to demonstrate any genuine issues of material fact and that defendants are entitled to judgment as a matter of law as to all of plaintiff’s retaliation claims. We hold that the trial court properly granted summary judgment in defendants’ favor on all claims.

AFFIRMED.

Judge DILLON concurs

Judge MURPHY concurs in the result only.

FRANK v. CHARLOTTE SYMPHONY

[255 N.C. App. 269 (2017)]

CYNTHIA FRANK, EMPLOYEE, PLAINTIFF

v.

CHARLOTTE SYMPHONY, EMPLOYER, AND SELECTIVE INSURANCE COMPANY OF
AMERICA, CARRIER, DEFENDANTS

No. COA17-211

Filed 5 September 2017

Workers' Compensation—symphony violinist—average weekly wage

Of the five methods of determining the average weekly wage of an injured symphony violinist, method five applied because none of the other statutory reasons were appropriate. The violinist was employed for 36 weeks in the year rather than 52 weeks; applying the methods intended for employment for less than 52 weeks would result in putting the violinist in a better position than before her injury or agreed by the parties to be inapplicable.

Appeal by plaintiff from an opinion and award entered 7 December 2016 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 23 August 2017.

Seth M. Bernanke for plaintiff-appellant.

Rudisill, White & Kaplan, P.L.L.C., by Garth H. White, for defendant-appellees.

TYSON, Judge.

Cynthia Frank (“Plaintiff”) appeals from the Opinion and Award of the North Carolina Industrial Commission (“Commission”), which determined the amount of her average weekly wages and compensation rate. We affirm the Commission’s Opinion and Award.

I. Background

Plaintiff was employed by the Charlotte Symphony Orchestra (“Defendant-Employer”) as a violist. On 24 June 2012, Plaintiff filed a Form 18 (“Notice of Accident to Employer and Claim of Employee, Representative, or Dependent”) with the Commission. She alleged sustaining a compensable injury and/or occupational disease to her right shoulder. Plaintiff listed her average weekly wages as “\$760.00+” on the Form 18, and stated both the number of hours per day and the days

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of the week she worked “varies.” Plaintiff listed her date of injury as 15 December 2013.

Defendant-Employer and its insurance carrier (collectively, “Defendants”) filed a Form 61 (“Denial of Workers’ Compensation Claim”). Plaintiff’s claim was heard before the deputy commissioner on 22 June 2015. Prior to the hearing, Defendants accepted Plaintiff’s shoulder injury as compensable. The parties agreed the only issue to be determined by the deputy commissioner was the calculation of Plaintiff’s average weekly wages.

The deputy commissioner issued her Opinion and Award and determined Plaintiff’s average weekly wages to be \$757.94, which produced a compensation rate of \$505.32. Plaintiff appealed the determination of her average weekly wages to the Commission.

By Opinion and Award dated 7 December 2016, the Commission unanimously affirmed the deputy commissioner’s determination of Plaintiff’s average weekly wages and compensation rate. Plaintiff appeals.

II. Jurisdiction

Jurisdiction lies in this Court from opinion and award of the Commission pursuant to N.C. Gen. Stat. §§ 97-86 and 7A-27(b) (2015).

III. Average Weekly Wages

Plaintiff’s sole argument on appeal asserts the Commission erred by applying the incorrect method under N.C. Gen. Stat. § 97-2(5) (2015) to calculate her average weekly wages. We disagree.

A. Standard of Review

This Court reviews an opinion and award of the Commission to determine whether the findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings of fact. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). However, “[t]his Court reviews the Commission’s conclusions of law *de novo*.” *McLaughlin v. Staffing Solutions*, 206 N.C. App. 137, 143, 696 S.E.2d 839, 844 (2004) (citation omitted).

“The determination of the plaintiff’s ‘average weekly wages’ requires application of the definition set forth in the Workers’ Compensation Act, [N.C. Gen. Stat. § 97-2(5)], and the case law construing that statute and thus raises an issue of law, not fact.” *Swain v. C & N Evans Trucking Co.*, 126 N.C. App. 332, 335-36, 484 S.E.2d 845, 848 (1997).

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B. Commission's Findings

No testimony was presented to the Commission as the parties stipulated to the facts:

1. Plaintiff has been employed as a violist with Defendant-Employer for 17 years.
2. Plaintiff's contracts for the 2012-2013 and 2013-2014 seasons and the referenced collective bargaining agreements for that period are stipulated. Wage printouts from the Defendant-Employer are stipulated. W-2 and contract from the Chautauqua Symphony are stipulated.
3. Defendant-Employer's regular season yearly runs from September through May. Each musician's individual contract specifies a weekly wage. In addition, there are additional payments available, such as "move up" pay, which compensates the musician for sitting in at a higher level for an absent colleague; broadcast pay, for when the concert is recorded; overtime for special or specific programs; and seniority pay. Plaintiff also received additional compensation through the Defendant-Employer for clinics she taught at local high schools.
4. Defendant-Employer operates a summer season, which usually runs 4 weeks in June and July. Participation in the summer season is optional for all musicians but, if a musician plays during the summer season, the musician is compensated at the weekly rate provided in the individual contract.
5. Rehearsals and concerts are called "services." Each regular season runs the number of weeks specified in the contract. Both the 2012-2013 regular season and the 2013-2014 regular season were 33 weeks. During the course of the regular season, there are three weeks that are designated as vacation weeks. There are no services scheduled during the off season. Any week that has no services scheduled and is not a designated vacation week is a layoff week. For all layoff weeks, musicians may file for unemployment checks from the N.C. Division of Employment

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Security. Until recently, Defendant-Employer applied for unemployment on behalf of its musicians. If a musician elects not to participate in the summer season, the musician cannot receive unemployment during that four week period. During 2013, plaintiff collected 3 weeks of unemployment benefits at a weekly rate of \$535.00 per week. These benefits were charged to Defendant-Employer.

6. The collective bargaining agreement expressly allows the musicians to have other employment as long as it does not interfere with performance of the contracted services. Even if it does conflict, there is a procedure by which the musician can request leave.
7. In the summer of 2013, Plaintiff played for Defendant-Employer for two weeks out of the four-week summer season. Plaintiff played all 33 weeks of the portions of the 2012-2013 season and 2013-2014 that fell in the calendar year 2013. Therefore, of the 52 weeks preceding Plaintiff's accepted date of injury, December 15, 2013, *Plaintiff performed services for Defendant-Employer a total of 36 weeks*. In the year prior to the injury date in this claim, the vacation weeks were December 24, 2012 through January 6, 2013 and March 4, 2013 through March 10, 2013. (emphasis supplied).
8. Plaintiff's gross wages from Defendant-Employer for the 52 weeks preceding Plaintiff's date of injury were \$39,412.83, a figure which includes all compensation referenced in paragraph 3 above.
9. For several years, including 2013, Plaintiff has worked during the summers as a violist for the Chautauqua Symphony in New York state. The Chautauqua season begins in the first week of July and continues for eight weeks. Plaintiff's weekly wages for this job were set by contract at \$1,080.00 gross compensation per week. They also paid her approximately \$6,000.00 as a housing allowance for the season. Plaintiff's employment for the Chautauqua Symphony and Defendant-Employer did not overlap and was not concurrent.

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C. Statutory Methods for Calculating Average Weekly Wages

N.C. Gen. Stat. § 97-2(5) governs the determination of an injured employee's average weekly wages:

(5) Average Weekly Wages. – [1] “Average weekly wages” shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by 52; [2] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. [3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. [4] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

[5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (bracketed numerals supplied).

The statute provides five possible and hierarchal methods for calculating the injured employee's average weekly wages. “[I]t is clear that this statute establishes an order of preference for the calculation method to be used[.]” *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123,

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128, 532 S.E.2d 583, 586 (2000) (citation omitted). “The final, or fifth method, as set forth in N.C. Gen. Stat. § 97-2(5), may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods.” *Id.* (citing *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 331, 181 S.E.2d 237, 239 (1971)).

Here, the Commission rejected the first four methods as inapplicable or unjust under these facts, and calculated Plaintiff’s average weekly wages by using the fifth, or final, method. *See* N.C. Gen. Stat. § 97-2(5). Plaintiff argues the Commission erred by employing this method to calculate her average weekly wages, and asserts the Commission should have employed the second method set forth in the statute.

D. Commission’s Application of N.C. Gen. Stat. § 97-2(5)

The Commission explained its analysis and rejection of each of the first four statutory methods, and its choice and application of the fifth method as the most appropriate, which we review *de novo*. *See McLaughlin*, 206 N.C. App. at 143, 696 S.E.2d at 844.

Methods One and Two

“‘Average weekly wages’ shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by 52[.]” N.C. Gen. Stat. § 97-2(5).

Method one only applies when an employee has worked for the employer at least 52 weeks prior to the injury, and “cannot be used when the injured employee has been working in that employment for fewer than 52 weeks in the year preceding the date of accident.” *Conyers v. New Hanover Cty. Schools*, 188 N.C. App. 253, 258, 654 S.E.2d 745, 750 (2008). The parties stipulated Plaintiff was employed by the employer for only 36 weeks in the year preceding the date of her injury, and the Commission properly rejected method one to calculate Plaintiff’s average weekly wages. *See id.*

Method two applies where the injured employee “lost more than seven consecutive calendar days at one or more times” during the 52 week period immediately preceding the date of injury. N.C. Gen. Stat. § 97-2(5) (emphasis supplied). In such event, “the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.” *Id.* Plaintiff asserts method two is the appropriate method to calculate her average weekly wages. We disagree.

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The Symphony's rehearsal and performance season runs from September through May, and includes an optional summer season. Plaintiff argues method two applies because, although she stipulated she worked only 36 weeks during the relevant time period, her contract period was for a full year. Plaintiff asserts the 16 weeks when no services were performed for Defendant-employer should be considered "lost" under method two of N.C. Gen. Stat. § 97-2(5). We disagree.

Plaintiff relies upon this Court's decision in *Bond*. The plaintiff in *Bond* was injured during the course of his employment as a brick mason. *Bond*, 139 N.C App. at 124, 532 S.E.2d at 584. The plaintiff was a full time employee, but only worked when contract jobs were available and the weather was suitable. *Id.* at 125-26, 532 S.E.2d at 584. He did not work for seven or more consecutive days on more than one occasion during the 52 weeks preceding the injury. *Id.* at 126, 532 S.E.2d at 584.

In *Bond*, this Court explained the work available to the plaintiff was dependent upon demand and weather conditions, and the plaintiff was not required to work for days or weeks at a time. *Id.* at 129, 532 S.E.2d at 587. This Court further explained the plaintiff was not a "seasonal" employee, because "[a] seasonal employee or relief worker does not work full-time every week in the year." *Id.* The Court held the second, and not the fifth, method was appropriate for determining the plaintiff's average weekly wages, because "as a brick mason, plaintiff could be required to work every week, full-time by his employer." *Id.*

The facts of this case are distinguishable from those present in *Bond*. Unlike in *Bond*, Defendant-Employer in this case was unable to require Plaintiff to work for 52 weeks. Plaintiff performed services for Defendant-Employer pursuant to a contract, which contemplated 36 and not 52 weeks of work. Pursuant to contract, no rehearsals, concerts or "services" were scheduled for the "off season." Also, unlike in *Bond*, Plaintiff's contract clearly stated that no work was required from, or offered to, Plaintiff during that time.

Our precedent in *Conyers* is more directly on point and controlling. In *Conyers*, this Court determined whether the average weekly wages of a public school bus driver should be calculated with or without regard to the ten-week summer vacation period. *Conyers*, 188 N.C. App. at 257, 654 S.E.2d at 749.

In *Conyers*, the Court held that the plaintiff's employment extended for a period of less than 52 weeks prior to the injury. *Id.* at 258-59, 654 S.E.2d at 749. The plaintiff drove a school bus for only ten months of the year, was paid for only ten months of work, and was not hired or

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obligated to work during the summer vacation period. *Id.* at 259, 654 S.E.2d at 750. The Court held the plaintiff was not employed for a 52-week period and rejected the first and second methods in the statute to calculate the plaintiff's average weekly wages. *Id.*

Again, and unlike in *Bond*, the employment in *Conyers* and in this case was for a fixed and definite time period of less than 52 weeks. Because Plaintiff's job was non-existent during a portion of the year, she did not "lose" time like the employee in *Bond*.

The application of method two requires the employee to have been employed for a period of 52 weeks preceding the injury, which Plaintiff stipulated she was not. The Commission properly rejected method two as the appropriate method to calculate Plaintiff's average weekly wages.

Method Three

Method three applies "[w]here the employment prior to the injury extended over a period of fewer than 52 weeks." N.C. Gen. Stat. § 97-2(5). In such event, the Commission follows "the method of dividing the earnings during that period by the number of weeks and parts thereof during the employee earned wages," provided the results are "fair and just to both parties." *Id.* Where the employment prior to the injury extended over a period of less than 52 weeks, the average weekly wages are calculated in the same manner as method two, with the distinction that the results must be "fair and just to both parties." *Id.*

Like in *Conyers*, Plaintiff's employment prior to the injury extended over a period of fewer than 52 weeks. After rejecting the first two methods of calculating the plaintiff's average weekly wages, the Court in *Conyers* analyzed the third method, but determined that the plaintiff's yearly salary would be nearly \$5,000.00 more than her actual pre-injury wages, if she were permitted to divide her annual gross wages by the number of weeks she was actually employed. *Id.* at 259, 654 S.E.2d at 750. The Court rejected the third method, because "[t]he purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury." *Id.*

Here, Plaintiff earned \$39,412.83 while working 36 weeks during the 52-week time period preceding the injury. Dividing this amount by 36 results in an average weekly wage calculation of \$1,094.80. The Commission determined this weekly wage amount results in annualized wages of \$56,929.60, over \$17,000.00 more than Plaintiff's actual pre-injury yearly wages. We are bound by *Conyers* to conclude the

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application of method three would “put the employee in a better position” than prior to the injury and is not a “fair and just” method to calculate Plaintiff’s average weekly wages. *See id.*

Plaintiff notes that the application of method three will always result in gross annualized wages which are higher than the result of method one. Plaintiff argues method three could never be regarded as “fair and just” to both parties and would never be used to calculate average weekly wages. *See R.J. Reynolds Tobacco Co. v. N.C. Dep’t of Env’t & Natural Res.*, 148 N.C. App. 610, 616, 560 S.E.2d 163, 168, *disc. review denied*, 355 N.C. 493, 564 S.E.2d 44 (2002) (“[A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.” (citation omitted)).

Plaintiff proposes the Commission should have considered the “fairness” requirement of method three in light of her wage earning capacity. Plaintiff asserts the Commission should have taken into account her summer earnings from the Chautauqua Symphony in New York in order to determine whether the application of method three would result in a “windfall” to Plaintiff. The statute expressly excludes her earnings from outside employment and provides that average weekly wages “shall mean the earnings of the injured employee in the employment *in which he was working at the time of the injury.*” N.C. Gen. Stat. § 97-2(5) (emphasis supplied).

We affirm the Commission’s determination that applying method three does not produce “fair and just” results where Plaintiff’s average weekly wages would be increase to over \$17,000.00 more annually than Plaintiff’s actual pre-injury yearly wages. Plaintiff’s arguments are overruled.

Method Five

The parties agree method four is inapplicable to the circumstances at bar. The fifth, or final, method under the statute is to be used “for exceptional reasons” when the other methods “would be unfair to either the employer or employee.” N.C. Gen. Stat. § 97-2(5). In such event, the Commission is to “resort to” a method which “will most nearly approximate the amount which the injured employee would be earning were it not for the injury.” *Id.*

The Commission properly determined that exceptional reasons exist, which require the application of method five. None of the other four methods set forth in the statute are appropriate for calculation of

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Plaintiff's average weekly wages. Plaintiff asserts her pre-injury average weekly wages were \$1,094.80, yet acknowledges she was not actually paid this amount on a weekly basis for the 52 weeks prior to her injury and she specifically listed "\$760.00+" as her average weekly wages on her Form 18 at the time of her injury.

The Commission calculated Plaintiff's average weekly wages by dividing Plaintiff's annual gross earnings with Defendant-Employer by 52, "because this method produces a result which most nearly approximates the amount Plaintiff would be earning with Defendant-Employer were it not for the injury."

In *Conyers*, this Court affirmed the Commission's application of the fifth method and explained: the "[p]laintiff [bus driver] earned \$ 17,608.94 in the 52 weeks preceding the accident. Although she only worked approximately 40 of those weeks and was paid in 10 monthly paychecks, the compensation she collects for workers' compensation will be paid every week, including the weeks of her summer vacation." *Conyers*, 188 N.C. App. at 261, 654 S.E.2d at 751. Based upon *Conyers*, we affirm the Commission's use and application of the fifth method in the statute to calculate Plaintiff's average weekly wages. *Id.*; N.C. Gen. Stat. § 97-2(5). Plaintiff's arguments are overruled.

IV. Conclusion

The Commission properly concluded the application of the first four methods set forth in N.C. Gen. Stat. § 97-2(5) to determine Plaintiff's average weekly wages were inappropriate or unjust. The Commission properly determined that "exceptional reasons" existed to apply the fifth method, and applied the fifth method to "most nearly approximate the amount which the injured employee would be earning were it not for the injury." N.C. Gen. Stat. § 97-2(5).

Plaintiff has failed to show any error in the Commission's Opinion and Award. The Opinion and Award is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and STROUD concur.

GARDNER v. RINK

[255 N.C. App. 279 (2017)]

JAMES GARDNER AND JOAN GARDNER, PLAINTIFFS

v.

DOUGLAS W. RINK, GINGER RINK, RINK MEDIA, LLC, AND
THE RINK GROUP, INC., DEFENDANTS

No. COA16-948

Filed 5 September 2017

1. Judges—one judge overruling another—second summary judgment motion

A subsequent order by a second judge on a second summary judgment motion in the same case (one by defendants and one by plaintiffs) was vacated, leaving the first summary judgment order operative. Both parties moved for summary judgment on the same legal issue and, although plaintiffs argued that the second trial judge could rule on their motion because they supported it with different arguments, a subsequent motion for summary judgment may be ruled upon only when the legal issues differ.

2. Appeal and Error—two motions for summary judgment—second one vacated—appeal of first interlocutory

Where there were two motions for summary judgment on the same issues ruled on by different judges and the second was vacated on appeal, appeal of the first was interlocutory and was dismissed.

Appeal by defendants from orders entered 1 April 2016 by Judge Anna Wagoner and 26 April 2016 by Judge Robert C. Ervin in Catawba County Superior Court. Heard in the Court of Appeals 22 March 2017.

Homesley, Gaines & Dudley, LLP, by Christina Clodfelter, for plaintiffs-appellees.

Law Offices of Matthew K. Rogers, by Matthew K. Rogers, for defendants-appellants.

BERGER, Judge.

This appeal originated in a dispute over land on which an advertising billboard had been built. Douglas and Ginger Rink, Rink Media, LLC, and The Rink Group, Inc. (collectively “Defendants”) appeal from two orders ruling on motions for summary judgment.

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The first order, which was entered on April 1, 2016 by Judge Anna Wagoner (“April 1 Order”), partially granted and partially denied Defendants’ motion for summary judgment. James and Joan Gardner’s (collectively “Plaintiffs”) unjust enrichment claim was dismissed, but Defendants’ motion was otherwise denied because the trial court found genuine issues of material fact that precluded summary judgment on Plaintiffs’ motion to set aside a lease on the land that is the subject of this dispute.

The second order, which was entered on April 26, 2016 by Judge Robert C. Ervin (“April 26 Order”), granted Plaintiffs’ motion for summary judgment. Plaintiffs’ motion to set aside the lease was granted, the lease was declared void, and Defendants’ counterclaims for adverse possession, abuse of process, and unfair and deceptive trade practices were dismissed.

For the reasons set out below, we must vacate the April 26 Order, and dismiss the remainder of the appeal as interlocutory.

Factual & Procedural Background

Charles and Mark Alexander (collectively “Sellers”) jointly owned 12.7 acres located in Denver, North Carolina (the “Property”). Charles Alexander partnered with Douglas Rink to develop and rezone the Property. In November 2002, Sellers and Douglas Rink made plans for Douglas Rink and his wife, Ginger, to buy the Property.

Prior to his purchase of the land, Douglas Rink made plans to build an advertising billboard on Sellers’ Property. Before acquiring any ownership interest in the Property, Douglas and Ginger Rink entered into a ground lease agreement (“Lease”) with The Rink Group, Inc., an entity owned and operated by Douglas and Ginger Rink. The Lease was recorded on May 14, 2003.

The Rink Group, Inc. was eventually dissolved, and Douglas and Ginger Rink formed Rink Media, LLC to manage and operate the billboard that had been built on the Property. Douglas and Ginger Rink did not acquire any ownership interest in the Property until March 26, 2003, when they purchased the Property from Sellers in a seller-financed transaction.

Douglas and Ginger Rink defaulted on their payments to Sellers. They therefore conveyed the property back to Sellers by general warranty deed on February 11, 2004. The deed made no reference to or reservation for the Lease. The Sellers then sold the Property to Plaintiffs on October 26, 2004. However, Rink Media, LLC continued to operate the billboard even after Plaintiffs purchased the Property.

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On May 9, 2013, Plaintiffs filed their initial complaint against Douglas and Ginger Rink, and The Rink Group, Inc. for breach of contract and unjust enrichment, and also included a motion to set aside the Lease. The complaint was later amended to include all Defendants. Defendants filed a motion to dismiss all claims pursuant to Rule 12 of the North Carolina Rules of Civil Procedure. This motion was granted as to Plaintiffs' breach of contract claim, but denied for the two remaining claims.

On March 17, 2016, Defendants filed a motion for summary judgment seeking dismissal of Plaintiffs' claim of unjust enrichment and their motion to set aside the Lease, as well as a ruling in favor of Defendants' counterclaims. In the April 1 Order, the trial court granted Defendants' motion dismissing Plaintiffs' claim of unjust enrichment, but denied Plaintiffs' motion to set aside the Lease.

Subsequent to Defendant's March 17 motion, but prior to the April 1 Order, Plaintiffs had filed a separate motion for summary judgment on March 23, 2016 seeking to set aside the Lease and dismiss Defendants' counterclaims. The trial court, albeit a different judge than had ruled on the April 1 Order, granted Plaintiffs' motion for summary judgment in the April 26 Order.

Defendants timely appeal both the April 1 Order and the April 26 Order.

Analysis

[1] The trial court must grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). “The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact.” *Austin Maint. & Constr., Inc. v. Crowder Constr. Co.*, 224 N.C. App. 401, 407, 742 S.E.2d 535, 540 (2012) (citation and quotation marks omitted). “A genuine issue of material fact arises when the facts alleged . . . are of such nature as to affect the result of the action.” *Id.* (citation and quotation marks omitted). If the moving party is the defendant, and he or she has made the required showing of no genuine fact issue, the burden shifts to the plaintiff to “produce a forecast of evidence demonstrating specific facts,” opposed to mere allegations, by which he or she can “establish a *prima facie* case at trial.” *Id.* at 407, 742 S.E.2d at 540 (citation and quotation marks omitted). An appeal of a trial court's decision to grant summary judgment is reviewed *de novo*. *Id.* at 408, 742 S.E.2d at 541.

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Defendants argue that the trial court erred in the portion of the April 26 Order that granted Plaintiffs' summary judgment motion relating to their claim setting aside the Lease. However, a separate trial court had previously ruled on this same issue in the April 1 Order. Therefore, the relationship between the two trial court's rulings on summary judgment motions must be addressed because it is a jurisdictional issue, and therefore "can be raised at any time, even for the first time on appeal and even by a court *sua sponte*." *Cail v. Cerwin*, 185 N.C. App. 176, 181, 648 S.E.2d 510, 514 (2007), *disc. review denied*, 365 N.C. 75, 705 S.E.2d 743 (2011) (citation and quotation marks omitted).

It is well-established 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.

Id. (citation and quotation marks omitted). "[W]here one judge denies a motion for summary judgment, another judge may not reconsider . . . and grant summary judgment on that same issue." *Id.* at 182, 648 S.E.2d at 515 (citation and quotation marks omitted). A second motion will be appropriate only if different legal issues are presented than those raised by an earlier motion. *Id.* at 182, 648 S.E.2d at 514. "[I]t is immaterial whether a different party brings the second motion for summary judgment." *Id.* (citation omitted).

Here, the first trial court to address a motion for summary judgment granted Defendants' motion as to Plaintiffs' unjust enrichment claim in the April 1 Order. The trial court further ruled in that same order that there were genuine issues of material fact relating to Plaintiffs' motion to set aside the Lease, and therefore denied their motion on this issue. The second trial court to address a summary judgment motion in this case subsequently granted Plaintiffs' motion for summary judgment in the April 26 Order. This second order set aside the Lease declaring it void, and dismissed each of Defendants' counterclaims. The first trial court's ruling denying summary judgment on the legal issue of setting aside the Lease precluded the second trial court from later overruling its decision by granting summary judgment.

Plaintiffs contend that by supporting their motion to set aside the Lease with different arguments allowed the second trial court to rule on their motion. However, "the presentation of a new legal issue is distinguishable from the presentation of additional evidence, and only

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when the legal issues differ between the first motion for summary judgment and a subsequent motion may a trial court hear and rule on the subsequent motion.” *Id.* at 184, 648 S.E.2d at 516 (citations, quotation marks, and brackets omitted). Both parties moved for summary judgment on the same legal issue; it is irrelevant whether new evidence was introduced. Therefore, the April 26 Order granting Plaintiffs’ motion for summary judgment as to their motion to set aside the Lease was entered in error and must be vacated, leaving the first trial court’s order denying Defendant’s motion operative.

[2] “[T]he denial of a motion for summary judgment is interlocutory and not immediately appealable unless it affects a substantial right.” *Id.* at 185, 648 S.E.2d at 517 (citation, quotation marks, and brackets omitted). Here, as appellants, Defendants failed to argue any substantial right affected by the denial of their motion. This Court has previously held that

[i]t is not the duty of this Court to construct arguments for or find support for appellant’s right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted). Because the portion of the April 26 Order granting summary judgment to Plaintiffs must be vacated, the April 1 Order denying summary judgment determines this issue. As the denial of summary judgment is interlocutory, and Defendants failed to argue that this order affects any substantial right, we will not address the remainder of the appeal and dismiss.

Conclusion

Because the trial court’s April 26 Order improperly overruled a prior trial court’s April 1 Order, the April 26 Order granting summary judgment as to Plaintiffs’ motion to set aside the Lease and declaring the Lease void must be vacated, and the April 1 Order’s denial of Defendants’ motion is, therefore, operative. Consequently, because an appeal of the denial of a summary judgment motion is interlocutory, we must dismiss the remainder of the appeal.

VACATED IN PART, AND DISMISSED IN PART.

Judges CALABRIA and HUNTER, JR. concur.

IN RE FORECLOSURE OF ACKAH

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IN THE MATTER OF THE FORECLOSURE UNDER THAT POWERS GRANTED IN CHAPTER 47F OF THE NORTH CAROLINA GENERAL STATUTES AND IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR ADDISON RESERVE AT THE PARK AT PERRY CREEK SUBDIVISION RECORDED AT BOOK 9318, PAGE 369, ET SEQ., WAKE COUNTY REGISTRY CONCERNING GINA A. ACKAH

No. COA16-829

Filed 5 September 2017

1. Liens—homeowners dues—foreclosure—notice

The superior court did not err by holding that a homeowner who was foreclosed upon by her homeowners association while she was out of the country was entitled to relief. The homeowners association did not exercise due diligence in giving notice in that it had reason to know the owner was not residing at the residence and only posted a notice on the door of the residence when certified mail was returned. Due diligence required that the homeowners association at least attempt notification through the email address which the owner had left with them.

2. Liens—foreclosure—relief

The superior court erred in the relief granted to a homeowner who was foreclosed upon for failure to pay homeowners dues where the homeowners association had not exercised due diligence in providing notice of the sale but had provided constitutionally sufficient notice. The superior court ordered that the foreclosure sale be set aside and the title restored to the debtor; however, N.C.G.S. § 1-108 favors a good faith purchaser at a judicial sale, and the superior court cannot order relief which affects the title to property which has been sold to a good faith purchaser with constitutionally sufficient notice. The owner was entitled to seek restitution from the homeowners association.

Judge MURPHY dissenting.

Jones Family Holdings, LLC (“Jones Family”), the high bidder at a foreclosure sale, appeals from an order entered 30 December 2015 by Judge Kendra Hill in Wake County Superior Court setting aside the sale and restoring title to the debtor. Jones Family also appeals from the order entered the same day by the Assistant Clerk of Wake County Superior Court returning possession of the real property to the debtor. Heard in the Court of Appeals 9 March 2017.

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Law Office of Edward Dilone, PLLC, by Edward D. Dilone, for Appellant Jones Family Holdings, LLC.

Adams, Howell, Sizemore & Lenfestey, P.A., by Ryan J. Adams, for Respondent-Appellee Gina A. Ackah.

Bagwell Holt Smith P.A., by Michael R. Ganley, for Substitute Trustee Addison Reserve Homeowners Association, Inc.

This matter involves a dispute about a residential property (the “Property”) located within a planned community in Wake County. The planned community is governed by an association (the “HOA”). The parties involved include Gina A. Ackah, who purchased the Property in 2005; the HOA, which attached a lien to the Property based on Ms. Ackah’s failure to pay dues; and the Jones Family, who purchased the Property in 2015 at a public sale which had been ordered by the Clerk of Superior Court to enforce the HOA’s lien.

There is no evidence that Ms. Ackah received actual notice of the proceeding before the Clerk which resulted in the order allowing the sale of her Property. Based on its conclusion that the notice to Ms. Ackah was inadequate, the superior court granted Ms. Ackah’s motion for relief from the Clerk’s order and ordered that the sale of the Property to the Jones Family be set aside, restoring title to Ms. Ackah. The same day, the assistant clerk entered an order returning possession of the Property to Ms. Ackah.

We hold that the HOA’s notice to Ms. Ackah of the proceeding before the Clerk did not satisfy the requirements of Rule 4 of our Rules of Civil Procedure. Therefore, we conclude that Ms. Ackah was entitled to *some form* of relief from the Clerk’s order which had authorized the public sale of her Property.

However, the superior court was constrained by N.C. Gen. Stat. § 1-108 from granting a form of relief to Ms. Ackah which affected the title of the Jones Family’s – a good faith purchaser at the judicial sale ordered by the Clerk - to the Property. That is, by enacting G.S. 1-108, the General Assembly has chosen to favor the interests of the Jones Family over that of Ms. Ackah in the Property, where Ms. Ackah is otherwise entitled to relief from the order pursuant to Rule 60 of our Rules of Civil Procedure. G.S. 1-108 is not unconstitutional as applied to Ms. Ackah in this case since the HOA’s notice to Ms. Ackah of the proceeding before the Clerk was *constitutionally* sufficient, notwithstanding that she did not receive actual notice or notice which complied with Rule 4.

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Therefore, the type of relief available to Ms. Ackah from the Clerk's order was limited to restitution from the HOA. *See* N.C. Gen. Stat. § 1-108 (2015). Accordingly, we affirm in part and reverse and remand in part.

II. Background

Addison Reserve at the Park at Perry Creek is a residential planned community subject to the Planned Community Act codified in Chapter 47F of our General Statutes. The Perry Creek planned community is governed by the HOA, which is empowered to assess dues and attach a lien to any Perry Creek home if the owner becomes delinquent in paying HOA dues. *See* N.C. Gen. Stat. § 47F-3-116 (2015).

In 2005, Ms. Ackah purchased the Property, financing almost all of the purchase price with a loan secured by the Property. In 2012, Ms. Ackah moved to Africa, leasing her home during her absence. She did not inform the HOA of her move. She had her mail forwarded to her uncle's home in South Carolina.

In 2014, Ms. Ackah fell behind on her HOA dues. The HOA mailed several notices to the Property addressed to Ms. Ackah regarding the delinquency, all of which were forwarded to Ms. Ackah's uncle in South Carolina.

The HOA commenced foreclosure proceedings to enforce its statutory lien against the Property to recover the delinquent dues. The HOA sent *certified* letters addressed to Ms. Ackah to her mother's and uncle's addresses, notifying Ms. Ackah of the hearing set before the Clerk. These letters, however, were returned "unclaimed." The HOA then posted a notice of the hearing on the front door of the Property. Although the HOA had an email address for Ms. Ackah, the HOA did not notify Ms. Ackah by email of the proceeding to enforce its lien.

A hearing was held before the Clerk. Ms. Ackah was not represented at the hearing and claims that she never received *actual* notice of the hearing.

The Clerk ordered the Property sold to satisfy the HOA lien. The sale of the Property was held, and the Jones Family was the high bidder, with a bid of \$2,708.52. In early 2015, the Property was deeded to the Jones Family, subject to any lien superior to the HOA's lien, which included the lien securing Ms. Ackah's mortgage.

Shortly after the sale, Ms. Ackah first learned of the proceeding and the public sale from her tenant after her tenant received a notice to vacate the Property from the Jones Family. Upon learning of the sale from her tenant, Ms. Ackah filed a motion in superior court pursuant to

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Rule 60 for relief from the Clerk's order which had authorized the public sale of her Property. The superior court granted Ms. Ackah's Rule 60 motion and ordered that the sale to the Jones Family be set aside, thus restoring title to Ms. Ackah. The Jones Family has timely appealed.

III. Analysis

The superior court's 30 December 2016 order, which is the subject of this appeal, essentially did two things: it (1) stated that Ms. Ackah was entitled to relief under Rule 60(b) from the Clerk's order which had authorized the sale of her Property, and (2) ordered relief to Ms. Ackah by setting aside the sale to the Jones Family, thereby restoring title to Ms. Ackah. We address each issue in turn.

A. The Superior Court Was Authorized To Grant Relief From the Clerk's Order, Pursuant to Rule 60(b)

[1] We hold that the superior court did not err in concluding that Ms. Ackah was entitled to relief from the Clerk's order based on the HOA's failure to use "due diligence" to notify her of the proceeding as required by Rule 4 of our Rules of Civil Procedure. In order to enforce its statutory lien, the HOA was required to give Ms. Ackah notice of the hearing before the Clerk in a form which satisfied Rule 4. *See* N.C. Gen. Stat. § 47F-3-116 (c), (f). Rule 4 requires the use of "due diligence" in providing notice. N.C. Gen. Stat. § 1A-1, Rule 4 (2015).

We hold that in this case, the HOA did not use "due diligence" as required by Rule 4. Specifically, the HOA had Ms. Ackah's email address. The HOA attempted service by certified mail. The HOA had reason to know that Ms. Ackah was not residing at the Property as the HOA sent those letters to Ms. Ackah's mother and uncle. When the notice letters came back "unclaimed," Rule 4 due diligence required that the HOA at least attempt to notify Ms. Ackah directly through the email address it had for her rather than simply resorting to posting a notice on the Property. *See Chen v. Zou*, ___ N.C. App. ___, ___, 780 S.E.2d 571, 574 (2015) (due diligence requires emailing to a known email address before resorting to service by publication). And since the HOA failed to comply with Rule 4 in providing notice to Ms. Ackah, Ms. Ackah was entitled to relief from the Clerk's order pursuant to Rule 60.

B. The Superior Court Erred By Granting Ms. Ackah Any Form of Relief Which Would Affect the Jones Family's Title

[2] We hold that N.C. Gen. Stat. § 1-108 restricted the superior court in this case from granting Ms. Ackah any relief which affected the Jones Family's title in the Property.

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The plain language of N.C. Gen. Stat. § 1-108 states that a court setting aside an order pursuant to Rule 60 may order relief in the form of restitution, but that the court cannot order any relief which affects the title to property which has been sold to a good faith purchaser pursuant to the order being set aside:

If a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. . . .

N.C. Gen. Stat. § 1-108.

We note that N.C. Gen. Stat. § 1-108 may be unconstitutional *as applied* if the property owner being divested of her property has not received notice which is at least *constitutionally* sufficient. Our Supreme Court has held that a statute which allowed for the tax sale of a property without any attempted notice to the taxpayer/owner except by posting and publication was unconstitutional as applied, stating that the process “offends the fundamental concept of due process of law.” *Henderson County v. Osteen*, 292 N.C. 692, 708, 235 S.E.2d 166, 176 (1977) (setting aside a tax sale of taxpayer’s property where taxpayer did not receive notice which was constitutionally sufficient).

Here, there is no evidence that Ms. Ackah received actual notice or other notice sufficient under Rule 4. However, based on jurisprudence from the United States Supreme Court, we must conclude that the attempts by the HOA to notify Ms. Ackah were *constitutionally* sufficient. Specifically, a party need not use “due diligence” under the Constitution, but rather, as the United States Supreme Court held, notice is “constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent[.]” *Jones v. Flowers*, 547 U.S. 220, 220 (2006). The Court explained that constitutional “[d]ue process does not require that the property owner receive *actual* notice[.]” *Id.* at 226 (emphasis added). For instance, where notice sent by certified mail is returned “unclaimed,” due process requires only that the sender must take *some* reasonable follow-up measure to provide other notice where it is practicable to do so. *Id.* The Court specifically held that where the owner no longer resides at the property, due process is satisfied if the notice is posted on the front door of the property, as it is reasonable that the owner’s tenant would notify the owner of the posting:

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[A] reasonable followup measure[], directed at the possibility that [the owner] had moved as well as that he had simply not retrieved the certified letter, would have been to post notice on the front door, or to address otherwise undeliverable mail to “occupant.” . . . Either approach would increase the likelihood that the owner would be notified that [s]he is about to lose [her] property[.] . . . It is [] true in the case of an owner who has moved: Occupants who might disregard a certified mail slip not addressed to them are less likely to ignore posted notice[.] . . . [T]here is a significant chance the occupants will alert the owner, if only because a change in ownership could well affect their own occupancy.

Id. at 235.

In the present case, the HOA posted a notice on the Property’s front door after the HOA’s certified letters were unclaimed. Therefore, the HOA’s notice was *constitutionally* sufficient under *Jones*, notwithstanding that the notice did not satisfy the “due diligence” requirement of Rule 4. We note that the HOA did even more to notify Ms. Ackah than posting the notice on the Property: the HOA sent several letters by *regular mail* to Ms. Ackah indicating its intent to enforce the lien. *Id.* at 234 (holding that notice by regular mail is reasonable). It is certainly reasonable to assume that Ms. Ackah would reach out to her uncle where she had instructed her regular mail to be sent about any mail that had, in fact, been sent to her.

Accordingly, since the notice was constitutionally sufficient in this case, it is our duty to follow the policy decision made by our General Assembly, as set forth in N.C. Gen. Stat. § 1-108, which would favor the interests of the Jones Family, as a good faith purchaser at a judicial sale, ahead of the interests of Ms. Ackah in the Property. We note that the General Assembly’s policy decision favoring the Jones Family is rational because it encourages higher bids at judicial sales, as explained by our Supreme Court in *Sutton v. Schonwald*, 86 N.C. 198, 202-04 (1882), and other opinions which are explained more fully below. We note that N.C. Gen. Stat. § 1-108 does not leave Ms. Ackah without a remedy. Indeed, in this case, N.C. Gen. Stat. § 1-108 allows Ms. Ackah to seek restitution from the HOA.

The dissent relies on a 1990 opinion from our Court to suggest that the superior court *did* have the authority to affect the Jones Family’s title when it set aside the Clerk’s order. Specifically, in *Cary v. Stallings*,

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a panel of our Court held that N.C. Gen. Stat. § 1-108 allows a court to affect the title of property already sold when granting Rule 60 relief “if the court deems it necessary in the interest of justice.” *Cary v. Stallings*, 97 N.C. App. 484, 487, 389 S.E.2d 143, 145 (1990).¹ However, our Court did not cite to any Supreme Court precedent in *Stallings*, and its holding otherwise conflicts with the plain language of N.C. Gen. Stat. § 1-108 and with precedent from our Supreme Court which has interpreted the statutory language contained in N.C. Gen. Stat. § 1-108. Therefore, we hold that we are not bound by *Stallings* but rather by North Carolina Supreme Court precedent referenced below.

Our Supreme Court has not had occasion to address the language in N.C. Gen. Stat. § 1-108 since our Court decided *Stallings* in 1990. However, prior to 1990, our Supreme Court stated on a number of occasions that where a court sets aside a judgment, the court may not enter an order which affects the title to property sold under that judgment to a good-faith purchaser, at least so long as the debtor received *constitutionally* adequate notice of the proceeding. For instance, in 1920, our Supreme Court considered a predecessor to N.C. Gen. Stat. § 1-108, a statute which stated as follows:

. . . and if the defense be successful, and the [prior] judgment . . . shall have been collected, or otherwise enforced, such restitution may thereupon be compelled as the Court may direct, *but title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.*

White v. White, 179 N.C. 592, 599, 103 S.E. 216, 220 (1920) (emphasis added). In *White*, the defendant’s land was sold at a judgment execution sale to a good-faith purchaser, allegedly without actual notice to the defendant. Our Supreme Court held that the defendant was *not* entitled to the return of his property, noting that “the title to the land was acquired by the plaintiff as a *bona fide* purchaser at the sale under execution, *and cannot be disturbed.*” *Id.* (emphasis added). The Court held that the notice to the defendant was not constitutionally defective, notwithstanding the fact that he did not receive actual notice. *Id.* at 599-600, 103 S.E. at 220.

In 1926, our Supreme Court considered the statutory predecessor to N.C. Gen. Stat. § 1-108, specifically focusing on the line from the statute:

1. *Stallings* has been relied upon by panels of our Court in unpublished opinions. See *County of Jackson v. Moor*, 236 N.C. App. 247, 765 S.E.2d 122 (2014) (unpublished); *Zheng v. Charlotte Prop.*, 226 N.C. App. 200, 739 S.E.2d 627 (2013) (unpublished).

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“Title to property sold under such judgment to a purchaser in good faith is not hereby affected.” *Foster v. Allison Corp.*, 191 N.C. 166, 170, 131 S.E. 648, 650 (1926). In that case, the defendants sought to have a judgment set aside which had resulted in the sale of their property to a third party: “Counsel for defendants earnestly contends that in setting aside a judgment under [the precursor to N.C. Gen. Stat. § 1-108], a bona fide purchaser may obtain title and property be taken without [the defendants having their] day in court[.]” *Id.* at 170, 131 S.E. at 650-51. Our Supreme Court held that the statute did not violate the defendants’ due process rights, as the court had jurisdiction over the property. *Id.*

In 1897, our Supreme Court stated that, based on a statutory predecessor to N.C. Gen. Stat. § 1-108, the title to real estate purchased at a judicial sale cannot be affected where a court determines later that there was some irregularity in the judgment. *Harrison v. Hargrove*, 120 N.C. 96, 106, 26 S.E. 936, 939-40 (1897). In its decision, our Supreme Court quoted *England v. Garner*, 90 N.C. 197 (1884), as follows:

It is well settled principle and authority, that where *it appears by the record* that the Court had jurisdiction of the parties and the subject-matter of an action the judgment therein is valid, however irregular it may be, until it shall be reversed by competent authority; and although it be reversed, the purchaser of real estate or other property at a sale made under and in pursuance of such judgment, while it was in force and while it authorized the sale, will be protected. . . . [Where] the judgment is regular on its face, a purchaser of property under such a judgment or decree must be protected in his purchase, even though the judgment or decree be afterwards set aside on the ground that in point of fact service of summons had not been made[.]”

Hargrove, 120 N.C. at 105-06, 26 S.E. at 939 (emphasis in original).

On a number of occasions, our Supreme Court has stated that the policy behind the statutory language now found in N.C. Gen. Stat. § 1-108 is to encourage higher bids at judicial sales and to protect the integrity of title to property:

The title acquired at a judicial sale of lands made by a court of competent jurisdiction, is not rendered invalid by reason of the reversal of the decree for irregularity in the proceedings, of which the purchaser could have no notice.

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. . . .

A contrary doctrine would be fatal to judicial sales and values of title derived under them, as no one would buy at prices at all approximating the true value of property, if he supposed that his title might, at some distant day, be declared void, because of some irregularity in the proceeding altogether unsuspected by him[.]

. . . .

Under the operation of this rule, occasional instances of hardship [] may occur, but a different one would much more certainly result in mischievous consequences, and the general sacrifice of property sold by order of the courts. Hence it is, that a purchaser who is no party to the proceeding, is not bound to look beyond the decree [allowing for the property to be sold], if the facts necessary to give the court jurisdiction appear on the face of the proceedings. If the jurisdiction has been improvidently exercised, it is not to be corrected at his expense, who had a right to rely upon the order of the court as an authority emanating from a competent source—so much being due to the sanctity of judicial proceedings.

Sutton v. Schonwald, 86 N.C. at 202-04; see also *Bolton v. Harrison*, 250 N.C. 290, 298, 108 S.E.2d 666, 671 (1959) (“Necessarily, purchasers of property, especially land, must have faith in and place reliance on the validity of judicial proceedings.”); *Crockett v. Bray*, 151 N.C. 615, 617, 66 S.E. 666, 667 (1910)²; *Lawrence v. Hardy*, 151 N.C. 123, 129, 65 S.E. 766, 769 (1909)³; *Herbin v. Wagoner*, 118 N.C. 656, 661, 24 S.E. 490, 491 (1896).

2. Our Supreme Court in *Crockett* recognized the General Assembly’s purpose in enacting statutes like N.C. Gen. Stat. § 1-108 as follows: “The evident trend of enlightened legislation is to remove, before sale, all defects of title to property sold under judicial process. Its object is to have property sold under process of the courts, bring the highest price, and, as far as possible, to eliminate speculation in defective titles to property sold by its process. The courts have been liberal in construing this remedial legislation.” *Crockett*, 151 N.C. at 617, 66 S.E. at 667.

3. Our Supreme Court in *Lawrence* reiterated the law: “Our law is properly solicitous of the rights of such a purchaser; and, while they are affected by the existence of certain defects apparent in the record, numerous and well-considered decisions with us sustain the position that only those defects which are jurisdictional in their nature are available as against his title.” *Lawrence*, 151 N.C. at 129, 65 S.E. at 769.

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In the present case, the Clerk entered an order detailing the validity of the lien on Ms. Ackah's property and stating that service was accomplished on Ms. Ackah "as provided by law." There was nothing in the order which would have alerted the Jones Family of any irregularities in the proceeding. They made their bid in good faith. And the application of N.C. Gen. Stat. § 1-108 is not unconstitutional as applied to Ms. Ackah in this case, as Ms. Ackah was afforded *constitutionally* sufficient notice. Therefore, although Ms. Ackah is entitled to relief from the Clerk's order based on the HOA's failure to use "due diligence" to notify her of the proceeding under Rule 4, N.C. Gen. Stat. § 1-108 limits the *type* of relief available to her in order to protect the interests of a good-faith purchaser of the Property; here, the Jones Family.

Even assuming that we are bound by our Court's 1990 decision in *Stallings*, reversal of the superior court's order affecting the Jones Family's interest in the Property is still warranted. Specifically, the superior court based its order on its determination that the interests of justice required that the sale be set aside primarily "due to the Property being sold at a substantially low price[.]" However, this determination is not supported by the superior court's own findings or the evidence. Specifically, the court based this conclusion on its finding that "[t]he purchase price [at the judicial sale] of \$2,708.52 was significantly low, given Ackah's purchase price of \$123,000 in 2005." The superior court ignored the fact that the Jones Family bought the Property *subject to* Ms. Ackah's first mortgage, which the court found was in the amount of \$117,587.00 when it originated. And there is otherwise no finding regarding the actual value of the Property or the amount owed on the first mortgage at the time of the judicial sale. Therefore, the findings simply do not support the court's determination that the price paid by the Jones Family was "substantially low."

IV. Conclusion

The superior court properly determined that Ms. Ackah was entitled to some form of relief pursuant to Rule 60, as she did not receive notice which satisfied Rule 4 of the proceeding before the Clerk. However, because Ms. Ackah received constitutionally sufficient notice, the relief available to her was limited by N.C. Gen. Stat. § 1-108, which favors the rights of the Jones Family in the Property over that of Ms. Ackah. Therefore, we affirm in part, reverse in part and remand the superior court's 30 December 2015 order; and we reverse the 30 December 2015 order entered by the assistant clerk returning possession of the Property to Ms. Ackah. On remand, the superior court may enter an order not inconsistent with this opinion, which may include, for example, relief

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for Ms. Ackah in the form of restitution from the HOA, as authorized by N.C. Gen. Stat. § 1-108.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judge STROUD concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

I agree with the Majority in so far as it holds that the HOA failed to provide Ackah with sufficient notice under Rule 4 of the North Carolina Rules of Civil Procedure of its intent to enforce its statutory lien against the Property. However, I disagree with the Majority's holding that N.C.G.S. § 1-108 (2015) barred the trial court from granting Ackah any relief that affected Jones Family's title in the Property, and therefore I respectfully dissent.

Jones Family maintains that the trial court lacked jurisdiction to enter its 30 December 2015 Order setting aside the foreclosure sale and putting Ackah back in possession of the Property, even if the HOA failed to comply with all procedural timelines and notices. Specifically, Jones Family contends there is a statutory prohibition against disrupting a good faith purchaser's title to property. I disagree.

Jones Family's contention is incorrect. In foreclosure proceedings, we have interpreted the final portion of section 1-108 of the North Carolina General Statutes not as an absolute bar to the disruption of a transfer of title pursuant to a final judgment, but rather to mean that, when a judgment to set aside an order for sale is entered pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, the judgment does not *automatically* affect title to the property at issue. *Town of Cary v. Stallings*, 97 N.C. App. 484, 487, 389 S.E.2d 143, 145 (1990). Instead, "title to such property *may* in fact be affected if the court deems it necessary in the interest of justice." *Id.* at 487, 389 S.E.2d at 145.

By way of example, in *Stallings* the defendant failed to pay the cost of improvements made in front of her property by the Town of Cary. *Id.* at 485, 389 S.E.2d at 144. Consequently, the Town of Cary foreclosed on its assessment lien against her property and eventually the property was sold to a good faith purchaser. *Id.* at 485-86, 389 S.E.2d at 144. As here, the defendant then filed motion to set aside the judgment pursuant to

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Rule 60, which the trial court ultimately granted. *Id.* at 486, 389 S.E.2d at 144. On appeal, the good faith purchaser similarly argued that the trial court's order to set aside the final judgment should not have affected its purchase of the property. *Id.* at 486, 389 S.E.2d at 144-45. We upheld the trial court's determination that the defendant did not receive proper service of process and, for that reason, affirmed the trial court's resulting decision to set aside the order for sale, declare the Commissioner's Deed null and void, and put the defendant back in possession of the property. *Id.* at 487, 389 S.E.2d at 145. Therefore, pursuant to this Court's decision in *Stallings* and our Supreme Court's holding in *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), we must likewise recognize that "title to . . . property *may* in fact be affected if the court deems it necessary in the interest of justice[.]" *Stallings*, 97 N.C. App. at 487, 389 S.E.2d 145.

In reaching its conclusion, the Majority holds that we are not bound by *Stallings* and instead cites to precedent from our Supreme Court as the basis for its opinion. While I recognize that, "where there is a conflict between an opinion from this Court and one from our Supreme Court, we are bound to follow the Supreme Court's opinion," that rule is inapplicable to the instant case because the line of Supreme Court cases to which the Majority cites deals with predecessors to N.C.G.S. § 1-108 and are therefore not directly on point. *State v. Mostafavi*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (June 6, 2017) (No. 16-1233) (citations omitted). Furthermore, implicit in the binding effect of our holding in *Stallings* is the logic that, in deciding that case, we considered the decisions that came before it and rejected the application of the Majority's line of cases to N.C.G.S. § 1-108.

In sum, more than a quarter of a century ago, we rejected Jones Family's interpretation of N.C.G.S. § 1-108 in *Stallings* and the Supreme Court has not seen fit to disturb our holding. The trial court's order in the instant case is consistent with our precedent. I see no reason to conclude, as Jones Family suggests, that the trial court acted without jurisdiction in divesting it of the Property and I respectfully dissent from the Majority's holding embracing Jones Family's argument over binding caselaw.

IN RE L.W.S.

[255 N.C. App. 296 (2017)]

IN THE MATTER OF L.W.S.

No. COA17-173

Filed 5 September 2017

Appeal and Error—preservation of issues—failure to object at trial—Indian Child Welfare Act

The issue of whether the trial court erred by failing to address an issue under the Indian Child Welfare Act was not preserved for appeal where it was not raised in the trial court.

Appeal by respondent-father from order entered 28 November 2016 by Judge Burford A. Cherry in Burke County District Court. Heard in the Court of Appeals 10 August 2017.

Chrystal S. Kay for petitioner-appellee Burke County Department of Social Services.

Julie C. Boyer for respondent-appellant father.

Poyner Spruill LLP, by Christopher S. Dwight for guardian ad litem.

BRYANT, Judge.

Where respondent never presented the issue that he now raises on appeal to the trial court and completely failed to meet his burden of showing the provisions of the Indian Child Welfare Act apply to this case, we affirm.

The Burke County Department of Social Services (“DSS”) initiated the underlying juvenile case on 1 May 2015 when it filed a petition alleging L.W.S. (“Luke”)¹ was an abused, neglected, and dependent juvenile. DSS obtained nonsecure custody of Luke that same day and retained custody of him throughout the case. After a hearing on 3 March 2016, the trial court entered an order adjudicating Luke to be an abused, neglected, and dependent juvenile. The court found that both respondent and Luke’s mother had pending criminal charges of felony child abuse inflicting serious injury to Luke, that respondent and the mother had relinquished

1. A pseudonym is used throughout to protect the juvenile’s privacy pursuant to N.C. R. App. P. 3.1(b) (2017).

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their parental rights to two previous children, and that respondent and the mother had been involved in several past incidents of domestic violence in front of their children. The court ceased reunification efforts with respondent and Luke's mother and set the matter for a permanency planning hearing on 31 March 2016. In its order from the permanency planning hearing, the trial court set the permanent plan for Luke as adoption with a concurrent plan of custody or guardianship. Respondent was subsequently found guilty of felony child abuse and sentenced to a term of sixty to eighty-four months imprisonment.

On 1 August 2016, DSS filed a petition to terminate parental rights to Luke. As to respondent, DSS alleged grounds of abuse, neglect, failure to correct the conditions that led to Luke's removal from his home, failure to pay a reasonable portion of the cost of Luke's care while Luke was in DSS custody, abandonment, and that respondent had committed a felony assault against Luke that resulted in serious bodily injury. *See* N.C. Gen. Stat. § 7B-1111(a)(1)–(3), (7)–(8) (2015). DSS filed an amended petition for termination of parental rights on 22 August 2016, alleging the same grounds as the first petition but correcting the mother's name.

After a hearing on 27 October 2016, the trial court entered an order on 28 November 2016 terminating respondent's parental rights to Luke.² The court concluded all grounds alleged in the petition existed to terminate respondent's parental rights and that termination of his parental rights was in Luke's best interest. Respondent filed timely written notice of appeal from the trial court's order.

Respondent's sole argument on appeal is that the trial court erred in terminating his parental rights to Luke because it failed to address whether Luke was a member of a Native American tribe and whether the Indian Child Welfare Act applied to him. We disagree.

"The Indian Child Welfare Act of 1978 (hereinafter ICWA or Act) was enacted to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' " *In re A.D.L.*, 169 N.C. App. 701, 708, 612 S.E.2d 639, 644 (2005) (quoting 25 U.S.C.A. § 1902 (2005)).

There are two prerequisites to invoking the requirements of ICWA. First, it must be determined that the proceeding

2. The court's order also terminated the parental rights of Luke's mother, but she is not a party to this appeal.

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is a “child custody proceeding” as defined by the Act. Once it has been determined that the proceeding is a child custody proceeding, it must then be determined whether the child is an Indian child.

Id. (internal citations omitted). “ ‘Indian child’ means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]” 25 U.S.C. § 1903(4) (2006).

In any involuntary proceeding in a state court where the court knows or has reason to know that an Indian child is involved, and where the identity of the child’s Indian parents or custodians or tribe is known, the party seeking the . . . termination of parental rights to[] an Indian child shall directly notify the Indian parents, Indian custodians, and the child’s tribe by certified mail with return receipt requested of the pending proceedings and of their right of intervention.

25 C.F.R. § 23.11(a) (2011).³ “The burden is on the party invoking [ICWA] to show that its provisions are applicable to the case at issue, through documentation or perhaps testimony from a tribe representative.” *In re C.P.*, 181 N.C. App. 698, 701–02, 641 S.E.2d 13, 16 (2007) (citing *In re Williams*, 149 N.C. App. 951, 957, 563 S.E.2d 202, 205 (2002)).⁴

3. On 14 June 2016, a new subpart, Subpart I, was added to the Department of the Interior’s regulations implementing ICWA. See 25 C.F.R. §§ 23.101 *et seq.* (2017); *Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,867 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23) (effective 12 December 2016) (“The final rules adds [sic] a new subpart to the Department of the Interior’s (Department) regulations implementing . . . [ICWA], to improve ICWA implementation. The final rule addresses requirements for State courts in ensuring implementation of ICWA in Indian child-welfare proceedings and requirements for States to maintain records under ICWA.”). Among other things, the newly-added Subpart I provides that “[t]he Indian Tribe of which it is believed the child is a member . . . determines whether the child is a member of the Tribe” and further provides that this determination “*is solely within the jurisdiction and authority of the Tribe . . .*” 25 C.F.R. § 23.108(a)–(b) (2017) (emphasis added). Subpart I also provides that “[p]rior to ordering an involuntary . . . termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful[.]” and that those “[a]ctive efforts must be documented in detail in the record.” 25 C.F.R. § 23.120(a)–(b) (2017). However, because the order in the instant case was entered on 28 November 2016, before the effective date for new Subpart I (12 December 2016), Subpart I is not applicable to the instant case.

4. We note that, now, it seems to be the case that the burden has shifted to state courts to inquire at the start of a proceeding whether the child at issue is an Indian child, and, if so, the state court must confirm that the agency used due diligence to identify and work with the Tribe and treat the child as an Indian child unless and until it is determined otherwise. See 25 C.F.R. § 23.107(a), (b)(1)–(2) (2017).

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In support of his argument on appeal, respondent directs this Court's attention to an identical sentence from two court reports prepared by a DSS social worker on 3 and 16 March 2016, which state: "[Respondent] indicated he is Cherokee on [Luke's] birth certificate. The Department contacted the tribe regarding [respondent's] claim and did not receive a response." The statement that respondent indicated he is Cherokee on Luke's birth certificate is, however, demonstrably untrue, as shown by the copies of Luke's birth certificate included in the record on appeal. Luke's birth certificate does not include any statement that either respondent or Luke are Cherokee and does not have a section in which a parent's or child's American Indian heritage, or lack thereof, could be listed. Moreover, although the order terminating respondent's parental rights is silent as to the applicability of ICWA, we note the trial court repeatedly found in its orders entered in the underlying juvenile case, including the initial adjudication and disposition order, that ICWA does not apply to this matter.

Respondent never presented the issue to the trial court that he now raises on appeal and completely failed to meet his burden of showing the provisions of ICWA apply to this case. *See Williams*, 149 N.C. App. at 956–57, 563 S.E.2d at 205 ("Equivocal testimony of the party seeking to invoke the Act, standing alone, is insufficient to meet this burden."); *see also In re A.R.*, 227 N.C. App. 518, 523–25, 742 S.E.2d 629, 633 (2013) (noting that a "mere belief" that a child is an Indian child covered under the ICWA, without more, does not meet a parent's burden of showing ICWA applies in a Chapter 7B proceeding, but "err[ing] on the side of caution by remanding for the trial court to determine the results of the . . . 'investigation' and to ensure that the ICWA notification requirements, if any, are addressed as early as possible"). Accordingly, this argument is overruled. Respondent does not otherwise challenge the trial court's order terminating his parental rights to Luke, and it is hereby affirmed.

AFFIRMED.

Judges HUNTER, JR., and MURPHY concur.

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[255 N.C. App. 300 (2017)]

MARC MALECEK, PLAINTIFF

v.

DEREK WILLIAMS, DEFENDANT

No. COA16-830

Filed 5 September 2017

1. Alienation of Affections—criminal conversation—due process—not offended

North Carolina's common law causes of action for alienation of affections and criminal conversation do not violate the Fourteenth Amendment. Adult individuals have a constitutionally protected interest in engaging in intimate sexual activities free of governmental intrusion or regulation, but the State has a legitimate interest in protecting the institution of marriage and deterring conduct that would cause injury to one of the spouses.

2. Alienation of Affections—criminal conversation—free speech—no violation

Defendant's rights to free speech and expression were not violated by claims for alienation of affections and criminal conversation where defendant and plaintiff's wife had an affair. An extra-marital relationship can implicate protected speech and expression, but these torts exist for the unrelated reason of remedying the harms that result from breaking the marriage vows.

3. Alienation of Affections—criminal conversation—freedom of association—not violated

The First Amendment right to free association was not violated by the torts of alienation of affections and criminal conversation. Those torts did not prohibit all conceivable forms of association between a spouse and someone outside the marriage.

Appeal by plaintiff from order entered 11 May 2016 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 7 March 2017.

The Law Offices of J. Scott Smith, PLLC, by J. Scott Smith and Andrew Newman, for plaintiff-appellant.

Allman Spry Davis Leggett & Crumpler, P.A., by Kim R. Bonuomo, Joslin Davis, and Bennett D. Rainey, for defendant-appellee.

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DIETZ, Judge.

This case concerns two common law causes of action—alienation of affection and criminal conversation—that permit litigants to sue the lovers of their unfaithful spouses. These laws were born out of misogyny and in modern times are often used as tools for enterprising divorce lawyers seeking leverage over the other side.

Defendant Derek Williams contends that these aging common law torts are facially unconstitutional because they violate individuals' First and Fourteenth Amendment rights to engage in intimate sexual activity, speech, and expression with other consenting adults.

As explained below, we reject this facial constitutional challenge. Claims for alienation of affection and criminal conversation are designed to prevent and remedy personal injury, and to protect the promise of monogamy that accompanies most marriage commitments. This sets these common law claims apart from the discriminatory sodomy law at issue in *Lawrence v. Texas*, 539 U.S. 558 (2003), which was not supported by any legitimate state interest and instead stemmed from moral disapproval and bigotry. Similarly, these laws (in most applications) seek to prevent personal and societal harms without regard to the content of the intimate expression that occurs in the extra-marital relationship. Thus, under *United States v. O'Brien*, 391 U.S. 367 (1968), these torts are constitutional despite the possibility that their use burdens forms of protected speech and expression.

Our holding is neither an endorsement nor a critique of these “heart balm” torts. Whether this Court believes these torts are good or bad policy is irrelevant; we cannot hold a law facially unconstitutional because it is bad policy. We instead ask whether there are any applications of these laws that survive scrutiny under the appropriate constitutional standards. As explained below, although there are situations in which these torts likely are unconstitutional as applied, there are also many applications that survive constitutional scrutiny. Thus, the common law torts of alienation of affection and criminal conversation are not facially unconstitutional. We reverse the trial court's order and remand for further proceedings.

Facts and Procedural History

Marc and Amber Malecek were a married couple. Ms. Malecek is a nurse. Defendant Derek Williams is a medical doctor at the hospital where Ms. Malecek works. In early 2015, Dr. Williams and Ms. Malecek began a sexual relationship.

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Mr. Malecek discovered the affair and sued Dr. Williams for alienation of affection and criminal conversation. Dr. Williams moved to dismiss Mr. Malecek's claims under Rule 12(b)(6) of the Rules of Civil Procedure on the ground that North Carolina's common law causes of action for alienation of affection and criminal conversation are facially unconstitutional.

The trial court held a hearing on Dr. Williams's motion, accepted his constitutional arguments, and entered a written order granting his motion to dismiss. Mr. Malecek timely appealed.

Analysis

This Court reviews the grant of a Rule 12(b)(6) motion to dismiss *de novo*. *State v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016). A Rule 12(b)(6) motion "is properly granted where a valid legal defense stands as an insurmountable bar to a plaintiff's recovery." *Lupton v. Blue Cross & Blue Shield of N.C.*, 139 N.C. App. 421, 424, 533 S.E.2d 270, 272 (2000). Because the courts cannot permit a plaintiff to pursue a cause of action that is unconstitutional on its face, Dr. Williams's facial challenge to these common law torts is an appropriate subject for a Rule 12(b)(6) motion.

We begin by examining the elements of these common law claims. "A claim for alienation of affections is comprised of wrongful acts which deprive a married person of the affections of his or her spouse—love, society, companionship and comfort of the other spouse." *Darnell v. Rupplin*, 91 N.C. App. 349, 350, 371 S.E.2d 743, 744 (1988). To prevail on an alienation of affection claim, the plaintiff must prove (1) that the spouses were happily married and a genuine love and affection existed between them; (2) the love and affection was alienated and destroyed; and (3) the defendant caused the destruction of that marital love and affection. *Id.* at 350, 371 S.E.2d at 745.

Similarly, a claim for criminal conversation lies against a defendant who engages in sexual relations with a married person. "The elements of the tort are the actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture." *Johnson v. Pearce*, 148 N.C. App. 199, 200–01, 557 S.E.2d 189, 190 (2001).

In the trial court, Dr. Williams argued that both of these causes of action were facially unconstitutional under the First and Fourteenth Amendments. The trial court agreed and granted Dr. Williams's Rule 12(b)(6) motion without identifying the particular constitutional doctrine on which it relied. Because we review the grant of a Rule 12(b)(6)

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motion to dismiss *de novo*, we must address all grounds on which Dr. Williams challenged these two common law claims.

I. Substantive Due Process

[1] Dr. Williams first argues that alienation of affection and criminal conversation offend the Due Process Clause of the Fourteenth Amendment by restraining one's liberty to have intimate sexual relations with another consenting adult. In support of this argument, Dr. Williams relies on the U.S. Supreme Court's decision in *Lawrence v. Texas*.

In *Lawrence*, the Supreme Court invalidated a Texas law criminalizing intimate sexual conduct between two people of the same sex. 539 U.S. 558, 578 (2003). The Texas statute was rooted in bigotry; it criminalized homosexual sex solely because some found it immoral or distasteful. As the Court observed, the Constitution does not permit a state to degrade the basic liberties of a group of its citizens on moral grounds. Gays, lesbians, and all other people who engage in homosexual sex "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.* The Court thus invalidated the Texas law because it furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.*

We agree with Dr. Williams that *Lawrence* established (or reaffirmed) that adult individuals have a constitutionally protected interest in engaging in intimate sexual activities free of governmental intrusion or regulation. *Id.* at 567. Whatever the bounds of this protected right, it certainly extends to private sexual activities between two consenting adults. Moreover, a civil lawsuit between private parties constitutes "state action" for purposes of the Fourteenth Amendment when enforcement of that cause of action imposes liability for engaging in a constitutionally protected right. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). Thus, Dr. Williams correctly contends that a suit against him for alienation of affection and criminal conversation, based on his intimate sexual relationship with Ms. Malecek, implicates his Fourteenth Amendment rights.

But the Supreme Court also added an important caveat in *Lawrence*. It observed that the Fourteenth Amendment generally prohibits States from regulating private, consensual sexual activity "absent injury to a person or abuse of an institution the law protects." *Lawrence*, 539 U.S. at 567. It is well-settled that alienation of affection and criminal conversation seek to remedy an injury to a person. *Misenheimer v. Burris*, 360 N.C. 620, 624, 637 S.E.2d 173, 176 (2006). Moreover, although the

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Supreme Court in *Lawrence* did not explain what it meant by an “institution the law protects,” the institution of marriage seems an obvious choice. Marriage is, after all, perhaps the most important institution in human history. “The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations.” *Obergefell v. Hodges*, __ U.S. __, __, 135 S. Ct. 2584, 2594 (2015). “Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.” *Id.*

Importantly, marriage is a commitment. Among the most central vows in a marriage is the promise of fidelity. *Id.* at 2608. In most marriages, this means a promise of monogamy; an agreement to share romantic intimacy and sexual relations only with one’s spouse. Of course, not every marriage carries this commitment, but for those that do, society expects married couples to honor it. If they do not, injury results—personal injury to the still-faithful spouse, but also societal injury, because a broken marriage can mean the loss of all the benefits that a healthy marriage brings to society. *See id.* at 2595–97. Simply put, the State has a legitimate interest (indeed, a substantial interest) in protecting the institution of marriage, ensuring that married couples honor their vows, and deterring conduct that would cause injury to one of the spouses.

We thus turn to the critical question presented here: is the State’s need to protect these interests sufficient to justify private tort actions that restrict one’s right to engage in intimate sexual conduct with other consenting adults?

We hold that it is. The Supreme Court in *Lawrence* recognized a liberty interest in intimate sexual activity, but did not hold that it was a fundamental right. *Lawrence*, 539 U.S. at 578–79; *id.* at 605 (Scalia, J., dissenting). Instead, the Court applied what appears to be a robust form of rational basis review. *Lawrence*, 539 U.S. 558. Under that standard, instead of merely asking if a law is rationally related to some legitimate governmental interest, courts weigh the government’s asserted interest against the right to individual liberty or equal treatment that the challengers contend is violated. *See United States v. Windsor*, __ U.S. __, __, 133 S. Ct. 2675, 2694–96 (2013); *Romer v. Evans*, 517 U.S. 620, 631–33 (1996); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 461–64, (1988); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *Plyler v. Doe*, 457 U.S. 202, 224–30 (1982). Laws that demean individuals because of lingering prejudices or moral disapproval typically are invalidated under this standard, but laws that further important state

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interests without being rooted in bigotry or moral disapproval typically are upheld.

Alienation of affection and criminal conversation fall into the latter category. These causes of action do not demean the existence of any group of people. They apply evenly to everyone. Moreover, the State's interest in preserving these torts is strong. As explained above, these torts deter conduct that causes personal injury; they protect promises made during the marriage; and they help preserve the institution of marriage, which provides innumerable benefits to our society.¹

To be sure, these common law torts are not the least liberty-restrictive means of vindicating the State's interests. For example, the State could invest in education to deter its citizens from cheating on their spouses. And, of course, these laws only impose liability on the third party. It arguably would be a greater deterrent to marital infidelity to impose liability on both the third party *and* the cheating spouse.²

If a higher level of scrutiny applied in this case (Dr. Williams wrongly contends that strict scrutiny should apply here) these less liberty-restrictive alternatives would doom the torts. But under the robust rational basis standard applied in *Lawrence* and similar cases, Dr. Williams cannot prevail unless he shows that these laws stem from lingering prejudice or moral disapproval that overshadows the State's other reasons for enacting them. Dr. Williams has not made that showing. Thus, under *Lawrence*, our State's common law causes of action for alienation of affection and criminal conversation do not violate the Fourteenth Amendment.

II. Freedom of Speech, Expression, and Association

[2] Dr. Williams next argues that alienation of affection and criminal conversation violate his rights to free speech, expression, and association guaranteed by the First and Fourteenth Amendments.

1. Our analysis ignores those in "open" marriages where both spouses agree that they may engage in intimacy or sexual activity outside the marriage. When the spouses agree to an open marriage, this is a complete defense to claims of alienation of affection and criminal conversation. See *Barker v. Dowdy*, 223 N.C. 151, 152, 25 S.E.2d 404, 405 (1943); *Nunn v. Allen*, 154 N.C. App. 523, 536, 574 S.E.2d 35, 44 (2002).

2. North Carolina has a criminal law that could be used to prosecute unfaithful spouses but the State has chosen not to use it, at least in modern times. See N.C. Gen. Stat. § 14-184. This may be because many other applications of this criminal statute are plainly unconstitutional and the State has concerns that this application would be as well. See *Lawrence*, 539 U.S. at 578; *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at *1 (N.C. Super. Aug. 25, 2006) (unpublished).

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We begin with Dr. Williams's challenge based on the First Amendment protection of speech and expression. Dr. Williams conceded at oral argument that the trial court found these causes of action facially unconstitutional. "In a facial challenge, the presumption is that the law is constitutional, and a court may not strike it down if it may be upheld on any reasonable ground." *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 539, 571 S.E.2d 52, 61 (2002). Thus, Dr. Williams cannot prevail on his facial challenge unless there is no reasonable set of circumstances in which these torts would be constitutional.

We agree with Dr. Williams that, even where the challenged causes of action are based solely on the existence of an extra-marital sexual relationship, they can implicate protected speech and expression. In the past, cases involving the regulation of sexual activity typically have been viewed as regulations of conduct, not speech or expression. For example, in a First Amendment case involving prostitution at an adult bookstore, the Supreme Court noted that "the sexual activity carried on in this case manifests absolutely no element of protected expression." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986).

But later cases suggest that sexual activity can carry an expressive message. For example, in *City of Erie v. Pap's A.M.*, the Court held that nude, erotic dancing involved expression that fell "within the outer ambit of the First Amendment's protection." 529 U.S. 277, 289 (2000). If using one's naked body to arouse another's sexual desire is a form of protected expression, it is difficult to understand why that expressive conduct would cease once the couple embraced, as opposed to staying at arm's length. Moreover, in *Lawrence*, the Supreme Court expressly acknowledged that one's sexuality "finds overt expression in intimate conduct with another person." 539 U.S. at 567. Thus, we agree with Dr. Williams that facing liability for engaging in intimate sexual relations with a married person can implicate the First and Fourteenth Amendment rights to free speech and expression.

But, as with the substantive due process claim discussed above, the mere fact that these common law claims can burden the right to free speech and expression does not mean they must be struck down. In most applications of these torts, the State is not concerned with the *content* of the intimate speech or expression that occurs in an extra-marital relationship. Instead, the State seeks to deter and remedy the harmful effects *that result* from acts that cause people to break their marriage vows, inflict personal injury on others, and damage the institution of marriage. Put another way, these torts may restrict certain forms of intimate speech or expression, but they do so for reasons unrelated to the content of that speech or expression.

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Courts review laws that only incidentally burden protected expression under the test established in *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Supreme Court held that a ban on burning draft cards did not violate the First Amendment because, although the law burdened the rights of citizens seeking to burn their draft cards in political protest, the government's interest in preventing people from destroying their draft cards was justified by reasons unrelated to the content of that political speech. *Id.* at 376–77. As the Court later explained, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This type of content-neutral law will be upheld if it “is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

These common law torts are facially valid under this standard. They further the State's desire to protect a married couple's vow of fidelity and to prevent the personal injury and societal harms that result when that vow is broken. As explained above, preventing these personal injuries and societal harms is a substantial governmental interest. Moreover, the State's interest is unrelated to the content of the protected First Amendment right. If the defendant's actions deprived a married person of the love and affection of his or her spouse, the State will impose liability regardless of what the defendant actually said or did. *Cf. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). Indeed, when spouses agree to an “open” marriage that permits extra-marital intimacy or sex, that is a defense to these claims, as is physical separation of the spouses when either spouse intends for the separation to remain permanent. *See* N.C. Gen. Stat. § 52-13 (2015); *Barker v. Dowdy*, 223 N.C. 151, 152, 25 S.E.2d 404, 405 (1943); *Nunn v. Allen*, 154 N.C. App. 523, 536, 574 S.E.2d 35, 44 (2002). This undermines Dr. Williams's argument that these laws target extra-marital intimacy or sex because the State disapproves of expressing that intimacy while married to someone else.

Simply put, these torts are intended to remedy harms that result when marriage vows are broken, not to punish intimate extra-marital speech or expression because of its content. And, because the availability of a tort action to the injured spouse provides both a remedy for that harm and a deterrent effect (one that benefits the State and society without punishing any speech or expression that does not cause these harms), the torts are narrow enough to survive constitutional scrutiny under the *O'Brien* test.

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[3] Dr. Williams also argues that these torts are facially unconstitutional because they violate the First Amendment right to free association. The First Amendment “restricts the ability of the State to impose liability on an individual solely because of his association with another.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918–19 (1982). But these torts do not prohibit all conceivable forms of association between a spouse and someone outside the marriage. There are countless ways for one to associate with a married person, form meaningful relationships, and even share feelings and intimacy without incurring liability for alienation of affection or criminal conversation. Moreover, when Dr. Williams articulates the specific associational rights that he contends are impacted, his argument collapses back to arguments about rights to intimate speech and expression. For the reasons discussed above, the incidental burden on those rights does not render these torts facially unconstitutional.

We emphasize that our holding today does not mean that every application of these common law torts is constitutional. There may be situations where an as-applied challenge to these laws could succeed. Take, for example, one who counsels a close friend to abandon a marriage with an abusive spouse. But this case, as the parties concede, is not one of those cases. It was decided as a facial challenge on a motion to dismiss at the pleadings stage. In the future, courts will need to grapple with the reality that these common law torts burden constitutional rights and likely have unconstitutional applications. For now, we hold only that alienation of affection and criminal conversation are not facially invalid under the First and Fourteenth Amendments.³

Conclusion

For the reasons explained above, we reverse the trial court’s order and remand this case for further proceedings.

REVERSED AND REMANDED.

Judges ELMORE and TYSON concur.

3. Dr. Williams also argues that these torts violate rights to speech, expression, and privacy guaranteed by the North Carolina Constitution. Our State Supreme Court has interpreted these rights as co-extensive with the analogous rights in the U.S. Constitution. *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993); *In re Moore’s Sterilization*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976). This Court has no authority to overrule our Supreme Court’s interpretation of these state constitutional provisions.

MYRES v. STROM AVIATION, INC.

[255 N.C. App. 309 (2017)]

JEFF MYRES, EMPLOYEE, PLAINTIFF-APPELLANT

v.

STROM AVIATION, INC., EMPLOYER, AND UNITED STATES FIRE
INSURANCE/CRUM & FORESTER INSURANCE COMPANY,
CARRIER, DEFENDANTS-APPELLEES

No. COA16-558

Filed 5 September 2017

Workers' Compensation—average weekly wage—per diem payments—in lieu of wages

The Industrial Commission did not err in a worker's compensation case in its determination of plaintiff's average weekly wage—specifically, the determination that per diem payments were in lieu of wages. This was a question of fact which was supported by the evidence, and the Court of Appeals was not free to conduct a de novo review.

Appeal by plaintiff from opinion and award entered 10 July 2015 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 9 March 2017.

Stanley E. Speckhard, PLLC, by Stanley E. Speckhard, for plaintiff-appellant.

Cranfill Sumner & Hartzog, LLP, by Jaye E. Bingham-Hinch, for defendant-appellees.

STROUD, Judge.

Plaintiff, Jeffery Myres appeals from the opinion and award of the Full Commission concluding that: (1) plaintiff's per diem payments were not made in lieu of wages, but were reimbursement for plaintiff's business-related living expenses; (2) plaintiff's average weekly wage was \$340.62; and (3) plaintiff was not entitled to temporary total disability benefits from 20 July 2013 through 18 August 2013. Because the Commission's determination of plaintiff's average weekly wage was in accord with precedent of this Court, we affirm.

I. Background

Plaintiff suffered a compensable ankle injury while working for defendant-employer and the basic facts regarding his injury and

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employment are uncontested. Plaintiff is a trained and licensed airplane mechanic with over 21 years of experience in the aviation and aerospace industry. At the time of his ankle injury, he worked for defendant-employer, Strom Aviation, Inc. (“Strom”). Strom is an employment agency providing contract labor or temporary staffing to companies in the aerospace and aviation industry. The parties stipulated that an employee-employer relationship existed between the plaintiff and defendant-employer. Plaintiff’s ankle injury occurred on 22 April 2012 and he received medical treatment, including two surgeries. His doctor determined that he had a 25% permanent partial rating for his left ankle on 26 June 2013 and released him to full-duty work without restrictions. After working briefly through Strom at another location, Pat’s Aircraft in Georgetown, Delaware, plaintiff stopped working due to ankle pain and as of 20 December 2013, he had not returned to work.

On 16 August 2013, plaintiff initiated a workers compensation claim for his ankle injury by filing a Notice of Accident to Employer and Claim of Employee, and on 12 December 2013 filed a Request that Claim be Assigned for Hearing. In their response, defendants disagreed with plaintiff’s allegation of his average weekly wage and mileage reimbursement. On 31 December 2014, the deputy commissioner ultimately determined that “the per diem payments received by plaintiff were not made in lieu of wages, but instead were coordinated with a reimbursement for plaintiff’s business-related living expenses; . . . plaintiff’s average weekly wage upon which workers compensation benefits is calculated is \$340.62.”¹

Plaintiff appealed to the Full Commission on 8 January 2015, and ultimately the Full Commission filed an opinion and award on 10 July 2015, denying plaintiff’s Motion to Receive Additional Authority and agreeing with the deputy commissioner as to both the per diem payment and plaintiff’s average weekly wage of \$340.62. Plaintiff submitted a Motion to Reconsider on 29 July 2015, and defendants filed a Response to Plaintiff’s Motion to Reconsider on 10 August 2015. Plaintiff’s Motion to Reconsider was denied by the Full Commission on 28 January 2016. Plaintiff timely appealed to this Court on 11 February 2016.

On appeal, plaintiff challenges only the Commission’s determination of his average weekly wage. Although he states in his brief in a general sense that some of the findings of fact are not supported by the evidence,

1. The deputy commissioner and Full Commission also found that “plaintiff was not entitled to temporary total disability benefits from July 20, 2013 through August 18 2013.” Plaintiff has not made any argument regarding this part of the Commission’s order on appeal, and thus we have not addressed it on appeal.

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he does not specifically challenge any finding of fact other than Finding No. 14, which is the Commission's finding of ultimate fact that the per diem payments he received from Strom were not "paid in lieu of wages" and thus should not be used in the calculation of his average weekly wage. See *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951) ("An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts."). Plaintiff's general statements that certain evidentiary findings were not supported by the evidence, without any specific argument as to any particular finding, are simply not sufficient to allow appellate review. See *Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) ("Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission. Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." (citation and quotation marks omitted)). Since plaintiff's brief does not challenge any specific finding of fact other than finding 14, the other findings of fact are binding on appeal. See *id.* However, we also note that the other findings of fact mentioned by plaintiff are fully supported by the evidence. For example, several of the findings plaintiff mentions in his brief are simply summaries of certain IRS rules, and there is no question that those findings accurately reflect the IRS rules. We have reviewed all of the evidence, and the evidentiary findings upon which Finding No. 14 is based are fully supported by the record. Plaintiff's real argument is that the Commission should not have relied upon those IRS rules in its analysis, finding of ultimate fact, and conclusion of law.

II. Standard of Review

"The Commission has exclusive original jurisdiction over workers' compensation cases and has the duty to hear evidence and file its award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue." *Thompson v. STS Holdings, Inc.*, 213 N.C. App. 26, 20, 711 S.E.2d 827, 829 (2011). Our standard of review for an opinion and award from the Industrial Commission

is limited to a determination of (1) whether its findings of fact are supported by any competent evidence in the record; and (2) whether the Industrial Commission's findings of fact justify its legal conclusions. The Industrial Commission's conclusions of law are reviewable de novo by this Court.

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Moore v. City of Raleigh, 135 N.C. App. 332, 334, 520 S.E.2d 133, 136 (1999) (citation and quotation marks omitted). “The determination of whether an allowance was made in lieu of wages is a question of fact[.]” *Greene v. Conlon Constr. Co.*, 184 N.C. App. 364, 366, 646 S.E.2d 652, 655 (2007). Although the question of whether the per diem payments were made “in lieu of” wages may appear to be a legal conclusion subject to *de novo* review, prior cases have clearly established that this issue is an issue of fact. In *Greene*, this Court noted that the defendant’s employer and insurance carrier argued that the Commission “erred by including plaintiff’s per diem stipend in its calculation of plaintiff’s weekly wage.” *Id.* at 366, 646 S.E.2d at 654. This Court affirmed the Commission’s inclusion of the per diem in the average weekly wage and noted:

This issue is addressed by N.C. Gen.Stat. § 97–2(5) (2005), which provides in pertinent part that [w]herever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings. Defendants argue first that our common law precedent has not defined the meaning of the words in lieu of wages. We conclude that this phrase needs no special definition. Wages are commonly understood to be payment for labor or services, and in lieu of means instead of or in place of. Thus, allowances made in lieu of wages are those made in place of payment for labor or services.

Id. at 364, 646 S.E.2d at 652 (citation and quotation marks omitted). “The Commission’s findings of fact may be set aside on appeal only where there is a *complete* lack of competent evidence to support them.” *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995) (emphasis added).

III. Findings of Fact

The relevant evidentiary facts, as found by the Commission, regarding Plaintiff’s employment are as follows:

2. Defendant-employer is an employment agency that provides contract labor and temporary staffing to companies in the aerospace and aviation industries, including Timco.
3. On 17 October 2011, plaintiff entered into an employment contract with defendant-employer to perform structural repair work for Timco.

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4. Defendant-employer pays mechanics a straight time hourly wage and an overtime hourly wage, both of which are treated as taxable income. In addition, defendant-employer pays mechanics a non-taxable per diem amount. The per diem payment is intended to reimburse employees for the cost of living expenses while working away from home. Therefore, per diem is only available if the worksite is located more than 50 miles from the employee's permanent residence and the employee certifies that they are maintaining a temporary residence closer to the worksite. Per diem rates are set at a maximum weekly amount, and the amount of the payment is pro-rated if the employee works fewer than 40 hours in a week.

5. Pursuant to plaintiff's employment contract with defendant-employer, plaintiff was to be paid at a taxable "straight time rate" of \$7.25 per hour, and an overtime rate of \$20.50 per hour. The contract further reflects that plaintiff would be eligible to receive a maximum "per diem" amount of \$530.00 per week, which equates to \$13.25 per hour for a 40 hour work week. If plaintiff worked less than 40 hours during a week, his per diem earnings would be prorated based upon the \$13.25 hourly rate. At the time he entered into the employment contract, plaintiff signed a certificate verifying that his permanent residence continued to be in Hertford, which is more than 50 miles from Timco's facility in Greensboro.

6. Plaintiff testified that he incurred expenses for campground fees, gas, vehicle maintenance, internet service and food, but he was not required to submit receipts to defendant employer to substantiate these expenses.

7. The Internal Revenue Service ("IRS") has established guidelines under which fixed per diem payments at or below the Government Services Administration ("GSA") maximum allowable amount provided to employees on a uniform, objective basis are deemed substantiated travel expenses without proof from employees of expenses incurred.

8. For an employer to have per diem rates deemed "substantiated," it must follow three rules: (1) the per diem must be paid with respect to ordinary and necessary business expenses incurred or reasonably anticipated to be

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incurred; (2) the per diem must be reasonably calculated not to exceed the amount of the expenses or anticipated expenses; and (3) the per diem must be paid at or below the federal per diem rate found on the website.

9. Brian Lucker is defendant-employer's Chief Financial Officer. He testified, and the Full Commission finds, that defendant-employer established the maximum amount of per diem plaintiff received while working for defendant-employer at Timco by obtaining the maximum per diem rate listed on the GSA website for Greensboro (\$994.00 per week at the time plaintiff entered into his contract with defendant-employer), and adjusting that amount down to \$530.00 based upon an informal assessment of local living costs. Based upon this process, \$530.00 is the amount of business expenses defendant-employer reasonably anticipated plaintiff would incur in connection with his work at Timco.

10. Where an employer follows the established federal guidelines regarding per diem rates, the IRS does not consider per diem payments made by that employer to be wages or compensation, and therefore, such per diem payments are not subject to employment or withholding taxes.

11. Plaintiff confirmed that his per diem was not taxable and that he did not include per diem payments in his income tax filings. Plaintiff also acknowledged that, while working for defendant-employer, his W-2 reflected straight time wages and overtime pay, but not his per diem payments.

12. Plaintiff testified that the other aviation related staffing agencies he has worked for paid him in the same manner as defendant-employer paid him, with a straight time hourly rate of \$7.00 to \$8.00, an overtime hourly rate, and a per diem rate. As with the W-2 plaintiff received in connection with his employment with defendant-employer at Timco, plaintiff testified that the W-2s plaintiff received from the other staffing agencies only reflected his taxable wages.

13. Vocational rehabilitation counselor Michael Fryar was retained by counsel for plaintiff in this matter. Mr. Fryar testified that it would be extremely difficult for defendant-employer and other staffing agencies to recruit mechanics

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if they paid minimum wage. Mr. Fryar ultimately opined that defendant-employer and other staffing agencies that pay a minimum hourly wage plus a per diem are paying the per diem in lieu of what other employers are paying as wages. Mr. Fryar further testified with respect to plaintiff specifically that the per diem compensation paid to plaintiff by defendant-employer for his work at Timco was paid in lieu of wages.²

The Commission's finding of ultimate fact which plaintiff challenges on appeal is as follows:

14. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that the method used by defendant-employer to calculate the rate of per diem paid to plaintiff adjusts for the work locale and conforms to the federally established guidelines for treating an employee's business expenses as deemed substantiated. Therefore, notwithstanding the opinions of Mr. Fryar, the Full Commission finds that the per diem payments received by plaintiff from defendant-employer were coordinated with plaintiff's actual business expenses and were not paid in lieu of wages. Accordingly, pursuant to the parties' stipulations in this case, plaintiff's average weekly wage is \$340.62.

The Commission then concluded the following in Conclusion of Law No. 1:

In calculating plaintiff's average weekly wage, the Commission must first determine what constitutes plaintiff's earnings. Regarding per diem payments, N.C. Gen. Stat. § 97-2(5) provides, "[w]herever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings." Per diem amounts set a fixed amount

2. We note that some of the Commission's findings are recitations of testimony, but its ultimate finding resolves any uncertainty regarding which testimony the Commission found to be credible. But we encourage the Commission to avoid recitations of testimony in its findings if at all possible as this type of finding can lead to reversal and remand for clarification of findings if we are unable to determine which evidence the Commission found credible. *See People v. Cone Mills Corp.*, 316 N.C. 426, 442, 342 S.E.2d 798, 808 (1986) ("We, nevertheless, suggest to the Commission to make its findings in the form of declarations of facts rather than recitations of testimony.").

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regardless of actual employee expenses may be considered part of the employee's earnings. In the instant case, the per diem payments plaintiff received from defendant-employer were adjusted depending on locale, and were made subject to a policy in conformity with federal guidelines that allowed the payments to be treated as tax-deductible business expenses without further proof of actual expenses from the employee. The Full Commission therefore concludes that the per diem payments plaintiff received from defendant-employer were not made in lieu of wages, but instead were reimbursement for plaintiff's business-related living expenses.

(Citation and quotation marks omitted).

IV. Per Diem Payments

Unlike most worker's compensation cases, this case does not involve any issue regarding the compensability of plaintiff's injury, plaintiff's medical expenses, or plaintiff's relationship with the employer. The only issue on appeal is the amount of Plaintiff's "average weekly wages." Plaintiff argues that the Commission erred by calculating his "average weekly wages" based only upon his hourly rate and excluding his per diem payments, since he contends that the per diem payments are really paid "in lieu of wages" as defined by N.C. Gen. Stat. § 97-2(5). With the per diem payments, his hourly wages would be \$20.50/hour; without it, they are \$7.25/hour, or the federal minimum wage. We agree that it seems obvious that an aircraft mechanic with specialized training and over 20 years of experience would be paid far more than minimum wage. We also realize that it is to defendant's advantage to set up its compensation structure to make its employees' "average weekly wages" as low as possible to reduce any potential worker's compensation awards. For that matter, the arrangement is also advantageous to the employee, whose income tax burden is significantly lower if the per diem payments are not taxable income. The employee's problem with this pay structure arises only if he is injured on the job. Overall, it may not seem "fair and just to both parties" for the average weekly wage for an employee such as plaintiff, with many years of specialized experience in aviation mechanics, to have the same compensation rate as a teenager working at the drive-thru window of a fast food restaurant. But it is not this Court's role to weigh the policy considerations involved in how aircraft mechanics are paid and taxed, and we are constrained by precedent to hold that the Commission did not err in its determination.

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Workers compensation payments are based upon the employee's "average weekly wages," which are defined by N. C. Gen. Stat. § 97-2(5), in pertinent part, as follows:

(5) Average Weekly Wages. – "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury. . . .

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings.

N.C. Gen. Stat. § 97-2(5). "The intent of [G.S. § 97-2(5)] is to make certain that the results reached are fair and just to both parties. . . . Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls the decision." *Larramore v. Richardson Sports, Ltd. Partners*, 141 N.C. App. 250, 255, 540 S.E.2d 768, 771 (2000) (citation and quotation marks omitted). Plaintiff contends that the Commission erred by its reliance upon its findings that defendant had followed "established federal guidelines" and that the IRS does not consider the per diem allowances to be wages or compensation (Findings of Fact 7, 8, 9, 10, and 14 and Conclusion of Law 1).

In *Thompson*, this Court addressed the same issue, for an "airframe and power plant mechanic" who was placed by STS Holdings, Inc. – another staffing company like defendant-employer – at TIMCO in the Greensboro location. 213 N.C. App. at 27, 711 S.E.2d at 828. He was also injured during his work at TIMCO. The plaintiff in *Thompson* raised several other issues, since he had worked with four other employers in addition to STS during the 52 weeks preceding his injury, but ultimately the Commission and this Court also had to consider whether the per diem payments should have been included in calculation of his average weekly wages. Just as in this case, the Commission determined Thompson's average weekly wage based only upon his hourly rate and excluded the per diem payments, which reduced his compensation rate dramatically, from \$329.58 per week to \$30.00 per week.

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STS paid Plaintiff an hourly wage of \$7.50 an hour for Plaintiff's work with TIMCO. If Plaintiff worked overtime hours for STS, Plaintiff would earn overtime wages. STS also disbursed additional monies to Plaintiff while Plaintiff was in its employ. Plaintiff received a per diem amount for living expenses under certain circumstances.

The Commission found as fact:

The per diem is paid as non-taxable, is set at differing amounts according to the costs of staying in any given location, and is meant to reimburse employees for cost of living expenses while they are on the road. The per diem is set as a maximum weekly amount, and is paid on a pro-rated basis if the employee works fewer than 40 hours in a particular week. Per diem payments are only available if a worksite is located greater than 50 miles from the employee's permanent residence and the employee certifies to [STS] that he is maintaining a temporary residence nearer to the worksite. The Commission further found that the method used by STS to calculate the per diem rate to be paid to an employee was determined by first consulting the maximum allowable rate as set forth on the federal Government Services Administration website. STS would then reduce that amount by twenty percent and make additional downward adjustments related to the local cost of living, if applicable. The Commission also found that Plaintiff received travel pay for certain jobs to help defray the cost associated with travelling to a jobsite. An officer for STS testified that travel pay is used to assist employees in travelling to the job and is paid as a business expense reimbursement. . . . [T]ravel pay is typically tied to a minimum stay at a particular work cite [sic], and if an employee does not meet the minimum stay, the travel pay is deducted from the employee's final check for that contract as a cost or wage advance. The Commission further found that STS would sometimes give an employee wage advances. These advances constituted advance pay for work an employee had not yet performed, but was expected to perform. These advances were "deducted from the employee's subsequent post-tax earnings." Finally, the Commission found that Plaintiff's

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“payroll records include[d] additional categories labeled ‘RC’ and ‘RE.’ However, the record of evidence [did] not include sufficient information for the . . . Commission to determine how, or whether, amounts listed in association with those categories may have influenced the wages earned by [P]laintiff.” Based in part on these findings of fact, the Commission concluded that, while working for STS, Plaintiff’s wages consisted exclusively of his hourly wage and overtime pay. The Commission further concluded that the per diem, travel expenses, wage advances, and the additional “RC” and “RE” amounts did not constitute payments made by STS to Plaintiff in “lieu of wages.”

Id. at 28, 711 S.E.2d at 828. Thus, the *Thompson* Court was considering a payment structure which is essentially identical to plaintiff’s in this case, for an essentially identical job, and even at the same worksite.

Just as plaintiff here argues, the *Thompson* plaintiff argued:

the Commission erred in excluding *per diem*, travel pay, and wage advances from the calculation of Plaintiff’s earnings while working for STS. Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings. The determination of whether an allowance was made in lieu of wages is a question of fact[.]

Id. at 34, 711 S.E.2d at 831 (citation and quotation marks omitted). The *Thompson* Court rejected this argument and stated:

[O]ur review of the record shows that competent evidence exists in the record to support the Commission’s findings of fact that those items were not advanced to Plaintiff in lieu of wages. Because some competent evidence exists supporting these findings of fact, they are binding on appeal—regardless of whether conflicting evidence might exist.

Id. at 34, 711 S.E.2d at 832.

Since “[t]he determination of whether an allowance was made in lieu of wages is a question of fact,” *Greene*, 184 N.C. App. at 366, 646 S.E.2d at 655 (citations omitted), and since the evidentiary findings which support Finding No. 14 are not specifically challenged, we are not at liberty to conduct *de novo* review of the Commission’s determination. We are also

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constrained by *Thompson*, which presented essentially the same issue and even the same factual scenario, to hold that the Commission did not err by making its ultimate finding regarding calculation of plaintiff's average weekly wages.

Plaintiff also challenges the Commission's Conclusion of Law No. 1,

In calculating plaintiff's average weekly wage, the Commission must first determine what constitutes plaintiff's earnings. Regarding per diem payments, N.C. Gen. Stat. § 97-2(5) provides, "[w]herever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings." Per diem amounts set a fixed amount regardless of actual employee expenses may be considered part of the employee's earnings. In the instant case, the per diem payments plaintiff received from defendant-employer were adjusted depending on locale, and were made subject to a policy in conformity with federal guidelines that allowed the payments to be treated as tax-deductible business expenses without further proof of actual expenses from the employee. The Full Commission therefore concludes that the per diem payments plaintiff received from defendant-employer were not made in lieu of wages, but instead were reimbursement for plaintiff's business-related living expenses.

While this Court reviews the Commission's conclusions of law *de novo*, this review is "limited to whether the findings of fact support the Commission's conclusions of law." *Starr v. Gaston Co. Bd. Of Educ.*, 191 N.C. App. 301, 310, 663 S.E.2d 322, 328 (2008).

Some of plaintiff's arguments on appeal are based upon federal case law and reference to IRS guidelines regarding treatment of per diem payments, but none of those arguments were presented to the Full Commission. And since the Commission is not bound to define income in exactly the same way as the IRS or under exactly the same rules, it is unlikely that consideration of any additional information would have changed the result, particularly considering the similarity of the payment methods between this case and *Thompson*. Federal case law and IRS guidelines cannot overcome precedential rulings by North Carolina courts on this issue. The Commission's findings of fact fully support its conclusion of law and we therefore must affirm the order.

PINE v. WAL-MART ASSOCS., INC.

[255 N.C. App. 321 (2017)]

V. Conclusion

Because the Commission's finding of fact that the per diem payments were not made in lieu of wages and its conclusion of law is supported by the findings, we affirm the order and award.

AFFIRM.

Judges DILLON and MURPHY concur.

PATRICIA PINE, EMPLOYEE, PLAINTIFF

v.

WAL-MART ASSOCIATES, INC. #1552, EMPLOYER, AND

NATIONAL UNION FIRE INSURANCE CO.,

CARRIER (CLAIMS MANAGEMENT, INC. THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA16-203

Filed 5 September 2017

1. Workers' Compensation—Parsons presumption erroneously applied—preponderance of evidence—additional medical conditions—causally related to workplace injury

Although the Industrial Commission erred in a workers' compensation case by applying the *Parsons* presumption to a medical condition not listed on an employer's admission of compensability form, the error did not require reversal where the Commission also found that plaintiff employee had proved by a preponderance of the evidence that her additional medical conditions were causally related to her workplace injury.

2. Workers' Compensation—expert opinions—competent evidence—injuries causally related to workplace accident

The Industrial Commission did not err in a workers' compensation case by concluding that the expert opinions supported competent evidence to prove plaintiff employee's neck, hand, and wrist injuries were causally related to her workplace accident. The Commission is the sole judge of the credibility of witnesses and the weight to be given to their testimony.

Judge TYSON concurring in part and dissenting in part.

PINE v. WAL-MART ASSOCS., INC.

[255 N.C. App. 321 (2017)]

Appeal by Defendants from an Opinion and Award entered 10 November 2015 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 9 August 2016.

Doran Shelby Pethel and Hudson, P.A., by David A. Shelby, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Holly M. Stott and M. Duane Jones, for Defendant-Appellants.

INMAN, Judge.

This appeal involves a commonly relied upon presumption in North Carolina workers' compensation law, which shifts from an employee to an employer the burden of proof for causation of an injury. At issue is whether the North Carolina Industrial Commission erred by applying this presumption, known as the *Parsons* presumption, to a medical condition not listed on an employer's admission of compensability form.

Wal-Mart Associates, Inc., employer, and National Union Fire Insurance Co., carrier, (collectively "Defendants") appeal from an Opinion and Award of the Full North Carolina Industrial Commission (the "Commission") awarding Patricia Pine, employee, ("Plaintiff") compensation for medical treatment for injuries to her neck, wrist, shoulder, hand, and left knee and ongoing disability payments.

Following an amendment to the North Carolina Workers Compensation Act by the North Carolina General Assembly, we hold that it was error for the Commission to apply the *Parsons* presumption in this case. However, the error does not require reversal because the Commission also found that Plaintiff had proved by a preponderance of the evidence that her additional medical conditions were causally related to her workplace injury, thereby satisfying her burden of proof absent the presumption. Accordingly, we affirm the Commission's Opinion and Award.

Factual and Procedural History

On 29 December 2011, while at work, Plaintiff tripped and fell face-forward over the bottom of a stairway ladder. As she fell, she extended her right arm to break the fall; her wrist hit the floor first, followed by her right shoulder area, her left knee, and her chest near her collarbone. One of Plaintiff's co-workers witnessed the fall and confirmed that Plaintiff complained of left knee and right hand, wrist, and shoulder pain.

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Plaintiff, at the direction of her employer, went to Dr. Clifford Callaway, who diagnosed her with a shoulder sprain. Plaintiff followed up with Dr. Callaway several times throughout January 2012. Dr. Callaway updated his diagnosis to include a left knee sprain, a cervical strain, and a wrist sprain, and referred Plaintiff to Dr. James Comadoll, an orthopedic specialist.

Dr. Comadoll ordered an MRI of Plaintiff's right shoulder and diagnosed Plaintiff with a possible right rotator cuff tear and a left knee contusion. Plaintiff followed up with Dr. Comadoll within one month complaining of neck soreness and issues with range of motion. Dr. Comadoll ordered an EMG¹ to look for signs of nerve entrapment. The EMG showed Plaintiff suffered from carpal tunnel syndrome in her right wrist, so Dr. Comadoll performed a carpal tunnel release surgery. Because Plaintiff still complained of left knee pain, Dr. Comadoll ordered an MRI of Plaintiff's left knee, which showed a possible lateral meniscus anterior horn tear.

Dr. Comadoll referred Plaintiff to Dr. Michael Getter, a board-certified orthopedic surgeon who specializes in spinal surgery, for further evaluation of her continued complaints of numbness and pain in her upper extremities. Dr. Getter ordered a cervical MRI for Plaintiff, which showed degenerative disc disease causing stenosis compressing the nerve at C4-5, C5-6, and C6-7. Dr. Getter recommended surgery to decompress the nerve and to prevent progressive neurological problems and muscle atrophy.

At the request of Defendants, Plaintiff underwent additional medical examinations. Dr. Joseph Estwanik diagnosed Plaintiff with a partial full thickness tear of her right rotator cuff for which he recommended arthroscopic surgery. Dr. Louis Koman, a board-certified orthopedic surgeon with a certificate of subspecialty in hand surgery, diagnosed Plaintiff with a carpal boss, a traumatic sagittal band rupture, and cervical spine pathology that was causing some residual symptoms in her right upper extremity despite the carpal tunnel release.

Meanwhile, Plaintiff filed a Form 18, *Notice of Accident to Employer*, related to her fall at work, citing injuries to her "RUE, LLE, neck and any other injuries causally related." In response, Wal-Mart filed a Form 60, *Employer's Admission of Employee's Right to Compensation*, admitting

1. An EMG, also known as an electromyogram, is "[a] graphic representation of the electric currents associated with muscular action." Stedman's Medical Dictionary 283110 (28th ed. 2014).

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compensability for Plaintiff's claim with regard to the injuries suffered to her right shoulder and arm. Wal-Mart subsequently filed a Form 61, *Denial of Workers' Compensation Claim*, denying compensability for Plaintiff's cervical spine condition as "a new injury outside of her employment" and "unrelated to the original compensable injury."

Following a hearing before the Industrial Commission, deputy commissioner Kim Ledford issued an Opinion and Award concluding, as shown by the greater weight of competent medical opinion, that as a consequence of her workplace accident Plaintiff not only suffered the shoulder injury admitted by Wal-Mart, but also sustained injuries to her right wrist and left knee and aggravated her pre-existing cervical disc condition. Both parties appealed to the Full Commission.

Following additional proceedings, the Commission found, *inter alia*:

20. Based upon a preponderance of the evidence, the Full Commission places greater weight on the testimony of Dr. Callaway, Dr. Comadoll, Dr. Getter, and Dr. Koman, than that of Dr. Estwanik, and finds that Plaintiff's pre-existing cervical disc disease was aggravated by her fall at work on December 29, 2011. Additional medical treatment with Dr. Getter, including but not limited to surgery, is reasonable and necessary to effect a cure, give relief, or lessen the period of disability related to this injury.

...

22. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's carpal tunnel syndrome and sagittal band rupture were caused by the December 29, 2011 injury by accident. The Full Commission further finds, by a preponderance of the evidence that Plaintiff's carpal boss was materially aggravated by the December 29, 2011 injury by accident. Additional medical treatment, including but not limited to surgery with Dr. Koman, is reasonable and necessary to effect a cure, give relief, or lessen the period of disability related to these injuries.

The Commission concluded that because Wal-Mart accepted as compensable Plaintiff's right shoulder injuries, a rebuttable presumption arose that Plaintiff's other medical conditions were causally related to the compensable injury. It then concluded:

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3. Defendants failed to present sufficient evidence to rebut the presumption that Plaintiff's carpal tunnel syndrome, carpal boss, sagittal band rupture, dystrophic right hand symptoms, neck, and left knee problems are causally related to the December 29, 2011 injury by accident. *See Gonzalez v. Tidy Maids, Inc.*, 2015 N.C. App. LEXIS 138, 768 S.E.2d 886 (2015). . . .

The Commission awarded Plaintiff "all reasonable and necessary medical expenses which tend to effect a cure, give relief or lessen the period of Plaintiff's disability, incurred or to be incurred by Plaintiff for treatment of her right shoulder, left knee, right carpal tunnel syndrome, right sagittal band rupture, right hand dystrophic condition, right carpal boss, and neck injuries."

Defendants timely appealed.

Analysis

Defendants argue that the Commission acted under a misapprehension of the law when it relied on this Court's decision in *Wilkes v. City of Greenville*, __ N.C. App. __, __, 777 S.E.2d 282, 286 (2015) (citations omitted), *aff'd in part, aff'd as modified in part, and remanded by* __ N.C. __, 799 S.E.2d 838 (2017), and applied the presumption established by this Court in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), shifting to Defendants the burden of proving that Plaintiff's other injuries were not causally related to her right shoulder injury suffered in her fall at work. Defendants further assert that Plaintiff failed to meet her burden of proof without the *Parsons* presumption to establish a causal relationship between the injuries. We disagree.

A. Standard of Review

Appellate review of an opinion and award of the North Carolina Industrial Commission is "limited to determining: (1) whether the findings of fact are supported by competent evidence, and (2) whether those findings support the Commission's conclusions of law." *Reed v. Carolina Holdings*, __ N.C. App. __, __, 796 S.E.2d 102, 108-09 (2017) (citing *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006)). Findings of fact supported by competent evidence are binding on appeal, *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009), and unchallenged findings of fact are presumed to be supported by competent evidence, *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680 (2013). However, the Commission's conclusions of law are reviewed *de novo*. *McRae*

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v. Toastmaster, Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). And “[w]hen the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard.” *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citation omitted).

B. Parsons Presumption

[1] Defendants specifically challenge the Commission’s Conclusions of Law Numbers 1 and 3 related to Plaintiff’s neck, wrist, and hand injuries, asserting that the Commission misapplied the *Parsons* presumption to those medical conditions not previously admitted by Wal-Mart in its Form 60. This argument is supported by a recent statutory amendment, even though the amendment was enacted while this appeal has been pending. However, the error does not require reversal because the Commission made adequate findings that Plaintiff met her burden of proving causation without the presumption.

The North Carolina Workers’ Compensation Act requires employers to provide medical compensation for the treatment of compensable injuries, including “additional medical compensation . . . directly related to the compensable injury” that is designed to effectuate a cure, provide relief, or lessen the period of disability. *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005) (internal quotation marks and citation omitted); N.C. Gen. Stat. § 97-25 (2015). “It is well established that an employee seeking compensation for an injury bears the burden of demonstrating that the injury suffered is causally related to the work-related accident.” *Wilkes*, __ N.C. App. at __, 777 S.E.2d at 286.

Our Court has long held that once an employee obtained a compensation award for a workplace injury, if that employee seeks additional compensation for treatment of later developing medical conditions claimed to be causally related to the compensable injury, the Commission should presume “that the additional medical treatment is directly related.” *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292; *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869. “The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury.” *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292. This presumption allows an employee to obtain additional compensation for medical conditions related to a compensable injury without having to re-litigate the issue of causation. *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869 (“To require [a] plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission

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has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the [Workers' Compensation] Act in favor of injured employees.”).

In *Parsons*, the plaintiff was working as a store clerk when two men entered the store and assaulted her, striking her in the forehead and shooting her four times with a stun gun. *Id.* at 540, 485 S.E.2d at 868. The Industrial Commission awarded the plaintiff compensation for her injuries, which were primarily frequent headaches. *Id.* at 540-41, 485 S.E.2d at 868-69. Eight months after the award, the plaintiff sought compensation for additional treatment of her headaches, but the Commission denied her claim because she “ ‘ha[d] not introduced any evidence of causation between her injury and her headache complaints at the time of the hearing’ and . . . ‘failed to meet her burden of proof for showing the necessity of continued or additional medical treatment.’ ” *Id.* at 541, 485 S.E.2d at 869. Our Court reversed the Commission’s opinion and award, holding that “[i]n effect, requiring that [the] plaintiff once again prove a causal relationship between the accident and her headaches in order to get further medical treatment ignores th[e] prior award.” *Id.* at 542, 485 at 869.

In *Perez*, this Court extended the *Parsons* presumption to instances in which the Commission had not directly ruled on compensability of an injury because the employer had admitted it by filing of a Form 60 and had paid compensation to the employee. *Perez*, 174 N.C. App. at 136, 620 S.E.2d at 293 (“As the payment of compensation pursuant to a Form 60 amounts to a determination of compensability, we conclude that the *Parsons* presumption applies in this context.”). The *Perez* Court noted that “[t]he presumption of compensability applies to future *symptoms* allegedly related to the original compensable injury.” *Id.* at 136-37 n. 1, 620 S.E.2d at 293 n. 1 (emphasis added) (rejecting the defendant’s argument that the plaintiff suffered a different injury from the injury stated on the Form 60).

In *Clark v. Sanger Clinic*, 175 N.C. App. 76, 623 S.E.2d 293 (2005), this Court declined to extend the *Parsons* presumption to an injury that had not previously been deemed compensable by the Commission. The Court rejected the plaintiff’s argument that the *Parsons* presumption applied to the plaintiff’s compensation claim for degenerative arthritis after the plaintiff had obtained an award for a knee injury caused by an accident at work. *Id.* at 79, 623 S.E.2d at 296. The *Clark* decision emphasized in its holding the reasoning in *Parsons* that the presumption’s purpose was to alleviate a plaintiff from having to re-prove causation for the

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“very injury” the Commission determined compensable. *Id.* at 76, 623 S.E.2d at 296 (quoting *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869).

In *Wilkes*, this Court again extended the *Parsons* presumption, holding that “the *Parsons* presumption applies even where the injury or symptoms for which additional medical treatment is being sought is not the precise injury originally deemed compensable.” *Wilkes*, __ N.C. App. at __, 777 S.E.2d at 287 (citing *Carr v. Dep’t of Health & Human Servs. (Caswell Ctr.)*, 218 N.C. App. 151, 156, 720 S.E.2d 869, 874 (2012)). The plaintiff in *Wilkes* suffered numerous physical injuries in a work related car accident, which his employer accepted as compensable. *Id.* at __, 777 S.E.2d at 284. After the employer began providing medical compensation for the plaintiff’s physical injuries, the parties disagreed about the extent of the plaintiff’s other injuries. *Id.* at __, 777 S.E.2d at 284. The plaintiff was seeking compensation for, *inter alia*, depression and anxiety, injuries which were not listed on his employer’s Form 60. *Id.* at __, 777 S.E.2d at 285. Our Court held that the Commission erred by failing to apply the *Parsons* presumption “to his request for additional medical treatment and compensation for his complaints of anxiety and depression.” *Id.* at __, 777 S.E.2d at 285.

After this Court heard Defendants’ appeal in this case, our Supreme Court affirmed the holding in *Wilkes*² which applied the *Parsons* presumption to medical conditions not included on an employer’s admission of compensability form, but alleged to be related to the compensable injury. *Wilkes* at __, 799 S.E.2d at 846 (“Accordingly, we conclude that an admission of compensability approved under [N.C. Gen. Stat.] § 97-82(b) entitles an employee to a presumption that additional medical treatment is causally related to his compensable injury.”).

The General Assembly, however, promptly abrogated the Supreme Court’s decision in *Wilkes* by amending N.C. Gen. Stat. § 97-82. 2017 N.C. Sess. Laws 2017-124. Section 1.(a) rewrites N.C. Gen. Stat. § 97-82(b) as follows:

(b) If approved by the Commission, a memorandum of agreement shall for all purposes be enforceable by the court’s decree as hereinafter specified. Payment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice,

2. The Supreme Court modified other aspects of this Court’s decision in *Wilkes* unrelated to this appeal. *Wilkes*, __ N.C. at __, 799 S.E.2d at 848-51.

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shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury *as reflected on a form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d)* for which payment was made. *An award of the Commission arising out of G.S. 97-18(b) or G.S. 97-18(d) shall not create a presumption that medical treatment for an injury or condition not identified in the form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d) is causally related to the compensable injury. An employee may request a hearing pursuant to G.S. 97-84 to prove that an injury or condition is causally related to the compensable injury.* Compensation paid in these circumstances shall constitute payment of compensation pursuant to an award under this Article.

2017 N.C. Sess. Laws 2017-124, § 1.(a) (emphasis added). N.C. Gen. Stat. § 97-18(b) provides that an employer admits compensability by filing a Form 60 with the Industrial Commission, and N.C. Gen. Stat. § 97-18(d) provides that an employer can pay for an employee's medical treatment without admitting compensability by filing a Form 63.

Section 1.(b) of the Session Law amending N.C. Gen. Stat. § 97-82 provides that the intent of the General Assembly in amending the Workers' Compensation Act was "to clarify, in response to *Wilkes v. City of Greenville*, that an injury not identified in an award arising out of [N.C. Gen. Stat. §] 97-18(b) or [N.C. Gen. Stat. §] 97-18(d) is not presumed to be causally related to the compensable injury . . ." 2017 N.C. Sess. Laws 2017-124, § 1.(b). The statutory amendment binds our decision in this case because Section 1.(c) provides that the statute applies to all claims "accrued or pending prior to, on, or after" the date on which the amendment became law. 2017 N.C. Sess. Laws 2017-124, § 1.(c).

The medical conditions Plaintiff seeks compensation for were not admitted by Wal-Mart because they were not listed on its admission of compensability form. Plaintiff's reliance on this Court's decision in *Wilkes* fails in light of the General Assembly actions. We therefore hold that the Commission's application of the *Parsons* presumption in this case was error. Generally, such an error would require a remand to the Commission for the application of the correct legal standard. However, as explained below, we instead affirm the Commission's Opinion and Award because it includes factual findings applying the correct legal standard to support its award. In other words, the Commission found an alternative factual basis for its award, which we affirm.

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This Court's decision in *Wilkes* relied on *Carr* to apply the *Parsons* presumption to the plaintiff's claims for mental health conditions not listed on his employer's admission of compensability form. *Wilkes*, ___ N.C. App. at ___, 777 S.E.2d at 287. However, a closer reading of *Carr*, in light of the case before us, reveals that *Carr* differs from *Wilkes* in a manner dispositive to this case. In *Carr*, unlike in *Wilkes*, the Industrial Commission found separately that the plaintiff met her burden of proof for causation absent the *Parsons* presumption. *Carr*, 218 N.C. App. at 156, 720 S.E.2d at 874.

In *Carr*, the plaintiff was diagnosed with injuries to her left hand and her neck following a workplace accident. *Id.* at 152, 720 S.E.2d at 871-72. The defendant admitted the compensability of her left hand injuries, but denied the compensability of her neck injury. *Id.* at 153, 720 S.E.2d at 872. Before the Commission, the plaintiff presented testimony by a neurosurgeon who opined that her neck injury was causally related to the accident. *Id.* at 153-54, 720 S.E.2d at 872. In its Opinion and Award, the Commission discussed the *Parsons* presumption but also found that the plaintiff had met her burden of proof to establish that she had suffered the neck injury as a result of the same accident. *Id.* at 156, 720 S.E.2d at 874. This Court, affirming the Commission's award of medical compensation, held that "[a]lthough the Commission recited the *Parsons* presumption, it did not rely on it in finding the [plaintiff's] neck injury compensable." *Id.* at 156, 720 S.E.2d at 874. Nothing in the recent amendment to N.C. Gen. Stat. § 97-82 suggests that the General Assembly sought to alter our Court's holding in *Carr*.

This case is indistinguishable from *Carr*. Wal-Mart filed a Form 60 accepting compensability for Plaintiff's injuries to her "right shoulder/arm," but has denied compensability for her other medical conditions, specifically, aggravation of a pre-existing cervical disc disease, carpal tunnel syndrome, a sagittal band rupture, aggravation of carpal boss, left knee problems, and dystrophic right hand symptoms.

The Commission erred in apply the *Parsons* presumption in its Conclusions of Law. But the Commission also found that Plaintiff had proved by a preponderance of the evidence—the applicable standard of proof absent the *Parsons* presumption—that her additional injuries were causally related to her workplace accident and are therefore compensable. The Commission's Finding of Fact Number 20, quoted in full above, expressly states that "[b]ased upon a *preponderance of the evidence*, the Full Commission . . . *finds* that Plaintiff's pre-existing [condition] *was aggravated* by her fall at work" (emphasis added).

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The Commission's Finding of Fact Number 22, quoted in full above, expressly states that "[b]ased upon a *preponderance of the evidence*, the Full Commission *finds* that Plaintiff's [medical conditions not admitted by Wal-Mart] *were caused* by . . . [her] accident." (emphasis added).

The Commission's use of affirmative language in these findings of fact indicates it placed the burden of proof on Plaintiff to demonstrate causation of her disputed additional medical conditions. By contrast, had the Commission placed the burden of proof on Defendants for these findings, the Opinion and Award would have stated that "the Full Commission *does not find* that Plaintiff's injuries were *not caused* by her accident."

The Commission's separate findings of fact determining causation are supported by competent evidence, as discussed *infra*, or unchallenged and thus presumed to be supported by competent evidence.³ Accordingly, we hold that regardless of the Commission's discussion of the *Parsons* presumption in its Conclusions of Law, its Opinion and Award should be affirmed because the Commission found that Plaintiff proved by a preponderance of the evidence a causal relationship between her compensable injury by accident and the medical conditions for which she now seeks compensation.⁴

C. Causation

[2] Defendants do not challenge the Commission's Findings of Fact Numbers 20 and 22, quoted *supra*, in which the Commission found that Plaintiff proved causation of her additional medical conditions "[b]ased upon a preponderance of the evidence" Rather, Defendants challenge the Commission's Findings of Fact Numbers 14, addressing

3. In addition to the challenged Findings of Fact Numbers 14 and 19, which are supported by competent evidence, the Commission's other unchallenged Findings of Fact Numbers 6, 7, 16, 20, and 22 support our affirmation of its Opinion and Award.

4. Our dissenting colleague, citing the North Carolina Rules of Appellate Procedure Rule 10, asserts that we may not "invent a non-explicit alternative basis to re-weight or view the evidence in a manner to affirm the Award of the Commission, particularly where Plaintiff-Appellee has not cross-assigned as error the Commission's omission of an 'alternative basis in law' to support its Opinion and Award." Rule 10 states that "an appellee *may* list proposed issues on appeal . . . that deprived the appellee an alternative basis in law . . ." N.C. R. App. P. 10(c) (2017) (emphasis added). Rule 10, however, further notes that "[a]n appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief." *Id.* Here, Plaintiff has presented in her brief to this Court the argument that "[t]he Full Commission made Findings of Fact based on the evidence presented and determined Plaintiff proved that her current conditions were causally related to the December 29, 2011 compensable injury."

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Dr. Getter's causation opinion, and 19, addressing Dr. Koman's causation opinion. Defendants argue that the expert opinions relied upon by the Commission were unsupported by the record evidence, based on speculation and conjecture, and therefore are not competent evidence; Defendants assert that without this evidence, Plaintiff failed to prove that her neck, hand, and wrist injuries were causally related to her workplace accident. We disagree.

To be compensable under the Workers' Compensation Act, an injury must result from an accident "arising out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-2(6) (2015). When the primary injury has been shown to arise out of and in the course of employment, "every natural consequence that flows from the injury likewise arises out of the employment" *English v. J.P. Stevens & Co.*, 98 N.C. App. 466, 470, 391 S.E.2d 499, 501 (1990) (citations omitted). "Although the employment-related accident need not be the sole causative force to render an injury compensable, the plaintiff must prove that the accident was a causal factor by a preponderance of the evidence[.]" *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003) (internal quotation marks and citations omitted).

"There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Id.* at 167, 265 S.E.2d at 391 (citations omitted). This Court has further noted that "[w]hen expert opinion is based 'merely upon speculation and conjecture,' it cannot qualify as competent evidence of medical causation." *Carr*, 218 N.C. App. at 154-55, 720 S.E.2d at 873 (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)). "Stating an accident 'could or might' have caused an injury, or 'possibly' caused it is not generally enough alone to prove medical causation; however, supplementing that opinion with statements that something 'more than likely' caused an injury or that the witness is satisfied to a 'reasonable degree of medical certainty' has been considered sufficient." *Carr*, 218 N.C. App. at 155, 720 S.E.2d at 873 (citations omitted).

In certain instances, expert medical testimony has been found to fall short of competent evidence where it is based on speculation

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and conjecture. *Young*, 353 N.C. at 230, 538 S.E.2d at 915 (“[W]hen such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman’s opinion.”); *Dean v. Coach Co.*, 287 N.C. 515, 522, 215 S.E.2d 89, 94 (1975) (holding that “an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.” (citation omitted)). The Court in *Young* held that expert medical testimony based solely on the maxim “*post hoc, ergo propter hoc*”—which “denotes the fallacy of . . . confusing sequence with consequence”—does not rise to the necessary level of competent evidence. 353 N.C. at 232, 538 S.E.2d at 916 (alteration in original) (internal quotation marks and citations omitted). A careful review of that expert’s testimony revealed that there were at least three alternative potential causes to the plaintiff’s condition and that the doctor had performed no tests to rule them out. *Id.* at 231, 538 S.E.2d at 915. The expert’s opinion of causation was entirely based upon the “*post hoc, ergo propter hoc*” fallacy, which he affirmed was “the only piece of information that relate[d] the [condition to the injury by accident].” *Id.* at 232, 538 S.E.2d at 916 (internal quotation marks omitted).

Here, Plaintiff presented various medical records and expert testimony from several of her treating physicians. Among those testifying was Dr. Louis Koman who stated that “[i]t was [his] opinion, within a reasonable degree of medical certainty” that Plaintiff’s cervical arthritis and carpal boss were pre-existing conditions exacerbated by her 29 December 2011 fall. Dr. Koman also testified that Plaintiff’s sagittal band rupture was “more likely than not” caused by the same fall. Dr. Michael Dennis Getter testified that Plaintiff’s fall materially aggravated her condition and that the fall was most likely the cause of her current symptoms. Dr. James Comadoll testified that Plaintiff’s fall exacerbated and materially aggravated her degenerative cervical condition.

Defendants challenge the Commission’s findings as to Dr. Koman’s opinion on the basis that his opinions were based on conjecture and speculation and not supported by the evidence in the record. Our review of Dr. Koman’s deposition reveals key distinctions from the opinion testimony at issue in *Young*. Here, unlike in *Young*, there were no other potential causes of Plaintiff’s injuries, and while Dr. Koman did rely on the maxim “*post hoc, ergo propter hoc*,” his reliance was relevant and necessary. Dr. Koman testified that based on Plaintiff’s medical history and a lack of any other potential cause, the fall was more likely than not the cause of Plaintiff’s additional medical conditions. Dr. Koman testified that in reaching his opinion he “took a history, [he] reviewed the medical records[,] . . . did a physical exam, . . . x-rays, . . . [and]

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diagnostic testing[.]” and “fit that all into [his] experience, the literature, the probabilities of what happened, [and] when and whether it was all consistent[.]” Because a full review of Dr. Koman’s testimony demonstrates that his opinion was based on more than merely *post hoc, ergo propter hoc*, and went beyond a “could” or “might” testimony, we hold the Commission properly determined it to be competent evidence.

Defendants also challenge the causation opinion testimony by Dr. Getter, asserting that it relied on the assumption that Plaintiff’s head was thrown about during the fall and that the evidence in the record does not support this fact. Dr. Getter testified that Plaintiff’s symptoms were consistent with “some accident of some kind where your head is thrown back and forth on your neck like a flexion extension injury in a car, *falling down*, . . . falling down then having your head fall forward.” (emphasis added). The Commission found, and Defendants do not challenge, that “she tripped and fell face-forward over the bottom of a stairway ladder.” We hold that the record supports Dr. Getter’s testimony and his reliance on the type of injuries that resulted in Plaintiff’s symptoms. Accordingly, Dr. Getter’s testimony was based on more than mere speculation and conjecture and was properly considered as competent evidence.

We do not agree with Defendants’ contention that the opinions of Dr. Koman and Dr. Getter were so speculative as to render them incompetent. Their testimony along with the others cited by the Commission and the evidence contained in the record support the Commission’s conclusion that the additional medical conditions complained of by Plaintiff were causally related to Plaintiff’s fall.

It is not within the scope of our review to determine the weight given to testimony, as “ ‘the sole judge of the credibility of witnesses’ and the weight given to their testimony” is the Commission. *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 129, 468 S.E.2d 283, 286 (1996) (quoting *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). The Commission explicitly “place[d] greater weight on the testimony of Dr. Callaway, Dr. Comadoll, Dr. Getter, and Dr. Koman, than that of Dr. Estwanik,” in its determination of causation of the present injuries. We hold that the Commission’s findings were supported by competent evidence, and that those findings support the Commission’s conclusions of law.

Conclusion

While the Commission discussed the *Parsons* presumption in its Opinion and Award, the presumption was unnecessary for the

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Commission's determination of causation. The record demonstrates competent evidence to support the Commission's factual findings that Plaintiff proved causation by a preponderance of the evidence, which support the Commission's conclusions of law that Plaintiff's medical conditions are causally related to her workplace injury and are therefore compensable. Accordingly, we hold in error that part of the Commission's Opinion and Award discussing the *Parsons* presumption and affirm the Commission's Opinion and Award.

AFFIRMED.

Judge BRYANT concurs.

Judge TYSON concurs in part, dissents in part, with separate opinion.

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

I fully concur with those portions of the majority's opinion, which hold it was reversible error for the Industrial Commission to apply the *Parsons* presumption in this case, based upon the General Assembly's recent amendment to the North Carolina Workers' Compensation Act, 2017 N.C. Sess. Laws 2017-124, § 1. The amendment was enacted after the Commission's Opinion and Award, but is expressly applicable because this appeal was pending after enactment. *See* 2017 N.C. Sess. Laws 2017-124, § 1.(c).

I respectfully dissent from the majority's determination that the Commission inherently found and concluded Plaintiff had met her burden to prove the medical conditions, for which she is seeking additional compensation, are causally related to her original and accepted compensable injury, without regard to the *Parsons* presumption. This conclusion is unsupported by the Commission's Findings of Fact or Conclusions of Law. The Industrial Commission's Opinion and Award, awarding Plaintiff additional compensation for injuries and conditions not listed or accepted by Defendants on the Form 60, is properly set aside and remanded. I respectfully dissent.

I. Standard of Review

This Court reviews an opinion and award of the Commission to determine "whether there is any competent evidence in the record to support the Commission's findings and whether those findings support

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the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001).

"[T]he Commission is the fact finding body. . . [and] is the sole judge of the credibility of the witnesses and the weight to be given to their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (internal citations and quotation marks omitted). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 304-05, 663 S.E.2d 322, 325 (2008).

The Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). We all agree there is error in the Commission's Opinion and Award. "When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citation omitted).

II. Parsons presumption

As the majority's opinion notes, after this Court heard Defendants' appeal and the Supreme Court of North Carolina had issued its opinion in *Wilkes* on 9 June 2017, the General Assembly, less than three weeks later on 29 June 2017, amended and enacted N.C. Gen. Stat. § 97-82, to read:

(b) If approved by the Commission, a memorandum of agreement shall for all purposes be enforceable by the court's decree as hereinafter specified. Payment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury as reflected on a form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d) shall not create a presumption that medical treatment for an injury or condition not identified in the form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d) is causally related to the compensable injury. An employee may request a hearing pursuant to G.S. 97-84 to prove that an injury or condition is causally related to the compensable injury. Compensation paid in these

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circumstances shall constitute payment of compensation pursuant to an award under this Article.

2017 N.C. Sess. Laws 2017-124, § 1.(a).

The General Assembly clearly stated its intent in 2017 N.C. Sess. Laws 2017-124 was “to clarify, in response to *Wilkes v. City of Greenville*, that an injury not identified in an award arising out of [N.C. Gen. Stat. §] 97-18(b) or [N.C. Gen. Stat. §] 97-18(d) is not presumed to be causally related to the compensable injury . . .” 2017 N.C. Sess. Laws 2017-124, § 1.(b).

N.C. Gen. Stat. § 97-18(b) provides that an employer accepts as compensable the injuries listed on a Form 60 filed with the Industrial Commission. The General Assembly specified the amended N.C. Gen. Stat. § 97-82 applies to all claims “accrued or pending prior to, on, or after” the date on which the amendment became law. 2017 N.C. Sess. Laws 2017-124, § 1.(c). The amended statute applies to the Opinion and Award before us. *See id.*

The *Wilkes* decision, expressly referred to as the reason for the amendment in 2017 N.C. Sess. Laws 2017-124, and expressly relied upon by Plaintiff and the Commission, held that “the *Parsons* presumption applies even where the injury or symptoms for which additional medical treatment is being sought is not the precise injury originally deemed compensable.” *Wilkes v. City of Greenville*, __ N.C. App. __, __, 777 S.E.2d 282, 287 (2015), *aff’d as modified*, __ N.C. __, 799 S.E.2d 838 (2017).

The rebuttable presumption in *Parsons* provides where a Plaintiff’s injury has been proven to be compensable, it is presumed that additional medical treatment is directly related to the compensable injury, unless rebutted by the employer. *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135-36, 620 S.E.2d 288, 292 (2005); *see Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997).

All of the original injuries Plaintiff listed were accepted by Defendants as compensable injuries. As such, Plaintiff was not required to meet her burden to prove these injuries arose in the course and scope of her employment, or that the original injuries by accident were causally related to her employment. *See Perez*, 174 N.C. App. at 136, 620 S.E.2d at 293 (determining *Parsons* presumption applied where employer admitted compensability for employee’s injuries on Form 60); *Sims v. Charmes/Arby’s Roast Beef*, 142 N.C. App. 154, 159, 542 S.E.2d 277, 281 (employer filing Form 60 pursuant to N.C. Gen. Stat. § 97-18(b) “will be deemed to have admitted liability and compensability”), *disc. review denied*, 353 N.C. 729, 550 S.E.2d 782 (2001).

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I agree with the majority's conclusion that 2017 N.C. Sess. Laws 2017-124, which amended N.C. Gen. Stat. § 97-82, expressly abrogates and supplants this Court's and our Supreme Court's holdings in *Wilkes* that "an admission of compensability approved under [N.C. Gen. Stat.] § 97-82(b) entitles an employee to a presumption that additional medical treatment is causally related to his compensable injury." *Wilkes* at ___, 799 S.E.2d at 846.

As the medical conditions for which Plaintiff is seeking compensation were not listed or accepted by Defendants in their Form 60, the majority's opinion correctly concludes the General Assembly's amendment of N.C. Gen. Stat. § 97-82 shows the Commission erred in applying the *Parsons* presumption to relieve Plaintiff of her burden of proof of causation. I also concur with the majority opinion's conclusion, correctly stating: "Generally, such an error would require a remand to the Commission for the application of the correct legal standard." *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685.

"When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Id.* at 158, 357 S.E.2d at 685 (citation omitted). This appeal is properly set aside and remanded to the Commission. *See id.*

III. Burden of Proof

In spite of this clear precedent and directive to set aside and remand, I must respectfully dissent from the majority's affirmation of the Commission's Opinion and Award "on alternative grounds." The Commission did not make factual findings and conclusions based thereon, independently of, and without consideration of the *Parsons* presumption, as extended by *Wilkes*. The Commission never imposed nor applied the correct legal standard upon Plaintiff, who bears the burden to prove causation. No "alternative basis" has been proven by Plaintiff nor stated by the Commission for this Court to properly affirm the Opinion and Award.

"Plaintiff must prove causation by a greater weight of the evidence or a preponderance of the evidence." *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (citation and internal quotation marks omitted), *aff'd*, 360 N.C. 54, 619 S.E.2d 495 (2005).

The majority's opinion asserts the Commission's error in applying the *Parsons* and *Wilkes* standard "does not require reversal because the Commission made adequate findings that *Plaintiff met her burden of*

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proving causation without the presumption.” (emphasis supplied). The majority’s implicit and erroneous determination that the Commission clearly placed the burden of proof on Plaintiff to prove causation is not supported by the Commission’s findings of fact, to which we are bound. Such a conclusion is also directly contradicted by the Commission’s unambiguous conclusions of law, which expressly cited and relied upon *Parsons* and *Wilkes*.

In its Opinion and Award, the Commission made, *inter alia*, the following Conclusions of Law:

1. On December 29, 2011, Plaintiff sustained a compensable injury by accident arising out of and in the course of her employment with Defendant-Employer. N.C. Gen. Stat. § 97-2(6). Defendants accepted liability for this injury on a Form 60, *Employer’s Admission of Employee’s Right to Compensation*, dated October 4, 2012, on which they indicated, for body part(s) involved, “Right shoulder/arm.” In *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997) the Court held that where a Plaintiff’s injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury. *The Parsons presumption is a rebuttable presumption and Defendants have the burden of producing evidence showing the treatment is not directly related to the compensable injury. In order to rebut the presumption, Defendants must present expert testimony or affirmative medical evidence tending to show that the treatment Plaintiff seeks is not directly related to the compensable injury. Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 136-37, 620 S.E.2d 288, 293 (2005). *The Form 60 thus creates a rebuttable presumption that Plaintiff’s other complaints are causally related to the December 29, 2011 injury by accident. See Wilkes v. City of Greenville*, 2015 N.C. App. LEXIS 826 (N.C. Ct. App. Oct. 6, 2015) (holding that the Parsons presumption applies even where the injury or symptoms for which additional medical treatment is being sought is not the precise injury originally deemed compensable).

....

3. *Defendants failed to present sufficient evidence to rebut the presumption that Plaintiff’s carpal tunnel*

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syndrome, carpal boss, sagittal band rupture, dystrophic right hand symptoms, neck, and left knee problems are causally related to the December 29, 2011 injury by accident. *See Gonzalez v. Tidy Maids, Inc.*, 2015 N.C. App. LEXIS 138, 768 S.E.2d 886 (2015). However, *Defendants did rebut the presumption that Plaintiff's Dupuytren's condition is related to the December 29, 2011 injury by accident. Id.*

(emphasis supplied). Conclusions of Law 1 and 3 clearly indicate the Commission solely predicated its Opinion and Award for Plaintiff on the *Parsons* presumption and *Wilkes* being applicable to these facts, and unlawfully shifted the burden to rebut the presumption onto Defendants. We all agree the *Parsons* presumption, as extended by *Wilkes*, cannot apply here. The General Assembly's recent amendment to N.C. Gen. Stat. § 97-82 wholly abrogated *Wilkes v. City of Greenville*, __ N.C. __, 799 S.E.2d 838.

Because the Commission incorrectly relied upon *Wilkes* to apply the *Parsons* presumption to Defendants, and Defendants accepted liability for Plaintiff's original injury as compensable on their Form 60, Plaintiff has *never* been required to carry her burden to prove causation for *any* of her injuries, putatively arising from her 29 December 2011 workplace accident.

The majority opinion states, "The Commission also found that Plaintiff had proven by a preponderance of the evidence—the applicable standard of proof absent the *Parsons* presumption—that her additional injuries were causally related to her workplace accident and are therefore compensable." This notion misstates Plaintiff's burden of proof for the applicable standard of proof. The standard of proof is the "preponderance of the evidence," regardless of the applicability of the *Parsons* presumption. *See Adams*, 168 N.C. App. at 475, 608 S.E.2d at 361 (stating that causation must be proven by a preponderance of the evidence).

The *Parsons* presumption, rather than *changing* the standard of proof, instead *shifts* the burden to the employer to rebut the presumption that subsequent injuries and treatments are causally related to the original accepted injury for which compensation has been previously awarded. *See Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869 ("defendants now have the responsibility to prove the original finding of compensable injury is unrelated to [employee's] present discomfort").

Nowhere in the record or in the Opinion and Award did the Commission conclude Plaintiff has met her burden of proof to show

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causation. As *Parsons* and *Wilkes* cannot apply to shift the burden to Defendants to rebut the presumption of causation, the Commission's conclusions clearly misapprehend the law as amended on Plaintiff's burden to prove causation. The Commission's misapprehension is clearly evident from the plain language of its Opinion and Award, which only refers to Defendants, *not Plaintiff*, as bearing the burden to rebut causation, and Defendants "failure" to present sufficient evidence to rebut the *Parsons* presumption on all of Plaintiff's injuries except for Plaintiff's Dupuytren's condition.

The majority's opinion mischaracterizes the Commission's Findings of Fact number 20 and 22 as showing the Commission placed and adjudicated the burden of proof on Plaintiff to establish causation of her additional medical conditions. Finding of Fact number 20, as quoted by the majority opinion, states "[b]ased upon a preponderance of the evidence, the Full Commission . . . finds that Plaintiff's pre-existing [condition] was aggravated by her fall at work." Finding of Fact number 22 states "[b]ased upon a preponderance of the evidence, the Full Commission finds that Plaintiff's [medical conditions not admitted by Wal-Mart] caused by . . . [her] accident." This language states the required standard of proof, but never states that Plaintiff had carried her burden of proof.

The majority's opinion construes the Commission's use of standard language in these two Findings of Fact as indicating the Commission alternatively placed the burden of proof on Plaintiff to show causation, despite its express reliance on *Parsons* and *Wilkes* to conclude and award for Plaintiff. The majority states "had the Commission placed the burden of proof on Defendants for these findings, the Opinion and Award would have stated that 'the Full Commission *does not find* that Plaintiff's injuries were *not caused* by her accident.'" I disagree.

The Commission's Findings of Fact do not indicate which party bore the burden of proof to show or rebut causation, especially in light of the unequivocal language of Conclusions of Law 1 and 3 expressly indicating the Commission allocated to Defendants the burden to rebut causation. Presuming, *arguendo*, that the Findings of Fact quoted by the majority tend to suggest the Commission alternatively placed the burden to prove causation upon Plaintiff, the language of the Commission's Conclusions of Law strongly indicate the Commission placed the burden to rebut causation upon Defendants. The Opinion and Award is wholly unclear upon which party the Commission placed, or considered as having, the burden of proof to show or rebut causation. As such, the Award must be set aside and remanded.

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Interpreting the Commission's Findings of Facts even as the majority asserts, merely shows that it is unclear upon which party the Commission allocated the burden of proof of causation. Our precedents require us to set aside and remand to the Commission for a new hearing on causation with the burden of proof clearly placed on Plaintiff. *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685; *see In re C.B.*, 187 N.C. App. 803, 807, 654 S.E.2d 21, 24 (2007) (remanding case to trial court where burden of proof stated in trial court's order was ambiguous).

The majority's opinion *Carr v. Dep't of Health & Human Servs.* 218 N.C. App. 151, 720 S.E.2d 869 (2012), and asserts the Commission separately found Plaintiff had met her burden of proof for causation, absent the *Parsons* presumption and *Wilkes*. The majority's opinion proclaims *Carr* is "indistinguishable" from the case at bar. I disagree.

In *Carr*, the defendant argued the *Parsons* presumption did not apply when the plaintiff's injury was a wholly different injury from the one accepted by the defendant on the Rule 60 admission of compensability form. *Id.* at 156, 720 S.E.2d at 874. The Industrial Commission recited the *Parsons* presumption in its Opinion and Award. This Court in *Carr* determined that, regardless of whether the *Parsons* presumption applied, the Industrial Commission *did not rely on Parsons* in finding the plaintiff's new injuries causally related to the prior injuries the employer admitted were compensable. *Id.*

Carr is distinguishable from the case at bar for several reasons. First, the Court in *Carr* did not state the *Parsons* presumption was the *only* rule recited by the Commission, as here, in the Opinion and Award regarding the burden of proof, only that the Commission did recite it. *See id.* ("Although the Commission recited the *Parsons* presumption, it *did not rely on it* in finding the neck injury compensable." (emphasis supplied)).

Second, *Carr* is also clearly distinguishable by the fact N.C. Gen. Stat. § 97-82 had not been amended while the appeal was pending in that case. Here, the Commission was relying on the former version of N.C. Gen. Stat. § 97-82, and clearly and expressly upon *Wilkes'* interpretation that the statute at that time did not prohibit the *Parsons* presumption from applying when an employer admits compensability for different injuries on Form 60. *See* N.C. Gen. Stat. § 97-82(b)(2015), *amended by* 2017 N.C. Sess. Laws 2017-124.

The Commission's conclusions in the Opinion and Award are necessarily and expressly predicated on the former version of N.C. Gen. Stat. § 97-82(b) as interpreted by *Wilkes*. The Opinion and Award's

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conclusions are wholly dependent upon the *Parsons* presumption, as extended by *Wilkes*, to apply after Wal-Mart admitted compensability for Plaintiff's previous injury on its Form 60 admission of compensability, but not liability for any of the injuries asserted here.

This salient fact, viewed in conjunction with the Opinion and Award only applying the *Parsons* presumption with regard to the burden of proof of causation, and stating Defendants bore the burden to rebut causation, contradicts the majority's assertion that the Commission, wholly independently of *Parsons*, alternatively placed and kept the burden of proof upon Plaintiff to prove causation.

We all agree the Opinion and Award clearly and unambiguously shows the Commission misapprehended the law by placing the burden to rebut causation upon Defendants. The required outcome here is to set aside the Award and remand. See *Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685 ("When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard.").

The Commission did not explicitly set forth any "alternative basis" to support its conclusions, and the Commission's conclusions explicitly invokes the *Parsons* presumption and *Wilkes* several times. None of the Commission's findings of fact state the Plaintiff has met her burden of proof on causation.

We cannot read into the Opinion and Award an alternative basis to prove Plaintiff met her burden of proof to show causation, when the Commission clearly and expressly placed the burden to rebut causation upon Defendants. See *Vaughan v. Carolina Indus. Insulation*, 183 N.C. App. 25, 34-5, 643 S.E.2d 613, 619 (2007) (affirming Commission's decision on an alternative basis explicitly stated in the Commission's conclusions of law when the primary basis was made on an error of law).

This Court cannot invent a non-explicit alternative basis to re-weigh or view the evidence in a manner to affirm the Award of the Commission, particularly where Plaintiff-Appellee has not cross-assigned as error the Commission's omission of an "alternative basis in law" to support its Opinion and Award. See N.C. R. App. P. 10(c) (appellee may cross-assign error to omission of trial court when omission raises "an alternative basis in law" for supporting the order of the trial court).

Plaintiff has not done so here, but attempts to assert an "alternative basis" after *Parsons* was unlawfully used to shift the burden to rebut upon Defendants. The Commission made no explicit findings or

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conclusions to support the majority's affirmance on any other grounds, other than unlawfully under *Parsons* and *Wilkes*. This error requires the Opinion and Award to be set aside and remanded to the Commission. See *Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685 ("When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard").

IV. Dr. Koman's Testimony is Insufficient to Establish Causation of Plaintiff's Hand and Wrist Conditions

The majority's opinion views Dr. Koman's testimony regarding Plaintiff's hand and wrist conditions as competent evidence. I respectfully disagree. Even erroneously applying *Parsons* and *Wilkes*, the Commission's Conclusion of Law 3 states: "Defendants did rebut the presumption that Plaintiff's Dupuytren's condition is related to the December 29, 2011 injury by accident."

As the majority notes: for an injury to be compensable under the Workers' Compensation Act, the injury must result from an accident "arising out of and in the course of the employment[.]" N.C. Gen. Stat. §97-2(6) (2015). "There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Id.* (citations omitted). This Court has further noted that "[w]hen expert opinion is based 'merely upon speculation and conjecture,' it cannot qualify as competent evidence of medical causation." *Carr*, 218 N.C. App. at 154-55, 720 S.E.2d at 873 (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)). "Stating an accident 'could or might' have caused an injury, or 'possibly' caused it is not generally enough alone to prove medical causation; however, supplementing that opinion with statements that something 'more than likely' caused an injury or that the witness is satisfied to a 'reasonable degree of medical certainty' has been considered sufficient." *Id.* at 155, 720 S.E.2d at 873 (citations omitted).

Our Supreme Court held in *Young* that expert medical testimony based on the maxim "*post hoc, ergo propter hoc*" which means, "after this, therefore because of this" is "not competent medical evidence of causation." *Young*, 353 N.C. at 232, 538 S.E.2d at 916.

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Dr. Koman's opinion relied upon the "*post hoc, ergo propter hoc*" fallacy in making his conclusions. Dr. Koman testified as follows:

Q. Okay. So just to kind of clarify your opinion, are you saying that, since she did not have symptoms before the fall, and she has symptoms after the fall, therefore her - - whatever is causing her symptoms was caused by the fall?

A. That's medicine. It may or may not be law, but that's medicine.

Q. So does that mean yes, that's - -

A. That means yes.

....

Q. And so you found that the exacerbation of the [carpal boss] was caused by the fall. So my question is going to be the same as it was for the [sagittal] band. Is it your opinion that, because she didn't have - - well, I guess, how do you get that the fall caused the carpal tunnel boss?

A. It's the absence of history that refutes that, and that's all.

Q. What do you mean by absence of history?

A. That there was no other event that I know of.

Q. So back to that she didn't have any issues before the accident, she had issues after, therefore it was caused by the accident?

A. Correct.

Q. Okay.

A. So you have to have evidence that something else happened that you can give me, and then I can actually answer whether it's, more likely than not, caused by that. In the absence of that, [*post hoc, ergo propter hoc*] is the reason.

Dr. Koman's testimony clearly shows he solely relied on the "*post hoc, ergo propter hoc*" fallacy in concluding Plaintiff's carpal boss aggravation and sagittal band rupture were causally related to her fall on 29 December 2011. Dr. Koman's testimony is not competent evidence for Plaintiff to prove her carpal boss aggravation and sagittal band rupture were causally related to her accepted Form 60 injury. *Young*, 353 N.C. at 232-33, 538 S.E.2d at 916.

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V. Conclusion

We all agree the *Parsons* presumption, as extended by *Wilkes*, cannot place or shift the burden upon Defendants to rebut that Plaintiff's new injuries were causally related to the compensable injury listed and admitted by Defendants on the Form 60. N.C. Gen. Stat. § 97-82(b)(2015), *amended by* 2017 N.C. Sess. Laws 2017-124.

To the extent the majority's opinion purports to affirm the Commission's Opinion and Award, independently of the *Parsons* presumption and *Wilkes*, Plaintiff was never required, and the Commission did not require, find, nor conclude Plaintiff had met her burden, to prove the medical conditions, are causally related to her original and admitted compensable injury. The majority's decision to affirm, despite the clear and acknowledged errors, is based upon a wholly unsupported alternative basis, not stated in the Opinion and Award. *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685.

Dr. Koman's testimony is premised on the incompetent "*post hoc, ergo propter hoc*" fallacy, and does not prove causation. *Young*, 353 N.C. at 232-33, 538 S.E.2d at 916. Testimony tending to show "an accident 'could or might' have caused an injury, or 'possibly' caused it" is not evidentiary support. *Carr*, 218 N.C. App. at 155, 720 S.E.2d at 873.

Plaintiff bears the burden to prove causation. *See Adams*, 168 N.C. App. at 475, 608 S.E.2d at 361. The Opinion and Award is properly set aside and remanded to the Commission for Plaintiff to prove her new or additional injuries are causally related to her listed and accepted injuries on Form 60 by a preponderance of the evidence. Defendants do not bear any burden to rebut or show the absence of causation. 2017 N.C. Sess. Laws 2017-124, § 1. I respectfully dissent.

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[255 N.C. App. 347 (2017)]

PREMIER, INC., PLAINTIFF

v.

DAN PETERSON; OPTUM COMPUTING SOLUTIONS, INC.; HITSCHLER-CERA, LLC;
DONALD BAUMAN; MICHAEL HELD; THE HELD FAMILY LIMITED PARTNERSHIP;
ROBERT WAGNER; ALEK BEYNESEN; I-GRANT INVESTMENTS, LLC;
JAMES MUNTER; GAIL SHENK; STEVEN E. DAVIS; CHARLES W. LEONARD, III;
AND JOHN DOES 1-10, DEFENDANTS

No. COA16-1139

Filed 5 September 2017

Declaratory Judgments—summary judgment—right to receive annual earnout payments—stock purchase agreement

The trial court did not err in a declaratory judgment action by granting summary judgment in favor of plaintiff company and determining that it had not violated defendants' rights to receive annual earnout payments under a stock purchase agreement. Defendant stockholders failed to provide evidence of affirmative acts taken by the pertinent hospital sites to "subscribe to" or "license" SafetySurveillor (a software program generating automated alerts to notify users of health-related problems that require attention).

Judge DILLON concurring in separate opinion.

Appeal by Defendants from order entered 13 May 2016 by Judge Louis A. Bledsoe, III in Mecklenburg County Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 23 March 2017.

Moore & Van Allen PLLC, by J. Mark Wilson and Kathryn G. Cole, for Plaintiff-Appellee.

The Spence Law Firm, LLC, by Mel C. Orchard, III, and Tin, Fulton, Walker & Owen, PLLC, by Sam McGee, for Defendants-Appellants.

MURPHY, Judge.

Dr. Dan Peterson ("Dr. Peterson"); Optum Computing Solutions, Inc.; Hirschler-Cera, LLC; Donald Bauman; Michael Held; The Held Family Limited Partnership; Robert Wagner; Alek Beynenson; I-Grant Investments, LLC; James Munter; Gail Shenk; Steven E. Davis; Charles

PREMIER, INC. v. PETERSON

[255 N.C. App. 347 (2017)]

W. Leonard, III; and John Does 1-10¹ (collectively “Defendants”) appeal from an Order and Opinion granting Premier, Inc.’s (“Premier”) motion for summary judgment; dismissing with prejudice Defendants’ counterclaims for breach of contract, attorneys’ fees, and recovery of audit expenses; and entering judgment for Premier on its claim for declaratory judgment upon determining that Premier had not violated Defendants’ rights to receive annual earnout payments (the “Earnout Amount”) under their Stock Purchase Agreement (the “Agreement”). After careful review, we affirm the trial court’s decision.

Background

This is Defendants’ second appeal in this case. Although a full recitation of the first appeal’s facts and procedural history may be found in *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 755 S.E.2d 56 (2014) (“*Premier, Inc. I*”), we limit our discussion in this opinion to the facts and procedural history relevant to the issues currently before us.

On 29 September 2006, Premier acquired stock in Cereplex, Inc. (“Cereplex”) by entering into a Stock Purchase Agreement with Defendants, former shareholders and stakeholders of Cereplex, under which Defendants were entitled to receive an annual Earnout Amount from Premier for five years after the date of the Agreement. Cereplex had developed software products, Setnet and PharmWatch, that provided web-based surveillance and analytic services for healthcare providers. After acquiring shares of Cereplex, Premier developed SafetySurveillor, a successor product that combined the functionalities of Setnet and PharmWatch into one software program which generates automated alerts to notify its users of health-related problems that require attention.

Pursuant to the Agreement, the annual Earnout Amount to which Defendants are entitled is calculated as “\$12,500 for each Hospital Site where a Product Implementation occurs during the applicable 12-month period; excluding the first fifty (50) Hospital Sites where a Product Implementation occurs[.]” There has been “Product Implementation” when:

a Hospital Site . . . has (A) *subscribed to or licensed* the Company’s Setnet or PharmWatch product (or any derivative thereof, successor product, or new product that substantially replaces the functionality of either product),

1. The record contains a number of different names and spellings for certain individual defendants. However, pursuant to court practice, we use the above names and spellings listed on the order from which appeal is taken.

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whether such product is provided, sold, or licensed (for a charge or at no charge, or provided on a stand-alone basis or bundled with other products and/or services) to the applicable Hospital Site by Company (or its successor in interest), any affiliate of the Company or any reseller authorized by the Company, and (B) *completed any applicable implementation, configuration and testing* of the product so that the product is ready for production use by the Hospital Site.

(Emphasis added and omitted).

Following an audit of Premier's records, Defendants accused Premier of failing to report or include in the Earnout Amount certain Hospital Sites where there was Product Implementation. Specifically, Defendants alleged that single-event alerts² that were reported in the audit were indicative of Product Implementation. Ultimately, the audit indicated that SafetySurveillor software was utilized by over 1,000 Hospital Sites. However, Premier only recognized 263 Hospital Sites for purposes of the Product Implementation provision of the Agreement. Accordingly, Defendants informed Premier that they intended to sue for miscalculating the Earnout Amount to which Defendants were entitled and violating the terms of the Agreement.

On 19 January 2011, Premier preemptively filed an action in Mecklenburg County Superior Court seeking declaratory judgment that it had not breached the Agreement.³ On 27 April 2011, Defendants filed an answer and counterclaims, alleging breach of contract and seeking recovery of damages, audit expenses, and attorneys' fees. On 30 August 2011, Premier filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, or, alternatively, a motion for summary judgment pursuant to Rule 56. On 11 December 2012, the trial court entered an Order and Opinion granting summary judgment in favor of Premier on its declaratory judgment claim as well as Defendants' counterclaims.

2. A single-event alert refers to the notification the SafetySurveillor program sends to designated medical personnel to identify either (1) the potential presence of an infection that a patient acquired during their course of treatment in a healthcare facility or setting; or (2) a possible problem with the antibiotic therapy prescribed to a patient.

3. This matter was designated as a mandatory complex business case by the Chief Justice of the Supreme Court of North Carolina on 19 January 2011.

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i. Premier, Inc. I

Defendants timely appealed the 11 December 2012 Order and Opinion. In the original appeal, Premier claimed that “for Product Implementation to occur, a Hospital Site must affirmatively take steps to subscribe to or license the SafetySurveillor” software, and that mere receipt of the product was not enough. *Premier, Inc. I*, 232 N.C. App. at 606, 755 S.E.2d at 60. Based on this assertion, Premier argued it had fully satisfied its obligations under the Agreement as it had made Earnout Amount payments for all of the Hospital Sites with which it had formal written subscription agreements, not including the first 50 Hospital Sites where Product Implementation occurred as allowed under the Agreement. *Id.* at 606, 755 S.E.2d at 60.

Conversely, Defendants asserted that the “subscribed to or licensed” component of Product Implementation is satisfied when Premier simply *provides* SafetySurveillor to a facility, a fact which would be evinced by the alerts fired from those facilities. *Id.* at 606, 755 S.E.2d at 60. Therefore, Defendants maintained “that Premier was not entitled to summary judgment because the . . . audit . . . indicated that Premier . . . ‘provided’ the SafetySurveillor program to over 1,000” Hospital Sites, which necessarily constitutes Product Implementation. *Id.* at 606, 755 S.E.2d at 60.

On 4 March 2014, we vacated the trial court’s 11 December 2012 Order and Opinion and remanded the case for further proceedings. *Id.* at 610, 755 S.E.2d at 62. In doing so, we agreed with Premier and held that “the unmistakable meaning of the language the parties agreed upon in drafting the Agreement is that some affirmative act on the part of the Hospital Site is required” to show Product Implementation, and that mere provision of the software to Hospital Sites without more is insufficient. *Id.* at 607, 755 S.E.2d at 60. To conclude otherwise would be to read out of the Agreement the phrase “subscribed to or licensed.” *Id.* at 607, 755 S.E.2d at 60.

However, we also recognized that the Agreement does not specifically require a formal written agreement. *Id.* at 609-10, 755 S.E.2d at 62. In that respect, although the firing of an alert is not dispositive, it is probative of the issue of Product Implementation. *Id.* at 609, 755 S.E.2d at 61. Simply put, we held that “the Agreement contemplates a mutual arrangement between Premier and the Hospital Site whereby Premier *agrees* to provide the SafetySurveillor product and the Hospital Site *agrees* to accept it and utilize its services.” *Id.* at 608, 755 S.E.2d at 61 (emphasis added).

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Pertinent to the instant appeal, we also concluded that interpreting the Agreement in this way did not resolve the case. *Id.* at 608, 755 S.E.2d at 60-61. Specifically, we held that “[w]hile we do not foreclose the possibility that summary judgment may ultimately be appropriate in this matter, we believe that such a determination cannot properly be made at the present time in light of the incomplete factual record that currently exists[,]” and therefore we remanded the case to the trial court for a fuller development of the factual record. *Id.* at 610, 755 S.E.2d at 62 (citation omitted). Further factual development was necessary to explore what affirmative acts, if any, were taken by the disputed Hospital Sites to obtain the SafetySurveillor product so that any such acts could be evaluated in accordance with our interpretation of the “subscribed to or licensed” language in the Agreement. *Id.* at 610, 755 S.E.2d at 62. Mandate issued on 24 March 2014.

ii. Case Activity on Remand

On remand, the parties submitted a joint Case Management Report in which they agreed that fact discovery would consist of two phases – fact witness depositions followed by written discovery. On 30 June 2014, the trial court entered an Amended Case Management Order that established the parties would have through 1 November 2014 to conduct fact discovery as contemplated by the Case Management Report.

On 31 October 2014, one day before the discovery deadline and 221 days after remand from this court, Defendants served their first set of interrogatories and requests for production of documents. On 21 November 2014, Premier filed a motion for protective order arguing that Defendants’ discovery requests were untimely under Rule 18.8 of the North Carolina Business Court’s General Rules of Practice and Procedure as they could not be answered within the trial court’s deadline. However, the trial court, giving great deference to this Court’s directive to develop more fully the factual record, ordered Premier to serve responses to Defendants’ discovery requests. The parties subsequently engaged in written discovery and related document production to retrieve evidence of the requisite affirmative acts. Defendants did not conduct third party discovery, did not issue a single subpoena, nor did they produce evidence relating to interactions between Premier and the Hospital Sites in contention, or, as we noted in *Premier, Inc. I*, evidence of “affirmative acts [] taken by the facilities identified by Defendants to obtain the SafetySurveillor product[.]” *Id.* at 610, 755 S.E.2d at 62.

On 1 December 2015, Premier filed a motion for summary judgment which was heard on 26 February 2016. On 13 May 2016, the trial court

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granted Premier's motion for summary judgment, dismissed with prejudice Defendants' counterclaims, and entered judgment in Premier's favor on its claim for declaratory judgment. In doing so, the trial court observed:

[D]espite ample opportunity to develop a more complete factual record, Defendants have failed to bring forward evidence that any of the [Hospital Sites] took "affirmative acts . . . to obtain the SafetySurveillor product." [*Id.*] at 610, 755 S.E.2d at 62. Because the Court of Appeals has concluded that "the Agreement requires some affirmative act by a Hospital Site to subscribe to or license the SafetySurveillor product in order for Product Implementation to occur," *id.* [at 610, 755 S.E.2d at 62], Defendants cannot show that there was a Product Implementation at any [Hospital Site].

Defendants timely appealed to this Court.

Analysis

As the parties' depositions, affidavits, and other documents were filed under seal, the depth of our discussion and analysis in this opinion is somewhat limited; however, our review was exhaustive and we considered all of the documents and testimony under seal. *See e.g. Radiator Specialty Co. v. Arrowood Indemnity Co.*, ___ N.C. App. ___, ___, 800 S.E.2d 452, 456 (2017) (explaining the court's discussion and analysis is limited where the documents in the record were filed under seal).

The issue on appeal is whether Plaintiffs have forecast any evidence which would create a genuine issue of material fact that the Hospital Sites took affirmative acts as outlined in *Premier, Inc. I* to "subscribe to" or "license" SafetySurveillor. "Our standard of review of an appeal from summary judgment is de novo[.]" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). The evidence presented must be "viewed in the light most favorable to the non-moving party," and all inferences must be drawn in favor of the non-movant. *Furr v. K-Mart Corp.*, 142 N.C. App. 325, 327, 543 S.E.2d 166, 168 (2001) (quotations omitted). 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.G.S. § 1A-1, Rule 56(c) (2015). If the movant can show an absence of a genuine issue of material fact, the burden then shifts to the non-movant to produce evidence to establish a genuine issue. *Jones*, 362 N.C. at 573, 669 S.E.2d at 576. We conclude that Premier has successfully

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shown a complete lack of evidence regarding such affirmative acts, and that Defendants failed to provide evidence that the individual Hospital Sites, and not the Hospital Networks for which Defendants have already been compensated, took such affirmative acts.

Defendants first contend that the work of an Infection Preventionist to identify health related issues that will trigger alerts, coupled with the software's firing of alerts, constitutes an affirmative act taken by the Hospital Site to subscribe to SafetySurveillor. We have already held that firing of alerts alone is insufficient. *Premier, Inc. I*, 232 N.C. App at 609, 755 S.E.2d at 61.

According to the Law of the Case Doctrine, "an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal." *Creech v. Melnik*, 147 N.C. App. 471, 473-74, 556 S.E.2d 587, 589 (2001) (citation omitted).

In *Premier, Inc. I*, this Court determined that the firing of alerts and "the circumstances under which the product came to be received by these facilities is probative of the issue of whether the facilities did, in fact, meet the criteria for Product Implementation[,] but that firing of alerts is not enough in and of itself. *Premier, Inc. I*, 232 N.C. App at 609, 755 S.E.2d at 61. The record during the first appeal was completely devoid of specific evidence concerning how these facilities received the software. *Id.* at 609, 755 S.E.2d at 61. Following an additional opportunity to take discovery on remand, the record remains devoid of any such evidence, and the Law of the Case Doctrine prohibits this Court from reconsidering this issue.

Defendants next contend that, for Premier to be compliant with the Health Insurance Portability and Accountability Act ("HIPPA"), a Business Associate Agreement ("BAA") must necessarily exist between the Hospital Site and Premier prior to any exchange of patient information. Based on this, Defendants ask us to accept that a BAA exists between Premier and every Hospital Site at issue. Defendants maintain that the signing of a BAA constitutes the requisite affirmative act taken by the Hospital Sites necessary to show that Product Implementation occurred. However, there is no record evidence that Premier is in fact HIPPA compliant. Defendants took no steps to obtain evidence of any specific BAA that may exist between Premier and the Hospital Sites. In fact, the record before this Court has over 2,000 pages, but there is only one "example" BAA in the record.

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Even if we assume *arguendo* that Premier is HIPPA compliant, the exchange of information between Premier and the Hospital Sites alone does not necessarily prove that a BAA exists between Premier and that Hospital Site. Therefore, the HIPPA-compliant exchange of information between Premier and these Hospital Sites does not demonstrate the existence of an affirmative act that would trigger an Earnout Amount payment.

In *Premier, Inc. I*, we determined that “the unmistakable meaning of the language the parties agreed upon in drafting the Agreement is that some affirmative act on the part of the Hospital Site is required.” *Premier, Inc. I*, 232 N.C. App. at 607, 755 S.E.2d at 60. The Agreement “contemplates a mutual arrangement between Premier and the Hospital Site whereby Premier agrees to provide the SafetySurveillor product and the Hospital Site agrees to accept it and utilize its services.” *Id.* at 608, 755 S.E.2d at 61.

SafetySurveillor receives Protected Health Information (“PHI”) transferred from the source site to the system operator. The transfer of PHI is governed by HIPPA. *See* 45 C.F.R. § 160 *et seq.* (2016). Although a Hospital Site may freely share information with other entities in the Hospital Network and remain HIPPA compliant, *see* 45 C.F.R. § 164.506(c)(5), a Hospital Site or Network must have a BAA in place with any third party in order to share data with that entity. 45 C.F.R. § 164.504(e)(2)(i)(B). It is possible for a BAA between a third party and the Hospital Network to provide for the free exchange of patient information between an individual Hospital Site and the third party, even when there is no BAA directly between them. *See generally* 45 C.F.R. §§ 164.502, 164.508. In such a scenario, the parent Hospital Network signs the BAA on *behalf* of the individual Hospital Sites. 45 C.F.R. § 164.502(a)(3). However, a Hospital Network signing on a Hospital Site’s behalf is not demonstrative, as this Court previously held, of “the Hospital Site agree[ing] to accept [SafetySurveillor] and utilize its services.” *Premier, Inc. I*, 232 N.C. App. at 608, 755 S.E.2d at 61.

In the instant case, the parties have provided evidence in the form of depositions, affidavits, and one example BAA between Premier and one Hospital Network. However, even with additional time for discovery, the denial of Premier’s Motion for Protective Order, and specific instruction from this Court regarding the evidence needed, Defendants declined to take third-party discovery to determine whether even one of the Hospital Sites in dispute, and not the Hospital Networks, took any affirmative steps to *accept* SafetySurveillor. Since the record evidence only shows that the Hospital Networks signed the BAA *on behalf of* the Hospital Sites, and Defendants failed to produce evidence of acceptance

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of SafetySurveillor *by* the Hospital Sites as required in *Premier, Inc. I*, the mere existence of a BAA does not prove that an affirmative action was taken by the Hospital Sites themselves. Even after having the opportunity to develop more fully the factual record on remand from this Court, Defendants have failed to demonstrate that they are entitled to an Earnout Amount on the basis of any of the disputed Hospital Sites. Accordingly, the trial court's grant of summary judgment in favor of Premier was appropriate.

Conclusion

Defendants failed to provide evidence of affirmative acts taken by the Hospital Sites at issue to "subscribe to" or "license" SafetySurveillor. Therefore, Premier is not required to provide an Earnout Amount to Defendants for the disputed Hospital Sites. Accordingly, for the reasons stated above, we affirm the ruling of the trial court.

AFFIRMED.

Judge STROUD concurs.

Judge DILLON concurs by separate opinion.

DILLON, Judge, concurring.

I concur based on the conclusion that we are bound by holdings of our Court in the first appeal of this case, reported at *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 755 S.E.2d 56 (2014) (hereinafter "*Premier I*"). Specifically, we are bound by the narrow definition of "subscribe" only to mean "to agree to receive and pay for a periodical service[.]" (quoting Webster's Dictionary), and that the term connotes "an affirmative act by the recipient *prior* to receipt of the product or service." *Id.* at 608, 755 S.E.2d at 61 (emphasis added). We are also bound by the holding in *Premier I* that the evidence that had been "discovered" to that point in the litigation was *not* sufficient to create a genuine issue of fact, and remanded to give Defendant a chance to engage in discovery to uncover additional evidence. Defendant, however, has failed to point to any evidence that was "discovered" since the first appeal. Accordingly, we are compelled to affirm.

I note that in its definition of "subscribe," Webster's does not require an affirmative act which occurs *prior* to receipt of the product, as *Premier I* suggests. Webster's lists other definitions for "subscribe"

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as well, such as to “sanction” and to “assent to.” Here, I believe that the term “subscribe” is sufficiently ambiguous to include Hospital Sites within networks where the network had a contract with Premier but where the Hospital Site received the product, but then implemented the product – where the inputting of patient data and other acts to implement the product constitute affirmative acts of “Product Implementation” to constitute “sanction[ing]” and “assent[ing] to” the product. And perhaps the best evidence concerning the parties’ intent in their use of the word “subscribe” was evidence of Premier’s relationship with the Hospital Sites identified in Section 2(b)(iii) of the Disclosure Schedule of the agreement, in which the parties agreed where Product Implementation had occurred. For example, it would be interesting if some of the Sites that implemented the product which are listed as part of a network did not actually have a direct formal agreement with Premier but were included because they were part of a network which did have a formal agreement. But the record is silent on this issue.

LINNIE PRICE RUTLEDGE AND HUSBAND CHARLES RUTLEDGE, PLAINTIFFS

v.

LISA VIELE FEHER, MARSHA VIELE, DAVID VIELE JR., AND WIFE RACHEL VIELE,
 BEAU SKINNER AND WIFE, JOSEFINA SKINNER, BRIDGETT SKINNER OTERO AND
 HUSBAND, JEHIELL OTERO AND HELEN VIELE PRICE AND HUSBAND, GEORGE PRICE,
 LISA A. ADAMS AND HUSBAND, CHRISTOPHER ADAMS, PRANTAWAN JUSEE, AND
 BOB J. HOWELL, SUCCESSOR TRUSTEE OF THE DWIGHT A VIELE, SR.
 REVOCABLE TRUST U/A/D JULY 28, 2010, DEFENDANTS

No. COA16-1287

Filed 5 September 2017

1. Declaratory Judgments—general warranty deed—life estate—contingent remainder interest

The trial court did not err in a declaratory judgment action, involving a dispute over a general warranty deed conveying a life estate to the grantors’ children and a future interest to certain of the grantors’ grandchildren, by concluding that the grantor’s two living grandchildren each held a contingent remainder interest in the subject property where they had to outlive the last of the living children in order for their title to the property to vest.

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2. Declaratory Judgments—general warranty deed—life estate—future interest—class of grandchildren

The trial court did not err in a declaratory judgment action, involving a dispute over a general warranty deed conveying a life estate to the grantors' children and a future interest to certain of the grantors' grandchildren, by concluding that the class of grandchildren would not close and could not be determined until the death of the grantor's last living child (Price), and the individuals in which the remainder interest vested could not be established until the death of Price.

Appeal by Defendants David Viele, Jr. and wife, Rachel Viele; Beau Skinner and wife, Josefina Skinner; and Bridgett Skinner Otero from judgment entered 21 September 2016 by Judge Alan Z. Thornburg in Jackson County Superior Court. Heard in the Court of Appeals 24 May 2017.

McLean Law Firm, P.A., by Russell L. McLean, III, for Defendants-Appellants.

Scott Taylor, PLLC, by J. Scott Taylor, for Plaintiffs-Appellees.

MURPHY, Judge.

This case involves a general warranty deed conveying a life estate to the grantors' children and a future interest to certain of the grantors' grandchildren. One of the grantors' grandchildren, Linnie Price Rutledge, and her husband, brought this action, seeking a declaratory judgment as to their rights and interest in the subject property and an injunction prohibiting Defendants from transferring any ownership interest they have in the property.

Based on the language of the deed at issue, the trial court concluded that Plaintiff Linnie Price Rutledge and Defendant Lisa Viele Feher both hold a contingent remainder interest in the property. Further, the trial court concluded that the class of grandchildren will not close and cannot be determined until the death of Helen Viele Price, nor can the individuals in which the remainder interest vests be determined until the death of Helen Viele Price.¹ After careful review, we affirm the trial court's decision.

1. Helen Viele Price passed away between the entry of the trial court's judgment and the filing of the briefs to this Court.

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Background

C.E. Viele and his wife Margaret Viele (collectively, the “Vieles”) owned land in Jackson County (the “Property”). They had four children together: Dwight Allen Viele (“Dwight”), Charles E. Viele, Jr. (“Charles”),² Richard E. Viele (“Richard”), and Helen Viele Price (“Ms. Price”). The Vieles also had several grandchildren. Dwight had four children: Dwight Viele, Jr., David Viele, Sr., Terry Viele Skinner, and Lisa Viele Feher (“Lisa”).³ Richard had two children: Debra Viele and Richard Viele, Jr.⁴ Ms. Price had one child: Linnie Price Rutledge (“Linnie”).

On 12 October 1983, the Vieles executed a North Carolina General Warranty Deed (the “Deed”) to the Property in which they retained a life estate for themselves and conveyed a life estate to their four children as well as a fee simple remainder interest to their grandchildren. In pertinent part, the precise language of the Deed reads:

That [the Vieles] . . . have given, granted, bargained, sold and conveyed and by these presents do hereby give, grant, bargain, sell and convey unto [Dwight, Ms. Price, Charles, and Richard], subject to the exceptions, reservations and restrictions, if any, and together with any rights-of-way, if any, hereinafter state, a life estate, *said life estate to continue until the death of the last survivor of the four above-named children; and upon the death of the last of the four above-named children, fee simple title is to vest in our grandchildren, the living issue of the four above-named children*, all of that certain piece, parcel or tract of land, situate[d], lying and being in Jackson County, North Carolina, but reserving, however, unto Grantors, a Life Estate in said lands

(Emphasis added).

2. Charles died in 1989 without marrying or having children.

3. Dwight died in 2011, and he was preceded in death by his son, Dwight Viele, Jr., who passed away in 1996 with no surviving spouse or children. David Viele, Sr., has since passed away and was survived by his wife, Marsha Viele, and his two children – David Viele, Jr., and Lisa Viele Adams. Terry Viele Skinner passed away in 2014, and she was survived by two children – Beau Skinner and Bridgett Skinner.

4. Before Richard died, he and his two children executed and recorded a quitclaim deed conveying any potential interest he had in the Property to his remaining siblings.

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At the time of execution of the Deed, all seven of the named children and grandchildren were alive. According to Appellants' brief, C.E. Viele died in 1987 and Margaret Viele died in 2002.

Linnie and her husband, Charles Rutledge, (collectively, "Plaintiffs") commenced this action on 24 November 2014, seeking declaratory judgment and injunctive relief. Specifically, Plaintiffs sought a declaration of the parties' respective rights and obligations in the Property pursuant to the Deed, and they contended that "they are the persons with who[m] title vests upon the passing of Helen Viele Price." Accordingly, they requested that the trial court enjoin Defendants from transferring any ownership rights or interest in the Property. At the time, Ms. Price was the only living child of the Vieles, and Linnie and Lisa were their only living grandchildren. David Viele, Jr., Lisa Viele Adams, Beau Skinner, and Bridgett Skinner Otero were living great-grandchildren of the Vieles.

Plaintiffs filed an amended complaint on 18 February 2015, adding several parties not involved in the instant appeal.⁵ In March of 2015, Ms. Price conveyed her life estate interest to Linnie. On 15 October 2015, Defendants David Viele, Jr., and his wife, Rachel Viele, Beau Skinner and his wife, Josefina Skinner, and Bridgett Skinner Otero (collectively, "Appellants") and husband, Jehiell Otero, filed an answer. The remaining Defendants did not respond and default judgments were entered against them.

The matter was scheduled for a non-jury trial and the participating parties entered 20 stipulations of fact to narrow the issues before the trial court. After considering the pleadings, stipulations, and the Deed, the trial court concluded:

1. Lisa Viele Feher and Linnie Price Rutledge each hold a contingent remainder interest in the subject property.
2. The class of grandchildren will not close and cannot be determined until the death of Helen Viele Price.

5. Plaintiff brought this action against:

"Lisa Viele Feher, Marsha Viele, David Viele, Jr. and wife, Rachel Viele, Beau Skinner and wife, Josefina Skinner, Bridgett Skinner Otero and husband, Jehiell Otero, Helen Viele Price and husband, George Price, Lisa A. Adams and husband, Christopher Adams, Prantawan Jusee, and Bob J. Howell, Successor Trustee of the Dwight A. Viele, Sr. Revocable Trust U/A/D July 28, 2010 [collectively, "Defendants"]."

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3. The individuals in which the remainder interest vests cannot be established until the death of Helen Viele Price.

Appellants timely appealed.

Analysis

Appellants raise three issues on appeal: (1) whether the trial court erred in determining Linnie and Lisa hold a contingent remainder interest in the Property rather than a vested remainder subject to open or partial divesture; (2) whether the trial court erred in determining that the class of grandchildren cannot be determined until the death of Ms. Price; and (3) whether the trial court erred in determining that the individuals in which the remainder interest vests cannot be determined until the death of Ms. Price. As each of these issues overlap, we discuss them collectively.

We review a judgment entered after a non-jury trial to determine “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.” *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001)). In the instant case, neither party disputes the findings of fact made by the trial court, and, accordingly, they are binding on appeal. *Cape Fear River Watch v. N. Carolina Envntl. Mgmt. Cmm’n*, 368 N.C. 92, 99, 772 S.E.2d 445, 450 (2015) (quotation omitted). “Conclusions of law are reviewed de novo and are subject to full review.” *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (“Conclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal.” (emphasis omitted)).

The outcome of the instant matter hinges on interpreting the language of the Deed, and therefore our analysis is rooted in the canons of construction outlined by our state’s jurisprudence. In construing written conveyances of property, the court ultimately endeavors to determine and effectuate the intent of the parties based on the written language they used. *Strickland v. Jackson*, 259 N.C. 81, 83, 130 S.E.2d 22, 24 (1963); *see also Mercer v. Downs*, 191 N.C. 203, 205, 131 S.E. 575, 576 (1926) (holding that “the intent of the testator is paramount”). Explained more broadly by our Supreme Court nearly a century ago:

Whatever the technicalities of the law may formerly have required in the construction of deeds, the modern doctrine does not favor the application of such technical rules as

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will defeat the obvious intention of the grantor—not the unexpressed purpose which may have existed in his mind, of course, but his intention *as expressed in the language he has employed*; for it is an elementary rule of construction that the intention of the parties shall prevail, unless it is in conflict with some unyielding canon of construction or settled rule of property, or is repugnant to the terms of the grant. *Such intention as a general rule must be sought in the terms of the instrument*; but if the words used leave the intention in doubt, resort may be had to the circumstances attending the execution of the instrument and the situation of the parties at that time

Seawell v. Hall, 185 N.C. 80, 82, 116 S.E. 189, 190 (1923) (emphasis added). Our Supreme Court also guided that, ordinarily, to construe a deed and determine the parties' intention, a court gathers the intention "from the language of the deed itself when its terms are unambiguous. However, there are instances in which consideration should be given to the instruments made contemporaneously therewith, the circumstances attending the execution of the deed, and to the situation of the parties at the time." *Smith v. Smith*, 249 N.C. 669, 675, 107 S.E.2d 530, 534 (1959)

On that basis, if "[t]he language of the deed [at issue is] clear and unequivocal, it must be given effect according to its terms, and we may not speculate that the grantor intended otherwise." *Cty. of Moore v. Humane Soc'y of Moore Cty., Inc.*, 157 N.C. App. 293, 298, 578 S.E.2d 682, 685 (2003) (citations and internal quotation marks omitted). "We must, if possible without resorting to parol evidence, determine the grantors' intent based on the four corners of the deed." *Simmons v. Waddell*, 241 N.C. App. 512, 524, 775 S.E.2d 661, 674 (2015) (citation omitted). Language that is otherwise clear will not be disturbed by punctuation; however, punctuation may be considered in deriving the intent of the parties. *Stephens Co. v. Lisk*, 240 N.C. 289, 293, 82 S.E.2d 99, 102 (1954) (citations omitted).

[1] Appellants contend that, as heirs of the Vieles' son Dwight, the Deed conveyed to them a vested remainder subject to partial divestment by after-born children rather than a contingent remainder interest at the moment of its creation. Their argument rests on *Buchanan v. Buchanan*, 207 N.C. App. 112, 698 S.E.2d 485 (2010), in which this Court stated,

[A] remainder is vested, when, throughout its continuance, the remainderman and his heirs have the right to the immediate possession whenever and however the preceding

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estate is determined; or, in other words, a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estate; or, again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estate.

Id. at 118, 698 S.E.2d at 489 (citation omitted). Accordingly, Appellants claim that the Vieles' seven then-living grandchildren obtained a vested remainder subject to open or partial divesture at the moment of the Deed's execution and that the class of grandchildren intended to take pursuant to the Deed was therefore immediately ascertainable.

Plaintiffs counter that the plain language of the Deed instructs that title shall not vest in any grandchildren until the death of the last of the Vieles' children. To conclude that title vests at any point prior to the death of the last of the Vieles' living children would blatantly disregard the grantors' intent as expressed in the Deed. Furthermore, because title cannot vest until the last of the Vieles' children dies, the Vieles' living grandchildren have only a contingent remainder interest in the Property as they must outlive the last of the living children in order for their title to the Property to vest.

Hence, the dispute is whether the grandchildren's interest is vested or contingent.

The distinction between a vested and a contingent remainder is the capacity to take upon the termination of the preceding estate. Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent. Only those who can answer the roll immediately upon the happening of the event acquire any estate in the properties granted.

Strickland, 259 N.C. at 84, 130 S.E.2d at 25 (citing *Wimberly v. Parrish*, 253 N.C. 536, 117 S.E.2d 472 (1960); *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1960); *Wachovia Bank & Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E.2d 578 (1952)) (citations omitted); see also *Hollowell v. Hollowell*, 107 N.C. App. 166, 174, 420 S.E.2d 827, 832 (1992) ("The triggering event for the passage or vesting of the contingent remainder in this case is the death of each of the two life tenants." (citation omitted)).

As outlined at length above, our ultimate objective in construing a deed is to effectuate the intent of the grantor as expressed through the language of the deed itself, and, in this case, the Vieles plainly stated

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their desire that “upon the death of the last of the four above-named children, fee simple title is to vest in our grandchildren, the living issue of the four above-named children.” Based on this language, it is clear that this is the type of case “[w]here those who are to take in remainder cannot be determined until the happening of a stated event” – the death of the last of the Vieles’ children.⁶ If a particular grandchild fails to survive the last of the Viele children, he does not take of the Property according to the express terms of the Deed. For that reason, the trial court correctly determined that Linnie and Lisa have contingent remainders, and we therefore affirm as to this issue.

[2] In regard to the overlapping second and third issues, our conclusion as to Linnie’s and Lisa’s contingent remainders dictates the outcomes of those issues as well. As Linnie’s and Lisa’s remainders are contingent, they do not vest until the happening of a triggering event. *See Strickland*, 259 N.C. at 84, 130 S.E.2d at 25 (recognizing that remainders are contingent if the remaindermen cannot be determined until the happening of a specified event). In this case, the language of the Deed specifies both when the class of remaindermen is to be identified and when title to the Property vests in those remaindermen. Specifically, the Deed pronounces, “and upon the death of the last of the four above-named children, fee simple title is to vest in our grandchildren, the living issue of the four above-named children[.]” (Emphasis added).

A plain reading of this text requires that the class of remaindermen will consist of the then-living grandchildren upon the death of the last surviving child, who we now know was Ms. Price, and that title to the Property vests in those grandchildren “upon the death” of that last surviving child. As such, we cannot conclude, as Appellants urge, that the trial court erroneously concluded “[t]he class of grandchildren will not close and cannot be determined until the death of Helen Viele Price,”

6. We acknowledge our state Supreme Court’s long-held precedent that, “where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue.” *Starnes v. Hill*, 112 N.C. 1, 12, 16 S.E. 1011, 1014 (1893) (citation omitted). However, the Deed in this case is distinguishable as it did not simply convey the Property to the Vieles’ children for life, and then to such of the Vieles’ grandchildren as should be living after the death of the last Viele child. Instead, as we have explained, the explicit language chosen by the Vieles declares that title is not to vest until the specified triggering event. Therefore, *Starnes* is inapplicable as it is in contravention of the Vieles’ intent. *See Croxall v. Shererd*, 72 U.S. (5 Wall.) 268, 287, 18 L. Ed. 572, 579 (1866) (holding that a remainder will not be deemed contingent “when, consistently with the intention, it can be held to be vested” (emphasis added)).

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and “[t]he individuals in which the remainder interest vests cannot be established until the death of Helen Viele Price.” Accordingly, we also affirm as to these issues.

Conclusion

For the reasons stated above, the trial court correctly concluded: (1) Lisa Viele Feher and Linnie Price Rutledge each hold a contingent remainder interest in the subject property; (2) the class of grandchildren will not close and cannot be determined until the death of Ms. Price; and (3) the individuals in which the remainder interest vests cannot be established until the death of Ms. Price. Accordingly, we affirm the trial court’s ruling.

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

STATE OF NORTH CAROLINA
v.
DARYL JONES, DEFENDANT

No. COA17-59

Filed 5 September 2017

Motor Vehicles—operating motor vehicle with open container—subject matter jurisdiction—citation not required to state all elements of charge

The trial court had subject matter jurisdiction in an operating a motor vehicle with an open container of alcohol (while alcohol remained in system) case even though a citation issued to defendant failed to state facts establishing each of the elements under N.C.G.S. § 20-138.7(a). A citation simply needs to identify the crime charged to comply with N.C.G.S. § 15A-302(c), and any failure of an officer to include each element of the crime in a citation is not fatal to the court’s jurisdiction. Further, defendant was apprised of the charge against him and would not be subject to double jeopardy.

Judge ZACHARY dissenting.

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Appeal by defendant from judgment entered 15 June 2016 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 8 June 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Carole Biggers, for the State.

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

BERGER, Judge.

Daryl Lamont Jones (“Defendant”) appeals from the judgment entered following his conviction for operating a motor vehicle with an open container of alcohol while alcohol remained in his system. Defendant alleges the trial court lacked subject matter jurisdiction, arguing the citation issued to Defendant failed to state facts establishing each of the elements of the statutory offense. We disagree.

Factual & Procedural Background

On January 4, 2015, Officer Donnie Johnson with the Raleigh Police Department stopped a vehicle driven by Defendant on New Bern Avenue. Officer Johnson estimated Defendant’s speed to be approximately sixty-five miles per hour in a forty-five mile-per-hour zone. Officer Johnson approached Defendant’s vehicle and noticed an open can of beer in the center console of Defendant’s vehicle. After determining Defendant was not impaired, Officer Johnson issued Defendant a citation for speeding and operating a vehicle with an open container of alcohol in the car, while alcohol remained in his system. The citation read as follows:

The officer named below has probable cause to believe that on or about Sunday, the 04 day of January, 2015 at 10:16PM in [Wake] [C]ounty . . . [Defendant] did unlawfully and willfully OPERATE A MOTOR VEHICLE ON A STREET OR HIGHWAY AT A SPEED OF 62 MPH IN A 45 MPH ZONE. (G.S. 20-141(J1))

and on or about Sunday, the 04 day of January, 2015 at 10:16PM in [Wake] [C]ounty . . . [Defendant] did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING. (G.S. 20-138.7(A)).]

(Emphasis added). In addition, the officer’s comments contained the following: “OPEN COORS LIGHT IN CENTER CONSOLE. HALF

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CONSUMED, STILL WITH CONDENSATION ON IT. . . . PULLED OUT OF DONALD ROSS DR[.] AND SPED UP TO 62MPH. PURSUED FOR NEARLY 1/2 MILE BEFORE SLOWING DOWN [IN FRONT OF] WAKE MED.”

Defendant was convicted of both offenses in District Court, and appealed the conviction to Superior Court. At trial in Superior Court, Defendant made a motion to dismiss the open container charge at the close of the State’s evidence, arguing that the citation was “fatally defective” and the trial court lacked jurisdiction. Defendant asserted that the citation failed to include an essential element of an open container offense: operating a motor vehicle while on a public street or highway. The trial court, citing *State v. Allen*, ___ N.C. App. ___, 783 S.E.2d 799 (2016), denied Defendant’s motion. The jury found Defendant guilty of the open container charge and not guilty of speeding. Defendant timely filed notice of appeal.

Analysis

The North Carolina Constitution states, “Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.” N.C. Const. art. I, § 22. A “valid indictment returned by a legally constituted grand jury” is required for a court to have jurisdiction. *State v. Yoes*, 271 N.C. 616, 630, 157 S.E.2d 386, 398 (1967) (citations and quotation marks omitted).

However, “[t]he General Assembly may . . . provide for other means of trial for misdemeanors, with the right of appeal for trial *de novo*.” N.C. Const. art. I, § 24.

The Superior Court Division “has original general jurisdiction throughout the State *except as otherwise provided by the General Assembly*; and the General Assembly is authorized by general law to prescribe the jurisdiction and powers of the district courts.” *State v. Wall*, 271 N.C. 675, 680, 157 S.E.2d 363, 366 (1967) (emphasis in original). The General Assembly has indeed delineated the jurisdiction and procedure for trial of misdemeanors in the district courts, and provided for the right of appeal of those matters for trial *de novo* in the superior courts.

North Carolina General Statute § 7A-270 (2015) provides that “[g]eneral jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of

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Justice.” The district court division has “exclusive, original jurisdiction” of misdemeanors, N.C. Gen Stat. § 7A-272(a) (2015), while superior courts, with limited exception, have “exclusive, original jurisdiction over all criminal actions not assigned to the district court division[.]” N.C. Gen Stat. § 7A-271(a) (2015).

Defendant was issued a citation for misdemeanor offenses and directed to appear in Wake County District Court. A citation directs a defendant to “appear in court and answer a misdemeanor or infraction charge or charges.” N.C. Gen. Stat. § 15A-302(a) (2015). A law enforcement officer may issue a citation when he has probable cause to believe the individual cited committed an infraction or misdemeanor offense. N.C. Gen. Stat. § 15A-302(b) (2015). For a citation to be valid, it must:

- (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,
- (2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,
- (3) Identify the officer issuing the citation, and
- (4) Cite the person . . . to appear in a designated court, at a designated time and date.

N. C. Gen. Stat. § 15A-302(c) (2015).

The official commentary to Article 49, entitled Pleadings and Joinder, contains a primer on various criminal pleadings in North Carolina. N.C. Gen. Stat. ch. 15A, art. 49 official commentary (2015). The commentary notes that misdemeanor cases initiated by warrant or criminal summons require a finding of probable cause and a “statement of the crime.” *Id.* It is the “statement of the crime” set forth in warrants and criminal summons that constitutes the “pleading” for misdemeanor criminal cases. *Id.* Citations, however, are treated differently. According to the commentary, a citation simply needs to identify the crime charged.

It should be noted that the citation (G.S. 15A-302) requires only that the crime be “identified,” less than is required in the other processes. This is a reasonable difference, since it will be prepared by an officer on the scene. *It still may be used as the pleading, but rather than get into sufficiency of the pleading in such a case the Commission simply gives the defendant the right to object and require a more formal pleading.* G.S. 15A-922(c).

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Id. (emphasis added). See also N.C. Gen. Stat. § 15A-302 official commentary (2015) (“[I]n certain circumstances the citation can serve as the pleading upon which trial is based. See G.S. 15A-922 . . .” (emphasis added)).

To the extent there was a deficiency in the citation, Defendant had the right to object to trial on the citation by filing a motion:

A defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading. The prosecutor must then file a statement of charges unless it appears that a criminal summons or a warrant for arrest should be secured in order to insure the attendance of the defendant, and in addition serve as the new pleading.

N.C. Gen. Stat. §15A-922(c) (2015). The statement of charges, summons, or warrant may then be subjected to the scrutiny argued for by Defendant. However, a defendant must file his or her objection to the citation in the district court division.

The defendant in *State v. Allen*, ___ N.C. App. ___, ___, 783 S.E.2d 799, 799 (2016) was charged by citation with, among other offenses, transporting an open container of alcohol. Defendant was convicted by a jury and, on appeal, he argued that the citation failed to allege all essential elements of the offense, depriving the court of jurisdiction. *Id.* at ___, 783 S.E.2d at 800. This Court held that because the citation put the defendant on notice and met the statutory requirements of N.C. Gen. Stat. § 15A-302, his failure to object to the citation pursuant to N.C. Gen. Stat. § 15A-922(c) precluded his challenge to jurisdiction. *Id.* at ___, 783 S.E.2d at 801. The Court also stated:

We acknowledge defendant is allowed to challenge jurisdiction for the first time on appeal. See N.C. R. App. P. 10(a)(1) (2015) (“[W]hether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.”). However, the ability to raise a jurisdictional challenge at any time does not ensure that the jurisdictional challenge has merit.

Defendant argues that “[a] citation, like a warrant or an indictment, may serve as a pleading in a criminal case and must therefore allege lucidly and accurately all the essential elements of the [crime] . . . charged.” However,

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defendant fails to direct our attention to any opinion from this Court or other authority equating the requirements for a valid citation with those of a valid indictment, and we find none. *Compare id.* § 15A-302(c) (“The citation must: (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved[.]”), *with id.* § 15A-644(a)(3) (“An indictment must contain: . . . (3) Criminal charges pleaded as provided in Article 49 of [Chapter 15A], Pleadings and Joinder[.]”); *see also State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (“An indictment, as referred to in [N.C. Const. art. I, § 22] . . . , is a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill. To be sufficient under our Constitution, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.” (citation and quotation marks omitted)); *State v. Jones*, 157 N.C. App. 472, 477, 579 S.E.2d 408, 411 (2003) (“[A] citation is not an indictment[.]”).

Id. at ___, 783 S.E.2d at 800-01.

Similarly, in *State v. Monroe*, 57 N.C. App. 597, 598, 292 S.E.2d 21, 21-22 (1982), the defendant argued that a jurisdictional defect existed for his charges of driving under the influence and driving while license revoked. Defendant filed a motion pursuant to Section 15A-922(c) in Superior Court. *Id.* This Court held that

[h]ad defendant filed his motion prior to his trial at district court, the statute would indeed have precluded his trial on the citation alone. . . . [But] [o]nce jurisdiction had been established and defendant had been tried in district court, therefore, he was no longer in a position to assert his statutory right to object to trial on citation when he appealed to superior court.

Id. at 598-99, 292 S.E.2d at 22. *See also State v. Phillips*, 149 N.C. App. 310, 318, 560 S.E.2d 852, 857 (“[The] defendant’s objection to trial by citation must be asserted in the court of original jurisdiction, in this case, the district court.” (citation omitted)), *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002).

Defendant contends the trial court lacked jurisdiction to try him for a violation of N.C. Gen. Stat. § 20-138.7(a), and asserts that the citation

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charging him failed to allege an essential element of that statutory offense. However, the citation issued to Defendant by Officer Johnson complied with the provisions of N.C. Gen. Stat. § 15A-302(c). The citation properly identified the crime of having an open container of alcohol in the car while alcohol remained in his system, charged by citing N.C. Gen. Stat. § 20-138.7(a) and stating Defendant had an open container of alcohol after drinking. Identifying a crime charged does not require a hyper-technical assertion of each element of an offense, nor does it require the specificity of a “statement of the crime” necessary to issue a warrant or criminal summons.

However, a citation charging the offense of driving with an open container after consuming must include additional information to be considered sufficient.

(g) Pleading. — In any prosecution for a violation of subsection (a) of this section, *the pleading is sufficient* if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a motor vehicle on a highway or the right-of-way of a highway with an open container of alcoholic beverage after drinking.

N.C. Gen. Stat. § 20-138.7(g) (2015) (emphasis added). Pursuant to the Official Commentary to Article 49, issues concerning the sufficiency of pleadings in citations are to be addressed through a Section 15A-922(c) motion.

The citation at issue here satisfied the requirements of Section 15A-302, establishing jurisdiction in the District Court division. Defendant’s concern regarding sufficiency of the offense charged in the citation required an objection to trial on the citation at the district court level. Because Defendant failed to file a motion pursuant to Section 15A-922(c), he was no longer in a position to assert his statutory right to object to trial on citation, or to the sufficiency of the allegations set forth in Section 20-138.7(g).

Even if, assuming *arguendo*, Defendant was not required to object, the failure to comply with N.C. Gen. Stat. § 15A-924(a)(5) by neglecting to allege facts supporting every element of an offense in a citation is not a *jurisdictional* defect.

Our state constitution requires an indictment to allege each element as a prerequisite of the superior court’s jurisdiction. “Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment,

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presentment, or impeachment.” N.C. Const. art. I, § 22. Therefore, the constitution does not so require for a citation charging a misdemeanor to allege each element as a prerequisite of the district court’s jurisdiction.

Our Supreme Court has held that “[every defendant] charged with a criminal offense has a right to the decision of twenty-four of his fellow-citizens upon the question of his guilt: first, by a grand jury [of twelve], and secondly, by a petit jury [of twelve][.]” *State v. Barker*, 107 N.C. 913, 918, 12 S.E. 115, 117 (1890) (citation and quotation marks omitted). That is, where the prosecutor elects to use an indictment, the superior court does not obtain jurisdiction to try a defendant unless a grand jury of twelve has first determined that probable cause exists that the defendant committed the crime. *See State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) (“It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.” (citation and quotation marks omitted)). *See also State v. Thomas*, 236 N.C. 454, 458-61, 73 S.E.2d 283, 286-88 (1952). Further, our Supreme Court has instructed that “[t]o be sufficient under our Constitution, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.” *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003) (citations and quotation marks omitted).

In sum, if an indictment is returned by a grand jury without referencing each element, it cannot be said that the grand jury found probable cause that the defendant committed the crime charged – which, under our constitution where an indictment is used, is required to empower the superior court to try the defendant.

As mentioned above, citations differ from indictments. Our constitution does not require a grand jury to make a probable cause determination for misdemeanors tried in district court as a jurisdictional prerequisite. Therefore, any failure of a law enforcement officer to include each element of the crime in a citation is not fatal to the district court’s jurisdiction. Moreover, the record establishes that Defendant was apprised of the charge against him and would not be subject to double jeopardy.

Defendant’s contention of error is overruled.

NO ERROR.

Judge DILLON concurs.

Judge ZACHARY dissents with separate opinion.

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ZACHARY, Judge, dissenting:

Defendant appeals from the judgment entered upon his conviction of operating a motor vehicle with an open container of alcohol in the passenger area of his car while alcohol remained in his system. On appeal, defendant argues that the trial court lacked subject matter jurisdiction over the charge because the citation that the State used as the criminal pleading did not state facts supporting the elements of this criminal offense, as required by long-standing appellate jurisprudence and the express language of N.C. Gen. Stat. § 15A-924 (2015). The majority opinion holds that a citation is not required to comply with the statutory requirements for all criminal pleadings, but need only meet the requirements of N.C. Gen. Stat. § 15A-302 (2015) for use of a citation as a form of process to secure defendant's attendance in court. Because I disagree with this conclusion, I must respectfully dissent.

Background

On 4 January 2015, a Raleigh police officer stopped a car driven by defendant, based upon the officer's estimation that defendant was exceeding the legal speed limit. When the officer approached defendant's car, he observed an open can of beer in the center console next to defendant. After determining that defendant was not impaired, the officer issued a citation that purported to charge defendant with speeding and with operating a motor vehicle with an open container of alcohol while alcohol remained in his system. Defendant was convicted of both offenses in district court and appealed to superior court for a trial *de novo*, where the jury returned a verdict finding defendant guilty of operating a motor vehicle with an open container of alcohol in the passenger area of the car with alcohol remaining in his system. Defendant noted an appeal to this Court.

Standard of Review

Defendant argues that the trial court lacked subject matter jurisdiction to try him for a violation of N.C. Gen. Stat. § 20-138.7(a) (2015), on the grounds that the citation that purported to charge him with this offense did not meet the requirements for a valid criminal pleading. "A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case." *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008) (citations omitted). "The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal." *State v. Barnett*, 223 N.C. App. 65, 68, 733

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S.E.2d 95, 98 (2012) (citation omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court].” *In re Appeal of The Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

Preservation of Issue for Appellate Review

The majority opinion emphasizes the district court’s general jurisdiction over the trial of misdemeanors, and the jurisdiction of our superior courts to conduct a trial *de novo* upon a criminal defendant’s appeal from district court. Defendant has not challenged the trial court’s general jurisdiction. However, “a trial court’s general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action.” *In re McKinney*, 158 N.C. App. 441, 447, 581 S.E.2d 793, 797 (2003) (citation omitted).

The majority opinion also discusses N.C. Gen. Stat. § 15A-952(c) (2015), which provides that a “defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading.” The majority opinion appears to hold that by failing to file such a motion in district court, defendant has lost the right to challenge the trial court’s subject matter jurisdiction. The majority opinion notes that defendant “contends [that] the trial court lacked jurisdiction to try him . . . when the citation charging him failed to allege an essential element” of the charged offense. The opinion then holds that “Defendant was required to raise any objection to trial on the citation at the district court level. Defendant’s failure to object to proceeding by citation established jurisdiction in district court.” This indicates that the majority opinion is holding that defendant has waived review of the issue of the trial court’s subject matter jurisdiction to try him. However, it is axiomatic that:

A court must have subject matter jurisdiction in order to decide a case. . . . As a result, subject matter jurisdiction may be raised at any time, whether at trial or on appeal, ex mero motu. “A party may not waive jurisdiction, and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking.”

State v. Sellers, __ N.C. App. __, __, 789 S.E.2d 459, 465 (2016) (quoting *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 882 (2000) (other citations omitted) (emphasis added)). Moreover, N.C. Gen. Stat. § 15A-1446(d) (2015) specifically provides that:

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Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. . . . (4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).

To the extent that the majority opinion holds that defendant has waived his right to seek review of the issue of the trial court's subject matter jurisdiction, I believe this holding to be inconsistent with long-standing legal principles of our jurisprudence.

Requirements for a Valid Criminal Pleading in North Carolina

Defendant was charged in a two-count citation with two separate offenses. Defendant has not challenged the validity of the charge of speeding, for which the jury found him not guilty. The pivotal issue in this case is whether the second count of the citation met the requirements for a valid criminal pleading, thus giving the trial court subject matter jurisdiction over the charge of driving a motor vehicle on a public highway with an open container of alcohol in the passenger area of the car while alcohol remained in defendant's system. I would hold that, upon application of the plain language of the statutes governing criminal pleadings in North Carolina, the citation is invalid.

A criminal pleading is “[a]n indictment, information, or complaint by which the government begins a criminal prosecution.” BLACK’S LAW DICTIONARY 8th Edn. 1190. The State charges a criminal offense in a pleading. N.C. Gen. Stat. § 15A-921 (2015) sets out the documents that may be used as the State’s pleading in a criminal case in North Carolina, and states that “the following may serve as pleadings of the State in criminal cases:

- (1) Citation.
- (2) Criminal summons.
- (3) Warrant for arrest.
- (4) Magistrate’s order . . . after arrest without warrant.
- (5) Statement of charges.
- (6) Information.
- (7) Indictment.

The general requirements for all criminal pleadings are set out in N.C. Gen. Stat. § 15A-924(a) (2015), which states in relevant part that:

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- (a) A criminal pleading must contain:
- (1) The name or other identification of the defendant[.]
 - (2) A separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count.
 - (3) A statement or cross reference in each count indicating that the offense charged therein was committed in a designated county.
 - (4) A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date[.]
 - (5) A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. . . .
 - (6) For each count a citation of any applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. . . .

It is well established that “[N.C. Gen. Stat. §] 15A-924 codifies the requirements of a criminal pleading. A criminal pleading must contain, *inter alia* . . . ‘[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant’s commission thereof[.]’ ” *State v. Sauls*, 294 N.C. 722, 724, 242 S.E.2d 801, 803-04 (1978). The purpose of this requirement is:

- (1) [to provide] such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged;
- (2) to protect the accused from being twice put in jeopardy for the same offense;
- (3) to enable the accused to prepare for trial; and
- (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case.

State v. Greer, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). Thus, “an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” *Hamling v. United States*, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 620 (1974).

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“This constitutional mandate, however, merely affords a defendant the right to be charged by a lucid prosecutive statement which factually particularizes the essential elements of the specified offense. See G.S. 15A-924(a)(5)[.]” *State v. Sturdivant*, 304 N.C. 293, 309, 283 S.E.2d 719, 730 (1981). “N.C.G.S. § 15A-924 does not require that an indictment contain any information beyond the specific facts that support the elements of the crime.” *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995).

“An indictment is invalid and prevents the trial court from acquiring jurisdiction over the charged offense if [it] ‘fails to state some essential and necessary element of the offense of which the defendant is found guilty.’” *State v. McNeil*, 209 N.C. App. 654, 658, 707 S.E.2d 674, 679 (2011) (quoting *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998)). “Lack of jurisdiction in the trial court due to a fatally defective indictment requires ‘the appellate court . . . to arrest judgment or vacate any order entered without authority.’” *State v. Galloway*, 226 N.C. App. 100, 103, 738 S.E.2d 412, 414 (2013) (quoting *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993)).

The vast majority of our appellate cases addressing the sufficiency of a criminal pleading arise in the context of indictments. However, N.C. Gen. Stat. § 15A-924 states the general requirement that a “criminal pleading” must contain certain information, and does *not* limit its application to a subset of the types of criminal pleadings listed in N.C. Gen. Stat. § 15A-921. In addition, the requirement that a criminal pleading must state facts supporting the elements of the charged offense has been addressed in cases in which a defendant’s conviction was based on a criminal pleading other than an indictment. See, e.g., *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984) (addressing the sufficiency of the factual allegations in a citation charging the defendant with impaired driving), *State v. Balance*, 218 N.C. App. 202, 720 S.E.2d 856 (2012) (applying the requirements of N.C. Gen. Stat. § 15A-924(a) to a misdemeanor statement of charges), and *State v. Camp*, 59 N.C. App. 38, 41-42, 295 S.E.2d 766, 768 (1982) (applying requirement that a criminal pleading must state facts supporting the elements of the charged offense to a warrant).

In sum, N.C. Gen. Stat. § 15A-921 expressly states that a citation may serve as the State’s pleading in a criminal case, and N.C. Gen. Stat. § 15A-924(a)(5) requires that every criminal pleading must contain facts supporting each of the elements of the criminal offense with which the defendant is charged. There do not appear to be any appellate cases holding that N.C. Gen. Stat. § 15A-924 does not apply to a citation used

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as the pleading in a criminal case. Under the plain language of these statutes, when a citation is used by the State as the pleading in a criminal case, it must -- like any other criminal pleading -- allege facts that support the elements of the offense with which the defendant is charged.

Discussion

Defendant was convicted of operating a motor vehicle with an open container of alcohol in the passenger area of the car while alcohol remained in his system, in violation of N.C. Gen. Stat. § 20-138.7(a) (2015). This statute provides that “[n]o person shall drive a motor vehicle on a highway or the right-of-way of a highway: (1) While there is an alcoholic beverage in the passenger area in other than the unopened manufacturer’s original container; and (2) While the driver is consuming alcohol or while alcohol remains in the driver’s body.” The elements of this offense are that the defendant (1) drove a motor vehicle on a highway or right-of-way of a highway, (2) with an open container of an alcoholic beverage in the passenger area of the car, (3) while alcohol remained in the defendant’s body.

The charging language of the citation issued in order to compel defendant’s attendance in court states the following:

The officer named below has probable cause to believe that on or about Sunday, the 04 day of January 2015 at 10:16 p.m. in the county named above you did unlawfully and willfully

OPERATE A MOTOR VEHICLE ON A STREET OR HIGHWAY AT A SPEED OF 62 MPH IN A 45 MPH ZONE. (G.S. 20-141(J1))

and on or about Sunday, the 04 day of January 2015 at 10:16 p.m. in the county named above you did unlawfully and willfully

WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING. (G.S. 20-138.7(a))

(Underlined script indicates information added by the law enforcement officer on a Uniform Citation Form).

The citation thus charges that on Sunday, 4 January 2015, defendant “did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING. (G.S. 20-138.7(a)).” This sentence fragment fails to include a verb stating *what* defendant did “with an open container of alcohol.” Specifically, it fails to allege that

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defendant operated a motor vehicle on a public road or highway, or even that he “drove.” Nor does the citation allege that the open container of alcohol was in the passenger area of defendant’s car. The citation fails to allege facts that would support two of the three elements of the offense: that defendant drove on a public highway, or that he had an open container of alcohol in the passenger area of the car. As a result, the citation did not comply with the requirements of N.C. Gen. Stat. § 15A-924 and did not confer subject matter jurisdiction upon the trial court. The majority opinion reaches the contrary conclusion and holds that the citation was valid. After careful consideration of the reasoning supporting this holding, I am unable to agree.

Firstly, in its assessment of the validity of the citation, the majority includes notes made by the charging officer in a box below the charging language with the heading “Officer’s Comments.” No legal basis for including this language is set out in the opinion. Moreover, the “Officer’s Comments” do not state that defendant was driving a motor vehicle upon a public road.

Secondly, the majority opinion appears to adopt the State’s argument that we should read the language of the first count, which alleges that defendant operated a motor vehicle at a speed in excess of the legal speed limit, and then add only the word “and” from the second count (which alleges that “and on or about Sunday, the 04 day of January 2015 at 10:16 PM in the county named above you did unlawfully and willfully”), and by this means arrive at a reading of the citation stating that defendant “operated a motor vehicle” at an excessive speed “and” (omitting the words “on or about Sunday, the 04 day of January 2015 at 10:16 PM in the county named above you did unlawfully and willfully”) “with an open container of alcoholic beverage after drinking.” However, no authority is cited in support of this procedure, and “[i]t is settled law that each count of an indictment containing several counts should be complete in itself.” *State v. Moses*, 154 N.C. App. 332, 336, 572 S.E.2d 223, 226 (2002) (internal quotation omitted). By the same measure, each count of a criminal pleading, such as a citation, containing several counts should be complete in itself.

The holding of the majority opinion that the citation issued in this case was valid is based primarily upon the language of N.C. Gen. Stat. § 15A-302 (2015). The opinion states that “[f]or a citation to be valid, it must contain” the information specified in N.C. Gen. Stat. § 15A-302(b). The flaw in this argument is that N.C. Gen. Stat. § 15A-302 is a statute contained in N.C. Gen. Stat. § 15A, Article 17, entitled “Criminal Process,”

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which addresses the use of a citation as criminal *process*, and not as a *pleading*. The majority fails to acknowledge this issue or to articulate a basis for applying the requirements for use of a citation as a form of process, rather than the specific statutory criteria for use of a citation as a criminal pleading.

The Official Commentary to Article 17 states that “[c]riminal process includes the citation, criminal summons, warrant for arrest, and order for arrest. They all serve the function of requiring a person to come to court.” This language is consistent with the definition of “criminal process” as “[a] process (such as an arrest warrant) that issues to compel a person to answer for a crime.” BLACK’S LAW DICTIONARY, 8th Edn. 1242. The statutes in Article 17 govern the requirements for issuance of process requiring a defendant to appear in court and answer a criminal charge. For example, N.C. Gen. Stat. § 15A-301 (2015) states that:

(a)(2) “Criminal process, other than a citation, must be signed and dated by the justice, judge, magistrate, or clerk who issues it. The citation must be signed and dated by the law-enforcement officer who issues it.”

(b) Warrants for arrest and orders for arrest must be directed to a particular officer, a class of officers, or a combination thereof, having authority and territorial jurisdiction to execute the process. A criminal summons must be directed to the person summoned to appear[.] . . . The citation must be directed to the person cited to appear.

Similarly, N.C. Gen. Stat. § 15A-302 sets out the requirements for the use of a citation as criminal *process*:

(a) A citation is a directive, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges. (emphasis added).

. . .

(c) Contents. -- The citation must:

(1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,

(2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,

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- (3) Identify the officer issuing the citation, and
- (4) Cite the person to whom issued to appear in a designated court, at a designated time and date.
- (d) A copy of the citation shall be delivered to the person cited who may sign a receipt on the original which shall thereafter be filed with the clerk by the officer. . . .

The functions of a criminal pleading, which are discussed above, are fundamentally different from the purpose of criminal process, which is simply to secure the defendant's attendance in court. Notably, an indictment, which is the primary form of criminal pleading, is not included as a permissible type of criminal process. The majority opinion holds that "[f]or a citation to be valid" it need only comply with N.C. Gen. Stat. § 15A-302(c). However, the majority offers no basis upon which to ignore the express language of N.C. Gen. Stat. § 15A-924, which governs the requirements for all criminal pleadings, in favor of N.C. Gen. Stat. § 15A-302, which sets out the requirements for the use of a citation as criminal process.

I conclude that equating the requirements for process with those applicable to pleadings is a classic "apples to oranges" comparison. This position finds support in the language of the relevant statutes and in this Court's opinion in *State v. Garcia*, 146 N.C. App. 745, 553 S.E.2d 914 (2001). In *Garcia*, the defendant was served with an arrest warrant charging him with assault. On appeal, the defendant argued that the arrest warrant, although adequate to compel him to appear in court, failed to satisfy the requirements for a criminal pleading. We agreed, and held that:

A warrant for an arrest "must contain a statement of the crime of which the person to be arrested is accused. No warrant for arrest . . . is invalid because of any technicality of pleading if the statement is sufficient to identify the crime." N.C.G.S. § 15A-304(c) (1999). If the arrest warrant, however, is used as a criminal pleading pursuant to N.C. Gen. Stat. § 15A-921(3), it must contain "[a] plain and concise factual statement . . . which . . . asserts facts supporting every element of [the] criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (1999).

Garcia, 146 N.C. App. at 746, 553 S.E.2d at 915 (emphasis added).

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Given that (1) when used as criminal *process*, both warrants and citations must “identify the crime” charged; (2) N.C. Gen. Stat. § 15A-921 includes both warrants and citations as valid criminal pleadings; and (3) N.C. Gen. Stat. § 15A-924 requires that all criminal pleadings state facts supporting the elements of the offense with which the defendant is charged, I would conclude that the holding of *Garcia* is equally applicable to the instant case. I cannot agree that the criminal process requirements of N.C. Gen. Stat. § 15A-302, rather than the pleading requirements of N.C. Gen. Stat. § 15A-924, should determine the resolution of this case. *See also State v. Cook*, 272 N.C. 728, 731, 158 S.E.2d 820, 822 (1968) (“[T]he warrant fails to allege an essential element of the offense[.] . . . This defect is not cured by reference in the warrant to the statute.”).

The majority opinion also notes this Court’s opinion in *State v. Allen*, __ N.C. App. __, 783 S.E.2d 799 (2016). In *Allen*, the defendant was charged in a citation with a violation of N.C. Gen. Stat. § 18B-401(a) (2015), which makes it unlawful “for a person to transport fortified wine or spirituous liquor in the passenger area of a motor vehicle in other than the manufacturer’s unopened original container.” On appeal, the defendant argued that the trial court lacked jurisdiction to try him, on the grounds that the charging citation failed to allege an essential element of the offense. This Court held that the citation complied with the requirement of N.C. Gen. Stat. § 15A-302 that the citation “[i]dentify the crime charged.” Apparently the charging citation was also used as the State’s criminal pleading in *Allen*. However, *Allen* did not cite N.C. Gen. Stat. § 15A-924(b)(5) or address the requirements of that statute for all criminal pleadings. As a result, *Allen* is distinguishable from the present case.

Conclusion

The majority opinion holds that when a citation is used by the State as a criminal pleading, the law “does not require a hyper-technical assertion of each element of an offense[.]” However, our legislature enacted N.C. Gen. Stat. § 15A-921 and N.C. Gen. Stat. § 15A-924, and thereby determined the types of documents that may serve as a criminal pleading as well as the level of specificity required. These statutes plainly state that a citation may serve as the State’s criminal pleading and that criminal pleadings must state facts supporting the elements of the charged offense. “This policy decision is within the legislature’s purview,” *Hest Techs., Inc. v. State of N.C. ex rel. Perdue*, 366 N.C. 289, 303, 749 S.E.2d 429, 439 (2012), and “[w]hen the language of a statute is clear and unambiguous, it must be given effect and its clear meaning

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may not be evaded . . . under the guise of construction.” *State v. Bates*, 348 N.C. 29, 34-35, 497 S.E.2d 276, 279 (1998) (citation and internal quotation marks omitted).

For the reasons discussed above, I conclude that the citation charging that defendant “unlawfully and willfully with an open container of alcoholic beverage after drinking” failed to state facts that would support the elements of the offense of operating a motor vehicle with an open container of alcohol in the passenger area of the car while alcohol remained in the defendant’s system. Pursuant to N.C. Gen. Stat. § 15A-924(a)(5), all criminal pleadings, including citations, must allege facts that establish every element of the offense with which the defendant is charged. For this reason, I cannot agree with the holding of the majority opinion and must respectfully dissent.

STATE OF NORTH CAROLINA
v.
CHESSICA PETERS, DEFENDANT

No. COA17-91

Filed 5 September 2017

1. Appeal and Error—preservation of issues—failure to renew motion to dismiss after jury verdict—general motions at both close of State’s evidence and all evidence

The State’s argument in a delaying a public officer case that defendant failed to preserve review based on failure to renew a motion to dismiss after the jury rendered its verdict was without merit where defendant made general motions to dismiss at both the close of the State’s evidence and at the close of all evidence.

2. Police Officers—delaying a public officer—motion to dismiss—sufficiency of evidence—wrongful deed

The trial court did not err by denying defendant’s motion to dismiss the charge of delaying a public officer in a shoplifting case based on alleged insufficient evidence of a wrongful deed. Defendant produced an altered ID and knowingly stated that the erroneous number on the ID was accurate, thus causing an officer to spend more time locating records associated with defendant to continue the investigation.

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3. Police Officers—delaying a public officer—motion to dismiss—sufficiency of evidence—intent—willfulness

The trial court did not err by denying defendant’s motion to dismiss the charge of delaying a public officer in violation of N.C.G.S. § 14-223 in a shoplifting case based on alleged insufficient evidence of intent. An officer’s testimony about his interactions with defendant at the time of her arrest gave rise to an inference that defendant willfully gave false information for the purpose of delaying the officer in the performance of his duties.

Appeal by defendant from judgment entered 2 September 2016 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 8 June 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Durwin P. Jones, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.

BERGER, Judge.

Chessica Peters (“Defendant”) appeals from judgment entered following her conviction for attempting to obtain property by false pretense, possessing or displaying an altered North Carolina driver’s license, and delaying a public officer in the discharge of his duties. Defendant was sentenced as an habitual felon to 95 to 126 months in prison.

Defendant has only challenged her conviction for the Class 2 misdemeanor of delaying a public officer in violation of N.C. Gen. Stat. § 14-223 (2015). Specifically, Defendant contends the trial court erred by denying her motion to dismiss when the State failed to introduce sufficient evidence that she delayed a public officer or intended to delay a public officer. We disagree.

Factual & Procedural Background

On June 28, 2015, Larkin Anderson (“Anderson”), a loss prevention officer for Wal-Mart, Inc., Store 1027, (“Wal-Mart”) observed a female enter Wal-Mart with two expensive, identical blenders. She approached the customer service counter, returned the two blenders for a refund, purchased two vacuum cleaners and two toys, and then exited the store. After she had loaded her purchased items into her vehicle, she handed Defendant her receipt and drove away.

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Defendant then entered Wal-Mart, selected two vacuums and two toys identical to the ones purchased formerly. She proceeded to Wal-Mart's garden center exit with them, rather than returning to the general entrance through which she originally came. Defendant picked up an additional item and paid cash for it, and presented the cashier with the receipt that was given to Defendant in the parking lot. Defendant then left Wal-Mart through the garden center exit, without paying for the vacuums or the toys.

Anderson approached Defendant outside the doors of the garden center and confronted her about her apparent theft. Anderson asked Defendant to accompany him to the store's Asset Protection Office, and held her there until a law enforcement officer could arrive to investigate the incident.

Officer Parker Phillips ("Officer Phillips") of the Concord Police Department reported to the Wal-Mart as the investigating officer. Officer Phillips first attempted to identify Defendant by requesting an identification card ("ID"). Defendant produced a North Carolina ID that she gave to Officer Phillips. He stepped outside of the office, and radioed his dispatch officer asking for information related to the license number on Defendant's ID.

The dispatch officer reported that the name associated with the given ID number differed from the one listed on the ID. Officer Phillips returned to the office and asked Defendant if the numbers on the ID were correct, and Defendant confirmed that they were. Officer Phillips then asked Defendant if there were any additional numbers, as it appeared the ID had been altered. Defendant replied that there may have been an "8" missing from the end of the ID number. Officer Phillips asked if she was certain there were no other numbers missing, to which Defendant stated, "there's no other numbers, just an 8." Officer Phillips again requested the dispatch officer to check the ID number, now including the "8", and again was given a name that did not match the ID.

Officer Phillips then asked the dispatch officer to search using Defendant's name and date of birth. This search proved fruitful, and the dispatch officer reported that Defendant's ID number also included a "0". All other information on Defendant's ID – her name, date of birth, race, etc. – was correct. The dispatch officer also reported that Defendant had "a couple outstanding warrants." Officer Phillips then charged Defendant with resisting, delaying, or obstructing a public officer in the performance of his duties for "verbally giving an incorrect driver's license ID number."

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Officer Phillips testified at trial that the delay in Defendant's identification could have been avoided had he initially requested a search using her name and birth date as the parameters. However, Concord Police officers are trained to search records by license number when doing so over their radios, and Officer Phillips followed this protocol.

On July 6, 2015, Defendant was indicted by a Cabarrus County grand jury for attempting to obtain property by false pretense, in violation of N.C. Gen. Stat. § 14-100 (2015); possessing or displaying an altered North Carolina driver's license, in violation of N.C. Gen. Stat. § 20-30(1) (2015); and willfully and unlawfully resisting, delaying, or obstructing a public officer in discharging or attempting to discharge a duty of his office, in violation of N.C. Gen. Stat. § 14-223 (2015). On August 17, 2015, Defendant was indicted as an habitual felon pursuant to N.C. Gen. Stat. § 14-7.1 (2015). Beginning on August 31, 2016, Defendant was tried before a jury, and found guilty of all charges on September 2, 2016. Defendant subsequently pleaded guilty to having attained habitual felon status. These convictions were consolidated into a single active sentence of 95 to 126 months in prison. Defendant gave timely notice of appeal at the close of her trial.

Analysis

[1] Initially, we must address the State's argument that Defendant failed to preserve her right to appeal the denial of her motion to dismiss for insufficiency of the evidence. Defendant allegedly failed preservation of her appellate rights when she did not renew her motion to dismiss after the jury rendered its verdict. "In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial." N.C.R. App. P. 10(a)(3) (2015).

In this case, Defendant made general motions to dismiss at both the close of the State's evidence, and at the close of all evidence. "A general motion to dismiss requires the trial court to consider the sufficiency of the evidence on all elements of the challenged offenses, [which] thereby preserv[es] the arguments for appellate review." *State v. Walker*, ___ N.C. App. ___, ___, 798 S.E.2d 529, 531, *disc. review denied*, ___ N.C. ___, 799 S.E.2d 619 (2017). The State's argument that Defendant failed to preserve her right to review is therefore without merit, and we proceed to Defendant's appeal.

Both of Defendant's issues asserted on appeal pertain to the denial of her motion to dismiss and the related allegations that the State introduced insufficient evidence of two elements required for a conviction

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of delaying a public officer in the discharge of his duties pursuant to N.C. Gen. Stat. § 14-223. We review the denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Bagley*, 183 N.C. App. 514, 526, 644 S.E.2d 615, 621 (2007) (citation omitted).

“Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (citation omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

“In making its determination, the trial court must consider all [competent] evidence admitted . . . 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) (citation omitted).

Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant’s guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant’s guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citations, emphasis, quotation marks, and brackets omitted).

N.C. Gen. Stat. § 14-223 proscribes not merely resisting an arrest, but includes any willful and unlawful resistance, delay, or obstruction of a public officer in the discharge of his or her duty. *State v. Newman*, 186 N.C. App. 382, 388, 651 S.E.2d 584, 588 (2007), *disc. review denied*, ___ N.C. ___, 667 S.E.2d 234 (2008) (citation omitted). Violation of this statute is a Class 2 misdemeanor. G.S. § 14-223 (2015). The essential elements of this ‘resist, delay, or obstruct’ charge are:

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- (1) that the victim was a public officer;
- (2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
- (3) that the victim was discharging or attempting to discharge a duty of his office;
- (4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
- (5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Washington, 193 N.C. App. 670, 679, 668 S.E.2d 622, 628 (2008), *appeal dismissed, disc. review denied*, ___ N.C. ___, 674 S.E.2d 420 (2009) (citation and brackets omitted). Section 14-223 has been interpreted by this Court to embrace as punishable the “failure to provide information about one’s identity during a lawful stop[,]” but this Court also noted that “[t]here are, of course, circumstances where one would be excused from providing his or her identity to an officer[.]” *State v. Friend*, 237 N.C. App. 490, 493, 768 S.E.2d 146, 148 (2014), *disc. review denied*, ___ N.C. ___, 771 S.E.2d 308 (2015); *see also Roberts v. Swain*, 126 N.C. App. 712, 724, 487 S.E.2d 760, 768 (holding that a defendant’s refusal to give his social security number to police officers could not be used as the basis for a resisting charge pursuant to N.C. Gen. Stat. § 14-223), *review denied*, 347 N.C. 270, 493 S.E.2d 746 (1997).

In the case *sub judice*, Defendant has only challenged the sufficiency of the evidence introduced by the State to prove element four, that she resisted, delayed, or obstructed an officer; and element five, that this conduct was intentional. We therefore must review whether sufficient evidence of both the wrongful deed and the requisite intent was introduced.

[2] The evidence tended to show that Defendant’s conduct did delay Officer Phillips, satisfying element four. This is irrespective of Defendant’s contention that Officer Phillips could have chosen other methods of investigation to confirm Defendant’s information that would not have resulted in delay. Officer Phillips testified that he had requested Defendant’s ID; Defendant voluntarily produced an ID with an altered identification number; he asked Defendant “if this was the correct number on the ID”; Defendant affirmed that it was, knowing that it was not. Defendant’s production of an altered ID, coupled with her affirmation

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that the number on the ID was accurate, caused Officer Phillips to spend more time than he would have otherwise to locate records associated with Defendant so that he could continue his investigation. Therefore, sufficient evidence was introduced for this element to allow resolution by the jury.

[3] The evidence also permitted a reasonable inference that Defendant had the requisite intent to delay and obstruct Officer Phillips, satisfying the intent requirement of element five. To establish guilt beyond a reasonable doubt, Section 14-223 requires that the State prove a defendant acted “willfully” when resisting, delaying, or obstructing a public officer in the discharge of his or her duties. To prove ‘willfulness,’ the State must introduce sufficient evidence that the defendant acted without justification or excuse, “purposely and deliberately in violation of law.” *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (citation omitted). “Because willfulness is a mental state, it often must be inferred from the surrounding circumstances rather than proven through direct evidence.” *State v. Crockett*, 238 N.C. App. 96, 106, 767 S.E.2d 78, 85 (2014), *aff’d*, 368 N.C. 717, 782 S.E.2d 878 (2016) (citation omitted).

When used in a criminal statute, ‘willful’ is to be interpreted as

something more than an intention to do a thing. It implies the doing [of] the act purposely and deliberately, indicating a purpose to do it without authority – careless whether he has the right or not – in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute.

State v. Moore, 240 N.C. App. 465, 478, 770 S.E.2d 131, 141, *writ denied, disc. review denied*, 368 N.C. 353, 776 S.E.2d 854 (2015) (citation omitted). “When intent is an essential element of a crime the State is required to prove the act was done with the requisite specific intent, and it is not enough to show that the defendant merely intended to do that act.” *State v. Brackett*, 306 N.C. 138, 141, 291 S.E.2d 660, 662 (1982) (citation omitted).

Here, Officer Phillips testified that, from his law enforcement training, he knew that subjects being investigated for charges similar to those in this case would scratch numbers off of their identification cards. This was done so that, if apprehended by a retailer, when that retailer went to press charges against the subject it would be unable to identify him or her with the incomplete or incorrect number from their ID. That is exactly what

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happened here when Officer Phillips attempted to run the incomplete information: the inability to properly identify Defendant. The jury could reasonably find from the evidence presented that Defendant intended to delay Officer Phillips by her failure to provide complete information.

Officer Phillips' testimony about his interactions with Defendant at the time of her arrest gives rise to an inference that Defendant was willful in the giving of false information, i.e., she intended to give a false statement for the purpose of delaying Officer Phillips in the performance of his duties.

Conclusion

Defendant received a fair trial, free from error. As explained above, the State introduced sufficient evidence of both Defendant's intent to delay and her actual delay of Officer Phillips in the performance of his duties. The trial court did not err in denying Defendant's motion to dismiss.

NO ERROR.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY NEAL PRINCE

No. COA16-1275

Filed 5 September 2017

1. Evidence—felony child abuse—nurse practitioner testimony—vouching for victim's credibility

The trial court did not commit plain error in a child abuse case by concluding a nurse practitioner's testimony relating the victim's disclosure about how his injuries occurred and who caused the injuries was not improper vouching. The nurse was describing her process of gathering necessary information to make a medical diagnosis, and further, there was no prejudice based on the overwhelming evidence of defendant's guilt, including the testimony of three eyewitnesses.

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2. Constitutional Law—effective assistance of counsel—failure to object

Defendant did not receive ineffective assistance of counsel in a child abuse case where defense counsel’s “failure” to object to alleged improper vouching testimony was not objectionable and could not serve as the basis for a viable ineffective assistance of counsel claim.

Appeal by defendant from judgment entered 9 May 2016 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 8 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth N. Strickland, for the State.

Mark Montgomery for the defendant-appellant.

BRYANT, Judge.

Where an expert witness’s testimony did not constitute improper vouching, the trial court did not err in admitting the testimony. Furthermore, defendant did not receive ineffective assistance of counsel where defendant’s trial counsel failed to object to testimony that was admissible.

Perry,¹ the minor victim in this case, originally lived with his mother, father, sister Nancy,² and other siblings in New York. When the family split up, Perry, Nancy, and two other siblings moved to North Carolina to live with their aunt, cousins, and grandmother. After a while, his mother came to North Carolina and Perry and his siblings moved in with her.

When Perry was thirteen years old, his mother brought defendant Timothy Neal Prince into their home in Raleigh. According to Perry, defendant and his mother were in a relationship for about six months. At first, Perry thought defendant was “cool,” but after a few days, defendant got upset and punched Perry’s mother in the stomach and then punched Perry in the face. The next night, defendant got upset again and hit Perry’s mother and threw a night stand at her. Perry was hit by the night

1. A pseudonym will be used for the minor child victim.

2. A pseudonym will also be used to refer to Perry’s sister, who was fourteen years old at the time of trial.

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stand when he tried to grab it. Perry was beaten by defendant on several other occasions, at least three times while trying to defend his mother.

On one occasion, defendant took Perry and his family to a cookout party. Defendant was drinking. At some point during the party, defendant asked Perry and defendant's niece to come outside. Defendant told Perry to hit his niece, which Perry refused to do. Defendant then told his niece to hit Perry, which she did. Then, defendant punched Perry in the face. Perry began crying and told a relative that defendant "remind[ed] [him] of [his] father." When defendant heard what Perry had said (Perry's father was abusive), defendant became angry and told Perry, Perry's mother, and Nancy to get in his truck.

At some point on the way home, defendant stopped at a highway exit and told Perry to get out of the truck. Defendant pulled Perry out of the truck and hit him with a bat several times. Perry took off running, and defendant tried to run Perry down with his truck. Eventually, defendant cornered Perry between the woods and the truck and said, "if you don't come out, I will hit you with this bat." Perry's mother was able to convince Perry to walk back and get in the truck. As they got close to home, defendant stopped the truck again, got out of the truck, and hit Perry with the bat. Then, defendant took a metal flashlight and hit Perry three times on the head. The third blow split Perry's "head open," and Perry had to wrap his head in his mother's shirt to avoid getting blood in defendant's truck.

Once at home, defendant told Perry, "I am going to shoot you through the head if this gets out[,]” presumably referring to the abuse he inflicted on Perry. Defendant also told Perry, "if anyone asks you, just say you fell off the bed, the bunk bed." At trial, Nancy testified that "we all lied. We lied to survive."

The next day, Perry's head was still bleeding and aching, and he was limping because of a hurt knee. When later asked why he had not told anyone at school, Perry said, "[b]ecause he, the defendant, had previously been to school and he said no matter where [he] was, if [Perry] told anyone about this, it didn't matter where [he] was, [defendant] would come and find [him] and do it again." Later, when Perry's mother took Perry to the emergency room, defendant was also present either in the treatment room or just outside the door, so Perry was afraid to tell the truth about how his injuries were sustained. Due to the injuries, staples were put in his head and his knee. Perry also had a cast put on his arm for a fracture to the elbow area, which was on for six weeks, followed by another cast.

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Perry's mother also testified about a choking incident involving defendant and Perry. The mother did not observe the incident, but heard Perry cry out. According to Perry, defendant wrapped his arm around Perry's neck and choked him, such that Perry was unable to "really breathe" and he was "gasping for air." There was no injury Perry's mother could easily see, but the next morning Perry's eyes looked funny—the blood vessels in his eye were "popped open and bleeding"—so the mother took Perry to the hospital, where he was diagnosed with a form of asphyxiation.

When Perry's maternal aunt came over to the house shortly after Perry's ER visit where his arm was put in a cast, she continued to ask what happened until Perry finally told her that defendant had hit him with a bat. After consulting with family members, Perry's aunt called Child Protective Services ("CPS") that evening.

Initially, when a social worker came to the home, Perry's mother and sisters denied that anything had happened; defendant was present in the room during the social worker's visit. Eventually, however, Nancy told one social worker about what happened because she "couldn't deal with it anymore and [she] didn't want to see nobody hurt." Shortly thereafter, Perry and his siblings were removed from the home. At the time of trial, Perry was residing in a controlled facility in South Carolina receiving treatment for, several conditions, including PTSD and depression.

On 13 January 2014, an arrest warrant was issued for defendant for the offenses of (1) feloniously and intentionally inflicting serious bodily injury (broken arm and head and leg lacerations) on a child (Perry) who was under sixteen years old; and (2) unlawfully and willfully and feloniously assaulting the child and inflicting personal injury (causing subconjunctival hemorrhages by strangulation by placing an arm around Perry's neck and squeezing), in violation of N.C. Gen. Stat. § 14-318.4(a3) and 14-32.4(B). On 27 October 2014, an indictment was returned against defendant for felony child abuse inflicting serious bodily injury and assault by strangulation. Thereafter, a superseding indictment was issued for the same offenses.

The case came on for trial at the 2 May 2016 session of Wake County Criminal Court before the Honorable Graham Shirley, Superior Court Judge presiding. On 9 May 2016, the jury returned a verdict of guilty against defendant for felony child abuse inflicting serious bodily injury and a verdict of not guilty for strangulation.

Defendant was sentenced to 127 to 165 months imprisonment and ordered to undergo a substance abuse assessment, a mental health

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assessment, other psychological assessments, as well as anger management or psychological counseling. Defendant entered notice of appeal in open court.

On appeal, defendant contends the trial court committed plain error in allowing a State's expert to vouch for the complainant's credibility. In the alternative, defendant argues he was denied effective assistance of counsel where counsel did not object to the improper vouching of the State's expert witness.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2017); *State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). Plain error arises when the "error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Lawrence*, 365 N.C. 506, 516–17, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

A. Expert Vouching for the Truthfulness of a Witness

[1] "The 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 (1995) (citing *State v. Ford*, 323 N.C. 466, 469, 373 S.E.2d 420, 421 (1988)). Indeed,

[o]ur appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence. However, those cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness.

State v. Bailey, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) (internal citations omitted).

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In the instant case, defendant made no objection at trial to the expert testimony given by Holly Warner (“Nurse Warner”), a nurse practitioner who worked with the Safe Child Advocacy Center in 2013. Now, on appeal, defendant claims it was plain error to allow Nurse Warner’s testimony. We disagree.

After Perry was placed in foster care, he was evaluated by Nurse Warner. She reviewed his medical records from two emergency room visits, observed an interview he gave where he described two significant events involving physical abuse, and then spoke with Perry about injuries sustained in those events. She also took photos of the injuries, which were admitted into evidence at trial. Nurse Warner testified on direct in relevant part as follows:

Q. . . . [W]hat, if anything, did [Perry] tell you about how he received those injuries?

A. He told me that [defendant] hit him on the head and the arms and legs, was hitting him with a baseball bat and a flashlight.

Q. At any point did you ask him about the history that was presented to the hospital, that is the bunk bed and hitting on various objects.

A. Yes.

Q. What did he say about that?

A. He said that [defendant] went with him to the hospital to make sure that the hospital didn’t know what happened.

. . . .

Q. And at some point, either yourself or with the interview, did [Perry] indicate to you how he received those injuries [to his eyes (the burst blood vessels)]?

A. He did.

Q. What did he say?

A. He said that after school [defendant] came into [his] room screaming and yelling. [Defendant] was behind [him] with his arm around [his] neck. [He] felt like [he] could not breathe or swallow.

[Perry] then says [defendant] left the room and he went to sleep. He reports when he woke up, [his] face was

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swollen and [he] had little red dots on [his] face and on [his] eyes.

He says his mother and [defendant] took him to the hospital a few days later because the red spots in his eyes started turning yellow and [his] mom thought [he] had jaundice.

....

Q. And with respect to [Perry], and in terms of the physical concerns he had described to you, did you come to some sort of medical diagnosis for that?

A. Yes.

Q. What was that?

A. That the injuries were due to child physical abuse.

Here, Nurse Warner was relating what Perry told her about his injuries and what she observed during her evaluation of him before she gave a medical opinion based on her medical diagnosis that Perry was abused. When she related Perry's disclosure about how his injuries occurred and who caused the injuries, she was describing her process of gathering necessary information to make a medical diagnosis. Contrary to defendant's argument, she was not commenting on Perry's credibility.

On cross-examination, Nurse Warner testified that Perry "disclosed being abused by [defendant]," and that she took pictures of the injuries Perry told her were inflicted by defendant. When asked if she had anything "professionally to draw conclusions as to who perpetuated the physical abuse," Nurse Warner responded that she was not present when Perry was injured and that the "evidence [she] [had] is what the child reported and his reported history of the injuries were corroborated by his medical visits and injuries." Nurse Warner stated her professional opinion was that "the child's disclosure matche[d] the injuries he sustained," and "[w]hat the child said is the evidence. That is the evidence that we have." Nurse Warner did not state that Perry was believable, credible, or telling the truth. Thus, defendant's claim that Nurse Warner improperly vouched for Perry's credibility is not supported by her direct or cross-examination testimony. Accordingly, the trial court committed no error, and certainly no plain error, in allowing this testimony.

Even assuming *arguendo* the trial court erred, there is not a reasonable probability that the jury would have reached a different result had counsel objected at any point during Nurse Warner's testimony.

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See Lawrence, 365 N.C. at 516–17, 723 S.E.2d at 333. Indeed, the evidence presented at trial of defendant’s guilt was overwhelming: three eyewitnesses, including Perry, his mother, and his sister Nancy, testified in great detail about the injuries inflicted on Perry by defendant the night of the cookout, and hospital reports also documented the injuries, which included an injured head, knee, and fractured elbow. Defendant’s argument is overruled.

B. Ineffective Assistance of Counsel

[2] In the alternative, defendant contends he was denied effective assistance of counsel when his trial counsel did not object to what defendant argues was improper vouching by an expert witness. Based on *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984), defendant would have to show counsel’s actions were prejudicial to his defense. In other words, “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.” *Id.* However, because we have concluded that Nurse Warner’s expert testimony did not constitute improper vouching, there is no viable argument that the performance of defendant’s counsel was deficient. Defense counsel’s “failure” to object to testimony that was not objectionable cannot serve as the basis for a viable ineffective assistance of counsel claim. Accordingly, defendant was not denied effective assistance of counsel, and this argument is overruled.

NO ERROR.

Judges CALABRIA and STROUD concur.

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STATE OF NORTH CAROLINA, PLAINTIFF
v.
CHARLES BERNARD ROBINSON, DEFENDANT

No. COA16-1213

Filed 5 September 2017

1. Appeal and Error—preservation of issues—abandonment of issue on appeal—failure to argue at trial

Although defendant contended that the trial court erred by denying his motion to suppress evidence seized during the search of a residence and the statements defendant made to officers during the search, defendant failed to preserve the issue where he either abandoned the argument by failing to address it on appeal or did not argue it at trial. Even assuming this issue was preserved, defendant did not show that the trial court erred in its assessment of the weight and credibility of the evidence.

2. Jury—jury instruction—actual possession—constructive possession—drugs

The trial court did not commit plain error by its instructions to the jury on actual and constructive possession where there was substantial evidence that defendant constructively possessed the items seized during the search, and defendant did not contest the sufficiency of that evidence. The possession distinction did not play a role in the outcome of the case where the question for the jury was whether to believe that defendant's sister-in-law planted the drugs and that his wife's brother was storing weapons in defendant's house.

Appeal by defendant from judgment entered 19 February 2016 by Judge R. Gregory Horne in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Martin T. McCracken, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.

ZACHARY, Judge.

Charles Bernard Robinson (defendant) appeals from the judgments entered upon his conviction of possession of cocaine with the intent to

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sell or deliver and possession of a firearm by a felon, and from his plea of guilty to having attained the status of an habitual felon. On appeal, defendant argues that the trial court erred by denying his motion to suppress evidence, and committed plain error in its instructions to the jury on actual and constructive possession. After careful consideration of defendant's arguments, we conclude that the court did not err by denying his suppression motion, and that the court's instructions did not constitute plain error.

Background

On 26 June 2014, Detective C.T. Davis of the Charlotte-Mecklenburg Police Department applied for and was issued a search warrant authorizing him to search a house located at 3627 Corbett Street, in Charlotte, North Carolina. During the search, law enforcement officers seized two firearms, marijuana, and cocaine. Defendant was present during the search and made inculpatory statements to a law enforcement officer, admitting ownership of the firearms and the cocaine.

On 3 November 2014, defendant was indicted for possession of cocaine with the intent to sell or deliver, possession of marijuana, maintaining a dwelling for the purpose of keeping or selling controlled substances, possession of a firearm by a person previously convicted of a felony, and having attained the status of an habitual felon. Prior to trial, the State dismissed the charges of possession of marijuana and maintaining a dwelling for the purpose of keeping or selling controlled substances. On 6 November 2015, defendant filed a motion asking the court to suppress the evidence that was seized during the search of the Corbett Street residence and the statements defendant made to law enforcement officers during the search. Defendant alleged that the search warrant was not based upon probable cause and that the statements he made "were involuntary and made as the result of mental or psychological pressure[.]" Defendant was tried before the trial court and a jury beginning on 16 February 2016. Prior to trial, the trial court conducted a hearing on defendant's suppression motion, and orally denied defendant's motion to suppress evidence. The court entered a written order on 1 March 2016.

The State's evidence at trial tended to show, in relevant part, the following: Detective Todd Hepner of the Charlotte-Mecklenburg Police Department testified that he and several other officers executed the search warrant for the Corbett Street residence. When Detective Hepner entered the house, defendant was present, along with his wife, Armisher Glenn, and the couple's two children. In the master bedroom, Detective

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Hepner and another officer found a .44 caliber revolver, a shotgun, cocaine, and marijuana. Detective Charlie Davis testified that on 26 June 2014 he obtained and executed a search warrant for the house located at 3627 Corbett Street, Charlotte. He described for the jury the process of searching the house and the items that were seized. After the contraband had been located and placed on the bed, defendant was brought into the bedroom by another officer and accurately identified the location within the bedroom where each of the items had been stored. Andrew Oprysko, a chemist for the Charlotte-Mecklenburg Police Department, testified as an expert in forensic chemistry that forensic testing had identified the material seized during the search of the Corbett Street house as cocaine.

Detective Sidney Lackey testified that while other officers were searching the house, he interviewed defendant. During this interview, defendant admitted that the cocaine, marijuana, and firearms discovered by the law enforcement officers belonged to him. The State accepted defendant's stipulation to the fact of his prior conviction of a felony for purposes of the charge of possession of a firearm by a felon.

Defendant also presented evidence at trial. Armisher Glenn testified that she was defendant's wife and that she had never known defendant to be in possession of cocaine or to sell drugs. Neither she nor defendant owned any firearms; however, Ms. Glenn's brother had asked to store two guns at her house and she assumed that these were the firearms seized by the police. In June of 2014, defendant and Ms. Glenn were separated due to marital difficulties; however, defendant sometimes visited the family home. On one occasion, Ms. Glenn's sister, Ms. Luba Hill, watched the children while defendant and Ms. Glenn went out to supper. Upon their return, defendant engaged in a conflict with his nephew, Ms. Hill's son. Assault charges were filed against defendant and his nephew, but were later dismissed. Ms. Hill remained angry at defendant after this altercation and made false reports about Ms. Glenn to the Department of Social Services. Ms. Hill's daughter, Kiarra Hill, testified about Ms. Hill's anger about the conflict between her son and defendant, and about statements her mother made in which she threatened to "get" an unnamed person. Candace Glenn testified that Armisher Glenn and Luba Hill were her daughters, and that Ms. Hill was very angry about the fight between defendant and Ms. Hill's son. At one point Ms. Hill was holding a "rock" of some substance and threatened to "get" defendant.

Defendant testified on his own behalf at trial. He denied owning firearms or cocaine or selling cocaine in 2014. Defendant testified about the fight between him and his nephew and about his belief that his arrest was the result of being "set up" by Ms. Hill. He was not aware that

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there were drugs or firearms in the house on 26 June 2014. Although the contraband did not belong to him, defendant made inculpatory statements to Detective Lackey in order to prevent the police from arresting Ms. Glenn and placing his children in the custody of DSS. On cross-examination, defendant admitted to having prior criminal convictions, including a 2009 conviction for identity theft.

Following the presentation of evidence, the arguments of counsel, and the trial court's instructions, the jury returned verdicts finding defendant guilty of possession of cocaine with the intent to sell or distribute and with possession of a firearm by a convicted felon. Defendant then entered a plea of guilty to having the status of an habitual felon. The trial court sentenced defendant to concurrent sentences of 83 to 112 months' imprisonment for possession of a firearm by a felon, and 73 to 100 months' imprisonment for possession of cocaine with the intent to sell or deliver. Defendant gave notice of appeal in open court.

Standard of Review

Defendant argues that the trial court erred by denying his motion to suppress. "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) (citation omitted).

Defendant also argues that the trial court erred by instructing the jury that it could find that he was in either actual or constructive possession of the firearms and cocaine in the house, on the grounds that there was no evidence to support a finding of actual possession. As defendant did not object to this instruction at trial, we review only for plain error. Under this standard, the defendant "must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Denial of Suppression Motion

[1] Defendant argues that the trial court erred by denying his motion to suppress the evidence seized pursuant to the search of the Corbett Street residence.¹ Defendant's motion also sought to suppress the statements

1. On appeal, the State argues that defendant lacked standing to challenge the search warrant, and that he failed to object at trial to the introduction of the evidence that was

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defendant made to Detective Lackey at the time of the search; however, defendant has not pursued this argument on appeal and, accordingly, it is deemed to be abandoned. See N.C. R. App. P. 28(a) (“Issues not presented and discussed in a party’s brief are deemed abandoned.”). The sole basis of defendant’s appellate argument that the trial court erred by denying his suppression motion is his contention that, when Detective Davis executed a sworn affidavit in support of his application for a search warrant, he made “a knowingly false statement that, if omitted, would render the search warrant insufficient to establish probable cause.” However, at the trial level, defendant did not argue that the statements which Detective Davis included in the affidavit were made in bad faith or reckless disregard of the truth. As a result, defendant has not preserved this issue for appellate review. Moreover, even assuming, *arguendo*, that this issue were preserved, defendant has failed to show that the trial court erred by denying his motion to suppress.

It is well-established that:

The requirement that a search warrant be based on probable cause is grounded in both constitutional and statutory authority. U.S. Const. amend. IV; N.C.G.S. § 15A-244 [(2015)]. Probable cause for a search is present where facts are stated which establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender. It is elementary that the Fourth Amendment’s requirement of a factual showing sufficient to constitute “probable cause” anticipates a truthful showing of facts.

State v. Fernandez, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (citing *Franks v. Delaware*, 438 U.S. 154, 164-65, 57 L. Ed. 2d 667, 678 (1978)). However:

There is a presumption of validity with respect to the affidavit supporting the search warrant. Before a defendant is entitled to a hearing on the issue of the veracity of the facts contained in the affidavit, he must make a preliminary showing that the affiant knowingly, or with reckless disregard for the truth, made a false statement in the affidavit. . . . A claim under *Franks* is not established merely by evidence that contradicts assertions contained

seized during the search. We conclude that these arguments lack merit and do not require further discussion.

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in the affidavit, or even that shows the affidavit contains false statements. Rather, the evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith.

Fernandez, 346 N.C. at 14, 484 S.E.2d at 358 (citations omitted).

The motion that defendant filed seeking the suppression of evidence seized pursuant to the execution of a search warrant for the Corbett Street house disputes the accuracy of two sections of the affidavit. First, defendant objects to the statement in the affidavit that he gave 3627 Corbett Street as his address “in April of 2013 during a domestic violence arrest.” The incident to which this allegation refers was the altercation between defendant and his nephew, which resulted in both being charged with assault. At the hearing on his suppression motion, defendant argued that this was not a “domestic violence” arrest. In addition, during the hearing on his motion, the parties agreed that the arrest had actually taken place in May of 2014, rather than April, 2013. However, defendant neither disputed that at the time of his arrest he gave 3627 Corbett Street as his address, nor argued that these inaccuracies were made in bad faith or with a reckless disregard for the truth. Furthermore, defendant did not argue at the hearing or on appeal that the details of this arrest were important to the magistrate’s determination that probable cause existed for the issuance of the search warrant.

Defendant’s primary challenge was to the section of Detective Davis’s affidavit concerning the use of a confidential and reliable informant, referred to in the affidavit as a “CRI.” The affidavit states the following:

In June of 2014, this applicant began utilizing a CRI to complete the investigation on Charles Bernard Robinson. This Applicant obtained a 2006 Mug shot photo of Charles Bernard Robinson and showed the photograph to the CRI. The CRI advised that Charles Bernard Robinson was known on the streets as “Red.” The CRI confirmed that Charles Bernard Robinson sold crack cocaine and that he operated from the telephone number (704)-819-4383. This confirmed the information that was provided by the Crime Stopper tipster.

Within the past 72 hours this confidential and reliable informant has purchased “crack” cocaine from Charles Bernard Robinson at the residence located on 3627 Corbett Street under this Applicant’s direct supervision.

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This Applicant has known this confidential informant for over (28) months. During this time, this informant has provided intelligence information regarding Drug distributors in the Charlotte area that this Applicant has verified to be true and factual. This informant has admitted to using and selling controlled substances in the past and is familiar with how they are packaged and sold on the streets of Charlotte. This informant has made purchases of controlled substances under this Applicant's direct supervision.

In his suppression motion, defendant states that he was not known by the street name Red, was not selling cocaine from the Corbett Street house, and had not sold crack cocaine "in the recent past." However, the suppression motion does not assert that these alleged inaccuracies were the result of bad faith, intentional misstatement, or reckless indifference to the truth. Instead, the thrust of defendant's suppression motion and of his argument before the trial court was that the allegations in Detective Davis's affidavit were insufficiently detailed to establish probable cause for the issuance of a search warrant. Defendant contends in the suppression motion that the information in the affidavit concerning the CRI's purchase of crack cocaine was "insufficient to reach the level of probable cause[.]" Defendant supports this assertion with quotations from *State v. Taylor*, 191 N.C. App. 587, 664 S.E.2d 421 (2008).

At the hearing on the suppression motion, defendant argued that the characterization of his arrest for assault as a "domestic violence" incident was misleading. Regarding the information in the affidavit about the controlled buy, defense counsel informed the trial court that "the case [he was] relying on" was *State v. Taylor*, cited above. Defendant's counsel discussed the holding of *Taylor* at length as it related to the level of detail required for an affidavit's description of a controlled buy of drugs. Defense counsel summarized his argument as follows:

MR. CLIFTON: In this case, we've got the past 72 hours this confidential reliable informant has purchased crack cocaine from Charles Bernard Robinson at the residence located on 3627 Corbett Street under this affiant's direct supervision, and to me that just doesn't fit what *State v. Taylor* is calling for. It appears to me to be insufficient, and that's why I'm arguing this motion to suppress should be granted. There's nothing about the cocaine being turned over to the officer, and it doesn't even say in here that he saw him go into the house or make the buy. So in

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other words, to me, it does not meet the standards that are set out in *Taylor*. In *Taylor*, you know, the motion – they affirmed the trial court’s granting of the defendant’s motion to suppress. This case is dated from 2008, which I believe this postdates all these cases that [the prosecutor] presented to you, so it just looks to me like there’s not enough in this affidavit to lead to a finding of probable cause in order to go into somebody’s house.

The prosecutor argued that the facts of *Taylor* were distinguishable, and then addressed the issue of whether the affidavit contained incorrect statements:

MS. HONEYCUTT: As far as the other sub issue, incorrect information in the search warrant, I was referring to . . . the issue Mr. Clifton already addressed as far as the previous arrest at that location. . . . [*State v.*] *Fernandez* says that when a search warrant is issued on the basis of an affidavit containing false facts which are necessary to a finding of probable cause, the defendant has to prove by a preponderance of the evidence that the facts were asserted with knowledge of their falsity or reckless disregard for the truth. *Fernandez* also says that before the defendant is entitled to a hearing on the issue of the veracity of the facts contained in the affidavit, he has to make a preliminary showing that the affiant either knowingly or with reckless disregard for the truth made a false statement in the affidavit and that he must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith. . . . [T]he defendant hasn’t made – in any way established that the affiant was acting in bad faith when he alleged the incorrect date and that the defendant was arrested at this address.

Thereafter, defense counsel called defendant to testify about the facts set out in the affidavit. Defendant testified in detail regarding the altercation with his nephew, his living situation at the time of his arrest, and his lack of recent criminal activity. He also made a single, conclusory, statement about the controlled buy:

MR. CLIFTON: Okay. All right, now the affidavit that Detective Davis filed states that the confidential informant bought cocaine from you three days before – sometime in the three days before the search warrant was served. What do you have to say about that?

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DEFENDANT: I say that's a lie.

MR. CLIFTON: Okay.

After hearing the testimony offered to support or challenge the issuance of a search warrant, the trial court asked defense counsel if he wished to be heard on the issue of Detective Davis's good faith in executing the affidavit, and defendant's attorney said he did not want to address the issue. The prosecutor then argued that defendant's bare denial did not establish bad faith, citing an unpublished case from this Court, *State v. Price*, __ N.C. App. __, __ S.E.2d __ (2005 N.C. App. Lexis 556) (unpublished):

MS. HONEYCUTT: Your Honor, I'll just point out that in *State v. Price*, which is one of the first cases I handed up, it also addresses the issue of the defendant testifying as far as incorrect or false information in the affidavit. It specifically says in that case that the defendant's testimony that he didn't sell was mere contradictory evidence that doesn't show bad faith. In that case, the defendant took the stand and said he didn't sell to an informant, and the Court ruled that that was not enough to show bad faith on the facts of the affiant which is contradictory evidence to what was in the search warrant, and I would say that's what we have here.

In response to the prosecutor's argument, defendant's attorney did not contend that bad faith on the part of Detective Davis could be established on the basis of defendant's bare denial, and repeated that the basis for the suppression motion was the lack of detail in the affidavit:

MR. CLIFTON: Okay. And, Your Honor, I understand that. I mean, I'm hanging my hat on the – *State v. Taylor* basically. I don't know how we could get into it at trial where the State's going to say this happened, he's going to say no, there's no way that happened. That's not going to do any good, but certainly the *State v. Taylor* language, I think, does.

THE COURT: Thank you, Mr. Clifton.

On appeal, defendant limits his argument to the section of the affidavit concerning the purchase of crack cocaine by a CRI. Defendant contends that the issue of Detective Davis's bad faith was raised at the trial level and that defendant's statement at the hearing that these

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allegations were “a lie” served to “establish” that the detective knowingly made false statements in the affidavit.

We have carefully reviewed defendant’s suppression motion and the transcript of the hearing on the motion. We conclude that at no time did defendant argue that Detective Davis had knowingly made false statements in the affidavit or that he had acted in bad faith or in reckless disregard for the truth. Instead, defendant’s suppression motion was based on a question of law: whether the allegations contained in the affidavit were sufficiently detailed to permit the magistrate to issue a search warrant upon a finding of probable cause. “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.’” *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). See also *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988) (applying the “no swapping horses” rule where defendant relied on one theory at trial as basis for written motion to suppress and then asserted a different theory on appeal).

On appeal, defendant asserts that the “veracity” of Detective Davis’s allegations in the affidavit was “before the trial court” at the hearing on his suppression motion. However, defendant has failed to identify any instances in which he argued before the trial court that Detective Davis had knowingly made false statements in the affidavit or had acted in bad faith.

Defendant also directs our attention to selected excerpts from Detective Davis’s testimony at trial. During cross-examination, defense counsel attempted to ask the detective for the basis of the information about defendant’s home address contained in the affidavit. The prosecutor objected, saying that they “had already dealt with the search warrant” and the trial court sustained the objection. In the absence of the jury, defense counsel brought up the issue of Detective Davis’s good faith for the first time, and only as it related to the characterization of defendant’s arrest as being for domestic violence:

THE COURT: In terms of the second issue, I was going to allow you to make a proffer, if you wish, with regard to your question concerning the search warrant. Again, this being outside the presence of the jury. I sustained the objection but if you wish to be heard further regarding that outside the presence of the jury, I’m happy to hear it.

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MR. CLIFTON: It's my client's concern that it was done out of bad faith by Detective Davis. That sentence in the search warrant about it being a domestic violence connected to an arrest at this address. He sees that as a bad faith -- something put into the search warrant out of bad faith on the part of the detective, and that's why he wants me to bring it up.

...

MS. HONEYCUTT: Your Honor, I would say that the Court has already addressed the issue of bad faith. This is not a situation where the search warrant is in front of the jury and they're thinking that something is true that wasn't because of what's in that search warrant. They don't have that before them, and I think we've already addressed that issue.

THE COURT: All right. I have sustained the State's objection previously. I will continue with that same ruling, but it is on the record the basis by which the question is reserved for review.

On appeal, defendant contends that this dialogue establishes that Detective Davis's good faith in asserting that a CRI had made a controlled buy of cocaine "is properly before this Court." However, defense counsel's belated reference to the detective's "bad faith" in using the term "domestic violence" does not alter the fact that neither defendant's written motion nor his argument during the hearing on the suppression motion ever asserted that Detective Davis had made knowingly false statements regarding the controlled buy. We conclude that defendant's appellate argument, that the allegations in the affidavit concerning the purchase of cocaine by a CRI were knowingly false and made in bad faith, was not raised before the trial court and therefore was not preserved for appellate review.

Our conclusion on this question does not reflect a technical default, but an issue of fundamental fairness. On appeal, defendant stresses that Detective Davis "did not testify at the suppression hearing" and that "the State did not put on any evidence relating to the controlled buy." Appellate counsel argues that defendant's "uncontroverted testimony that he did not sell cocaine in the 72 hours before the search warrant was executed was evidence of bad faith." However, as discussed above, at the hearing on his suppression motion, defendant relied upon a *legal*

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argument - that, even if the allegations in the affidavit were true, they were insufficient to establish probable cause for the issuance of a search warrant. Given that defendant did not argue at the hearing that Detective Davis had acted in bad faith, the State had no reason to offer testimony from the officer on the issue of his good faith. Moreover, the trial court was not asked to rule on this issue; in fact, when the prosecutor argued that defendant's conclusory statement that the affidavit was "a lie" did not establish bad faith, defense counsel conceded as much and stated that he was "hanging his hat" on the legal argument based on *State v. Taylor*.

Finally, we observe that even assuming that this issue were preserved, defendant has failed to show that he is entitled to relief. The sworn affidavit submitted by Detective Davis contained a comprehensive explanation of the basis for the application for a search warrant, including information as to (1) Detective Davis's extensive experience in law enforcement and specifically in the investigation of crimes involving controlled substances; (2) the tip received through the Crime Stoppers organization that included many details about defendant's drug dealing; (3) corroboration of defendant's address through investigative research; (4) the fact that defendant's prior criminal record included a 2001 conviction for possession of cocaine; (5) the basis of Detective Davis's belief that the CRI was a reliable informant, and; (6) the CRI's purchase of cocaine from defendant. Defendant's opposition to the affidavit consisted of a conclusory assertion that it was "a lie." It is axiomatic that:

An appellate court's review of a trial court's order on a motion to suppress "is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." Because the trial court, as the finder of fact, has the duty to pass upon the credibility of the evidence and to decide what weight to assign to it and which reasonable inferences to draw therefrom, "the appellate court cannot substitute itself for the trial court in this task."

State v. Villeda, 165 N.C. App. 431, 437-38, 599 S.E.2d 62, 66 (2004) (quoting *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829 (2002), and *Nationsbank of North Carolina v. Baines*, 116 N.C. App. 263, 269, 447 S.E.2d 812, 815 (1994)).

In this case, the trial court found that the affidavit established that the CRI had purchased cocaine from defendant within 72 hours before

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the issuance of the search warrant. Defendant objects to the use of the word “established,” and argues that because defendant called the affidavit a lie, “the affidavit could not ‘establish’ evidence of its own truthfulness.” Defendant contends that the trial court should have instead found only that the affidavit “stated” certain things. However, the trial court’s use of the word “established” clearly indicates that the court is finding the statement to be accurate. In contrast, a court’s recitation of what a witness or document “stated” does not constitute a finding of fact. *Moore v. Moore*, 160 N.C. App. 569, 571-72, 587 S.E.2d 74, 75 (2003) (“Recitations of the testimony of each witness do not constitute findings of fact by the trial judge[.]”). Furthermore, defendant has offered no reason why the trial court could not consider both defendant’s testimony that the affidavit was “a lie” as well as the contents of the sworn affidavit, in order to make a determination of the facts.

For the reasons discussed above, we conclude that defendant failed to preserve for appellate review the argument that Detective Davis knowingly and in bad faith made false statements in the affidavit. We further conclude that, even assuming that this issue were preserved, defendant has not shown that the trial court erred in its assessment of the weight and credibility of the evidence.

Instructions on Possession

[2] Defendant also argues that the trial court erred by instructing the jury on both actual and constructive possession, on the grounds that there was no evidence to support an instruction on actual possession. We conclude that defendant is not entitled to relief on the basis of this argument.

At the close of all the evidence, the prosecutor requested that the trial court instruct the jury on both actual and constructive possession, and defense counsel agreed to this. Upon review of the printed copies of the instructions that the trial court intended to give the jury, defendant’s attorney had no requests for changes. After the jury was instructed, defense counsel informed the trial court that he had no objections or requests for additions or modifications. We conclude that defendant did not object at trial to the instruction that he challenges on appeal.

“Because defendant did not object to the instruction as given at trial, we consider whether this instruction constitutes plain error. See N.C. R. App. P. 10(a)(4); see also *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).” *State v. Juarez*, __ N.C. __, 794 S.E.2d 293, 299 (2016). The plain error standard requires a defendant to “demonstrate that a fundamental error occurred at trial. To show

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that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal quotation omitted). "For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict." *Juarez*, ___ N.C. at ___, 794 S.E.2d at 300 (citing *Lawrence*).

Our appellate courts previously held that it was *per se* plain error for a trial court to instruct the jury on a theory of the defendant's guilt that was not supported by the evidence. *See, e.g., State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986) ("[I]t would be difficult to say that permitting a jury to convict a defendant on a theory . . . not supported by the evidence is not plain error even under the stringent test required to invoke that doctrine.") However, in *State v. Boyd*, 222 N.C. App. 160, 167-68, 730 S.E.2d 193, 198 (2012), *reversed and remanded*, 366 N.C. 548, 742 S.E.2d 798 (2013), the jury was instructed that it could convict the defendant of kidnapping based upon a finding that the defendant had confined, restrained, or removed the victim. There was no evidence to support the theory that the defendant had removed the victim, and on appeal this Court held that the trial court's instruction constituted plain error. Judge Stroud, relying upon standard for plain error set out in *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012), dissented:

I do not believe that defendant has shown "that, absent the error, the jury probably would have returned a different verdict. Thus, he cannot show the prejudicial effect necessary to establish that the error was a fundamental error. In addition, the error in no way seriously affects the fairness, integrity, or public reputation of judicial proceedings." *See Lawrence*, [365] N.C. at [519], 723 S.E.2d at 335. The omission of approximately ten words relating to 'removal' from the above jury instructions would, under the facts of this particular case, make no difference at all in the result. Therefore, I would find no plain error as to the trial court's instructions as to second-degree kidnapping.

Boyd, 222 N.C. App. at 173, 730 S.E.2d at 201 (Stroud, J., dissenting). On appeal, the North Carolina Supreme Court, in a *per curiam* opinion, reversed for the reasons stated in the dissent. *State v. Boyd*, 366 N.C. 548, 548, 742 S.E.2d 798, 799 (2013). Thus, "under *Boyd*, a reviewing court is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the

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jury relied on the inappropriate theory.” *State v. Martinez*, __ N.C. App. __, __, 801 S.E.2d 356, __ (2017).

“To prove that a defendant possessed contraband materials, the State must prove beyond a reasonable doubt that the defendant had either actual or constructive possession of the materials.” *State v. Loftis*, 185 N.C. App. 190, 197, 649 S.E.2d 1, 6 (2007) (citation omitted), *disc. review denied*, 362 N.C. 241, 660 S.E.2d 494 (2008). “A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use.” *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002) (citation omitted). “Constructive possession exists when the defendant, ‘while not having actual possession, . . . has the intent and capability to maintain control and dominion over’ the narcotics.” *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)).

In the present case, Detective Davis testified without objection that he “had obtained a search warrant for the residence in reference to drugs being sold from the home” by defendant. When the law enforcement officers searched the Corbett Street house, defendant was present along with his wife and children. Detective Hepner and another officer searched the master bedroom, where they found a .44 caliber revolver, a shotgun, cocaine, and marijuana. During the search, defendant was interviewed by Detective Lackey, to whom he admitted owning the firearms and the cocaine. Defendant testified at trial that, although he and his wife were separated at the time of the search, he was at the house “pretty much on a daily basis,” and when defendant was brought into the bedroom, he accurately pointed out where the drugs and firearms had been, indicating that he had been aware of their presence.

Defendant’s defense at trial was that the contraband found in the house did not belong to him. Defendant’s wife testified that the marijuana in the house belonged to her and that her brother had asked to store two firearms in the house. Defendant and his wife testified that defendant did not own guns or cocaine and did not sell drugs. In regard to the cocaine found in the house, defendant, his wife, and several other witnesses testified to circumstances in support of defendant’s theory that his sister-in-law had planted the drugs in his house in revenge for a fight between defendant and his nephew.

We conclude that there was substantial evidence that defendant constructively possessed the items seized during the search, and defendant

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has not contested the sufficiency of the evidence of constructive possession. We agree with defendant that there was no evidence that defendant was in actual possession of either the firearms or the narcotics seized from the house. These items were found in the master bedroom of the home, rather than on defendant's person. We conclude, however, that defendant has failed to show that it is "probable, not just possible, that absent the instructional error the jury would have returned a different verdict." *Juarez* at ___, 794 S.E.2d at 300. The primary factual issue for the jury to resolve was whether to find defendant guilty based upon the State's evidence or to believe defendant's explanations for the presence of firearms and cocaine in the house. Simply put, the question for the jury was whether to believe that defendant's sister-in-law planted the drugs and that his wife's brother was storing weapons in defendant's house. We conclude without difficulty that the distinction between actual and constructive possession did not play a significant role in the jury's decision.

Conclusion

For the reasons discussed above, we conclude that the trial court did not err by denying defendant's suppression motion and did not commit plain error in its instructions to the jury. Defendant had a fair trial, free of reversible error.

NO ERROR.

Judges DILLON and BERGER, JR. concur.

STATE v. ROGERS

[255 N.C. App. 413 (2017)]

STATE OF NORTH CAROLINA
v.
MICAHA PAUL ROGERS, DEFENDANT

No. COA16-1112

Filed 5 September 2017

Larceny—of a firearm—intent to permanently deprive

There was sufficient evidence to support the element of intent for the charge of larceny of a firearm where police found the stolen firearm in the spare tire well of defendant’s vehicle and defendant feigned ignorance about the firearm.

Appeal by defendant from judgment entered 29 June 2016 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 19 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Regina T. Cucurullo, for the State.

William D. Spence for defendant-appellant.

BERGER, Judge.

A New Hanover County jury found Micah Paul Rogers (“Defendant”) guilty of larceny of a firearm on June 29, 2016. Defendant appeals, asserting that the trial court erred in denying his motion to dismiss for insufficient evidence. We disagree.

Factual & Procedural Background

On August 19, 2015, Bianca Justafort (“Justafort”) invited her boyfriend, Zachary Weber (“Weber”), and Defendant over to the home she resided in with Sue Marie Sachs (“Sachs”). Throughout the day, Justafort, Weber, and Defendant consumed alcohol, and Defendant made several remarks about the loaded pistol that he always carried with him. Around 9:00 p.m., Defendant passed out on Sachs’ couch with the loaded pistol in his pants.

Earlier in the day, Sachs repeatedly asked Justafort and Weber to ensure that Defendant did not keep a loaded pistol in her house. In response to Sachs’ request, Weber took the loaded pistol from Defendant while he was passed out and placed it in a cabinet. Sachs subsequently

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took the pistol, removed the bullets, and placed the pistol in a camper she had parked in the yard.

Defendant woke up at approximately midnight and began searching for his pistol. Sachs told Defendant that his pistol was not in her home and that he needed to leave. Instead of leaving, Defendant continued searching for his pistol in Sachs' home and in his vehicle. Defendant began arguing with Sachs near the front gate of her home, and the verbal confrontation became physical. Defendant shoved Sachs to the ground and began yelling that he knew she had taken his pistol.

Fearing retaliation, Sachs went back into her home and retrieved her own pistol. She removed the clip before going back outside to confront Defendant and again demanded that he leave her property. Justafort and Weber did not know Sachs' pistol was unloaded and worried that Sachs would shoot Defendant. The two pushed Sachs, causing her to lose balance, at which time Defendant grabbed the unloaded pistol from Sachs' hands and fled the scene.

That same night, Sachs called 911 to report her firearm stolen. Officers with the Wilmington Police Department apprehended Defendant a few blocks from Sachs' home during the early morning hours of August 20, 2015. Officers searched his vehicle and discovered Sachs' pistol inside a latched spare tire well, covered by Defendant's personal effects. Police arrested Defendant for larceny of a firearm. When informed that he was being arrested for stealing Sachs' pistol, Defendant responded, "Whoa, whoa, whoa, whoa, what firearm? What gun? What gun?"

It was from this evidence that the jury convicted Defendant of larceny of a firearm. Defendant filed timely notice of appeal.

Standard of Review

It is well settled that a trial court's denial of a motion to dismiss based on insufficiency of the evidence is reviewed *de novo*. *State v. Marley*, 227 N.C. App. 613, 614, 742 S.E.2d 634, 635 (2013). When ruling on a motion to dismiss for insufficiency of the evidence, "the question for [this] Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant[] being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). In reviewing challenges to the sufficiency of evidence, the evidence must be viewed in the light most favorable to the State, and all reasonable inferences are drawn in favor of the State. *Id.* at 596, 573 S.E.2d at 869 (citations omitted).

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Evidence is substantial when it is sufficient to “persuade a rational juror to accept a conclusion.” *Id.* at 597, 573 S.E.2d at 869 (citation omitted). It is not this Court’s role to weigh the evidence; that is the task of the jury. *Id.* at 596-97, 573 S.E.2d at 869. Rather, if “more than a scintilla of competent evidence . . . support[s] the allegations” against a defendant, then the trial court’s denial of a defendant’s motion to dismiss must be upheld. *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958).

Analysis

“The essential elements of larceny [of a firearm] are: (1) taking the [firearm] of another; (2) carrying it away; (3) without the owner’s consent; and (4) with the intent to deprive the owner of the [firearm] permanently.” *State v. Sheppard*, 228 N.C. App. 266, 269, 744 S.E.2d 149, 151 (2013) (citation omitted). Larceny of a firearm is a felony, regardless of the value of the weapon in question. N.C. Gen. Stat. § 14-72(b)(4) (2015).

As an initial matter, it must be noted that Defendant has only challenged the element of intent on appeal. Accordingly, Defendant has abandoned any argument relating to the other three elements of larceny of a firearm and the sole issue to be addressed by this Court is whether substantial evidence was introduced to support the conclusion that Defendant intended to permanently deprive Sachs of her pistol. *See* N.C.R. App. P. 28(b)(6) (2015).

“A man’s intentions can only be judged by his words and deeds; he must be taken to intend those consequences which are the natural and immediate results of his acts.” *State v. Smith*, 268 N.C. 167, 173, 150 S.E.2d 194, 200 (1966). “Intent is a mental [state that is] seldom provable by direct evidence. [Intent] must ordinarily be proved by circumstances from which it may be inferred.” *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) (citations omitted). Generally, where a defendant takes property from its rightful owner and keeps it as his own until apprehension, the element of intent to permanently deny the rightful owner of the property is deemed proved. *Smith*, 268 N.C. at 173, 150 S.E.2d at 200 (citation omitted). However, where a defendant takes property for his own “immediate and temporary use” without the intent to permanently deprive the rightful owner of his property, then he is not guilty of larceny but merely trespass. *Id.* at 170, 150 S.E.2d at 198 (citations omitted).

In the present case, Defendant claims that despite being apprehended by law enforcement with Sachs’ pistol hidden in the spare tire well of his vehicle, the evidence was insufficient to support a finding that he intended to permanently deprive Sachs of her firearm at the time

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of the taking. Defendant contends that the evidence only shows that he took the unloaded pistol from Sachs to prevent serious bodily injury to the Defendant. We disagree.

When viewed in a light most favorable to the State, sufficient evidence supported the inference that Defendant intended to permanently deprive Sachs of her pistol. Even assuming that Defendant initially secured possession of the pistol in an effort to prevent injury, the jury could infer that Defendant, a former marine, knew or should have known, upon handling the firearm, that it was not capable of discharging a projectile as it was unloaded. However, instead of returning the weapon once he realized it posed no threat to his safety, Defendant fled the scene with the pistol.

Moreover, after he was apprehended by police, Defendant never told the arresting officer that Sachs' pistol was in his vehicle or of his altercation with Sachs. When Defendant was informed that he was being arrested for stealing the pistol, which was found hidden beneath Defendant's personal effects in a latched spare tire well, he feigned ignorance and responded, "Whoa, whoa, whoa, whoa, what firearm? What gun? What gun?"

Defendant's attempt to conceal the firearm in the spare tire well of his vehicle and his subsequent comments to law enforcement after being apprehended provided sufficient evidence to support an inference that Defendant intended to permanently deprive Sachs of her pistol. Accordingly, the trial court did not err in its denial of Defendant's motion to dismiss at the close of evidence, and this contention of error is overruled.

Conclusion

The trial court's denial of Defendant's motion to dismiss for insufficiency of the evidence was proper because the evidence, when viewed in a light most favorable to the State, was sufficient for the jury to find that Defendant intended to permanently deprive Sachs of her firearm. Therefore, we conclude Defendant received a fair trial, free from error.

NO ERROR.

Judges ELMORE and INMAN concur.

STATE v. SEAM

[255 N.C. App. 417 (2017)]

STATE OF NORTH CAROLINA

v.

SETHY TONY SEAM, DEFENDANT

No. COA17-219

Filed 5 September 2017

Sentencing—first-degree murder—resentencing—lack of jurisdiction—Supreme Court mandate not issued

The trial court lacked jurisdiction to resentence a sixteen-year-old defendant in a first-degree murder case where the mandate from the N.C. Supreme Court had not been issued. The judgment was vacated and remanded for resentencing.

Appeal by the State of North Carolina from judgment entered 30 December 2016 by Judge Theodore S. Royster, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Robert C. Montgomery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellee.

BERGER, Judge.

The State of North Carolina appeals from judgment entered December 30, 2016, resentencing Sethy Tony Seam (“Defendant”) for first degree murder committed November 19, 1997, when Defendant was sixteen years old. Pursuant to *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), Defendant was entitled to resentencing because his original, mandatory sentence of life without parole violated the Eighth Amendment of the U.S. Constitution. Our Supreme Court affirmed Defendant’s right to be resentenced in *State v. Seam*, ___ N.C. ___, 794 S.E.2d 439 (2016). However, before the mandate issued from that Court, Superior Court Judge Theodore Royster ordered the resentencing of Defendant to occur one day before Judge Royster was to retire. Because the Supreme Court mandate had not issued, the trial court was without jurisdiction to enter judgment for Defendant. Therefore, we vacate the judgment and remand for resentencing.

STATE v. SEAM

[255 N.C. App. 417 (2017)]

Factual and Procedural Background

The facts of this case as previously stated by this Court are as follows:

The State's evidence at trial tended to show that on the evening of 19 November 1997, defendant and Freddie Van [(Van)] walked to King's Superette in Lexington, North Carolina. They both entered the store around closing time when the store's proprietor, Mr. Harold King, Sr. (Mr. King), was squatting down in the rear of the store, fixing the beer cooler. Defendant and Van were standing in the middle of the store when Van pulled a .22 caliber pistol from the front of his pants and said, "Freeze, give me all of your money." As Van approached Mr. King from behind, Mr. King stood up and asked, "How much do you all want?" At this time, Van pointed the pistol at Mr. King's back and ordered him to the cash register at the front of the store. As Van and Mr. King were approaching the cash register, defendant also moved closer to the cash register. Suddenly, Van knocked Mr. King's glasses off, whereupon Mr. King turned around and punched Van in the mouth. An argument ensued and Van shot Mr. King three times, fatally wounding him. Defendant and Van attempted to open the cash register but were unsuccessful. They then ran from the store.

State v. Seam, 145 N.C. App. 715, 552 S.E.2d 708 (2001) (unpublished).

Defendant was convicted of first degree murder and attempted robbery in 1999, and sentenced to life in prison. Due to Defendant's age at the time of the murder and attempted robbery, Defendant filed a motion for appropriate relief in 2011 pursuant to *Miller*. In 2013, Defendant's motion was granted, and the trial court indicated that it would resentence Defendant at that time. The State objected, and resentencing was continued. Prior to resentencing, the State appealed the trial court's ruling.

On December 21, 2016, the North Carolina Supreme Court affirmed the trial court's decision on the motion for appropriate relief, and remanded the case for resentencing. The mandate, however, would not issue from that Court until January 10, 2017. Judge Royster scheduled a special session of superior court, one day before he was set to retire, for the resentencing of Defendant. Defendant filed a motion to expedite

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the mandate on December 29, 2016, but it was summarily denied by the Supreme Court that same day.

Regardless of the mandate not being issued, Judge Royster held a resentencing hearing on December 30, 2016. The State objected to the hearing being held before the mandate had issued citing jurisdictional concerns. At the conclusion of the hearing Judge Royster entered a written order that included the following decree:

1. That the Resentence of defendant shall be not less than 183 months and not more than 229 months in the NORTH CAROLINA DIVISION OF ADULT PRISONS. Defendant's Record Level is I. Defendant's Disposition Range is Mitigated. Since Class A under Sentencing Grid for offenses committed on or after December 1, 1995, is unconstitutional, the Court used Class B1.

(Emphasis omitted). It is from this order that the State timely appealed.

Analysis

“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.” *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (citations omitted). With limited exception, jurisdiction of the trial court “is divested . . . when notice of appeal has been given[.]” N.C. Gen. Stat. § 15A-1448(a)(3) (2015). “An appeal removes a case from the trial court which is thereafter without jurisdiction to proceed on the matter until the case is returned by mandate of the appellate court.” *Woodard v. Local Governmental Employees' Retirement Sys.*, 110 N.C. App. 83, 85, 428 S.E.2d 849, 850 (1993) (citations omitted). Unless otherwise ordered, a mandate issues “twenty days after the written opinion of the court has been filed with the clerk.” N.C.R. App. P. 32(b).

Thus, the trial court was divested of jurisdiction until the mandate from the Supreme Court issued on January 10, 2017, and without authority to enter the December 30, 2016 judgment. We therefore vacate the judgment and remand for resentencing.

VACATED AND REMANDED.

Judges DILLON and ZACHARY concur.

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[255 N.C. App. 420 (2017)]

STATE OF NORTH CAROLINA

v.

CHARLES AUGUSTUS SHORE, JR.

No. COA16-1243

Filed 5 September 2017

1. Evidence—expert witness testimony—sexual abuse—children delay disclosure of sexual abuse—reasons for delay—reliability test—Rule 702(a)

The trial court did not abuse its discretion in a child sex abuse case by allowing an expert witness in clinical social work specializing in child sexual abuse cases to testify that it was not uncommon for children to delay the disclosure of sexual abuse and by allowing the witness to provide possible reasons for delayed disclosures where the testimony satisfied the three-prong reliability test under N.C.G.S. § 8C-1, Rule 702(a). Defendant failed to demonstrate that his arguments attacking the principles and methods of the testimony were pertinent in assessing its reliability.

2. Constitutional Law—effective assistance of counsel—premature claim

Defendant's ineffective assistance of counsel claim in a child sex abuse case, based on his attorney eliciting evidence of guilt that the State had not introduced, was premature and dismissed without prejudice to his right to assert it during a subsequent motion for appropriate relief proceeding.

3. Appeal and Error—preservation of issues—failure to declare mistrial sua sponte—failure to object

Although defendant contended the trial court abused its discretion in a child sex abuse case by failing to declare a mistrial sua sponte after the victim's father engaged in a "pattern of abusive and prejudicial behavior" during defendant's trial, defendant failed to preserve this issue where he did not request additional action by the trial court, did not move for a mistrial, and did not object to the trial court's method of handling the alleged misconduct in the courtroom.

4. Criminal Law—trial court expression of opinion—denial of motion to dismiss in presence of jury—child sex abuse

The trial court did not impermissibly express an opinion on the evidence in a child sex abuse case by denying defendant's

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motion to dismiss in the presence of the jury in violation of N.C.G.S. § 15A-1222 where defendant did not seek to have the ruling made outside the presence of the jury, did not object, and did not move for a mistrial on this issue.

Appeal by defendant from judgments entered 26 April 2016 by Judge Stanley L. Allen in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Margaret A. Force, for the State.

Hale Blau & Saad Attorneys at Law, P.C., by Daniel M. Blau, for defendant-appellant.

ARROWOOD, Judge.

Charles Shore (“defendant”) appeals from judgments entered upon his convictions for statutory sexual offense of a person thirteen, fourteen, or fifteen years old, and for statutory rape of a person thirteen, fourteen, or fifteen years old. Based on the reasons stated herein, we dismiss in part and find no error in part.

I. Background

On 31 March 2014, defendant was indicted on the following charges: four counts of indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1; one count of statutory sexual offense of a person thirteen, fourteen, or fifteen years old in violation of N.C. Gen. Stat. § 14-27.7A(a); and three counts of statutory rape of a person thirteen, fourteen, or fifteen years old in violation of N.C. Gen. Stat. § 14-27A.

Defendant was tried at the 18 April 2016 criminal session of Mecklenburg County Superior Court, the Honorable Stanley Allen presiding.

The State’s evidence tended to show that in 2012, H.M.¹ began living with her father. She was eleven years old at the time. H.M.’s father was living with Brandi Coleman (“Brandi”) and defendant, who was Brandi’s boyfriend. H.M. testified that after moving into the house, she spent time with defendant by jumping on the trampoline, watching sports, fishing, watching television, and playing video games. She described

1. Initials are used throughout this opinion to protect the identity of the juvenile and for ease of reading.

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their relationship as “always friendly, really nice. Anything I ever needed when my dad wasn’t around or Brandi wasn’t around, he always helped me.” In the summer of 2013, defendant’s son moved into the house. H.M. shared a room with defendant’s son and they became best friends.

In January 2014, after Brandi and defendant ended their relationship, defendant and defendant’s son moved to a nearby apartment complex. H.M. testified that she saw defendant and defendant’s son “all the time” after they moved, frequently visiting their apartment to “hang out.” H.M. spent the night at their apartment more than once and slept in defendant’s bed.

H.M. testified that one night, she was sleeping in defendant’s bed when defendant got into his pajamas and crawled into bed with her. They “cuddled up together.” H.M. testified that defendant’s hands “slowly started to go down my side,” defendant put his hands around the waistband of her pants, and then her shorts came off. Defendant’s hands “entered” her underwear and defendant began touching H.M.’s vagina. Defendant got on top of H.M. and kissed her neck. H.M. told defendant that she was tired and defendant replied, “okay,” gave her a hug, and the two fell asleep.

H.M. testified that she and defendant had vaginal intercourse on two occasions. One incident occurred when she spent a few nights at defendant’s apartment during the weekend of 14 February 2014. On one of those nights, defendant and H.M. began kissing on the couch. They went into defendant’s bedroom where defendant “crawled” on top of her, put his hand inside of her, and then put his penis inside of her. The next morning, defendant gave her a pill which he instructed her to take. The other occasion where defendant had sex with H.M. occurred in the same way except that defendant did not give her a pill to take.

H.M.’s father testified that he would check H.M.’s cell phone on a regular basis. On 22 February 2014, H.M.’s father was looking through H.M.’s cell phone when he noticed text messages from defendant. The messages included “Good morning, Baby[,]” “Good morning, Beautiful[,]” and “Hello, Princess.” H.M.’s father became very angry and threw the cell phone on the ground and the screen broke. H.M.’s father confronted H.M., asking if “anything ever happened between you and [defendant]” and H.M. replied, “yes.” H.M.’s father proceeded to drive to defendant’s apartment.

While H.M.’s father was gone, Brandi spoke with H.M. During the conversation, H.M. revealed that defendant had touched her in “her private areas” and that she and defendant engaged in sex.

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Defendant was not at his apartment when H.M.'s father arrived. H.M.'s father called Brandi and she was able to convince him to return back to his house. At his house, H.M.'s father directly asked H.M. if she and defendant had ever had sex and H.M. replied, "yes, Dad[.]" H.M.'s father left his house again and went to defendant's apartment. Defendant was not home, so H.M. went to a nearby karate studio in search of defendant. As H.M.'s father walked up to the karate studio, defendant was walking out. H.M.'s father yelled, "you son of a b****, I'm here to kill you[.]" Defendant ran back inside the studio and came back outside with twenty men to protect him. H.M.'s father continued to scream at defendant, claiming that defendant had raped his daughter.

H.M.'s father had called the police earlier and the police arrived on the scene. Officer Thomas Gordon and Sergeant Grant Nelson, of the Matthews Police Department, testified that on 22 February 2014, they responded to a call at Scott Shields Martial Arts Academy. H.M.'s father informed the officers why he was angry and accused defendant of inappropriately touching H.M. Sergeant Nelson testified defendant "knew what we were there [in] reference to." After Sergeant Nelson explained to defendant that he was not under arrest, defendant told him of two different incidents that occurred with H.M. Defendant stated that one time, H.M. had sat on defendant's lap, grinding her bottom pelvic area into his pelvic area and grabbing his crotch area. Defendant told her to stop, but she continued. On another occasion, defendant was standing when H.M. approached him from behind and grabbed his crotch. Defendant again told her to stop, but she continued to grab him. H.M. then took defendant's hand and placed it down her pants. Defendant left his hand there for a minute and then pulled it out of her pants.

Kelli Wood ("Wood") testified as an expert in clinical social work, specializing in child sexual abuse cases. Wood testified that on 5 March 2014, she interviewed H.M. at Pat's Place Child Advocacy Center, a center providing services to children and their families when there are concerns that a child may be a victim of maltreatment or may have witnessed violence. A videotape of her interview was played for the jury with a limiting instruction that it should be received for corroborative purposes.

At the close of the State's evidence, the State dismissed one count of indecent liberties and one count of statutory rape.

Defendant testified that his relationship with H.M. was "[p]retty good" and they were like family. Defendant denied ever sitting on his couch and kissing H.M. and denied ever sleeping in his bed with H.M.

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He also denied ever touching her sexually with his hands, using his mouth to touch her private parts, or having sexual intercourse with her. Defendant admitted that H.M. spent the night at his apartment on 14 and 15 February 2014, but testified that H.M. slept on the lower bunk bed one of the nights and slept on the couch the other night. He testified that on 15 February 2014, his girlfriend, Bridget Davenport, had spent the night with defendant in his bedroom. Defendant testified that on 16 February 2014, he was making lunch in the kitchen when H.M. walked up to him and grabbed his crotch. He backed away and told her “no, no. Inappropriate.” H.M. giggled in response. Defendant further testified that on the same day, he was sitting in a recliner when H.M. sat on top of him. Defendant pushed H.M. off of him and told her that “it was very inappropriate, she couldn’t do it, could not do that.”

On 26 April 2016, a jury found defendant guilty of three counts of taking indecent liberties with a child, one count of statutory sexual offense of a person thirteen, fourteen, or fifteen years old, and one count of statutory rape of a person thirteen, fourteen, or fifteen years old. The jury acquitted defendant of one count of statutory rape.

Judgment was arrested as to the indecent liberties convictions. Defendant was sentenced to a term of 144 to 233 months for the statutory rape conviction and to a consecutive term of 144 to 233 months for the statutory sexual offense conviction.

Defendant was ordered to register as a sex offender upon release from imprisonment. The trial court further ordered that the Department of Adult Correction shall perform a risk assessment of defendant and will determine the need for satellite-based monitoring (“SBM”).

Defendant gave oral notice of appeal in open court. Defendant also filed a petition for writ of certiorari to this Court, since the sex offender registration and SBM are civil in nature, and thus require written notice of appeal. N.C. R. App. P. 3(a) (2017); *State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010). Our Court granted defendant’s petition for writ of certiorari on 21 July 2017 and we review the merits of his appeal.

II. Discussion

On appeal, defendant argues that: (A) the trial court erred by permitting the State to introduce unreliable expert testimony, in violation of Rule 702 of the North Carolina Rules of Evidence; (B) he received ineffective assistance of counsel where his attorney elicited evidence of guilt that the State had not introduced; (C) the trial court erred by failing

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to declare a mistrial *sua sponte* after a State's witness engaged in a "pattern of abusive and prejudicial behavior" during defendant's trial; and (D) the trial court impermissibly expressed an opinion on the evidence by denying defendant's motion to dismiss in the presence of the jury, in violation of N.C. Gen. Stat. § 15A-1222. We address each argument in turn.

A. Expert Testimony Under Rule 702

[1] Defendant argues the trial court abused its discretion by allowing expert witness Wood to testify that it is not uncommon for children to delay the disclosure of sexual abuse and by allowing Wood to provide possible reasons for delayed disclosures. Specifically, defendant contends that Wood's testimony was unreliable because it was neither "based upon sufficient facts or data[.]" nor "the product of reliable principles and methods[.]" in violation of N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)-(2). While acknowledging that our Court has previously allowed analogous expert testimony, *see State v. Carpenter*, 147 N.C. App. 386, 556 S.E.2d 316 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 217, 560 S.E.2d 143, *cert. denied*, 536 U.S. 967, 153 L. Ed. 2d 851 (2002), he urges our Court to examine this issue in light of the General Assembly's 2011 amendment to Rule 702 of the North Carolina Rules of Evidence and the specific facts of his case.

Our Court reviews a trial court's admission of expert testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 702(a) for an abuse of discretion. *State v. Hunt*, __ N.C. App. __, __, 790 S.E.2d 874, 881, *disc. review denied*, __ N.C. __, 795 S.E.2d 206 (2016). "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." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

In *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016), our Supreme Court confirmed that the most recent amendment of Rule 702 adopted the federal standard for the admission of expert witness testimony articulated in the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), line of cases. *See McGrady*, 368 N.C. at 884, 787 S.E.2d at 5. "By adopting virtually the same language from the federal rule into the North Carolina rule, the General Assembly thus adopted the meaning of the federal rule as well." *Id.* at 888, 787 S.E.2d at 7-8. Although Rule 702 was amended, our Supreme Court reasoned that "[o]ur previous cases are still good law if they do not conflict with the *Daubert* standard." *Id.* at 888, 787 S.E.2d at 8. While the amendment "did not change the basic structure of the inquiry" under Rule 702(a),

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it “did change the level of rigor that our courts must use to scrutinize expert testimony before admitting it.” *Id.* at 892, 787 S.E.2d at 10. “To determine the proper application of North Carolina’s Rule 702(a), then, we must look to the text of the rule, [the *Daubert* line of cases], and also to our existing precedents, as long as those precedents do not conflict with the rule’s amended text or with *Daubert*, *Joiner*, or *Kumho*.” *Id.* at 888, 787 S.E.2d at 8.

The text of Rule 702, in pertinent part, provides:

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

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2016).

The *McGrady* Court held that:

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.” This is the relevance inquiry[.]

. . . .

Second, the witness must be “qualified as an expert by knowledge, skill, experience, training, or education.” This portion of the rule focuses on the witness’s competence to testify as an expert in the field of his or her proposed testimony. . . . Whatever the source of the witness’s knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?

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....

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. These three prongs 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 889-90, 787 S.E.2d at 8-9 (internal citations, footnote, and quotation marks omitted).

In the present case, defendant does not dispute either Wood's qualifications or the relevance of her testimony. Defendant challenges the reliability of Wood's delayed disclosure testimony; whether her testimony met prongs (1) and (2) of the three-pronged reliability test.

"The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *Id.* at 890, 787 S.E.2d at 9. Regarding factors a trial court may consider in its determination of reliability, the *McGrady* Court explained as follows:

In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593-94, 113 S.Ct. 2786. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho*, 526 U.S. at 147-49, 119 S.Ct. 1167. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the

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reliability of expert testimony.” *Id.* at 152. Those factors are part of a “flexible” inquiry, *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786, so they do not form “a definitive checklist or test,” *id.* at 593, 113 S.Ct. 2786. And the trial court is free to consider other factors that may help assess reliability given “the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” *Kumho*, 526 U.S. at 150, 119 S.Ct. 1167.

The federal courts have articulated additional reliability factors that may be helpful in certain cases, including:

- (1) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
- (3) Whether the expert has adequately accounted for obvious alternative explanations.
- (4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.
- (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Fed. R. Evid. 702 advisory committee’s note to 2000 amendment (citations and quotation marks omitted). In some cases, one or more of the factors that we listed in *Howerton* may be useful as well. *See Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (listing four factors: use of established techniques, expert’s professional background in the field, use of visual aids to help the jury evaluate the expert’s opinions, and independent research conducted by the expert).

Id. at 890-91, 787 S.E.2d at 9-10.

At trial, Wood testified that she had a bachelor’s degree in sociology from Georgia State University and a master of social work from Clark Atlanta University. She had been a licensed clinical social worker for six

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years. Wood was working as forensic interviewer at Pat's Place Child Advocacy Center. Wood testified that a forensic interview is a structured conversation with a child, allowing the child to be able to communicate in their own words, about a personal experience or something they had witnessed. She explained that the purpose of a forensic interview is to "elicit those details, and those details are either to refute the allegations that something may have happened to a child or a child may have witnessed something, or to support those allegations." She had approximately eleven years of forensic interviewing experience and over 200 hours of training in the field of forensic interviews of children suspected of being maltreated. Wood testified that she had obtained research-based knowledge of sexually abused children by reading research studies concerning the suggestibility of children, best types of questions to ask, how children develop and understand questions, and the process by which children provide disclosures. She continued to update her research in order to ensure she was utilizing the best practices. Wood testified that over her eleven years of experience, she had interviewed over 1,200 children, with 90% of those interviews focusing on sexual abuse allegations. She had also been qualified as an expert in child sexual abuse in Georgia over twenty times and once in North Carolina.

The State tendered Wood as an expert in the field of clinical social work, specializing in child sexual abuse and defendant objected. On *voir dire*, Wood testified that she had not conducted research in the delayed reporting of sexual assault cases by children, but had reviewed research on "delayed disclosures, reasons for delayed disclosures, as well as concerns that delayed disclosures could be false disclosures, and so I have reviewed on both sides of the concerns of delayed disclosures." When asked by defense counsel whether the claims of the research participants were determined to be true or false, Wood explained that the research she had reviewed were "already supposing that the participants are victims" and "they are just going by what the participants are saying." Wood testified that she was forming opinions based on her observations through the thousand-plus interviews she had conducted, as well as research she had reviewed. She estimated that she had read over twenty articles on delayed disclosures.

Ultimately, the trial court allowed Wood to testify as an expert in clinical social work, specializing in child sexual abuse cases. However, the trial court prohibited any testimony as to why, if at all, H.M. delayed in reporting the alleged abuse. The trial court stated as follows:

THE COURT: Based on [] Miss Wood's education, she's a licensed clinical social worker, and having done forensic

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interviews of at least, approximately, over 1,200 children, 90 percent of those were focused on sexual abuse allegations, the Court will allow her to testify as a licensed clinical social worker with a specialization in child-sexual-abuse cases. And – however, despite that, the state has already said that they’re not going to try to elicit testimony, and the Court will prohibit any testimony as to why, if at all, [H.M.] delayed in reporting, if she did, in reporting any potential inappropriate behavior, but just in general what Miss Wood has observed from child abuse, I’m sorry, sexual abuse from persons in the past.

I think, [defense counsel], almost the exact question in *State v. Dew*, and then the quote: R.O says, however, the appellate courts in this jurisdiction have consistently allowed the admission of expert testimony, such as the witness in that case, which relies upon personal observations of professional experience rather than upon quantitative analysis.

I think something like this would not be able to be, as you indicated, from empirical data or empirical testing, but I think that’s going to go to the weight rather than to the admissibility so I’ll deny the motion to the extent that she cannot testify as an expert, but I’ll allow it to the extent that she cannot testify as to why anybody involved in this case may have delayed reporting any inappropriate behavior.

Wood later testified, amid objections from defendant, to the following:

[THE STATE:] In your experience and in your survey of the research, is it uncommon for a child to delay disclosure of sexual abuse?

[WOOD:] No.

....

[WOOD:] No, it’s not.

[THE STATE:] What are some of the reasons that a child, based on the research and experience, in general, may delay disclosure?

....

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[WOOD:] There are numerous reasons. Some of them are due to fear: Fear of not being believed, fear of what others are going to say about them, fear of what the disclosure will do to the family, will it break the family up, fear that something will happen to the alleged perpetrator, fear that something will happen to the victim, fear that something will happen to the other family members if there's retaliation. Then, also, blame and self-guilt that they didn't do something to stop it, that they didn't run, that they didn't say something. Also, concern that if they tell, what will happen to their family. If this is – if the alleged perpetrator is a primary caregiver, will they have to begin to look for a new residence, will their brothers or sisters not be able to see their parent any further, and how will others in the family – will the other family members blame them for the destruction or the demise of the family; and so some of those are the reasons that children do not tell immediately.

Wood further testified that she had personally heard children express the same potential reasons for delayed disclosures that she had found in her research throughout her experience in forensic interviewing.

Defendant cross-examined Wood about whether the studies on delayed disclosures included false allegations of child sexual abuse. Wood replied that she had examined “both research that deal with children who have identified a positive disclosure and a negative disclosure, and they both do talk about delayed disclosures that is found in – throughout the research.”

First, to be reliable, an expert's testimony must be based upon sufficient facts or data pursuant to Rule 702(a)(1). Defendant contends that Wood's testimony was unreliable because she had not conducted her own research and instead, relied on studies conducted by others. Defendant is essentially arguing that the trial court abused its discretion when it admitted Wood's expert testimony which was based upon her review of research on delayed disclosures, combined with professional experience. Upon thorough review, we hold that this contention directly conflicts with the meaning of Rule 702, the *Daubert* line of cases, and our existing precedent.

The Advisory Committee Notes to the federal rule state that subsection (a)(1) of Rule 702 “calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying ‘facts or data.’ The term ‘data’ is intended

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to encompass the reliable opinions of other experts.” Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments; see *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374, 770 S.E.2d 702, 710 (citations omitted) (stating that the “requirement that expert opinions be supported by ‘sufficient facts or data’ means ‘that the expert considered sufficient data to employ the methodology[.]’ ” and that “experts may rely on data and other information supplied by third parties”), *disc. review denied*, 368 N.C. 284, 775 S.E.2d 861 (2015). Moreover, the Advisory Committee Notes provide as follows:

Nothing in this amendment is intended to suggest that experience alone – or experience in conjunction with other knowledge, skill, training or education – may not provide a sufficient foundation for expert testimony. . . . In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.

Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments. The *Daubert* line of cases also stands for the proposition that “no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156, 143 L. Ed. 2d 238, 255 (1999).

The principle that experience alone or experience combined with knowledge and training is sufficient to establish a proper foundation for reliable expert testimony is in line with our previous holding in *Carpenter*. In *Carpenter*, our Court admitted analogous expert testimony under the prior version of Rule 702(a). The defendant in *Carpenter* argued that the trial court erred by admitting expert witness testimony from a licensed clinical social worker that “delayed and incomplete disclosures are not unusual in cases of child abuse[.]” *Carpenter*, 147 N.C. App. at 393, 556 S.E.2d at 321. The defendant asserted, *inter alia*, that the State had failed to establish that there was any scientific foundation for this opinion testimony and our Court rejected his argument. *Id.* Our Court reasoned as follows:

Though she did not specifically cite supporting texts, articles, or data, [the expert witness] testified on *voir dire* that she was basing her conclusions on literature, journal articles, training, and her experience. Thus, a proper foundation was established for her opinion testimony. In her testimony, [the expert witness] explained general characteristics of children who have been abused. [The expert witness] testified that an abused child often delays

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disclosing the abuse and offered various reasons an abused child would continue to cooperate with an abuser. [The expert witness] did not testify as to her opinion with respect to [the victim's] credibility.

Evidence similar to that offered by [the expert witness] has been held admissible to assist the jury. *See State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988) (finding expert testimony as to why a child would cooperate with adult who had been sexually abusing child admissible); *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 132 (1994) (concluding trial court did not err in admitting testimony describing general symptoms and characteristics of sexually abused children to explain the victim's behavior); *State v. Bowman*, 84 N.C. App. 238, 352 S.E.2d 437 (1987) (holding trial court was proper in admitting a doctor's testimony that a delay between the occurrence of an incident of child sexual abuse and the child's revelation of the incident was the usual pattern of conduct for victims of child sexual abuse). Thus, for the foregoing reasons we hold that the trial court did not abuse its discretion in admitting [the expert witness'] testimony.

Id. at 394, 556 S.E.2d at 321-22.

We find the circumstances in *Carpenter* and the case *sub judice* to be substantially similar. In *Carpenter*, our Court held that a proper foundation for the expert witness' testimony was established when the expert testified that her testimony was based on literature, journal articles, training, and experience. Likewise, Wood testified that her testimony on delayed disclosures was grounded in her 200 hours of training, eleven years of forensic interviewing experience, conducting over 1,200 forensic interviews with 90% of those focusing on sex abuse allegations, and reviewing over twenty articles on delayed disclosures. Wood, like the expert in *Carpenter*, testified about delayed disclosures in general terms and did not express an opinion as to the alleged victim's credibility. We hold that *Carpenter* is still good law as it does not conflict with the reliability requirements of the *Daubert* standard. *See McGrady*, 368 N.C. at 888, 787 S.E.2d at 8.

Based on the foregoing, Wood's testimony on delayed disclosures was clearly based upon facts or data sufficient to satisfy the first prong of Rule 702(a), and the trial court did not abuse its discretion in admitting this testimony.

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Second, an expert's testimony must be the product of reliable principles and methods pursuant to Rule 702(a)(2). Defendant argues that Wood's testimony is not reliable because the research she relied upon was flawed in the following ways: they assumed participants were honest; they did not have any methods or protocols in place to screen out participants who made false allegations; and because there was no indication of how many participants might have lied, it was impossible to know the "error rate." Defendant also argues that when Wood provided a list of possible reasons why an alleged victim might delay disclosure, she did not account for the obvious alternative explanation that the abuse did not occur.

A careful review of the transcript establishes that these concerns were addressed throughout the examination and cross-examination of Wood and that Wood was able to provide detailed explanations for each.

During cross-examination by defense counsel on whether the research she had reviewed eliminated delayed disclosures that were based on false allegations of child sexual abuse, Wood testified, "I've looked at both research that deal with children who have identified a positive disclosure and a negative disclosure, and they both do talk about delayed disclosures that is found in – throughout the research." As to defendant's argument that the research assumed participants were honest, Wood explained that the research on delayed disclosures was not focused on making a determination of whether the alleged sexual abuse had in fact occurred:

[WOOD:] . . . In the research they are – the researchers, from my understanding, at least the research that I have read, are not asking if it's true or false; they're taking from the – their methodology, they're asking, whether children or adults, to become participants if they have been victims, and so they're already supposing that the participants are victims.

Regarding defendant's argument that there were no methods or protocols in place to screen out participants making false allegations and thus, no way to obtain an error rate, Wood explained that there was not an identifiable method to ascertaining whether the participants were in fact sexually abused:

[DEFENSE COUNSEL:] Okay. So they're supposing that they're victims but it's not ascertained.

[WOOD:] It's not. Based on the participants, the participants are saying –

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. . . .

[DEFENSE COUNSEL:] Right. And so there's no digging down beneath the surface to see if those participants are being truthful about being abused.

[WOOD:] You mean, like, are they making them take a lie detector test?

[DEFENSE COUNSEL:] Or doing anything to find out if they're being truthful.

[WOOD:] I don't know how else someone would find out the truth about child sexual abuse.

[DEFENSE COUNSEL:] Exactly. So in these studies there's no way to know whether the participants who delayed reporting delayed reporting of a false occurrence or a true occurrence.

[WOOD:] Well, I guess they are just going by what the participants are saying.

Wood's clarification demonstrated that obtaining the "known or potential rate of error" was not pertinent in assessing reliability based on the nature of delayed disclosures. *See McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (stating that the "precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony.").

When asked by defense counsel if the research Wood reviewed involved a scientific data or theory, Wood suggested that if one method would be the creation of a control group, an ethical question would be raised in the context of delayed disclosures: "it would be unethical to have a control group to abuse children and uncontrol group to not abuse children." She further explained that: "I think that the theories that I have found is, is that they took populations that the researchers have gathered in their research; and according to multiple research articles, some of those same theories cross all the research, is similar."

Lastly, in regards to defendant's argument that Wood did not account for alternative explanations of delayed disclosures, Wood's testimony reflected that she was identifying a non-exhaustive list of possible reasons:

[THE STATE:] [] What are some of the reasons that a child, based on research and experience, in general, may delay disclosure?

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. . . .

[WOOD:] There are *numerous* reasons. *Some* of them are due to fear Then, also, blame and self-guilt Also, concern that if they tell, what will happen to their family and so *some* of those are the reasons that children do not tell immediately.

(emphasis added).

In sum, defendant has failed to demonstrate that his arguments attacking the principles and methods of Wood’s testimony were pertinent in assessing the reliability of Wood’s testimony on delayed disclosures. *See Kumho*, 526 U.S. at 150, 143 L. Ed. 2d at 251-52 (stating that the *Daubert* factors “may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his [or her] testimony.”). Accordingly, we hold that Wood’s testimony was the product of reliable principles and methods sufficient to satisfy the second prong of Rule 702(a), and the trial court did not abuse its discretion in admitting this testimony.

B. Ineffective Assistance of Counsel

[2] In his second argument on appeal, defendant contends that he received ineffective assistance of counsel (“IAC”) when his attorney elicited evidence of guilt that the State had not introduced. Specifically, defendant argues that while the State only elicited testimony from H.M. about one instance of sexual intercourse with defendant, defense counsel asked H.M. a leading question implying that she had sex with defendant on two occasions.

Defendant directs us to the following exchange that occurred during defense counsel’s cross-examination of H.M.:

[DEFENSE COUNSEL:] So the first weekend that my client, according to you, inappropriately touched you and put his hands in your vagina and actually, you said, had sexual intercourse with you, you didn’t tell your dad, did you?

[H.M.:] No

. . . .

[DEFENSE COUNSEL:] So how many times are you saying that my client had actually put his penis inside of you, how many different nights?

[H.M.:] Two times.

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In the present case, the record is not sufficiently complete to determine whether defendant's IAC claim has merit. *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) ("IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . ."). "Trial counsel's strategy and the reasons therefor are not readily apparent from the record, and more information must be developed to determine if defendant's claim satisfies the *Strickland* test." *State v. Al-Bayyinah*, 359 N.C. 741, 753, 616 S.E.2d 500, 509-10 (2005), *cert. denied*, 547 U.S. 1076, 164 L. Ed. 2d 528 (2006). Accordingly, the claim is premature and we are obligated to dismiss it "without prejudice to the defendant's right to assert [it] during a subsequent MAR proceeding." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525.

C. Mistrial

[3] In his third argument, defendant contends that the trial court erred by failing to declare a mistrial *sua sponte* after H.M.'s father engaged in a "pattern of abusive and prejudicial behavior" during defendant's trial.

Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The 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. Gen. Stat. § 15A-1061 (2015). "It is well settled that a motion for a mistrial and the determination of whether defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion." *State v. McNeill*, 349 N.C. 634, 646, 509 S.E.2d 415, 422-23 (1998) (citation omitted), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999).

In the present case, defendant points to several instances of conduct by H.M.'s father which he contends disrupted the "atmosphere of judicial calm" to which he was entitled. The first instance occurred in October 2015 at defendant's original court date which was later rescheduled. The trial court judge had just informed the audience to "maintain proper courtroom decorum at all times." Thereafter, defense counsel informed the trial court as follows:

[DEFENSE COUNSEL:] Your Honor, related to that, I would ask the Court not just in the courtroom, but outside the courtroom. This morning the alleged victim's father in a very loud voice made some derogatory comments to me about my client.

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And since we're going to have jurors, prospective jurors in that hallway during the course of jury selection and the trial itself, I would ask the Court to instruct him not to do that in the hallway because jurors are everywhere in this courthouse.

The trial court judge responded by stating:

THE COURT: There is to be no contact; all right? And I expect that from everyone. Look, this is a – court's a place where trials are tried in the courtroom and not in the hallway. And I'm not going to have any type of intimidation by anybody take place, a witness, a party, the defendant, the victim. It's just not going to happen.

And if it's reported to me that it does occur, you have been warned and I will deal with it appropriately; all right?

The second instance occurred in April 2016, prior to the commencement of jury selection:

[DEFENSE COUNSEL:] Your Honor, one more thing. This is a security matter for the courtroom staff. I've been informed by [defendant] and his girlfriend, they are both present in court today, both are inside the courtroom, that [H.M.'s father] approached my client and said something to the effect of – pardon my French – but f*** with my daughter, I'm going to f*** with you then he was on the phone standing close enough that his comments could be heard on the phone saying if [H.M.'s] mother was still alive, [defendant] would be dead, and, finally, that I'm going to kill the motherf***er. So we had some of these issues six months ago when we started this trial, and they're popping up again, and I'm very concerned about him sort of threatening when they got here. And the police may be made aware of this later when we finish with court, but I just wanted the Court and staff to know about the security concerns that I have with my client and others.

THE COURT: I appreciate you making the courtroom and the court officers aware of that. All right.

Defendant also points to several occasions during H.M.'s father's testimony where he was "admonished" by the trial court:

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THE COURT: If you know what [defense counsel is] asking, answer. If you don't, say you don't know.

. . . .

THE COURT: Listen to [defense counsel's] question.

. . . .

THE COURT: Sir, wait for the next question, please.

. . . .

[DEFENSE COUNSEL:] So going back to the morning that you discovered this on February 22nd, you speak to police at the scene of the karate studio, and then it's another couple weeks before Detective Bridges follows up and does anything?

[H.M.'S FATHER:] Yeah. That's the good old Mecklenburg County court system, sir.

THE COURT: Sir, if I have to keep admonishing you one more time –

[H.M.'S FATHER:] I apologize.

THE COURT: I'm going to – don't interrupt me. – about answering these questions directly, I'm going [to] exclude you from this trial and strike your testimony from the record, and you're going to be out in the hallway. Do you understand me?

[H.M.'S FATHER:] Yes, sir.

THE COURT: All right. Let's – I'm tired of this. Answer the lawyers' questions directly. Don't throw in editorial comments, don't threaten the lawyers or anybody else in this courtroom, and answer these questions, and let's move on with this. I'm sorry, [defense counsel.] Go ahead.

The record demonstrates that in each of these instances, defendant did not request additional action by the trial court, defendant did not move for a mistrial, and defendant did not object to the trial court's method of handling the alleged misconduct in the courtroom. Accordingly, defendant has not preserved this argument for appellate review. *See State v. McCall*, 162 N.C. App. 64, 70, 589 S.E.2d 896, 900 (2004) (holding that the defendant failed to preserve for appellate review a claim that the trial

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court erred by failing to declare a mistrial *sua sponte* after it had been notified that individuals were making hand signals to the alleged victim, where defense counsel did not request further action by the trial court, the transcript did not indicate who was making the hand signals or what type of signals were given, and the defendant did not move for a mistrial or object to the trial court's handling of the alleged disruption); N.C. R. App. P. 10(a)(1) (2017) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

D. Trial Court's Ruling in Presence of Jury

[4] In his final argument on appeal, defendant asserts that the trial court impermissibly expressed an opinion on the evidence by denying defendant's motion to dismiss in the presence of the jury, in violation of N.C. Gen. Stat. § 15A-1222. Specifically, defendant argues that because the trial court's ruling was audible to the jury, the exchange was a "focal point" of the jury's short trip to the courtroom, and the jury was not made aware of the difference in the standards of proof necessary to survive a motion to dismiss as compared to obtaining a conviction, the trial court's ruling carried a substantial risk of prejudice. We are not convinced by defendant's arguments.

N.C. Gen. Stat. § 15A-1222 provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2015).

We find the holding in *State v. Welch*, 65 N.C. App. 390, 308 S.E.2d 910 (1983), to be controlling on this issue. The defendant in *Welch* argued that the trial court expressed an opinion, in violation of N.C. Gen. Stat. § 15A-1222, by summarily denying his motion to dismiss while in the presence of the jury. *Id.* at 393-94, 308 S.E.2d at 912. Our Court stated as follows:

The record, however, does not affirmatively disclose that the ruling was in fact audible to the jurors. Defendant did not seek to have the ruling made out of the presence of the jury, nor did he object or move for mistrial on this account at trial. Generally, ordinary rulings by the court in the course of trial do not amount to an impermissible expression of opinion. *State v. Gooche*, 58 N.C. App. 582, 586-87, 294 S.E.2d 13, 15-16, *modified on other grounds*, 307 N.C. 253, 297 S.E.2d 599 (1982). At most the ruling here

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merely informed the jury that the evidence was sufficient to allow it to decide the case. On this record no prejudice to defendant appears.

Id. at 393-94, 308 S.E.2d at 912-13.

The circumstances found in *Welch* are analogous to those found in the present case. At the close of the State's evidence and outside the presence of the jury, defendant made a motion to dismiss the remaining charges. The trial court denied this motion. The next day, following the presentation of defendant's evidence, defendant renewed his motion to dismiss while the jury was present. Again, the trial court denied his motion. Defendant did not seek to have the ruling made outside the presence of the jury, he did not object, and he did not move for a mistrial on this account. Accordingly, we hold that defendant's argument is meritless.

DISMISSED IN PART; NO ERROR IN PART.

Judges ELMORE and DIETZ concur.

UNION COUNTY, PLAINTIFF

v.

TOWN OF MARSHVILLE, DEFENDANT

No. COA17-37

Filed 5 September 2017

1. Appeal and Error—interlocutory orders and appeals—wastewater disposal—substantial right—governmental immunity inapplicable

Defendant town's appeal from an interlocutory order dismissing some, but not all, of plaintiff county's claims made in its dispute over the disposal of wastewater was dismissed where the town failed to show a substantial right was affected since its defense of governmental immunity was inapplicable.

2. Appeal and Error—interlocutory orders and appeals—wastewater disposal—substantial right—possibility of inconsistent verdicts

Defendant town's appeal from an interlocutory order dismissing its counterclaims in its dispute with plaintiff county over the

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disposal of wastewater was dismissed where the town failed to show a substantial right was affected since it never explained how its allegations of inconsistent verdicts could truly become realities.

Appeal by defendant from orders entered 24 and 27 October 2016 by Judge Robert C. Ervin in Union County Superior Court. Heard in the Court of Appeals 3 May 2017.

Erwin, Bishop, Capitano & Moss, PA, by J. Daniel Bishop and Scott A. Hefner, for plaintiff-appellee.

Turrentine Law Firm, PLLC, by Karlene S. Turrentine, and Stark Law Group, PLLC, by S.C. Kitchen, for defendant-appellant.

BERGER, Judge.

The Town of Marshville (“Defendant Town”) appeals from two orders ruling on motions made in its dispute with Union County (“Plaintiff County”) over the disposal of wastewater. The appealed orders are interlocutory, and Defendant Town must therefore establish grounds for appellate review. Interlocutory review of these orders is argued by Defendant Town to be proper because the orders affect the substantial rights of governmental immunity and the avoidance of the possibility of inconsistent verdicts, and these substantial rights would be lost without immediate review. Because Defendant Town is unable to establish that either ground for appellate review applies to the appealed orders, we dismiss as interlocutory.

Factual & Procedural Background

In 1978, Plaintiff County and Defendant Town entered into a contract under which the wastewater and sewage of Defendant Town was collected, transported, monitored, and treated in exchange for payment of the costs incurred by Plaintiff County to carry out these duties. Since 1981, when the municipal collection system became operational, the system has transported Defendant Town’s sewage up to thirty miles to the treatment plant owned by the City of Monroe.

Federal law requires that a user charge system be implemented under which each user pays a proportional share of the costs of operations and maintenance, which includes necessary replacement of capital assets. The 1978 Contract implemented the payment structure used by the parties. In 1994, an agreement was reached extending the contract term until 2011. In the early 2000’s, the system needed repair, to the point that

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state regulators required corrective action to be taken by the County. Between 2005 and 2011, Plaintiff County spent more than \$12 million in improving the system, although some of this cost was funded through federal grants.

In 2011, Plaintiff County notified Defendant Town that their contract term had ended. A new contract was proposed in 2012 to Defendant Town, but no agreement was reached. For several years both parties operated under the terms of the original contract. However, in 2014, Defendant Town ceased its payment of the required user fees for its use of the sewage system. It was for the collection of over \$467,000.00 of unpaid fees owed by Defendant Town that Plaintiff County filed this lawsuit on April 11, 2016.

Defendant Town moved to dismiss the lawsuit, denying any obligation in contract or restitution. It also filed counterclaims asserting equitable ownership of the sewage system. Plaintiff County responded by formally revoking its permission for Defendant Town to discharge its sewage into the county system. It also amended its complaint to add claims, and it sought a preliminary injunction against Defendant Town to stop any further discharge into its system. The parties then cross-filed a motion to dismiss by Defendant Town and for judgment on the pleadings by Plaintiff County.

On October 7, 2016, a motions hearing was held in Union County Superior Court. Three orders were entered as a result of the hearing. First, on October 10, the trial court entered a preliminary injunction order requiring the Defendant Town to cease discharging sewage into the system. This injunction order was previously appealed, but the parties entered into a consent order causing that appeal to be moot and it was therefore dismissed. Then, on October 24, the trial court entered an order on the Plaintiff County's motion for judgment on the pleadings. In this order, the trial court granted in part and denied in part the motion, dismissing the Defendant Town's counterclaims for constructive and resulting trust and those labeled "Exclusive Emoluments" and "Clean Water Act." Finally, on October 27, the trial court entered an order granting in part and denying in part the Defendant Town's motion to dismiss, allowing a breach of contract claim to continue, but dismissing a separate breach claim and an unjust enrichment claim. It is from these last two orders that Defendant Town appeals.

Analysis: Grounds for Appellate Review

"The appeals process is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the

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whole case for determination in a single appeal from the final judgment.” *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (citation and quotation marks omitted).

North Carolina General Statutes Sections 1-277 and 7A-27 provide “that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment.” *Consumers Power v. Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974) (citations omitted). “An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy.” *Peterson v. Dillman*, ___ N.C. App. ___, ___, 782 S.E.2d 362, 365 (2016) (citation omitted). “Accordingly, interlocutory appeals are discouraged except in limited circumstances.” *Stanford*, 364 N.C. at 311, 698 S.E.2d at 40 (citations omitted).

The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature. Thus, the extent to which an appellant is entitled to immediate interlocutory review of the merits of his or her claims depends upon his or her establishing that the trial court’s order deprives the appellant of a right that will be jeopardized absent review prior to final judgment.

Richmond Cnty. Bd. of Educ. v. Cowell, 225 N.C. App. 583, 585, 739 S.E.2d 566, 568, *disc. review denied*, 367 N.C. 215, 747 S.E.2d 553 (2013) (citations and quotation marks omitted). “[T]he appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.” *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted).

This requirement that appellant establish a right to review is codified in our Appellate Rules. Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires that an appellant’s brief include, *inter alia*:

A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement must contain sufficient facts

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and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C.R. App. P. 28(b)(4) (2017).

[1] As grounds for appellate review of the first order dismissing some, but not all, of Plaintiff County's claims pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, Defendant Town asserts that the trial court erred in not dismissing Plaintiff County's remaining tort claims because governmental immunity shields it from liability. Generally, "[u]nder the doctrine of governmental immunity, a county or municipal corporation is immune from suit for the [torts committed by] its employees in the exercise of governmental functions absent waiver of immunity." *Estate of Williams v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (citations and quotation marks omitted).

However, governmental immunity has limits, and it is inapplicable here as a defense to the tort claims asserted by Plaintiff County.

Governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions. Governmental immunity does not, however, apply when the municipality engages in a proprietary function. In determining whether an entity is entitled to governmental immunity, the result therefore turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature.

We have long held that a "governmental" function is an activity that is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself. A "proprietary" function, on the other hand, is one that is commercial or chiefly for the private advantage of the compact community.

Id. at 199, 732 S.E.2d at 141 (citations, emphasis, quotation marks, and brackets omitted).

"The law is clear in holding that the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees for the maintenance of sewer lines." *Harrison v. City of Sanford*, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676, *disc. review denied*, ___ N.C. ___, 639 S.E.2d 649 (2006) (citations omitted). *See also Bostic*

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Packaging, Inc. v. City of Monroe, 149 N.C. App. 825, 829, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002) (in reversing summary judgment of claims dismissed on governmental immunity grounds, we held “defendant [town] is not immune from tort liability in the operation and maintenance of its sewer system”). Regardless of the clarity of North Carolina law, Defendant Town herein appeals to have this Court apply governmental immunity to claims that arose out of the operation of its sewer system. We decline to do so, and Defendant Town is, thus, unable to establish grounds for our interlocutory review because governmental immunity does not apply. We therefore dismiss this portion of the appeal.

[2] Defendant Town’s second argument on appeal is not grounded in governmental immunity, but rather addresses the order dismissing its counterclaims as affecting its substantial right to avoid inconsistent verdicts. In attempting to establish grounds for our review of the second order, which ruled on Plaintiff County’s motion for judgment on the pleadings pursuant to Rules 12(c) and (h)(2) of the North Carolina Rules of Civil Procedure, Defendant Town makes a circular argument. Defendant Town asserts that (1) the trial court erred in dismissing its counterclaims; (2) a successful appeal of the dismissal order based on the merits of the counterclaims could possibly create inconsistent verdicts; (3) the avoidance of inconsistent verdicts is a substantial right; (4) a substantial right establishes grounds for appellate review; and, therefore, (5) because there are grounds for appellate review, this Court should review the merits of the dismissed counterclaims.

To support its argument that immediate appeal from an otherwise un-appealable interlocutory order is proper, Defendant Town only cites *Hartman v. Walkertown Shopping Center*, in which we stated that “[t]he right to avoid the possibility of two trials on the same issues can be a substantial right. A judgment which creates the possibility of inconsistent verdicts on the same issue – in the event an appeal eventually is successful – has been held to affect a substantial right.” *Hartman*, 113 N.C. App. 632, 634, 439 S.E.2d 787, 789, *disc. review denied*, 336 N.C. 780, 447 S.E.2d 422 (1994) (citations, emphasis, brackets, and ellipses omitted). However, the order appealed from in *Hartman* could have had the effect of bifurcating adjudication of “identical factual claims” into distinct, and potentially inconsistent, resolutions for different defendants, although similarly situated. *Id.* Our facts differ, and *Hartman* is inapplicable.

Although Defendant Town argues that, if its appeal is successful, there could be the potential for inconsistent verdicts on the issues

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here, it never explains how these inconsistent verdicts about which it complains could truly become realities. This Court will not construct appellant's arguments in support of a right to interlocutory appeal. *Jeffreys*, 115 N.C. App at 380, 444 S.E.2d at 254 (citations omitted). This argument does not establish grounds for appellate review and we dismiss this portion of the appeal as well.

Conclusion

For the reasons given above, Defendant Town has not established grounds for appellate review for either challenged order. Therefore, this appeal is dismissed as interlocutory.

DISMISSED.

Judges ELMORE and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 SEPTEMBER 2017)

BOWDEN v. WASHBURN No. 16-1288	Harnett (16CVD1232)	Affirmed
BULLARD v. PRIME BLDG. CO., INC. No. 16-1279	Robeson (15CVS2084)	Affirmed
CARTER v. BARNES TRANSP No. 16-627	N.C. Industrial Commission (W69306)	Affirmed
DALY v. DALY No. 16-885	Lee (15CVD276)	Affirmed
EAGLE v. EAGLE No. 16-1315	Buncombe (14CVD3600)	Dismissed
FORTNER v. HORNBUCKLE No. 17-44	Swain (11CVS137)	No Error
HOLBERT v. BLANCHARD No. 17-134	Buncombe (12CVS2333)	Affirmed
IN RE A.J.S. No. 17-205	Forsyth (15JT15)	Affirmed
IN RE A.L.H. No. 16-1251	Catawba (15JT36)	Vacated and Remanded
IN RE A.M.S. No. 17-149	Edgecombe (15JT72)	Reversed
IN RE D.M.P. No. 17-297	Wake (15JT276)	Affirmed
IN RE G.M. No. 17-174	Wake (12JA313)	Affirmed
IN RE K.G.M. No. 17-304	Burke (09JT76)	Affirmed
IN RE M.H. No. 17-255	New Hanover (16JA232)	Vacated and Remanded
IN RE O.S.R. No. 16-958	Yadkin (11JB39)	Vacated in part and Remanded

IN RE S.S.T. No. 17-261	Burke (15JT100)	Affirmed
IN RE T.L.M. No. 17-189	Onslow (14JT22-23)	Affirmed in Part; Remanded in Part.
JACKSON v. CENTURY MUT. INS. CO. No. 16-997	Forsyth (14CVS7263)	Affirmed
KELLEY v. ANDREWS No. 17-20	Durham (13CVS5618)	Affirmed
KHASHMAN v. KHASHMAN No. 16-765	Mecklenburg (14CVS21105)	Affirmed
STATE v. ALLEN No. 16-1147	Union (12CRS52763-64)	No Error
STATE v. BATISTE No. 16-1186	Cumberland (14CRS59675)	Reversed
STATE v. BOOKER No. 16-1142	Cumberland (15CRS1623-27)	Vacated and Remanded
STATE v. BYRD No. 16-1025	Alamance (15CRS54988-89)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. CARLTON No. 17-36	Wilkes (15CRS51294) (15CRS527-28)	No Error
STATE v. CLEGG No. 17-76	Wake (14CRS202101)	No Error
STATE v. GOFF No. 17-34	Lenoir (15CRS1175) (15CRS50953) (15CRS51096) (15CRS668-71)	Affirmed
STATE v. McCOY No. 16-1099	Alamance (13CRS53245)	No error in part; vacated in part; remand in part.
STATE v. SMITH No. 17-93	Nash (14CRS54642) (15CRS1112)	Vacated in part, No error in part
STATE v. ST. CLAIR No. 16-1003	Washington (15CRS50180)	No Error

STATE v. TILGHMAN
No. 17-27

New Hanover
(15CRS4541)
(15CRS52868-69)

Dismissed in Part;
No Error in Part;
No Plain Error in Part

ULI v. ULI
No. 16-1301

Cabarrus
(12CVD1023)

Reversed and
Remanded

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[255 N.C. App. 451 (2017)]

BLUE RIDGE HEALTHCARE HOSPITALS INC. D/B/A CAROLINAS HEALTHCARE
SYSTEM – BLUE RIDGE, PETITIONER

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION
OF HEALTH SERVICE REGULATION, HEALTHCARE PLANNING AND CERTIFICATE
OF NEED SECTION, RESPONDENT

AND

CALDWELL MEMORIAL HOSPITAL, INC. AND SCSV, LLC, RESPONDENT-INTERVENORS

No. COA17-137

Filed 19 September 2017

1. Hospitals and Other Medical Facilities—operating rooms—certificate of need—agency criteria—geographic scope

In case involving the opening of an ambulatory surgical center and the issue of geographic scope, the hospital challenging the new surgical center did not meet its burden of showing that the Department of Health and Human Services' (the Agency's) interpretation and application of N.C.G.S. § 131E-183(a) was unreasonable or based on an impermissible construction of the statute. The Agency used its articulated and established practice of applying the standards and definitions set forth in the Administrative Code for determining certificates of need.

2. Hospitals and Other Medical Facilities—certificate of need—operating rooms—criteria—duplicate facts

In an action arising from a certificate of need (CON) proceeding for an ambulatory surgical center, the hospital did not show that the Department of Health and Human Services failed to perform an independent review and application of a criterion when it relied on facts used for other criteria.

3. Hospitals and Other Medical Facilities—certificate of need—ambulatory surgical center—financial and operational projections

The Department of Health and Human Services did not err in a certificate of need (CON) proceeding involving an ambulatory surgical center in its consideration of the criteria involving financial and operational projections. Although the hospital objecting to the ambulatory surgical center contended that this criteria was not satisfied because the application for the CON contained no documentation of the builder's financing or funding source, the application was not required to show the builder's source of funding for the construction of the shell building.

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4. Hospitals and Other Medical Facilities—certificate of need—ambulatory surgical center—prejudice

The lack of prejudice to the objecting hospital provided an alternative basis for affirming a certificate of need for an ambulatory surgical center. Normal competition does not constitute a showing of substantial prejudice from a certificate of need.

Appeal by petitioner from Final Decision entered 3 October 2016 by Administrative Law Judge Selina Malherbe Brooks in the North Carolina Office of Administrative Hearings. Heard in the Court of Appeals 23 August 2017.

Smith Moore Leatherwood LLP, by Maureen Demarest Murray, Carrie A. Hanger and Matthew Nis Leerberg, for petitioner-appellant Blue Ridge Healthcare Hospitals, Inc. d/b/a Carolinas Healthcare System – Blue Ridge.

Attorney General Joshua H. Stein, by Assistant Attorney General Jill A. Bryan and Special Deputy Attorney General June Ferrell, for respondent-appellee North Carolina Department of Health and Human Services.

Williams Mullen, by Joy Heath and Elizabeth D. Scott, for respondent-intervenors-appellees Caldwell Memorial Hospital, Inc. and SCSV, LLC.

TYSON, Judge.

Blue Ridge Healthcare Hospitals, Inc. d/b/a Carolinas Healthcare System – Blue Ridge (“Blue Ridge”) appeals from a final decision of the Administrative Law Judge (“ALJ”), which granted summary judgment in favor of the North Carolina Department of Health and Human Services (“DHHS”), Caldwell Memorial Hospital, Inc. (“Caldwell Memorial”), and SCSV, LLC. We affirm.

I. Background

A. Caldwell Memorial

Caldwell Memorial is a not-for-profit community hospital located in Lenoir, North Carolina, which became part of the UNC Health Care System in 2013. Caldwell Memorial operates and maintains eight operating rooms, which are the only operating rooms located in Caldwell County. Three of the operating rooms are located at Hancock Surgery

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Center (“HSC”), which is housed in an older building previously used as a shopping center. HSC is located approximately 0.6 miles from Caldwell Memorial, and is licensed as part of Caldwell Memorial.

In July 2015, Caldwell Memorial and SCSV, LLC (collectively, “Caldwell Memorial”) filed a Certificate of Need (“CON”) application with DHHS’s Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section (“the Agency”), seeking approval to establish Caldwell Surgery Center (“CSC”), a new separately-licensed ambulatory surgery center to be located in Granite Falls, one to two miles from the southern border of Caldwell County.

Caldwell Memorial seeks to create a second point of surgery access within a more densely populated area of Caldwell County in addition to the city of Lenoir. Ambulatory surgical centers are capable of offering surgical services to patients at a purported lower cost than surgeries performed inside of hospitals. Caldwell Memorial asserts an ambulatory surgery center is suited to attract and retain capable surgeons by offering physician investment opportunities, which are not available in hospital operating rooms. The propriety of this investment opportunity is not before us.

The total inventory of currently licensed operating rooms located in Caldwell County would not change as a result of Caldwell Memorial’s proposal. Caldwell Memorial had sought previous approval in 2014 to relocate the three operating rooms from HSC to CSC, but the Agency denied the CON application.

B. Blue Ridge

Blue Ridge maintains and operates six operating rooms at its Morganton hospital campus and four operating rooms at its Valdese hospital campus. It submitted written comments in opposition to the application, and participated in the public hearing held in September 2015. Blue Ridge had also submitted its objections to Caldwell Memorial’s previous CON applications. Two other hospitals and an ambulatory surgery center in the extended geographical area also submitted comments in opposition to Caldwell Memorial’s applications.

The proposed site for CSC is five miles from both Viewmont Surgery Center and Frye Medical Center, twelve miles from Catawba Valley Medical Center, and eleven miles from Blue Ridge’s Valdese hospital campus. All of these facilities possessed surgical capacity during the Agency’s review. Viewmont Surgery Center in Catawba County is the only multi-specialty ambulatory surgery center in the area, but does not

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offer the surgical specialties proposed in Caldwell Memorial's CON application, such as spine and vascular surgery. Blue Ridge notes the existence of a significant surplus of operating rooms in Caldwell, Burke, and Catawba Counties in support of its opposition to Caldwell Memorial's application.

C. Agency and ALJ Decision

By letter dated 28 December 2015, the Agency notified Caldwell Memorial of its decision to conditionally approve its application to establish the ambulatory surgery center. On 29 January 2016, Blue Ridge filed a petition for a contested case hearing in the Office of Administrative Hearings ("OAH") and challenged the Agency's decision to approve Caldwell Memorial's CON application. *See* N.C. Gen. Stat. § 131E-188(a) (2015) (providing any "affected person" is entitled to bring a contested case challenging the agency's decision on a CON application); N.C. Gen. Stat. § 131E-188(c) (defining "affected person" to include "any person who provides services, similar to the services under review, to individuals residing within the service area or geographic area proposed to be served by the applicant"). The ALJ permitted Caldwell Memorial and Frye Regional Medical Center, LLC ("Frye") to intervene.

Caldwell Memorial and the Agency moved for summary judgment before the OAH on 9 September 2016. Blue Ridge and Frye opposed the motion. By final decision entered on 3 October 2016, the ALJ granted summary judgment in favor of Caldwell Memorial and the Agency. Blue Ridge appeals.

II. Jurisdiction

Jurisdiction lies in this Court from the final decision of the ALJ pursuant to N.C. Gen. Stat. §§ 131E-188(b) and 7A-27(a) (2015).

III. Issues

Blue Ridge argues the Agency erred by ignoring or applying certain criteria set forth in N.C. Gen. Stat. § 131E-183 when it approved Caldwell Memorial's CON application and asserts genuine issues of material fact exist regarding the conformity of the CON application with the statutory review criteria.

IV. Standard of Review

The North Carolina Administrative Code governs our review of the ALJ's decision, and provides:

(b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It

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may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. . . .

(d) In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. . . .

N.C. Gen. Stat. § 150B-51 (2015).

“This Court has interpreted subsection (a) to mean that the ALJ in a contested case hearing must determine whether the petitioner has met its burden in showing that the agency substantially prejudiced the petitioner’s rights. . . . [and] that the agency erred in one of the ways described above.” *Surgical Care Affiliates, LLC v. N.C. Dep’t of Health & Human Servs.*, 235 N.C. App. 620, 624, 762 S.E.2d 468, 471 (2014) (citation, quotation marks, and brackets omitted).

Here, Blue Ridge appeals from the ALJ’s order granting summary judgment. Summary judgment is properly entered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

The evidence “must be viewed in a light most favorable to the non-moving party.” *Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 136, 757 S.E.2d 302, 304, *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014) (citation omitted). “The party seeking summary judgment bears

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the initial burden of demonstrating the absence of a genuine issue of material fact. If the movant successfully makes such a showing, the burden then shifts to the nonmovant to come forward with specific facts establishing the presence of a genuine factual dispute for trial.” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citations omitted).

“We review [the ALJ’s] order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and internal quotation marks omitted).

V. Agency’s Application of N.C. Gen. Stat. § 131E-183 Criteria

Our General Assembly recognized that potential and projected profits would drive the development of medical facilities and services in the marketplace. The General Assembly concluded the public is best served by having access to affordable healthcare that is distributed throughout the State based upon certificates of need. *See* N.C. Gen. Stat. § 131E-175(1)-(4) (2015). Otherwise, an over-abundance of facilities in certain areas would “lead[] to unnecessary use of expensive resources and overutilization of health care services” and result in greater costs to the public. *See* N.C. Gen. Stat. § 131E-175(4), (6)-(10).

The Agency’s decision to approve an applicant’s CON is based upon the Agency’s determination of whether the applicant has complied with the list of review criteria set forth in N.C. Gen. Stat. § 131E-183(a). “The [Agency] shall review all applications utilizing the criteria outlined in this subsection and shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued.” N.C. Gen. Stat. § 131E-183(a) (2015); *see also Parkway Urology, P.A., v. N.C. Dep’t of Health & Human Servs.*, 205 N.C. App. 529, 534, 696 S.E.2d 187, 191-92 (2010), *disc. review denied*, 365 N.C. 78, 705 S.E.2d 753 (2011).

A. Geographic Scope of Agency’s Review

[1] Blue Ridge argues the agency incorrectly limited its analysis of Criteria 3, 3a, 4, and 6 to the circumstances in Caldwell County, and did not consider any facilities, utilization, needs of the population, or circumstances in any of the other counties from which Caldwell Memorial is projected to draw patients to the new facility.

Blue Ridge further asserts the Agency failed to assess how the needs of patients from other counties would be met by the proposed relocation

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of operating rooms or how they would be impacted by physicians' plans to perform cases and procedures at the new facility, resulting in the reduction of services provided at facilities in other counties.

The four criteria of N.C. Gen. Stat. § 131E-183(a) at issue requires the following of the CON applicant:

(3) The applicant shall identify the *population to be served* by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

(3a) In the case of a reduction or elimination of a service, including the relocation of a facility or a service, the applicant shall demonstrate that *the needs of the population presently served* will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care.

(4) Where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed.

. . . .

(6) The applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.

N.C. Gen. Stat. § 131E-183(a) (emphasis supplied).

While Criterion 3 requires identification of the "population to be served" and the "need that this population has for the services proposed," the statute does not set forth the precise method by which this analysis is to be performed. Criterion 3 does not set forth guidance concerning the geographical location of the "population to be served" or the "area." N.C. Gen. Stat. § 131E-183(a)(3). Caldwell Memorial's CON application projected that 50.2% of the new facility's operating room's patients would come from Caldwell County, and 49.8% would come

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from outside of Caldwell County. For the procedure room, only 38.52% of the patients are projected to come from Caldwell County and 61.48% from elsewhere.

Similarly, Criterion 3a requires identification and an analysis of the “population presently served,” which includes patients from a multi-county area. N.C. Gen. Stat. § 131E-183(3a). Blue Ridge argues the Agency limited its analysis of the reduction in services to facilities and patients located within Caldwell County, and ignored the impact on medically underserved groups in other counties, who would be required to travel farther to the new facility.

Criteria 4 and 6 also do not set forth any geographical scope for the Agency’s analysis. With regard to Criterion 4, Blue Ridge asserts the Agency improperly limited its analysis of whether Caldwell Memorial “demonstrate[d] that the least costly or most effective alternative has been proposed,” where alternative methods for meeting the proposed project’s needs exist. N.C. Gen. Stat. § 131E-183(a)(4).

Finally, Blue Ridge asserts the Agency ignored the numerous surgical facilities located in Burke County, very near to the proposed site of the Granite Falls facility, in applying Criterion 6 to determine whether Caldwell Memorial demonstrated the “project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.” N.C. Gen. Stat. § 131E-183(a)(6).

Blue Ridge relies upon this Court’s decision in *AH N.C. Owner LLC v. N.C. Dep’t of Health & Human Servs.*, 240 N.C. App. 92, 771 S.E.2d 537 (2015). That case dealt with the Agency’s interpretation of Criterion 20 of N.C. Gen. Stat. § 131E-183(a), which states “[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past.” N.C. Gen. Stat. § 131E-183(a)(20).

This Court recognized, “[b]ecause the General Assembly has not articulated with specificity how the Agency should determine an applicant’s conformity with Criterion 20, *the Agency was authorized to establish its own standards* in assessing whether an applicant that was already involved in providing health care services had provided quality care in the past.” *AH N.C. Owner*, 240 N.C. App. at 100, 771 S.E.2d at 542 (emphasis supplied).

In *AH N.C. Owner*, the Agency reviewed multiple competing CON applications, which proposed to expand the number of nursing home beds in Wake County in response to a determination of need. *Id.* at 95, 771 S.E.2d at 539. Consistent with the Agency’s prior practice, it

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evaluated each applicant's conformity with Criterion 20 by examining each applicant's history of quality of care solely within Wake County, which resulted in an evaluation of past quality of care for those applicant's who already operated facilities in Wake County. *Id.* at 101, 771 S.E.2d at 542-43. The ALJ rejected the Agency's limit of its review of Criterion 20 to only Wake County. *Id.*

This Court explained:

As the ALJ noted, certain review criteria in N.C. Gen. Stat. § 131E-183(a) are specifically limited to the service area of the proposed project. Criterion 18a, for example, requires the applicant to “demonstrate the expected effects of the proposed services on competition *in the proposed service area . . .*” N.C. Gen. Stat. § 131E-183(a)(18a) (emphasis added). Criterion 20, on the other hand, contains no such geographic limitation.

It is well established that in order to determine the legislature's intent, statutory provisions concerning the same subject matter must be construed together and harmonized to give effect to each. *Cape Hatteras Elec. Membership Corp. v. Lay*, 210 N.C. App. 92, 101, 708 S.E.2d 399, 404 (2011). Furthermore, as this Court has previously explained, “[w]hen a legislative body includes particular language in one section of a statute but omits it in another section of the same [statute], it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion.” *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (citation, quotation marks, and brackets omitted).

Id. at 111, 771 S.E.2d at 548-49 (alterations in original).

This Court affirmed the ALJ and held “basic principles of statutory construction support the ALJ's conclusion that the General Assembly did not intend for the Agency's evaluation of an applicant's past quality of care to be limited to the service area of the proposed project.” *Id.* at 112, 771 S.E.2d at 549.

As specifically stated in *AH N.C. Owner*, the Agency is authorized to “establish its own standards” to determine whether the applicant met the requirements of the statutory criteria. *Id.* at 100, 771 S.E.2d at 542. “It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should *defer to the agency's*

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interpretation of the statute . . . as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006) (citations omitted) (emphasis supplied).

"If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Cty. of Durham v. N.C. Dep't of Env't & Natural Res.*, 131 N.C. App. 395, 397, 507 S.E.2d 310, 311 (1998) (citation, quotation marks, and brackets omitted), *disc. review denied*, 350 N.C. 92, 528 S.E.2d 361 (1999).

Our decision in *AH N.C. Owner* is distinguishable and does not control our analysis and outcome here. In that case, in "consider[ing] whether deference should be accorded to the Agency's interpretation of . . . the appropriate geographic scope of the quality of care assessment required under Criterion 20," the Court determined the existence of "no logical basis for disregarding such information evidencing quality of care on a statewide level[.]" and "such a policy actually contravenes one of the primary purposes of the CON laws." *AH N.C. Owner*, 240 N.C. App. at 110-13, 771 S.E.2d at 548-49. The Court further stated, "[s]ignificantly . . . Agency employees were unable to identify a plausible justification for its past interpretation of the geographic scope element of Criterion 20." *Id.* at 113, 771 S.E.2d at 549.

Here, unlike in *AH N.C. Owner*, Martha Frisone, Assistant Chief of the DHHS's CON section, testified by deposition that "it has long been Agency practice to use the same standards duly promulgated in the [administrative] rules when evaluating the statutory criteria, which don't [sic] contain any standards at all[.]" The Agency's practice is consistent with the law.

N.C. Gen. Stat. § 131E-183(b) specifically states the Agency "is authorized to adopt rules for the review of particular types of applications that will be used in addition to those criteria outlined in subsection (a) . . . and may vary according to the purpose for which a particular review is being conducted or the type of health service reviewed." *See Craven*, 176 N.C. App. at 51, 625 S.E.2d at 841 (recognizing "the Agency has adopted rules to be used as regulatory criteria *in conjunction with* Criterion 3" (emphasis supplied)).

Ms. Frisone further stated:

Where a patient goes and where a surgeon goes is surgeon and patient choice. And so the need methodology itself for

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determining a need for additional ORs does not take into account surpluses in adjoining counties, and we don't take them into account either in reviewing a – certainly not in reviewing a proposal to relocate two existing dedicated outpatient ORs and license them separately as an AMSU, which would reduce the cost for the patient.

Ms. Frisone explained the Agency reviewed the statutory criteria in conjunction with the provisions of the North Carolina Administrative Code, which state the requirements an applicant must meet to establish need for operating rooms and ambulatory surgical facilities. *See* 10A N.C.A.C. 14C.2101 *et seq.* Title 10A, Subchapter 14C of the Administrative Code sets forth the “Certificate of Need Regulations.”

Section 2100 states the “criteria and standards for surgical services and operating rooms,” and defines “service area” as “the Operating Room Service Area as defined in the applicable State Medical Facilities Plan [‘SMFP’].” 10A N.C.A.C. 14C.2101(10). In 2015, the SMFP defined “service area” as “the operating room planning area in which the operating room is located. The operating room planning areas are the single and multicounty groupings shown in Figure 6-1.” Figure 6-1 of the SMFP shows Caldwell County as a single county operating room service area.

Unlike in *AH N.C. Owner*, the Agency used its articulated and established practice of applying the standards and definitions set forth in the Administrative Code for determining certificates of need, where N.C. Gen. Stat. § 131E-183(a) is silent on the geographic scope of the Agency’s review. Giving deference to the Agency’s procedures and practice, we hold Blue Ridge has failed to meet its burden to show the Agency’s interpretation and application of N.C. Gen. Stat. § 131E-183(a) is unreasonable or based on an impermissible construction of the statute. *Craven*, 176 N.C. App. at 58, 625 S.E.2d at 844. Blue Ridge’s argument is overruled.

B. Application of Criterion 6

[2] Blue Ridge argues the Agency failed to apply Criterion 6 as an independent criterion, where the findings under Criterion 6 simply repeat findings under other criteria. Blue Ridge bases its claim upon the inclusion of the following language in the Agency’s findings for Criterion 6: “The discussions regarding analysis of need, alternatives and competition found in Criteri[a] (3), (4) and (18a), respectively, are incorporated herein by reference.” The Agency concluded Caldwell Memorial “adequately demonstrate[s] that the proposed project would not result in the unnecessary duplication of existing or approved ORs in Caldwell County.”

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Ms. Frisone explained that the Agency evaluates each criterion independently, and frequently relies upon the same facts in making its determination under each criterion. The Agency is permitted to rely upon the same facts and evidence in reviewing multiple criteria. Blue Ridge has failed to show the Agency failed to undertake an independent review and application of Criterion 6.

C. Application of Criterion 5

[3] Blue Ridge argues the Agency erred in its application of Criterion 5, which requires Caldwell Memorial to show:

(5) Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

N.C. Gen. Stat. § 131E-183(a)(5).

Criterion 5 requires an applicant to demonstrate: (1) the availability of funds for capital and operating needs, and (2) the financial feasibility of the proposal based upon the applicant's reasonable projections. *Id.*

The Agency must “determine the availability of funds for the project from the entity responsible for the funding[.]” *Retirement Villages, Inc. v. N.C. Dep’t of Human Res.*, 124 N.C. App. 495, 498, 477 S.E.2d 697, 699 (1996). “[I]n cases where the project is to be funded other than by the applicants, the application must contain evidence of a commitment to provide the funds by the funding entity.” *Id.* at 499, 477 S.E.2d at 699. “Without a commitment, an applicant cannot adequately demonstrate availability of funds or the requisite financial feasibility.” *Johnston Health Care Ctr., L.L.C. v. N.C. Dep’t of Human Res.*, 136 N.C. App. 307, 313, 524 S.E.2d 352, 357 (2000). “[T]he above statutory criterion does not require the submission of financial statements by the applicants. It merely requires the Agency to determine the availability of funds for the project from the entity responsible for funding, which may or may not be an applicant.” *Retirement Villages*, 124 N.C. App. at 498-99, 477 S.E.2d at 699.

In its CON application, Caldwell Memorial asserted the CSC shell building would be constructed by Brackett Flagship Properties, LLC (“BFP”). BFP would create a limited liability company to serve as the landlord and lease the property to Caldwell Memorial. Caldwell Memorial would be responsible for the design and upfit of the building.

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Caldwell Memorial estimated the total cost associated with the building to be \$4,350,000.00.

The Agency determined that total capital cost of the project will be \$3,650,000.00, and the working capital costs will be \$700,000.00. Caldwell Memorial provided a letter dated 8 July 2015 from a Vice President of First Citizens Bank, which includes two term sheets of the proposed financing for the project. One shows the financing for the capital costs of \$3,650,000.00 and the other shows the financing for the working capital costs of \$700,000.00.

Caldwell Memorial also provided a letter dated 8 July 2015 from appellant SCSV, LLC, which stated SCSV was committed to utilizing the funding provided by the bank to develop the facility. Caldwell Memorial provided another letter from its vice president and chief financial officer, which confirmed that Caldwell Memorial is committed to financing a portion of the capital costs in the amount of \$150,000.00, and the hospital has sufficient funds on hand to cover this cost. The Agency concluded Caldwell Memorial “adequately demonstrate[d] that sufficient funds will be available for the capital and working capital needs of the project,” and “that the financial feasibility of the proposal is based upon reasonable projections of costs and charges.”

Blue Ridge argues the Agency erred in determining Criterion 5 was satisfied where Caldwell Memorial’s CON application contained no documentation of BFP’s finances or funding source. We disagree.

Our Court has determined similar arrangements to be in conformity with the requirements of Criterion 5. In *Total Renal Care of N.C., LLC v. N.C. Dep’t of Health & Human Servs.*, 171 N.C. App. 734, 615 S.E.2d 81 (2005), the Agency awarded a CON to Bio-Medical Applications (“BMA”) for ten kidney dialysis machines, to be located inside a building to be leased from a lessor, who would “upfit, install, and build” the building. *Id.* at 735-36, 615 S.E.2d at 82. The ALJ determined BMA’s application was non-conforming to Criterion 5, because BMA had failed to include the future lessor as an applicant. *Id.* This Court overruled the ALJ and upheld the Agency’s determination that BMA was not required to name the lessor as an applicant, and BMA’s CON application was in conformity with the statutory criteria. *Id.* at 739, 615 S.E.2d at 84.

Caldwell Memorial’s costs to lease the building, upfit and house the ambulatory surgery center are properly asserted and accounted for. Its application separately documented the availability and commitment of funds for the acquisition of the specialized medical equipment necessary to develop and improve the ambulatory surgery center in the shell

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building. Caldwell Memorial was not required to show a source of funding for BFP's construction of the shell building. *See id.* Blue Ridge's argument is overruled.

VI. Substantial Prejudice

[4] As an alternate basis to affirm the ALJ's decision, it is well-established that "when the petitioner alleges [agency error], the petitioner *must also* prove . . . substantial prejudice." *Surgical Care Affiliates*, 235 N.C. App. at 628, 762 S.E.2d at 473-74. Even if the Agency erred in its application of the statutory criteria in reviewing Caldwell Memorial's CON, Blue Ridge has also failed to meet its burden of showing prejudice in the Agency's decision to grant the CON to reverse the ALJ's decision.

The Agency determined that Caldwell Memorial's proposed project does not involve the addition of any new health service facility beds, services, or equipment. The project involves relocating three existing operating rooms from HSC to a separately licensed and freestanding ambulatory surgical facility. The Agency determined Caldwell Memorial owns and operates all eight operating rooms in Caldwell County, and there are no existing ambulatory surgical facilities in Caldwell County. The total number of operating rooms currently located in Caldwell County will not change. Only how those operating rooms are licensed, and where they are located within Caldwell County, will change under the CON.

Blue Ridge argues it would lose patients and profits due to the approval of the CSC facility. Blue Ridge asserts Dr. Jason Zook, a spine surgeon who operates at Blue Ridge's facility, has expressly stated he intends to direct all of his surgeries to CSC in Granite Falls. Blue Ridge asserts it has spent significant funds in recruiting Dr. Zook and establishing Blue Ridge's spine surgery program. Blue Ridge also argues its other services, specifically the neonatal and emergency services, would be compromised by losing the profits provided by Dr. Zook's surgeries.

Our Court has explained that adopting Blue Ridge's argument "would have us treat any increase in competition resulting from the award of a CON as inherently and substantially prejudicial to any pre-existing competing health service provider in the same geographic area. This argument would eviscerate the substantial prejudice requirement contained in N.C. Gen. Stat. § 150B-23(a)." *Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195.

As in the present case, the appellant in *CaroMont Health, Inc. v. N.C. Dep't of Health & Human Servs.*, 231 N.C. App. 1, 8, 751 S.E.2d

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244, 249 (2013), asserted that specific evidence of financial harm resulting from the award of a CON constitutes a showing of substantial prejudice. This Court rejected the argument in *CaroMont* and held that such a physician-directed “shift” of cases is “normal competition.” *Id.* at 8, 751 S.E.2d at 250.

The Court explained that the claim of harm arose “solely out of the fact that competition would be increased by virtue of the authorization of two additional GI endoscopy rooms located in Gaston County” so “patients and doctors in Gaston County would now have a choice between CaroMont’s facilities and another separate facility also located in Gaston County.” *Id.* at 9, 751 S.E.2d 250. As in *CaroMont*, Blue Ridge has asserted harm from normal competition, which does not constitute a showing of substantial prejudice from the Agency’s allowance of the CON. *Id.*

Blue Ridge’s failure to show substantial prejudice is also fatal to its contested case. The ALJ correctly granted summary judgment in favor of the Agency and upholding the Agency’s approval of the CON for Caldwell Memorial.

VII. Conclusion

We review the Agency’s application of the criteria set forth in N.C. Gen. Stat. § 131E-183(a) with deference to the Agency’s interpretation of the statute. *Craven Reg’l Med. Auth.*, 176 N.C. App. at 58, 625 S.E.2d at 844. Blue Ridge has failed to carry its burden to show the Agency’s interpretation was either unreasonable or not based upon a permissible construction of the statute. *See id.*

As an alternative and independent basis for our holding, Blue Ridge has also failed to show it was substantially prejudiced by the Agency’s approval of Caldwell Memorial’s CON application and issuance of the CON. *See CaroMont*, 231 N.C. App. at 8-9, 751 S.E.2d at 249-50. The ALJ’s order granting summary judgment in favor of Caldwell Memorial is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and STROUD concur.

CTY. OF ONSLOW v. J.C.

[255 N.C. App. 466 (2017)]

COUNTY OF ONSLOW, STATE OF NORTH CAROLINA

v.

J.C., PETITIONER

No. COA17-207

Filed 19 September 2017

**Appeal and Error—appealability—expunction of criminal charge—
no right of appeal—failure to file petition for certiorari**

The Court of Appeals dismissed the State’s appeal from an order of the trial court finding petitioner to be eligible for (1) an expunction of a criminal charge to which petitioner pled guilty in 1987 and (2) an expunction of the dismissal of a criminal charge dismissed in exchange for petitioner’s guilty plea to the other offense. N.C.G.S. § 15A-1445 does not include any reference to a right of the State to appeal from an order of expunction, and the State did not file a petition for certiorari.

Appeal by the State from order entered 8 August 2016 by Judge Mary Ann Tally in Onslow County Superior Court. Heard in the Court of Appeals 24 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General William P. Hart, Jr., for Appellant, the County of Onslow, State of North Carolina.

Yoder Law PLLC, by Jason Christopher Yoder, for the Petitioner-Appellee.

DILLON, Judge.

The State appeals from an order of the trial court finding J.C. (“Petitioner”) to be eligible for (1) an expunction of a criminal charge to which Petitioner pleaded guilty in 1987 and (2) an expunction of the dismissal of a criminal charge dismissed in exchange for Petitioner’s guilty plea to the other offense. The trial court granted Petitioner’s petitions for expunction pursuant to N.C. Gen. Stat. § 15A-145.5 (2015) and N.C. Gen. Stat. § 15A-146 (2015) and ordered that the offenses be removed from Petitioner’s record.

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We conclude that the State has no statutory right to appeal an order of expunction, and we hereby grant Petitioner's motion to dismiss the appeal.

"[A]n appeal can be taken only from such judgments and orders as are designated by the statute regulating the right of appeal." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *see also State v. Harrell*, 279 N.C. 464, 183 S.E.2d 638 (1971) (holding that in general, the State cannot appeal from a judgment in favor of a defendant in a criminal proceeding in the absence of a statute clearly conferring that right). As our Supreme Court has pointed out, the statute "which permits an appeal by the State in a criminal case is contained in [N.C. Gen. Stat. §] 15A-1445" and this statute is to be "strictly construed." *State v. Elkerson*, 304 N.C. 658, 669-70, 285 S.E.2d 784, 791-92 (1982).

Our Court has previously held that where the State fails to demonstrate its right to appeal, "no appeal can be taken, and our Court is without jurisdiction over the appeal." *State v. Bryan*, 230 N.C. App. 324, 329, 749 S.E.2d 900, 904 (2013). Here, because N.C. Gen. Stat. § 15A-1445 clearly does not include any reference to a right of the State to appeal from an order of expunction, we are compelled to conclude that the General Assembly did not intend to bestow such a right at the time the statute was adopted. "It is for the legislative power, not for the courts, to consider whether th[e] [statute] should [] be extended" to include such a right. *Hodges v. Lipscomb*, 128 N.C. 57, 58, 38 S.E. 281, 282 (1901). And while we note that our court has, on several occasions, reviewed expunctions, we have obtained jurisdiction to do so pursuant to the granting of a petition submitted to our Court by the State for writ of *certiorari*. *See, e.g., State v. Frazier*, 206 N.C. App. 306, 697 S.E.2d 467 (2010) (granting the State's petition for *certiorari*); *see also In re Robinson*, 172 N.C. App. 272, 615 S.E.2d 884 (2005); *In re Expungement for Kearney*, 174 N.C. App. 213, 620 S.E.2d 276 (2005); *In re Expungement for Spencer*, 140 N.C. App. 776, 538 S.E.2d 236 (2000).

The State has not filed a petition for *certiorari* in this matter. Accordingly, the State's appeal is dismissed.

DISMISSED.

Judges HUNTER, JR., and ARROWOOD concur.

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[255 N.C. App. 468 (2017)]

BELINDA FOUSHEE, EXECUTOR OF THE ESTATE OF ANNEKA FOUSHEE, PLAINTIFF

v.

APPALACHIAN STATE UNIVERSITY, DEFENDANT

No. COA17-213

Filed 19 September 2017

Appeal and Error—interlocutory appeals—Industrial Commission—statute of repose

An appeal from the Industrial Commission in a wrongful death claim was dismissed as interlocutory. The underlying issue concerned only a determination of the application of the statute of repose to plaintiff's tort claims arising under the Tort Claims Act. There was no issue of immunity that would create a substantial right justifying an immediate appeal.

Appeal by plaintiff from the order of the North Carolina Industrial Commission entered 28 November 2016 by Commissioner Linda Cheatham for the Full Commission. Heard in the Court of Appeals 24 August 2017.

Wallace & Graham, P.A., by Edward L. Pauley, for plaintiff-appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Christina S. Hayes, for defendant-appellant.

ARROWOOD, Judge.

Appalachian State University (“defendant”) appeals from the Full Commission’s dismissal of its appeal on 28 November 2016. For the following reasons, we dismiss defendant’s appeal.

I. Background

Belinda Foushee (“plaintiff”), as executor of the estate of her daughter Anneka Foushee, commenced this wrongful death action against defendant on 7 April 2016 by filing a Form T-1 Affidavit with the North Carolina Industrial Commission (the “Commission”) under the North Carolina Tort Claims Act, N.C. Gen. Stat. § 143-291, *et seq.* Defendant responded on 10 June 2016 by filing a motion to dismiss pursuant to Rule 12(b)(6) and (2). Defendant asserted (1) the plaintiff failed to state a claim upon which relief could be granted because the applicable ten year statute of repose expired prior to plaintiff’s filing of the Form T 1; and (2) because

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the statute of repose had expired, the State had not waived sovereign immunity in this case because, under the Tort Claims Act, the State and its agencies are liable for negligence only under circumstances where a private person would be liable. Plaintiff filed a response to defendant's motion to dismiss on 23 June 2016 and on the same day a deputy commissioner entered an order denying defendant's motion.

On 8 July 2012, defendant gave notice of appeal seeking the immediate review of the Full Commission. Defendant's appeal was referred to the chairman for a ruling on the right of immediate appeal. On 22 July 2016, the chairman entered an order, and then an amended order, denying defendant's request for immediate review of the deputy commissioner's 23 June 2016 order by the Full Commission. In the amended order, the chairman explained that the deputy commissioner's order was interlocutory and although denial of a Rule 12(b)(2) motion based on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is immediately appealable, in the instant case, "[d]efendant's sovereign immunity argument is actually based on [the] statute of repose, not immunity from suit." Thus, defendant had not met its burden of showing it would be deprived a substantial right.

Defendant filed a motion to reconsider the chairman's order on 8 August 2016 and the chairman denied the motion by order filed 23 August 2016. Defendant then filed notice of appeal from the chairman's 22 July 2016 amended order to the Full Commission on 25 August 2016.

Plaintiff filed a motion to dismiss defendant's appeal of the chairman's amended order to the Full Commission on 26 August 2016. Plaintiff argued the appeal of the chairman's amended order was interlocutory and should be dismissed. On 28 November 2016, the Full Commission filed an order dismissing defendant's appeal. The Full Commission explained that "[n]either the State's Tort Claims Act, nor the Commission's *Tort Claims Rules* provide for a right of immediate appeal to the Full Commission from interlocutory Orders."

Defendant filed notice of appeal to this Court from the Full Commission's 28 November 2016 order on 19 December 2016.

II. Discussion

The sole issue on appeal is the Full Commission's dismissal of defendant's interlocutory appeal. Plaintiff moved to dismiss defendant's appeal as interlocutory. We agree that the appeal is interlocutory and dismiss defendant's appeal without reaching the merits of the underlying issues below.

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“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). “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted).

[I]mmediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a substantial right.

Sharpe v. Worland, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (internal citations and quotation marks omitted).

Defendant argued below, and now argues on appeal, that although the Commission’s orders are interlocutory, the orders affect a substantial right and concern personal jurisdiction and are therefore immediately appealable. However, the merits of the underlying orders are not on appeal to this Court. To be clear, the only order on appeal to this Court is the Full Commission’s order that determined there was no right of immediate appeal from an interlocutory decision in a case before the Commission arising under the Tort Claims Act. As plaintiff asserts, this appeal is not an appeal of the merits of the deputy commissioner’s denial of defendant’s motion to dismiss.

The Full Commission’s order is clearly interlocutory as it is not a final determination of plaintiff’s claims. Furthermore, defendant has not met its burden to show that the Full Commission’s decision dismissing the appeal affects a substantial right. Consequently, defendant’s appeal to this Court is dismissed as interlocutory.

Nevertheless, we take this opportunity to note that although defendant argues in the underlying motions that the statute of repose and immunity issues are intertwined and the appeal therefore affects a substantial right and implicates personal jurisdiction, it appears the underlying issue concerns only a determination of the application of the statute of repose to plaintiff’s tort claims arising under the Tort Claims Act. Defendant even states in its brief that it is “entitled to sovereign immunity in this claim for wrongful death *because it is barred by the statute of repose.*” (Emphasis added). The underlying arguments

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for the defendant do not raise an issue of sovereign immunity in the traditional sense. The only way immunity becomes an issue is if the statute of repose is applicable and has expired. Yet, if the statute of repose is applicable and has expired, the claim will be dismissed. Therefore, it is not necessary to address the issue of immunity. Thus, we ascertain no issue of sovereign immunity that would create a substantial right justifying an immediate appeal.

III. Conclusion

Because defendant's appeal from the Full Commission's 28 November 2016 order is interlocutory, we dismiss the appeal.

DISMISSED.

Judges HUNTER, Jr., and DILLON concur.

JORIS HAARHUIS, ADMINISTRATOR OF THE ESTATE OF JULIE HAARHUIS (DECEASED), PLAINTIFF
v.
EMILY CHEEK, DEFENDANT

No. COA16-961

Filed 19 September 2017

1. Jury—selection—hypothetical question—not a stake-out question

A question asked during voir dire of the jury was hypothetical but was not a stake-out question because the facts presented were not similar to the underlying facts of the case and did not ask jurors to state what kind of verdict they would render. It asked a question about a key criterion of juror competency—following the law.

2. Jury—selection—questions—attitude toward damages

There was no prejudice from jury voir dire questions concerning damages in an automobile accident case, even assuming they were stake-out questions.

3. Jury—selection—questions—loss of caregiver—not a stake-out question

A jury voir dire question in an automobile accident case concerning whether the potential jurors had lost a caregiver was not

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a stake-out question and was appropriate to allow both parties to evaluate the fitness of each juror.

4. Jury—questions on voir dire—not a stake-out question—juror’s opinions of DUI laws

A question to prospective jurors about whether DUI laws were too harsh or too lax was not a stake-out question because it did not provide any facts of the case and did not ask the jurors to state what their verdict would be under a given state of facts. There was no prejudice to defendant.

5. Damages and Remedies—pain and suffering—instructions—conscious pain and suffering

The trial court did not err in an automobile accident case by instructing the jury on pain and suffering damages where defendant contended that there was not evidence of conscious pain and suffering. There was, in fact, evidence that the victim was trying to breathe and was moaning after being struck by defendant’s vehicle, and the treating physician testified that the victim’s injuries would be severely painful and that she responded to pain stimuli.

6. Damages and Remedies—loss of society and companionship

There was no error in an auto accident case in the admission of evidence about loss of society and companionship damages from the victim’s cousin and one of her co-workers. The challenged evidence was relevant to the jury’s determination of the value of the victim’s society, companionship, comfort, kindly offices, and advice pursuant to N.C.G.S. § 28A-18-2(b)(4)(c). Additionally, defendant made no argument as to how she was prejudiced.

7. Damages and Remedies—compensatory—deterrence

The trial court did not abuse its discretion in the compensatory phase of a bifurcated wrongful death trial by allowing plaintiff to argue that not awarding full and fair compensation would mean not creating the deterrent of making people pay for the harm they caused, and “not one penny more.” A general deterrence argument is appropriate during the compensatory phase of a bifurcated trial so long as it does not refer to any of the aggravating factors in N.C.G.S. § 1D-15(a) or urge the trier of fact to punish the defendant.

8. Damages and Remedies—motion for a new trial—compensatory damages allegedly excessive

The trial court did not abuse its discretion in the bifurcated trial of an automobile accident case by determining that the

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compensatory damage award was appropriate and denying defendant's motion for a new trial. Although defendant argued that the small punitive damages award indicated that the jury included a measure of punishment in the compensatory damage award, there was evidence that defendant made very little and it was not an abuse of discretion to determine that the amount was an adequate punishment for this defendant.

Appeal by Defendant from judgment entered 28 April 2016 by Judge Eric L. Levinson in Chatham County Superior Court. Heard in the Court of Appeals 5 April 2017.

Copeley Johnson & Groninger PLLC, by Leto Copeley, White & Stradley PLLC, by J. David Stradley and Robert P. Holmes, and Patterson Harkavy LLP, by Narendra K. Ghosh, for the Plaintiff-Appellee.

Burton, Sue & Anderson, LLP, by Walter K. Burton, Stephanie W. Anderson, and Cam A. Bordman, for the Defendant-Appellant.

DILLON, Judge.

Emily Cheek ("Defendant") appeals from a jury verdict awarding Joris Haarhuis ("Plaintiff") compensatory and punitive damages for the wrongful death of Plaintiff's wife, and from an order by the trial court denying Defendant's motion for a new trial. For the following reasons, we affirm.

I. Background

Plaintiff filed this action against Defendant to recover both compensatory and punitive damages for the wrongful death of his wife, Julie Haarhuis. Before trial, the parties stipulated to a set of facts establishing that Defendant negligently caused the death of Ms. Haarhuis, in relevant part, as follows: Defendant was driving on a two-lane road at approximately 6:30 a.m. She lost control of her vehicle, crossing the opposing lane of traffic and striking Ms. Haarhuis, who was walking on the opposite shoulder of the road. As a result of the accident, Ms. Haarhuis suffered severe injuries. Several days later, Ms. Haarhuis died as a result of those injuries.

The trial was bifurcated, with the first phase of the trial addressing compensatory damages and the second phase addressing punitive damages. During the compensatory damage phase, Plaintiff put on

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evidence concerning his actual damages, including evidence of the suffering his wife endured before her death. The jury awarded Plaintiff \$4.25 million in compensatory damages. The trial then moved to the punitive damage phase.

During the punitive damage phase of the trial, the jury heard evidence that Defendant was still in school and worked part time, that she had consumed alcohol in the early morning hours prior to the accident, and that she had a blood alcohol content above the legal limit approximately two hours after the accident occurred. The jury awarded Plaintiff \$45,000 in punitive damages.

Defendant filed a motion for new trial which the trial court denied. Defendant appealed.

II. Analysis

On appeal, Defendant makes a number of arguments concerning the conduct of the trial and the trial court's denial of her motion for a new trial. We address each argument in turn.

When reviewing a trial court's ruling on a motion for a new trial, we consider whether there are grounds for a new trial pursuant to Rule 59. *See* N.C. Gen. Stat. § 1A-1, Rule 59 (2015). Our review is "limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "Abuse of discretion results where the [trial] 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).

A. Right to a Bifurcated Trial

At trial, Defendant exercised her right to request a bifurcated trial pursuant to N.C. Gen. Stat. § 1D-30. *See* N.C. Gen. Stat. § 1D-30 (2015). On appeal, Defendant argues that Plaintiff's questioning of the jury during *voir dire* was improper and violated her "due process right" to a bifurcated trial because it involved issues that would only be relevant to Plaintiff's punitive damage claim.

Our General Assembly has provided that a plaintiff may not recover punitive damages where the defendant is not found to be liable for compensatory damages. N.C. Gen. Stat. § 1D-15. Therefore, to ensure that a jury does not award compensatory damages based on issues relevant only to punitive damages, our General Assembly has granted a defendant the right to a bifurcated trial, which allows "issues of liability for

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compensatory damages and the amount of compensatory damages, if any, [to] be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any.” N.C. Gen. Stat. § 1D-30. In a bifurcated trial, the plaintiff is not allowed to introduce any evidence “relating solely to punitive damages” during the compensatory damage phase. *Id.* In addition, the statute requires the same trier of fact that tried the issues relating to compensatory damages to try the issues relating to punitive damages. *Id.*

In the present case, Defendant does not argue that Plaintiff introduced improper evidence concerning Defendant’s intoxication during the compensatory phase of the trial. Rather, she argues that Plaintiff’s questioning of potential jurors during *voir dire* regarding their general attitudes about alcohol and drunk driving – questions which were only relevant to the punitive damage phase of the trial – was inappropriate.¹

We acknowledge that N.C. Gen. Stat. § 1D-30 presents a dilemma of sorts, as suggested by Defendant’s argument. Specifically, N.C. Gen. Stat. § 1D-30 gives a defendant the right to a bifurcated trial in order to ensure that the jury, when considering the issue of compensatory damages, is not improperly influenced by evidence relevant only to punitive damages. However, a defendant’s right to bifurcation must be weighed against a plaintiff’s right to an impartial jury, which includes a plaintiff’s right to question potential jurors during *voir dire* about issues that they may be asked to consider. *See State v. Jones*, 339 N.C. 114, 136, 451 S.E.2d 826, 836-37 (1994) (“The purpose of *voir dire* is to ferret out jurors with latent prejudices and to assure the parties’ right to an impartial jury.”).

N.C. Gen. Stat. § 1D-30 *requires* that the same jury try both the issues relating to compensatory damages and the issues relating to punitive damages, presumably for judicial economy reasons. *See* N.C. Gen. Stat. § 1D-30 (providing that “[t]he same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages”). As such, in the present case, Plaintiff had the right to question potential jurors regarding their *general* attitudes about alcohol

1. Defendant’s objections to several of these questions were sustained by the trial court during *voir dire*. Consequently, Defendant would only be entitled to relief based on these questions if they, taken along with the totality of *voir dire*, resulted in an unfair trial. *See State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997) (“In reviewing any *voir dire* questions, [our] Court examines the entire record of the *voir dire*, rather than isolated questions.”).

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and drunk driving in order to determine “whether a basis for challenge for cause exist[ed]” and to allow both parties to “intelligently exercise [their] peremptory challenges.” *State v. Gregory*, 340 N.C. 365, 388, 459 S.E.2d 638, 651 (1995). Of course, the trial judge must exercise discretion in determining the extent and type of questioning permitted in order to protect the rights of all parties. *See Jones*, 339 N.C. at 134, 451 S.E.2d at 835 (stating that the “form of counsel’s questions” and “the manner and extent of trial counsel’s inquiries” are within the sound discretion of the trial court). We conclude that Plaintiff’s questioning, which was general in nature and did not expressly state that Defendant had been intoxicated, was appropriate.

B. “Stake Out” Questions

Defendant argues that the trial court erred in permitting Plaintiff’s attorney to ask improper “stake out” questions during *voir dire*. Defendant contends that the totality of Plaintiff’s *voir dire* questioning biased the jury, resulting in an unfair trial. We disagree.

The purpose of jury *voir dire* is to “eliminate extremes of partiality and ensure that the jury’s decision is based solely on the evidence presented at trial.” *State v. White*, 340 N.C. 264, 280, 457 S.E.2d 841, 850 (1995). “The extent and manner of a party’s inquiry into a potential juror’s fitness to serve is within the trial court’s discretion.” *Id.* On appeal, we review the entire record of *voir dire* to determine “whether the trial court abused its discretion and whether that abuse resulted in harmful prejudice to the defendant.” *State v. Cheek*, 351 N.C. 48, 66, 520 S.E.2d 545, 556 (1999).

A “stake out” question asks a juror to “pledge himself [or herself] to a future course of action” by asking what “verdict [the prospective juror] would render, or how they would be inclined to vote, under a given state of facts.” *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *vacated in part on other grounds*, 428 U.S. 902 (1976). Our Supreme Court has held that stake out questions are generally improper:

Counsel may not pose hypothetical questions which are designed to elicit from prospective jurors what their decision might be under a given state of facts. Such questions are improper because they tend to “stake out” a juror and cause him to pledge himself to a decision in advance of the evidence to be presented.

Id.

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[1] On appeal, Defendant challenges numerous questions asked by Plaintiff’s counsel during *voir dire*. We will address each line of questioning in turn.²

Defendant first takes issue with a hypothetical scenario presented by Plaintiff’s counsel where counsel asked if the juror approached a red light late at night with no traffic nearby, would the juror “wait for it to change or [] go straight through it?” Although this question did involve a hypothetical set of facts, it was not a stake out question because the facts presented were not similar to the underlying facts of the case and did not ask jurors to state what kind of verdict they would render. *See State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). Rather, this question addressed a “key criterion of juror competency” – whether jurors were inclined to follow the law. *See State v. Chapman*, 359 N.C. 328, 346, 611 S.E.2d 794, 810 (2005).

[2] Defendant next challenges Plaintiff’s counsel’s questions regarding jurors’ attitudes toward awarding damages. Plaintiff’s counsel first posed the question as follows:

Which way do you lean? Are you a little closer to the folks who think that, in considering money, you should only consider the harms and losses or are you closer to folks who think you should factor in other things in determining how much money to include in your verdict?

The trial court overruled Defendant’s first objection to this line of questioning, but after a bench conference, Plaintiff’s counsel rephrased the question as follows:

What trouble would you have, if you are instructed by the judge . . . that you are only to consider the harms and losses that are proven from the evidence[,] in following that instruction and only considering harms and losses and factoring out [] everything else?

Defendant’s counsel also objected to this phrasing of the question. Even assuming that the first iteration of the harms and losses question was an inappropriate stake out question, we do not believe that it prejudiced Defendant. Only one juror responded to the first question before

2. Defendant challenges several questions which she failed to object to during the trial. Because the trial court never had the opportunity to consider these issues, they are not properly before us on appeal. N.C. R. App. P. 10(b)(1); *State v. Nobles*, 350 N.C. 483, 498, 515 S.E.2d 885, 895 (1999); *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991).

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counsel rephrased it after the bench conference. The second iteration of the question was clearly an appropriate *voir dire* question intended to determine if jurors could follow the law as presented by the trial court. *See State v. Wiley*, 355 N.C. 592, 617, 565 S.E.2d 22, 40 (2002) (stating that the right to an impartial jury recognizes “that each side will be allowed to inquire into the ability of prospective jurors to follow the law”). Likewise, Plaintiff’s question to the jury regarding whether they would have trouble putting money into a verdict for pain and suffering also sought to determine whether jurors could follow the law allowing damages for pain and suffering. *See* N.C. Gen. Stat. § 28A-18-2 (2015).

[3] Defendant also contends that Plaintiff’s counsel improperly asked jurors whether they had lost someone who had provided “care” to them or to family members. This was clearly not a stake out question, and was appropriate in order to allow both parties to evaluate the fitness of each juror to serve on this particular jury. *See White*, 340 N.C. at 280, 457 S.E.2d at 850.

[4] Finally, Defendant contends that it was improper for Plaintiff’s counsel to ask whether jurors thought DUI laws were too harsh or too lax. Prior to trial, the parties agreed that no questions would be asked which tended to tie Defendant to alcohol, but that Plaintiff could ask about alcohol-related issues so long as it was not too suggestive. This question appears to be an attempt by Plaintiff’s counsel to gauge jurors’ attitudes toward alcohol in general. This was not a stake out question because it did not provide any facts of the case and did not ask jurors to state what their verdict would be under a given state of facts. *See Cheek*, 351 N.C. at 66-67, 520 S.E.2d at 556. While the issue of alcohol could perhaps have been approached more delicately, we do not believe that this question prejudiced Defendant, when reviewed in the context of the entire jury selection process.

After thorough review of the transcript of jury *voir dire* in this case, including the questions to which Defendant’s objections were sustained, we are unable to find that the trial court abused its discretion during *voir dire* or that Defendant was prejudiced by the totality of the questions posed by Plaintiff’s counsel. *See id.* Accordingly, this argument is overruled.

C. Jury Instructions

[5] Defendant’s next argument involves the trial court’s instruction of the jury. Specifically, Defendant argues that the trial court should not have given an instruction to the jury regarding pain and suffering damages because there was no evidence that the victim experienced

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conscious pain and suffering. We conclude that the trial court did not commit reversible error regarding the challenged instruction.

Our wrongful death statute provides that pain and suffering damages are recoverable in a wrongful death action, N.C. Gen. Stat. § 28A-18-2(a)(2) (2015); however, such damages are only available where the evidence supports such an award. *See DiDonato v. Wortman*, 320 N.C. 423, 431, 358 S.E.2d 489, 493 (1987) (stating that damages in a wrongful death action “must be proved to a reasonable level of certainty, and may not be based on pure conjecture”); *Brown v. Moore*, 286 N.C. 664, 672, 213 S.E.2d 342, 348 (1975) (noting that there is no basis for recovery of pain and suffering damages where injury and death occurred simultaneously). And when charging a jury in a civil case, the trial court “has the duty to explain the law and apply it to the evidence on the substantial issues of the action.” *Wooten v. Warren*, 117 N.C. App. 350, 358, 451 S.E.2d 342, 347 (1994); *see also* N.C. Gen. Stat. § 1A-1, Rule 51. The trial court must instruct on a claim or defense “if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense.” *Wooten*, 117 N.C. App. at 358, 451 S.E.2d at 347.

Here, the evidence at trial, viewed in the light most favorable to Plaintiff, did support a reasonable inference that the victim experienced conscious pain and suffering. For instance, three witnesses who were at the scene of the accident testified that the victim was “trying to breathe, and moaning” after being struck by Defendant’s vehicle. The victim’s treating physician testified that the injuries she sustained would be “severely painful” and that she responded to painful stimuli until her fourth day in the hospital. Based on this testimony, it could be reasonably inferred that the victim consciously experienced pain and suffering before her death, either immediately after the accident or during her hospitalization. Therefore, we conclude that the trial court did not err in instructing the jury on pain and suffering.

D. Witness Testimony

[6] Defendant next argues that the trial court improperly allowed individuals who were not heirs of the victim to testify regarding elements of loss of society and companionship damages. Specifically, Defendant contends that it was improper for the victim’s cousin and one of her co-workers to testify regarding the victim’s personality and demeanor, and for the co-worker to testify that she had discovered a pregnancy test in the victim’s desk at the office. We disagree.

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Damages recoverable for wrongful death include the value of “[s]ociety, companionship, comfort, guidance, kindly offices and advice of the decedent.” N.C. Gen. Stat. § 28A-18-2(b)(4)(c). Our wrongful death statute further provides:

All evidence which reasonably tends to establish any of the elements of damages in subsection (b) [of the statute], or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible[.]

N.C. Gen. Stat. § 28A-18-29(c). Our Supreme Court has noted that “personality and other traits relevant to what kind of companion” the decedent had been are relevant in a wrongful death action. *See DiDonato*, 320 N.C. at 432, 358 S.E.2d at 494.

Plaintiff argues that this challenged evidence was clearly relevant to the jury’s determination regarding the value of the victim’s society, companionship, comfort, guidance, kindly offices, and advice pursuant to N.C. Gen. Stat. § 28A-18-2(b)(4)(c), and we can discern no error in its admission. In addition, Defendant has failed to make any argument as to how she was prejudiced by this evidence, in light of the fact that other witnesses testified similarly, and Defendant has not challenged this other evidence.

E. Deterrence Argument

[7] Defendant argues that pursuant to Chapter 1D, it is improper to make a “deterrence” argument during the compensatory phase of a bifurcated trial. We disagree. In short, the purpose of punitive damages is to “punish,” N.C. Gen. Stat. § 1D-1; therefore, a “punishment” argument might have been inappropriate during the compensatory phase. However, another purpose of compensatory damages is to “deter” negligent behavior; therefore, Plaintiff’s deterrence argument was not inappropriate.

Compensation of persons injured by wrongdoing is “one of the generally accepted aims of tort law.” Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 13, at 389 (2d ed. 2011). However, “[c]ourts and writers almost always recognize that another [general] aim of tort law is to deter certain kinds of conduct by imposing liability when that conduct causes harm.” *Id.* § 14. Our Supreme Court has noted that “liability [itself] promotes care and caution.” *Rabon v. Rowan Memorial Hospital, Inc.*, 269 N.C. 1, 13, 152 S.E.2d 485, 493 (1967). The possibility

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of being found liable in tort and ordered to pay compensatory damages certainly acts to deter individuals from committing tortious conduct in the first instance. *See id.*

Under Chapter 1D, punitive damages may only be awarded if the plaintiff proves that the defendant is liable for compensatory damages *and* one of three aggravating factors is present. N.C. Gen. Stat. § 1D-15(a). These factors include “[w]illful or wanton conduct.” N.C. Gen. Stat. § 1D-15(a)(3). In a bifurcated trial, “evidence relating *solely* to punitive damages” is not admissible until the trier of fact has determined whether compensatory damages are warranted and has set the amount of compensatory damages. N.C. Gen. Stat. § 1D-30. Clearly, counsel would not be permitted to reference any aggravating factor during her closing argument in the compensatory phase of a bifurcated trial; however, that is not the issue we are faced with in this case.

Based on Chapter 1D of our General Statutes, the guidance of our Supreme Court, and the long-established general purposes of tort law, we conclude that a *general* deterrence argument is appropriate during the compensatory phase of a bifurcated trial so long as it does not refer to any of the aggravating factors set forth in N.C. Gen. Stat. § 1D-15(a) or urge the trier of fact to punish the defendant.

Here, Plaintiff’s counsel stated in closing that a purpose of the civil justice system was to “make people pay full and fair compensation . . . and[] not one penny more” in order to “enforce [] safety rules[.]” Plaintiff’s counsel reiterated this argument as follows:

If you[, the jury,] require less than full and fair compensation, . . . not only are you failing to compensate [Plaintiff] . . . for the harm that’s been suffered but you’re not creating a deterrent of *making people pay for the harm they cause, and not one penny more.*

These statements were a proper characterization of a purpose of compensatory damages. Plaintiff’s counsel did not urge the jury to punish Defendant or “send her a message.” Rather, counsel simply recounted the purposes of tort law and requested that the jury make Defendant pay for the “harm [she] cause[d], and not one penny more.”

Accordingly, we hold that the trial court did not abuse its discretion by failing to sustain Defendant’s objection. *See State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (noting the standard of review for improper closing arguments that provoke a timely objection).

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F. Damage Award

[8] Finally, Defendant contends that the trial court should have granted her motion for a new trial based on the fact that the jury’s \$4.25 million *compensatory* damages verdict was excessive and against the manifest weight of the evidence. We disagree.

Rule 59 allows for the trial court to grant a new trial in the case of “excessive . . . damages appearing to have been given under the influence of passion or prejudice[.]” N.C. Gen. Stat. § 1A-1, Rule 59(a)(6), or “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)(7). However, “[i]t is only when the jury has arbitrarily disregarded the law and the evidence that the judge must exercise [] judicial discretion and set the verdict aside.” *Brown v. Moore*, 286 N.C. 664, 674, 213 S.E.2d 342, 349 (1975). And our Supreme Court has “held repeatedly since 1820 in case after case, and no principle is more fully settled in this jurisdiction, that the action of the trial judge in setting aside a verdict . . . is not subject to review on appeal in the absence of an abuse of discretion.” *Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E.2d 676, 680 (1967) (citing *Armstrong v. Wright*, 8 N.C. 93 (1820)).

Here, we conclude that the trial court did not abuse its discretion in denying Defendant’s motion for a new trial.

Defendant argues that the jury’s relatively small *punitive* damage award of \$45,000 is indicative that the jury did more than simply compensate Plaintiff in awarding \$4.25 million in *compensatory* damages. Essentially, Defendant contends that the small punitive damage award is indicative that the jury included a measure of punishment in its compensatory award, not knowing that it would get the opportunity to award punitive damages in a second phase.

Regarding the large compensatory damage award, we note that our Supreme Court has recognized the difficulty of calculating the “monetary value of [a] decedent,” stating that such a task “will usually defy any precise mathematical computation.” *Brown*, 286 N.C. at 673, 213 S.E.2d at 348-49. Therefore, “the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury[.]” *Id.* at 674, 213 S.E.2d at 349. As for the small punitive damage award, we note that there was evidence that Defendant made very little money; therefore, it was not an abuse of discretion for the trial court to determine that the jury acted appropriately by finding that a \$45,000 punitive damage award was an adequate punishment for this particular Defendant. In conclusion, we cannot say that the trial court abused its discretion in determining that

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the compensatory award was appropriate. *See Worthington v. Bynum*, 305 N.C. 478, 486, 290 S.E.2d 599, 604 (1982).

III. Conclusion

For the foregoing reasons, we find that Defendant received a fair trial, free from prejudicial error. Accordingly, we affirm the trial court's denial of Defendant's motion for new trial pursuant to Rule 59.

AFFIRMED.

Chief Judge McGEE and Judge ZACHARY concur.

IN THE MATTER OF J.M. & J.M.

No. COA17-275

Filed 19 September 2017

1. Evidence—hearsay—admissions by party opponent

Evidence in an abused juvenile proceeding was hearsay but admissible as admissions of a party opponent where the mother testified about the father's actions. His actions had occurred in her presence and she was a party to the action filed by the Department of Social Services alleging abuse and neglect.

2. Evidence—hearsay—medical exception

Statements by a mother during a well baby checkup about the father's actions were hearsay but admissible in an abused juvenile proceeding. The two-month-old baby had marks on the neck and bloodshot eyes that were observed by the pediatrician, and the child was immediately sent to the emergency department of a hospital, where the mother disclosed the same information. The child was too young to talk and the declarant was not required to be the patient.

3. Child Abuse, Dependency, and Neglect—findings—supported by evidence

Certain findings in an abused juvenile proceeding were supported by the evidence, and others, or portions thereof, that were not supported by the evidence were not binding on the Court of Appeals. The binding findings of fact established that the child sustained multiple non-accidental injuries and that the father was responsible for the injuries.

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4. Child Abuse, Dependency, and Neglect—adjudication—serious neglect

The trial court erred in an abused juvenile proceeding by adjudicating a child as “seriously neglected” due to inappropriate discipline by the father and inaction by the mother. The trial court used the wrong definition of “serious neglect.” The definition the trial court used pertained to the responsible individuals list in N.C.G.S. § 7B-101(19a), rather than the definition pertaining to adjudication of neglect in N.C.G.S. § 7B-101(15).

5. Child Abuse, Dependency, and Neglect—reunification efforts ceased—statutory requirements not met

The statutory requirements for the cessation of reunification efforts in an abused juvenile proceeding were not met where dispositional and permanency planning matters were combined in a single order at the initial dispositional hearing. There was no indication that a previous court had determined that one of the aggravating factors in N.C.G.S. § 7B-901(c)(1) was present, and the trial court’s order should have included written findings pertaining to those circumstances.

Appeal by Respondent-Father from order entered 21 November 2016 by Judge William A. Marsh, III in District Court, Durham County. Heard in the Court of Appeals 31 August 2017.

Office of the Durham County Attorney, by Senior Assistant County Attorney Cathy L. Moore, for Petitioner-Appellee Durham County Department of Social Services.

Assistant Appellate Defender Joyce L. Terres for Respondent-Appellant Father.

K&L Gates, by Erica R. Messimer, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Father appeals from an adjudication, disposition, and permanency planning order concluding that his son, J.M. (“the son”), was an abused juvenile; that his daughter, J.M. (“the daughter”), was a seriously neglected juvenile (together, “the children”); that it was in the children’s best interests to remain in the custody of the Durham County Department of Social Services (“DSS”); and that DSS was not required

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to employ reasonable reunification efforts with Respondent-Father. We affirm in part, reverse and remand in part, and vacate in part.

I. Background

DSS filed a petition on 11 September 2015, alleging that the son and the daughter were abused, neglected, and dependent children. At the time the petition was filed, the son was two months old and the daughter was nearly two years old. The petition alleged that the mother brought the son to a well-baby check-up on 8 September 2015, at which the examining health professional observed “marks” on the son’s neck. The son was sent to UNC hospitals for further testing. The tests, including a “skeletal survey,” revealed healing fractures to his ribs, tibia, and fibula; ear and tongue bruising; subconjunctival hemorrhages; and excoriation under the chin. The examination also revealed that the son had a history of poor weight gain due to “not being fed on a regular schedule.”

The children’s mother revealed to DSS that Respondent-Father had: (1) “flick[ed]” the son in the chin and had punched the son in the stomach; (2) excessively disciplined the daughter by, *inter alia*, hitting her with a back scratcher and hitting her in the mouth; (3) engaged in domestic violence with the mother in front of the children; and (4) smoked marijuana in the presence of the children. The petition further alleged that the mother and Respondent-Father each had mental health diagnoses and that the mother had borderline intellectual functioning. According to the petition, the children’s maternal grandparents lived in New York but traveled to Durham on a regular basis to care for the children. DSS obtained nonsecure custody of the children on 11 September 2015, and the trial court sanctioned placement with the grandparents.

A hearing was held on DSS’s petition on 12 July 2016, during which the trial court heard testimony from: (1) a nurse practitioner, who treated the son and was an expert in pediatrics and child maltreatment; (2) the children’s maternal grandmother (“the grandmother”); and (3) a social worker supervisor familiar with the family’s case. Following the hearing, the trial court entered a combined adjudication, disposition, and permanency planning order on 21 November 2016.

Relevant to the present appeal, the trial court found as fact that: (1) the mother had disclosed to the grandmother and medical professionals that Respondent-Father was too rough with the son; (2) the mother had witnessed Respondent-Father being abusive to the son; (3) the son’s “skeletal surveys” showed healing fractures to his ribs, tibia, and fibula, bruising to his ear and tongue, subconjunctival hemorrhages,

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and excoriation under his chin; (4) there was no history of falls or accidents to explain the son's injuries, and the injuries were consistent with instances described by the children's mother; (5) the mother witnessed Respondent-Father inappropriately disciplining the daughter; and (6) the mother was not forthcoming during a prior child protective services investigation. The trial court also found that, pursuant to a safety plan, the grandmother agreed to reside in the home with the mother and Respondent-Father agreed to move out. However, the mother subsequently recanted her statements and moved out of the home.

Based on these, and other, findings of fact, the trial court concluded the son was an abused juvenile and that the daughter was a "seriously neglected" juvenile. The trial court further concluded it was in the children's best interests to remain in DSS custody; that the permanent plan for the children should be guardianship, with an alternative plan of adoption; and that reasonable reunification efforts with the mother and Respondent-Father were no longer required. Respondent-Father appeals.¹

II. Analysis

Respondent-Father argues the trial court erred by: (1) making several findings of fact that were not supported by competent evidence in the record or were improperly admitted hearsay statements; (2) concluding as a matter of law that the son was an abused juvenile; (3) concluding as a matter of law that the daughter was a "seriously neglected" juvenile; and (4) relieving DSS of its responsibility to make reunification efforts without following "any applicable statutory requirements."

A. Challenged Findings of Fact

Respondent-Father argues four of the trial court's findings of fact were improperly made because the evidence underlying those findings was inadmissible hearsay. In addition, Respondent-Father argues that four other findings of fact were unsupported by competent evidence in the record.

1. Hearsay

[1] Respondent-Father argues findings of fact 12 and 19 are unsupported by competent evidence because the testimony underlying the findings was inadmissible hearsay. These findings state:

1. The children's mother participated in the trial court proceedings, but is not a party to the present appeal.

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12. During the week prior to Labor Day, the mother contacted her mother, [the grandmother] in New York, several times a day by phone and text to attempt to tell her something. Finally, the mother called [the grandmother], informing her that [Respondent-Father] was treating the children too rough; it was serious; she didn't know how to handle it and he was abusing them.

. . . .

19. The children have been present during incidents of domestic violence between the parents. On one occasion, [mother] was holding [the son] in her arms and [Respondent-Father] hit her with a broom.

As Respondent-Father argues in his brief, the only competent evidence presented at the hearing to support these findings of fact was the testimony of the grandmother. The grandmother testified that the mother called and texted on numerous instances about “what was going on,” and that whatever was going on was “serious.” In one such conversation, which occurred in September 2015, the mother reported to the grandmother that she had been a victim of physical and sexual abuse at the hands of Respondent-Father, and that Respondent-Father “was hitting [the daughter] with a broomstick.” The grandmother testified that the mother told her that both the son and the daughter were present during instances of domestic violence between Respondent-Father and the mother.

Hearsay is defined as a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2015). Hearsay evidence is inadmissible unless an exception to the hearsay rule applies. N.C.G.S. § 8C-1, Rule 802. While we agree with Respondent-Father that this testimony, to which Respondent-Father properly objected, was hearsay, we find that the testimony was properly admitted under N.C.G.S. § 8C-1, Rule 801.

N.C.G.S. § 8C-1, Rule 801 provides, in relevant part:

- (d) Exception for Admissions by a Party-Opponent. – A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested

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his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject[.]

N.C. Gen. Stat. § 8C-1, Rule 801(d) (2015). Respondent-Father argues that the party opponent exception does not apply in this instance, because the statements in question were made by the mother, not by him. He also submits that the mother did not make them in a representative capacity, and that he did not authorize or adopt her statements.

We are not persuaded by Respondent-Father's argument, as he appears to overlook the fact that the mother was also a party to the action, and her inaction was relevant to the issue of whether the children were abused or neglected. Our Supreme Court has stated that "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).

This Court addressed a nearly identical issue in *In re Hayden*, 96 N.C. App. 77, 384 S.E.2d 558 (1989). In *Hayden*, the respondent-father objected to out-of-court statements made by the mother and, on appeal, he argued that the statements did not fit within the party-opponent exception to the hearsay rule. This Court rejected the respondent-father's argument in that case, and explained:

At the hearing, the social workers were permitted to testify, over [the] respondent's objections, as to his wife's out-of-court statements to them that respondent did not properly care for the children, excessively disciplined them, abused illegal drugs and alcohol in their presence, and was violent in his behavior. [The r]espondent argues that these statements should have been excluded under Rule 802 in that they are hearsay, not within any exception. We disagree. [The mother] was a party to this action which was brought to determine whether her child [] was abused and neglected. Her statements to the social workers about [respondent's] conduct can only be reasonably considered as admissions by her that [the juvenile] was subjected to conduct in her presence which could be found to be abusive and neglectful. Within the context of this juvenile petition case, we hold that her statements were properly admitted pursuant to the provisions of Rule 801(d).

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Id. at 81, 384 S.E.2d at 560-61. Like the mother's statements in *Hayden*, in the present case the mother was a party to the action that was brought to determine whether the children had been abused or neglected, and her statements were "reasonably considered as admissions by her that [the juvenile was] subjected to conduct in her presence which could be found to be abusive and neglectful." *Id.* Therefore, the mother's statements were properly admitted pursuant to N.C.G.S. § 8C-1, Rule 801(d).

[2] Respondent-Father also challenges findings of fact 13 and 14 as only supported by inadmissible hearsay. These findings state:

13. On September 8, 2015, the mother brought [the son] to a well-baby check-up and expressed her concerns to the doctor that the father was too rough with the child. Marks on [the son's] neck and conjunctival hemorrhages (bloodshot eyes) were observed by the medical provider. [The son] was two (2) months old at the time. [The son] was sent to UNC Hospital Emergency Department for further testing.
14. The mother disclosed the same information to the Emergency Department doctor. A consult was requested from the Beacon Program which reviews cases of suspected child maltreatment. [The mother] repeated the same information to [nurse practitioner] Holly Warner from the Beacon Program, specifically that on separate occasions she had witnessed [Respondent-Father] flicking [the son] under the chin, holding him upside down by his ankles, and punching him in the stomach. Respondent-mother failed to take steps to adequately protect [the son].

As with findings of fact 12 and 19, Respondent-Father is correct that the testimony underlying findings of fact 13 and 14 were out-of-court statements made by the mother detailing Respondent-Father's alleged abuse of the son. The statements were made by the mother to physicians during a well-child visit and a subsequent emergency room visit. We conclude that, contrary to Respondent-Father's assertion, the testimony is a statement made for the purpose of medical diagnosis or treatment, an exception to the hearsay rule pursuant to N.C. Gen. Stat. § 8C-1, Rule 803. N.C.G.S. § 8C-1, Rule 803(4) provides, as relevant here:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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...

(4) Statements for Purposes of Medical Diagnosis or Treatment—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C. Gen. Stat. § 8C-1, Rule 803(4) (2015).

Our Supreme Court has articulated a two-part inquiry to determine if testimony is admissible under the Rule 803(4) hearsay exception: “(1) whether the declarant’s statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant’s statements were reasonably pertinent to diagnosis or treatment.” *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000). With respect to the first prong, our Supreme Court has stated that “the trial court should consider all objective circumstances of record surrounding declarant’s statements in determining whether he or she possessed the requisite intent under Rule 803(4).” *Id.* at 288, 523 S.E.2d at 670.

In the present case, the record establishes that the statements in question meet both of the *Hinnant* requirements. The statements made by the mother to the physician were made during the son’s well-child visit. Following that visit, the son was immediately sent to the UNC Hospital Emergency Department. At the hospital, the mother disclosed the same information to an ER physician and to a nurse practitioner. In each instance, we find the surrounding circumstances sufficient to show that the mother’s statements were made for the purpose of medical treatment and diagnosis and were related to such treatment and diagnosis.

The first statement was made to a pediatrician at the son’s regular two-month well-child visit. At the visit, the mother was concerned about the son’s well-being, and the son’s pediatrician observed marks on the son’s neck and bloodshot eyes. The son’s pediatrician apparently was concerned enough about the injuries that he sent the son to the ER on the same day. There, the mother again disclosed the information to a doctor and a nurse. In both instances, the statements were made to medical professionals in a hospital or medical clinic setting. At the time the statements were made, the extent of the son’s injuries were not known, and medical professionals were attempting to diagnose them. A medical history and inquiry into these observations would have been part of any physician’s attempt to diagnose the extent and cause of the

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son's injuries. Therefore, we conclude that the statements satisfy both prongs of the *Hinnant* test.

Respondent-Father argues that the statements do not satisfy the Rule 803(4) exception because (1) the mother was not the patient, and (2) she made the statements to exculpate herself, not obtain treatment. North Carolina Courts have not considered whether N.C.G.S. § 8C-1, Rule 803(4) allows hearsay statements by persons other than the patient obtaining treatment. However, we agree with other jurisdictions, which have held that such testimony is admissible under Rule 803(4)'s hearsay exception. "Under the medical diagnosis exception to the hearsay rule, statements made by a patient for purposes of obtaining medical treatment are admissible for their truth because the law is willing to assume that a declarant seeking medical help will speak truthfully to medical personnel." *Galindo v. United States*, 630 A.2d 202, 210 (D.C. Ct. App. 1993). Like the District of Columbia Court of Appeals, "[w]e find no principled basis . . . not to apply the same rationale to a parent who brings a very young child to a doctor for medical attention; the parent has the same incentive to be truthful, in order to obtain appropriate medical care for the child." *Id.*; see also *Sandoval v. State*, 52 S.W.3d 851, 856-57 (Tex. Ct. App. 2001) ("[W]e conclude the fact that the information provided in the medical records came from complainant's mother does not affect the admissibility of the statements therein [under Rule 803(4)]. . . . In circumstances where the parent is giving the information to assist in the diagnosis and treatment of the child, we think the reliability of the statements is very high." (citation omitted)).

In the present case, we note that the son was only two months old at the time his injuries were discovered and was thus unable to talk. Nothing in the plain language of Rule 803(4) or in *Hinnant* requires the declarant to be the patient, and Respondent-Father's reading of the exception leads to an unworkable result — he would necessarily exclude any statements made in connection with medical diagnosis or treatment for any individual who is unable to speak. As DSS and the Guardian ad Litem ("GAL") point out, the mother's statements incriminate herself in addition to Respondent-Father, because they show she took no action to stop Respondent-Father or to protect the son. We perceive no limitation on allowing the parent of a child unable to relay his or her medical condition in the plain language of N.C.G.S. § 8C-1, Rule 803(4), and such an interpretation is not in conflict with our Supreme Court's guidance in *Hinnant*. We therefore conclude that the statements made by the son's treating physician fall within N.C.G.S. § 8C-1, Rule 803(4)'s exception to the hearsay rule, and were properly admitted.

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2. Competent Evidence Determination

[3] Respondent-Father next challenges all or portions of findings of fact 7, 15, 17, and 18 as unsupported by competent evidence in the record. These challenged findings (or portions thereof) state:

7. The family received in-home services beginning in March 2015, due to a finding of improper care based upon the mother disclosing that the father hit [the daughter].

....

15. A skeletal survey showed that [the son] had healing right tibia and fibula fractures. The child also had ear bruising, sub conjunctival hemorrhages, excoriation under the chin and tongue bruising. There was no history of falls, accidents or injuries to explain the injuries. A follow-up skeletal survey two weeks later revealed healing rib fractures which were probably ten (10) days to two weeks old. [The son's] injuries were consistent with the instances described by the mother.

....

17. [The daughter], had not had a physical examination since the February 2015 CME [complete medical examination].

18. [The mother] witnessed [Respondent-Father] inappropriately disciplining [the daughter] by hitting her with a back scratcher leaving marks, slapping and hitting her in the mouth, and during one incident slapping [the daughter's] face so that her head hit the wall. The mother did not intervene to protect [the daughter] during any of these incidents.

Review of a trial court's adjudication of dependency, abuse, and neglect requires a determination as to (1) whether clear and convincing evidence supports the findings of fact, and (2) whether the findings of fact support the legal conclusions. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (citation omitted), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied sub nom, Harris-Pittman v. Nash County Dept. of Social Servs.*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings."

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In re Helms, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citations omitted). If competent evidence supports the findings, they are “binding on appeal.” *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003) (citations omitted).²

As to finding of fact 7, Respondent-Father argues that DSS provided services based only on a “report,” but that no one actually determined the cause of the daughter’s injury before services were provided. Therefore, Respondent-Father argues, the finding is unsupported by the evidence. We disagree. The children’s grandmother testified that DSS became involved in the children’s lives after an incident in which Respondent-Father “had slapped [the daughter] in the eye” for no reason. The grandmother further testified that, while she was on the telephone with the mother one evening, she overheard an incident of domestic violence wherein Respondent-Father held a knife to the mother’s throat. The grandmother testified that she called 911 and remained on the line with the mother until the police arrived at the scene.

In addition, a DSS social worker offered testimony that contact between DSS, the mother, and Respondent-Father began in February 2015 when “[DSS] received the report that [Respondent-Father] had slapped [the daughter] in the face resulting in injury to her eye.” DSS assessed a “substantiation of improper care,” and the case was transferred to “in-home services within [DSS] to continue to work with the family and identify needs.” We hold that this testimony serves as competent evidence to support the challenged finding of fact, which is therefore conclusive on appeal. *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676.

As to finding of fact 15, Respondent-Father challenges the portion that states a follow-up “skeletal survey” was completed two weeks after the initial skeletal survey. Respondent-Father contends the follow-up survey was actually completed three weeks after the initial survey, and he argues the difference is significant, because it suggests that some of the son’s injuries occurred after Respondent-Father had moved out of the family home and had no contact with the children. Therefore, he argues the one-week difference tends to prove that he did not abuse the son.

Respondent-Father is correct in his assertion that the two skeletal surveys were three weeks apart, not two weeks apart, as the trial court

2. Appellees have filed a joint brief, in which they first argue that Respondent-Father’s appeal should be dismissed because it is moot. We find their arguments to be without merit and decline to address them.

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found. The medical records in the record establish that the first occurred on 9 September 2015 and the second occurred exactly 21 days later, on 30 September 2015. However, we reject Respondent-Father's argument that the time difference suggests he could not have been responsible for some of the son's injuries. His theory is based on testimony from Holly Warner ("Warner"), the nurse practitioner who treated the son after he was referred to UNC Hospital. She testified as follows:

When a rib fracture has just occurred, it's a very small fracture in the rib, and therefore, they're often not – you're not able to see it at all until it starts to heal, so – which is about seven to 14 days, depending on which radiologist you ask and the age of the child.

Respondent-Father argues that, if the rib fracture detected on 30 September 2015 was seven to fourteen days old, the injury would have occurred between 16 and 23 September 2015, by which time he had no contact with the children.

Respondent-Father suggests Warner definitively stated that the fracture was seven to fourteen days old, but in reality, Warner hedged her testimony as to the age of fracture, and offered a general time frame. Warner's main point was that "oftentimes a fracture can be present but you cannot see it until it starts to heal." She then stated: "So if there is healing, the fracture is thought to be *at least* ten to 14 days old." (emphasis added). Using the term "at least" suggests a fracture could be more than fourteen days old when it is detected by a radiologist. Furthermore, as DSS and the GAL note, the overarching theme is that the son suffered multiple fractures that were in multiple stages of healing. We hold the portion of finding of fact 15 that states the son's two skeletal surveys occurred two weeks apart to be unsupported by competent evidence, and we are not bound by that portion of the finding. However, we reject Respondent-Father's argument as to finding of fact 15 in all other respects.

Respondent next challenges finding of fact 17 as unsupported by competent evidence. Respondent-Father, DSS, and the GAL all agree that this finding is erroneous. The evidence presented at the hearing showed the daughter had at least one physical examination after February 2015. We therefore are not bound by finding of fact 17. *See In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003).

Finally, Respondent-Father challenges finding of fact 18, which details Respondent-Father's improper discipline of the daughter, as unsupported by competent evidence. The details of Respondent-Father's

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improper discipline of the daughter were memorialized in a Complete Medical Evaluation (“CME”) that was completed on the daughter in September 2015. The CME was introduced into evidence at the hearing, and it appears that none of the parties objected to its introduction. Therefore, we consider the CME to be competent evidence. *See In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 753-54 (2009) (holding that where the parties failed to raise an objection on hearsay grounds at trial, any objection was waived and the testimony in question must be considered competent evidence). Although the CME does not reference the daughter’s being hit with a “back scratcher,”³ the remainder of this finding is supported by the CME. We conclude that the portion of finding of fact 18 mentioning a back scratcher is not supported by competent evidence. However, the remainder of the finding, which details Respondent-Father’s abuse of the daughter, is supported by competent evidence.

III. Adjudication of the Son as an Abused Juvenile

Next, we turn to Respondent-Father’s challenge to the trial court’s conclusion that the son was an abused juvenile. An abused juvenile is defined, in pertinent part, as one whose parent, guardian, custodian, or caretaker “[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means[.]” N.C. Gen. Stat. § 7B-101(1) (2015). Respondent-Father’s argument essentially rests on his challenges to various findings of fact that we rejected in the previous section. Respondent-Father argues that, without the challenged findings of fact, there is no support for the trial court’s conclusion that the son was abused.

As discussed above, we have rejected Respondent-Father’s challenges to a majority of the findings of fact. The binding findings of fact establish that the son sustained multiple non-accidental injuries and Respondent-Father was responsible for the injuries. This Court has previously upheld adjudications of abuse where a child sustains non-accidental injuries, even where the injuries were unexplained. *See In re C.M.*, 198 N.C. App. 53, 60-62, 678 S.E.2d 794, 798-99 (2009) (affirming abuse where the findings of fact established that the juvenile sustained a head injury that doctors testified was likely non-accidental, despite

3. Details of the back scratcher incident apparently originate from the argument of DSS’s attorney at the hearing. During her opening and closing arguments, DSS’s attorney asserted that the CME “talks about an incident with [the daughter] being hit with a back scratcher.”

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being unable to specify when or how the injury occurred); *In re T.H.T.*, 185 N.C. App. 337, 345-46, 648 S.E.2d 519, 525 (2007), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008) (affirming adjudication of abuse where a juvenile sustained a non-accidental skull fracture and other injuries, the juvenile was in the physical custody of the mother, the mother's explanations were not consistent with the injuries, and the mother failed to seek prompt medical attention). Given the binding findings of fact in the present case, we hold the trial court did not err in concluding that the son was an abused juvenile.

IV. Adjudication of "Serious Neglect"

[4] Next, Respondent-Father argues the trial court erred in concluding that the daughter was "seriously neglected." He contends that "seriously neglected" is not a statutory term used for adjudication pursuant to the juvenile code, and that "serious neglect" pertains only to a parent's placement on the responsible individuals' list, which is not at issue here. Therefore, he argues, the trial acted under a misapprehension of the law. We agree.

N.C. Gen. Stat. § 7B-101(15) defines a neglected juvenile as

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or the custody of whom has been unlawfully transferred under G.S. 14-321.2; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2015). A separate section of the juvenile code authorizes the North Carolina Department of Health and Human Services ("DHHS") to "maintain a central registry of abuse, neglect, and dependency cases," and also authorizes DHHS to "maintain a list of responsible individuals." N.C. Gen. Stat. § 7B-311(a)-(b) (2015). The juvenile code defines "responsible individuals" as "[a] parent, guardian, custodian, or caretaker who abuses or seriously neglects a juvenile," and defines "serious neglect," in turn, as:

Conduct, behavior, or inaction of the juvenile's parent, guardian, custodian, or caretaker that evidences a disregard of consequences of such magnitude that the conduct, behavior, or inaction constitutes *an unequivocal danger*

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to the juvenile's health, welfare, or safety, but does not constitute abuse.

N.C. Gen. Stat. § 7B-101(18a), (19a) (2015) (emphasis added).

In the present case, the trial court found the daughter to be “a child who is seriously neglected[] due to inappropriate discipline by [Respondent-Father] and inaction by the mother which constituted *an unequivocal danger to [the daughter's] health, welfare or safety.*” (emphasis added). As Respondent-Father contends, the trial court used the term “serious neglect” and also employed the statutory language of N.C.G.S. § 7B-101(19a). The term “serious neglect” pertains only to placement of an individual on the responsible individuals’ list and is not included as an option for adjudication in an abuse, neglect, or dependency action. The term is not used in any statutory section governing adjudicatory actions. *See* N.C. Gen. Stat. §§ 7B-200 (jurisdiction), -401(a) (pleadings), -802 (adjudicatory hearing), -805 (quantum of proof at adjudication).

It appears the trial court was acting under a misapprehension of the law — the trial court used the definition of “serious neglect” in N.C.G.S. § 7B-101(19a), pertaining to the responsible individuals’ list, as opposed to the definition of “neglect” in N.C.G.S. § 7B-101(15), pertaining to an adjudication of neglect. Therefore, we reverse the trial court’s adjudication of “serious neglect” and remand the case for the trial court’s consideration of neglect within the proper statutory framework. *See Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960) (“[W]here it appears that the judge below has ruled upon the matter before him upon a misapprehension of the law, the cause will be remanded to the superior court for further hearing in the true legal light.”) (internal quotation marks and citation omitted).

V. Reunification Efforts

[5] Finally, Respondent-Father argues the trial court erred in relieving DSS from making further reunification efforts without following any applicable statutory requirements. We agree. After the trial court concluded the adjudication hearing, it proceeded to a combined disposition and permanency planning hearing. The parties do not dispute the trial court’s authority to combine the hearings, or its authority to address both initial disposition and permanency planning in a single order. Rather, Respondent-Father only argues that the trial court failed to follow the statutory requirements before relieving DSS of further reunification efforts.

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N.C. Gen. Stat. § 7B-901(c) authorizes the elimination of reunification efforts at an initial disposition under limited circumstances. N.C.G.S. § 7B-901(c), as relevant to the present case, provides:

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

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

N.C. Gen. Stat. § 7B-901(c) (2015). In *In re G.T.*, ___ N.C. App. ___, 791 S.E.2d 274 (2016), this Court interpreted N.C.G.S. § 7B-901(c), and concluded that, in order for a court to cease reunification efforts at the initial disposition hearing, “the dispositional court must make a finding that [a] court of competent jurisdiction has determined that the parent allowed one of the aggravating circumstances to occur.” *Id.* at ___, 791 S.E.2d at 279. Relying upon the use of the phrase “has determined” in the statute, this Court elaborated:

[It] is clear and unambiguous and that in order to give effect to the term “has determined” [in N.C.G.S. § 7B-901(c),] it must refer to a prior court order. The legislature specifically used the present perfect tense in subsections (c)(1) through (c)(3) to define the determination necessary. Use of this tense indicates that the determination must have

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already been made by a trial court—either at a previously-held adjudication hearing or some other hearing in the same juvenile case, or at a collateral proceeding in the trial court. The legislature’s use of the term “court of competent jurisdiction” also supports this position. Use of this term implies that another tribunal in a collateral proceeding could have made the necessary determination, so long as it is a court of competent jurisdiction.

Id. “Thus,” the Court concluded, “by our plain reading of the statute, if a trial court wishes to cease reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c)(1)[], it must make findings at disposition that a court of competent jurisdiction *has already determined* that the parent allowed the continuation of” one of the situations enumerated in N.C.G.S. § 7B-901(c)(1). *In re G.T.* at ___, 791 S.E.2d at 279 (emphasis added); *see also* N.C.G.S. §§ 7B-901(c)(1)(a)–(f).

In the present case, the trial court’s order does not cite to N.C.G.S. § 7B-901(c). However, because the trial court ceased reunification efforts in an order entered following an initial disposition hearing, N.C.G.S. § 7B-901(c) was necessarily implicated. The trial court’s order concluded that “[r]eunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile’s health or safety. Durham DSS should be relieved of further efforts to eliminate the need for the children to live outside the home.” This conclusion was based on a finding using the same wording. Notably absent from the trial court’s disposition is any finding indicating that a previous court had determined one of the aggravating factors to be present. *See* N.C.G.S. § 7B-901(c)(1). The trial court’s finding of fact is insufficient to cease reunification efforts at an initial disposition hearing; under *In re G.T.*, ___ N.C. App. at ___, 791 S.E.2d at 279, the trial court’s order was required to include a finding “that a court of competent jurisdiction ha[d] already determined that” one of the circumstances listed in N.C.G.S. § 7B-901(c) was present. No court of competent jurisdiction had made such a determination and, even if it had, the trial court did not make the required finding.

We recognize that the trial court’s initial disposition order in the present case also served as its permanency planning order. N.C. Gen. Stat. § 7B-906.2(b) permits a trial court to cease reunification efforts following a permanency planning hearing:

At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall remain a

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primary or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that *reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.*

N.C. Gen. Stat. § 7B-906.2(b) (2015) (emphasis added). DSS and the GAL argue, and it appears, that the trial court was attempting to follow the requirements of N.C.G.S. § 7B-906.2(b) in ceasing reunification efforts, as the trial court's finding and conclusion that eliminated reunification efforts track the language of that section. Notwithstanding the trial court's effort, the plain statutory language of N.C.G.S. § 7B-901(c) requires a trial court entering an initial dispositional order that places a juvenile in the custody of a county department of social services to "direct that reasonable efforts for reunification . . . shall not be required" only if the trial court "makes written findings of fact pertaining to" any of the circumstances listed in N.C.G.S. § 7B-901(c)(1)(a)-(f).

We find no merit in the argument that the clear command of N.C.G.S. § 7B-901(c) may be eluded in favor of the more lenient requirements of N.C.G.S. § 7B-906.2(b) simply by combining dispositional and permanency planning matters in a single order. Because the requirements of N.C.G.S. § 7B-901(c) were not met in the present case, and consistent with *In re G.T.*, we vacate that portion of the trial court's order that released DSS from further reunification efforts.

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

Judges DIETZ and INMAN concur.

IN RE N.H.

[255 N.C. App. 501 (2017)]

IN THE MATTER OF N.H.

No. COA17-171

Filed 19 September 2017

Guardian and Ward—appointment of guardian—financial resources

In a guardianship proceeding for a minor child, the trial court’s finding that the finances of the child’s aunt were sufficient to care for the child was supported by the testimony of the aunt, who worked as a school bus driver. Her testimony could have been more specific, but her sworn statement that she was willing to care for the child and possessed the financial resources to do so constituted competent evidence. The standard of review merely asks if there was competent evidence to support the findings.

Judge DILLON concurring in a separate opinion.

Judge DAVIS dissenting.

Appeal by respondent-mother from order entered 21 November 2016 by Judge Susan M. Dotson-Smith in Buncombe County District Court. Heard in the Court of Appeals 24 August 2017.

No brief filed for petitioner-appellee Buncombe County Department of Social Services.

David A. Perez, for respondent-appellant mother.

Amanda Armstrong, for guardian ad litem.

CALABRIA, Judge.

Respondent appeals from an order granting guardianship of her minor child, N.H. (“Nancy”), to her sister, K.P. (“Ms. Parker”).¹ We hold that there was evidence before the trial court that Ms. Parker has adequate resources to care appropriately for Nancy, and therefore that the trial court did not err in awarding guardianship of Nancy to Ms. Parker.

1. Pseudonyms are used throughout to protect the juvenile’s privacy and for ease of reading.

IN RE N.H.

[255 N.C. App. 501 (2017)]

I. Factual and Procedural Background

The Buncombe County Department of Social Services (“DSS”) initiated the underlying juvenile case on 23 March 2016, when it filed a juvenile petition alleging Nancy was an abused and neglected juvenile based on allegations that she had been sexually abused by respondent’s former roommates, concerns of possible drug use by respondent, and concerns of domestic violence in the home. DSS did not seek non-secure custody of Nancy, because she was in a safety resource placement. On 15 April 2016, Nancy was transferred to the care of Ms. Parker, and she has remained in Ms. Parker’s care throughout the case.

After a hearing on 6 July 2016, the trial court entered an order on 22 July 2016, adjudicating Nancy to be an abused and neglected juvenile. According to the order, Nancy remained in the legal custody of respondent and Nancy’s father, but Nancy’s safety resource placement continued with Ms. Parker. The court granted respondent weekly supervised visitation with Nancy and ordered that Nancy continue to be involved with outpatient mental health therapy. Additionally, the court ordered respondent to: (1) be involved in mental health treatment; (2) follow the therapist’s recommendations; (3) follow up with the recommendations of her comprehensive clinical assessment; (4) participate in Nancy’s therapy; (5) submit to random drug testing; and (6) complete a medication evaluation and follow all recommendations.

On 6 September 2016, the trial court conducted the initial permanency planning and review hearing in this case. In its order from the hearing, entered 21 November 2016, the court set the primary permanent plan for Nancy as guardianship and set the secondary plan as reunification with her parents. The court awarded guardianship of Nancy to Ms. Parker, granted respondent weekly supervised visitation with Nancy, and directed DSS to continue to work toward Nancy’s reunification with her parents. Respondent filed timely notice of appeal from the trial court’s order awarding guardianship of Nancy to Ms. Parker.

II. Verification of Guardian’s Resources

Respondent’s sole argument on appeal is that the trial court erred in failing to properly verify that Ms. Parker’s resources were adequate to provide Nancy appropriate care as her guardian. We disagree.

A. Standard of Review

“Appellate 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.” *In re R.A.H.*,

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182 N.C. App. 52, 57-58, 641 S.E.2d 404, 408 (2007) (citation and quotation marks omitted). Before a trial court may appoint a guardian of the person for a juvenile in a Chapter 7B case, the court must “verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile.” N.C. Gen. Stat. § 7B-600(c) (2015), *see also* N.C. Gen. Stat. § 7B-906.1(j) (2015) (requiring an identical verification when appointing a guardian of a person for a juvenile as part of the juvenile’s permanent plan). “[T]he trial court need not make detailed findings of evidentiary facts or extensive findings regarding the guardian’s situation and resources, . . . [but] some evidence of the guardian’s ‘resources’ is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence.” *In re P.A.*, 241 N.C. App. 53, 61-62, 772 S.E.2d 240, 246 (2015). “The court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” N.C. Gen. Stat. § 7B-906.1(c).

B. Analysis

With regard to the adequacy of Ms. Parker’s resources to care for Nancy as her guardian, the trial court found:

28. [Ms. Parker was] present at this hearing. Pursuant to N.C.G.S. § 7B-600(b), the Court questioned [Ms. Parker] and she understand[s] the legal significance of being appointed the minor child’s guardian, and she has adequate resources to care appropriately for the minor child, and [is] able to provide proper care and supervision of the minor child in a safe home.

However, on appeal, respondent contends that there was no evidence presented to the trial court to support such a finding. For example, respondent notes that Ms. Parker “testified as to her employment with Buncombe County Schools Transportation, but she did *not* testify as to her actual income, whether she was paid a salary or worked by the hour, whether she received any job benefits, nor any other specifics regarding her employment other than she had no other source of income.” Respondent notes various financial assets which Ms. Parker may or may not have had, and the fact that no testimony was elicited with respect to such hypothetical resources.

We acknowledge that our case law addresses this situation from numerous angles, none of them precisely on point. For example, in *In re N.B.*, guardians testified about their willingness to take responsibility,

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there was a report stating the guardians were willing and able to provide care, and the social worker spoke “in depth” with the guardians about the requirements and responsibilities of being guardians. We held that this was adequate evidence pursuant to N.C. Gen. Stat. § 7B-906.1. *In re N.B.*, 240 N.C. App. 353, 361-62, 771 S.E.2d 562, 568 (2015). By contrast, in *In re P.A.*, where the only evidence was an unsworn statement by the guardian that the guardian had the ability to support the juvenile, we held that this was insufficient. *P.A.*, 241 N.C. App. at 65, 772 S.E.2d at 248. Likewise, in *In re J.H.*, where there was a report in evidence but the proposed guardians did not testify, we held that this was insufficient. *In re J.H.*, ___ N.C. App. ___, ___, 780 S.E.2d 228, 240 (2015).

In the instant case, there are two GAL reports and one DSS report in the record, and Ms. Parker was present in court and offered testimony. The first GAL report, dated 30 June 2016, notes that Ms. Parker “is employed with the school district[,]” but makes no other observations about Ms. Parker’s resources. The second GAL report, dated 1 September 2016, notes that Ms. Parker “is employed as a school bus driver for the school district,” and that Ms. Parker “is a single mom with no income when she is not driving a school bus during the summer[,]” but otherwise makes no other observations about Ms. Parker’s resources. The DSS report, also dated 1 September 2016, notes that respondent has given Ms. Parker a total of \$30 when Ms. Parker experienced “significant financial difficulties[,]” that DSS has provided Ms. Parker with “gift cards of \$30 per month to assist with purchasing food and gas[,]” and that Ms. Parker “has experienced financial difficulties in this process[,]” but makes no specific findings as to Ms. Parker’s resources aside from these.

At trial, Ms. Parker was questioned about her resources. Although she was not specifically questioned about her salary or benefits, her examination was still thorough:

Q. Okay. And so you’re willing to be legally responsible for meeting all [Nancy]’s needs until she’s 18 years old, is that correct?

A. Yes.

Q. And you understand that that means you would [be] responsible for meeting her medical needs, her dental needs, her psychological needs, her educational needs, and any other needs until she’s 18, correct?

A. Yes.

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Q. And you're comfortable with that?

A. Yes.

...

Q. Do you work outside the home?

A. Yes.

Q. Where do you work?

A. Buncombe County Schools Transportation.

Q. Okay. And do you have any other source of income?

A. No.

Q. After you are paid every month, do you have sufficient money to cover all of your household bills?

A. Yes.

Q. And after you pay all of your bills, do you have money left over to cover groceries and any other needs?

A. It depends on what bills, but yes, we make it.

Q. Have you ever been a position where you didn't have enough money to pay all the bills related to housing, food, medical, transportation?

A. Over this past summer, yes, because I wasn't able to be employed with the intense home therapy and stuff, but I did manage to save up money and it go[t] me through almost all of the summer. So--

Q. Why weren't you able to be employed over the summer?

A. Due to the nonapproved child care for [Nancy], I didn't have no one to leave her with.

Q. Okay. So you were unable to be employed this summer because you were caring for [Nancy]?

A. Yes. And then whenever she started intense home therapy, it's a requirement three to five days a week [inaudible]. I have to be involved in that.

Q. Okay. And you mentioned you were able to save up money to get you through the summer?

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A. Yes.

Q. Okay. And if the Court were to award guardianship to you, what would be your plan for next summer?

A. Save up.

Q. Okay. So now that you -- this summer you would be aware that you would not be able to be employed and you can save up throughout the year to cover your expenses during the summer?

A. Yes.

Q. Do you feel--

A. It was -- it was more difficult because I had transitioned -- I worked at a gas station and transitioned into the Buncombe County Transportation in, I think, March -- at the end of March, and then I got [Nancy] and kind of put it on halt.

Q. Okay.

A. My plan was to have a summer job, so--

Q. Okay. Do you anticipate that you will have sufficient financial income to cover all of your expenses even during the summertime when you're not employed?

A. Yes.

Q. Okay. If you were to find that -- say, for example, you ran out of money and needed financial assistance, do you have family that you could go to ask for help?

A. Yes.

Q. Okay. And would you be willing to do that if you had to?

A. Yes.

Q. And would you also know to reach out to the Department or other community resources to seek help if you needed to?

A. Yes.

Certainly, the statements in the GAL and DSS reports, as well as Ms. Parker's own testimony that she had financial difficulties over the

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summer, would constitute evidence that Ms. Parker lacked the resources to care for Nancy. However, our role on appeal is not to weigh and compare the evidence; our standard of review merely asks if there was competent evidence, even hearsay evidence, at trial to support the trial court's findings.

We hold that this matter is distinguishable from *In re P.A.*, in which the only evidence was an unsworn statement by the guardian that the guardian had the ability to support the juvenile, and from *In re J.H.*, in which the proposed guardians did not testify. In this case, there is sworn testimony by Ms. Parker regarding her ability to provide appropriate care for Nancy.

While Ms. Parker's testimony appears to be the only evidence in the record to support her having adequate resources to provide appropriate care for Nancy, it is nonetheless evidence in the record. No challenge was raised at trial with respect to this evidence, nor did any party attempt to contradict or impeach Ms. Parker's testimony. In fact, in respondent's attorney's closing arguments, counsel did not advocate *against* Ms. Parker being awarded guardianship, but rather *in favor* of reunification with respondent. We hold that, although Ms. Parker's testimony was lacking in specificity, her sworn statement that she was willing to care for Nancy and possessed the financial resources to do so constituted competent evidence, which in turn supported the trial court's finding that she "has adequate resources to care appropriately for the minor child[.]"

AFFIRMED.

Judge DILLON concurs in a separate opinion.

Judge DAVIS dissents in a separate opinion.

DAVIS, J., dissenting.

Because I believe the majority's opinion is inconsistent with both the statutory provision at issue and the relevant prior opinions of this Court, I respectfully dissent. The only issue in this appeal is whether the trial court erred in failing to properly verify that Ms. Parker possessed the financial resources necessary to adequately care for Nancy. Subsection (j) of N.C. Gen. Stat. § 7B-906.1 states that

[i]f the court determines that the juvenile shall be placed in the custody of an individual other than a parent or

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appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and *will have adequate resources to care appropriately for the juvenile.*

N.C. Gen. Stat. § 7B-906.1(j) (2015) (emphasis added).

This Court has held that in order to meet this verification requirement, “the record must contain competent evidence of the guardians’ financial resources and their awareness of their legal obligations.” *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 240 (2015) (citation omitted). “The court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” N.C. Gen. Stat. § 7B-906.1(c) (2015). Such evidence may include reports and home studies conducted by the guardian *ad litem* (“GAL”) or department of social services (“DSS”). *In re J.E., B.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73, *disc. review denied*, 361 N.C. 427, 648 S.E.2d 504 (2007).

It is instructive to examine prior decisions in which this Court has concluded that the verification requirement contained in N.C. Gen. Stat. § 7B-906.1(j) was not satisfied. *In re P.A.*, 241 N.C. App. 53, 772 S.E.2d 240 (2015) involved a trial court’s award of guardianship of the minor child to his father’s girlfriend, “Ms. Smith.” At the permanency planning hearing, Ms. Smith was asked if she had (1) “the financial and emotional ability to support this child and provide for its needs”; (2) “the willingness to reach out when your resources are running out”; and (3) the “prepared[ness] to support this minor child” *Id.* at 59-60, 772 S.E.2d at 245. She answered “yes” in response to each of these questions. *Id.*

On appeal, the respondent-mother argued that “the trial court [had] failed to verify that Ms. Smith had adequate resources to care appropriately for [the minor child]” *Id.* at 58, 772 S.E.2d at 245. We agreed, holding that Ms. Smith’s conclusory answers alone were “insufficient to support the trial court’s finding” *Id.* at 60, 772 S.E.2d at 245. We observed that the record did not present actual evidence of Ms. Smith’s financial resources, but instead presented “Ms. Smith’s own opinion of her abilities.” *Id.* at 65, 772 S.E.2d at 248. Because her opinion as to her ability to care for the child was not sufficient to show that she actually had adequate resources to care for him, we ruled that “[t]he trial court ha[d] the responsibility to make an independent determination, based upon facts in the particular case, that the resources available to

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the potential guardian are in fact ‘adequate.’” *Id.* (citation, quotation marks, and brackets omitted). We further stated that although the verification requirement under N.C. Gen. Stat. § 7B-906.1(j) does not mandate “detailed findings of evidentiary facts or extensive findings regarding the guardian’s situation and resources[,]” this statute does require “some evidence of the guardian’s ‘resources’ . . . as a practical matter, since the trial court cannot make any determination of adequacy without evidence.” *Id.* at 61-62, 772 S.E.2d at 246.

On several other occasions, we have likewise rejected a trial court’s determination that a prospective guardian possessed adequate resources for purposes of N.C. Gen. Stat. § 7B-906.1(j). In *J.H.*, the juvenile had been previously placed with his maternal grandparents at the time the trial court entered a permanency planning order awarding guardianship to the grandparents. At the hearing, the court was presented with reports from both the DSS and the GAL. *J.H.*, __ N.C. App. at __, 780 S.E.2d at 240 (2015). The DSS report stated that the grandparents had met all of the child’s “well-being needs” and “medical needs[,]” including “making sure that he has his yearly well-checkups.” *Id.* at __, 780 S.E.2d at 240 (quotation marks omitted). The GAL report stated that the child “had no current financial or material needs.” *Id.* at __, 780 S.E.2d at 240 (quotation marks omitted). The reports also showed that the grandparents had custody of the minor child’s sister. Based on these reports alone, the trial court found that the grandparents had adequate resources to care for the child. *Id.* at __, 780 S.E.2d at 240.

On appeal, this Court vacated the trial court’s order and remanded on the ground that the evidence contained in these reports was “insufficient to support a finding that [the minor child’s] grandparents have adequate resources to care for [him].” *Id.* at __, 780 S.E.2d at 240 (citation and quotation marks omitted). In so holding, we stated that “[t]he trial court . . . failed to make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact adequate.” *Id.* at __, 780 S.E.2d at 240 (citation and quotation marks omitted).

Similarly, in *In re T.W.*, __ N.C. App. __, 796 S.E.2d 792 (2016), we held that the trial court erred in awarding legal custody to the minor child’s aunt because it had not verified that she would have adequate resources to care for the child. At the permanency planning hearing, the aunt testified that “she had yet to find employment and was just continuously looking for jobs” and had received “additional support and assistance” from her mother and grandmother so as to enable her to provide care for the juvenile. *Id.* at __, 796 S.E.2d at 798. The trial court received

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a GAL report that described the aunt's home as "very clean" and stated that the child would have "his own room." *Id.* at __, 796 S.E.2d at 798. However, we determined that this evidence did not support the trial court's finding that the aunt had adequate resources to care for the child. We stated that "vague assurances do not suffice to allow an independent determination by the court, based upon the facts in the particular case, that the resources available to the potential custodian are in fact 'adequate' for purposes of N.C. Gen. Stat. § 7B-906.1(j)." *Id.* (citation and quotation marks omitted).

In the present case, the only witness who testified at the 6 September 2016 permanency planning hearing on this issue was Ms. Parker herself. She testified that she had previously been employed as a bus driver during the prior school year. She stated, however, that she had been unable to obtain employment during the summer of 2016 because she had to participate in Nancy's intensive home therapy and other needs. She further conceded that her lack of employment during the summer months had resulted in her not having enough funds to pay all of her bills. She stated that she had been able to save up some money, which got her "through almost all of the summer."

Nevertheless, she answered in the affirmative when asked (1) whether she would have "sufficient financial income to cover all of [her future] expenses"; (2) whether she "ha[d] family that [she] could go to ask for help"; and (3) whether she would "know to reach out to [DSS] or other community resources to seek help if [she] needed to." In addition, she stated that her future plan for the following summer would be to "[s]ave up" and that she anticipated she would have sufficient income to cover her expenses next summer.

Rather than demonstrating that N.C. Gen. Stat. § 7B-906.1(j) had been satisfied, both Ms. Parker's testimony and the reports prepared by DSS and the GAL supported the opposite conclusion — that she *lacked* the financial resources to care for Nancy. Ms. Parker did not testify as to her actual income, her job benefits, or any other specific information regarding her finances. Moreover, she did not specify the amount of money she was lacking to pay her bills during her financial shortfall during the summer of 2016.

The DSS and GAL reports unambiguously showed that Ms. Parker has struggled financially while caring for Nancy. The GAL's report stated that Ms. Parker had a problem with transporting Nancy to visits, because she "is a single mom with no income when she is not driving a school bus during the summer." The report prepared by DSS further stated, in pertinent part, as follows:

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[Ms. Parker] had to cancel a recent orthopedic appt. due to transportation difficulties

. . . .

[Ms. Parker] has experienced financial difficulties in this process as she has provided transportation for the child for visitations, mental health appointments, physician appointments, school registration, etc. as well as providing for the minor child's basic needs.

. . . .

Respondent mother has given the caregiver, [Ms. Parker], a one[-]time amount of \$20 followed recently by a \$10 support during times when [Ms. Parker] has experienced significant financial difficulties. . . .

. . . .

. . . The agency has provided the caregiver, [Ms. Parker], with gift cards of \$30 per month to assist with purchasing food and gas. . . . [Social Worker] Banks made [a] referral to the Bair Foundation which has offered [Ms. Parker] some assistance with school supplies.

This evidence — in addition to Ms. Parker's own testimony about her lack of funds — demonstrated that Ms. Parker lacked the resources necessary to act as Nancy's guardian. As stated above, her own opinion of her future ability to financially care for Nancy, without more, was insufficient to support the court's finding that she possessed adequate resources as required under N.C. Gen. Stat. § 7B-906.1(j). See *In re P.A.*, 241 N.C. App. at 65, 772 S.E.2d at 248.

It is important to note that this is not a case in which there was conflicting evidence on this issue as to which it was the trial court's duty to weigh. To the contrary, the *only* evidence other than Ms. Parker's vague assurances showed that she has struggled to make ends meet. N.C. Gen. Stat. § 7B-906.1(j) clearly requires that before a person is appointed as guardian for a juvenile competent evidence must be presented that the prospective guardian will actually have adequate resources to take care of the child's needs. Here, such evidence simply was not presented to the trial court.

For these reasons, I would hold that the trial court's finding that Ms. Parker "has adequate resources to care appropriately for the minor child" is unsupported by the competent evidence presented at the

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permanency planning and review hearing and that the trial court's order must be vacated. Accordingly, I dissent.

DILLON, Judge, concurring.

In this matter, the trial court entered an order granting Ms. Parker guardianship over N.H. Our General Assembly requires that a trial court considering the appointment of a guardian must first verify that the potential guardian “*will have* adequate resources to care appropriately for the juvenile.” N.C. Gen. Stat. § 7B-906.1(j) (emphasis added). The sole issue here is whether there was sufficient evidence before the trial court for it to determine that Ms. Parker had adequate resources to care for N.H. *in the future*. Whether the evidence was sufficient in this case is a close question. But based on our binding jurisprudence on the issue, we must conclude that the evidence presented at the hearing was sufficient.

I believe that this case is more similar to *In re J.E.*, 182 N.C. App. 612, 643 S.E.2d 70 (2007) (holding that the trial court's consideration of a home study was “adequate compliance” with the relevant statutes), than the three cases relied on in the dissenting opinion – *In re P.A.*, 241 N.C. App. 53, 772 S.E.2d 240 (2015), *In re J.H.*, ___ N.C. App. ___, 780 S.E.2d ___ (2015), and *In re T.W.*, ___ N.C. App. ___, 796 S.E.2d 792 (2016) – in which we held the evidence to be insufficient to justify the trial court's course of action. Specifically, like in *In re J.E.*, and unlike the three cases relied on in the dissent, there was evidence at the hearing in this matter that the current income of the prospective guardian, Ms. Parker, was adequate to care for the juvenile going forward. Specifically, Ms. Parker testified that she was employed as a bus driver and that her income was sufficient to cover her expenses in caring for N.H. with some left over for savings.¹ Accordingly, I concur with the majority. I write separately to highlight the distinction between *In re J.E.* and the three cases relied upon in the dissent.

The key distinction between *In re J.E.* and the three cases relied upon in the dissenting opinion is that in *In re J.E.* there was at least *some* evidence regarding the prospective guardian's resources to care for the minor *in the future*. In the three cases relied upon in the dissent, the evidence we found insufficient consisted of nothing more than

1. Ms. Parker essentially testified that she worked as a school bus driver, that she had cared for N.H. during the prior school year and was able to save money during the year, that she was out of work during the summer where she spent her savings and ran out of money, but that at the time of the hearing she was again employed as a bus driver and the income was sufficient to cover her needs and the needs of N.H.

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evidence that (1) the prospective guardian *had* adequately cared for the juvenile in the recent *past*, and (2) a conclusory statement that the prospective guardian would be able to care for the juvenile in the future, without any reference to the evidence forming the basis of the opinion.²

In *In re J.E.* our Court held that evidence which consisted of a conclusion by DSS³ that the prospective guardians “*have adequate income and are financially capable of providing for the needs of [the juvenile]*” was sufficient. *In re J.E.*, 182 N.C. App. at 617, 643 S.E.2d at 73 (emphasis added). In other words, the distinguishing factor was that the trial court had some evidence regarding the current income of the prospective guardians, which our Court held was sufficient even though there was nothing in our opinion to suggest that the trial court itself delved into the math in its investigation of the guardians’ resources. Our Court in *In re P.A.* (one of the three opinions relied upon in the dissent) held that the conclusion by DSS in *In re J.E.* distinguished *In re J.E.* from *In re P.A.*, where there was no evidence regarding the prospective guardian’s current resources to care for the juvenile going forward:

In re J.E. is easily distinguishable from this case based upon the extensive evidence regarding the guardians presented in that case, which included the two home study reports.

It is correct that the trial court need not make detailed findings of evidentiary facts or extensive findings regarding the guardian’s situation and resources, *nor does the law require any specific form of investigation [by the trial court] of the potential guardian.* But the statute does require the trial court to make a determination that the guardian has “adequate resources” and *some evidence* of the guardian’s “resources” is necessary as a practical matter[.]

2. *In re P.A.*, 241 N.C. App. at 58, 772 S.E.2d at 245 (prospective guardian’s opinion that she could and would care for the juvenile was insufficient to allow the trial court to make an independent determination regarding the guardian’s resources going forward); *In re J.H.*, ___ N.C. App. at ___, 780 S.E.2d at 240 (trial court failed to consider any evidence regarding the potential guardians’ *current* resources when it considered that the guardians had a history of caring for the juvenile in the past); *In re T.W.*, ___ N.C. App. at ___, 796 S.E.2d at 797 (evidence that the home of the potential guardian was suitable in size and condition to care for the juvenile and a vague assurance that the guardian was looking for work to provide for the juvenile in the future was insufficient).

3. “DSS” refers to the two departments of social services which had been involved in the matter.

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In re P.A., 241 N.C. App. at 61-62, 772 S.E.2d at 246 (citations omitted) (emphasis added).

Like in *In re J.E.* the evidence in the present case consisted of more than just a conclusory opinion by Ms. Parker that she could care for N.H. The evidence also consisted of her testimony about her job and the income from her job. This testimony appears almost identical to the conclusion by DSS in *In re J.E.* It may be argued that such testimony from the guardian herself is not as credible as similar testimony from DSS, but this issue goes to the *weight* of the evidence, not its *sufficiency*. Accordingly, based on our holding in *In re J.E.*, I fully concur in the majority opinion holding that the trial court had sufficient evidence to make a determination regarding the adequacy of Ms. Parker's resources to care for N.H.



NORTH CAROLINA STATE BOARD OF EDUCATION, PLAINTIFF

v.

THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA RULES
REVIEW COMMISSION, DEFENDANTS

No. COA15-1229

Filed 19 September 2017

**Constitutional Law—North Carolina—Rules Commission—
authority to review rules of Board of Education**

Separation of powers was not violated where the review and approval of rules made by the State Board of Education was appropriately delegated by the General Assembly to the North Carolina Rules Commission. The General Assembly adequately directed and limited the Commission's review of the Board's proposed rules.

Judge TYSON dissenting.

Appeal by Defendants from order entered 2 July 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 9 August 2016.

*Campbell Shatley, PLLC, by Robert F. Orr, and Poyner Spruill LLP,
by Andrew H. Erteschik, for Plaintiff-Appellee.*

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Troutman Sanders LLP, by Christopher G. Browning, Jr., for Defendant-Appellant North Carolina Rules Review Commission.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amar Majmundar, and Special Deputy Attorney General Olga Vysotskaya de Brito, for Defendant-Appellant The State of North Carolina.

INMAN, Judge.

This appeal presents a question of first impression: Does the North Carolina Rules Review Commission, an agency created by the General Assembly, have the authority to review and approve rules made by the North Carolina State Board of Education, whose authority is derived from the North Carolina Constitution? For the reasons explained in this opinion, we conclude the answer is yes.

The North Carolina Rules Review Commission (the “Commission”) and the State of North Carolina (collectively, “Defendants”) appeal from a trial court’s order granting summary judgment in favor of the North Carolina State Board of Education (the “Board”) and denying Defendants’ motion to dismiss. Defendants argue the trial court erred because the state constitution provides that the Board’s power is “subject to laws enacted by the General Assembly,” and the General Assembly created the Commission and delegated its review power to the Commission by enacting laws. The Board, however, contends that review by the Commission encroaches on its constitutional authority and that the General Assembly’s delegation to the Commission of authority to review and “veto” Board rules violates the separation of powers provision in the North Carolina Constitution.

We hold that rules made by the Board are subject to statutes enacted by the General Assembly requiring review and approval by the Commission. We also hold that the General Assembly has not violated the separation of powers requirement by enacting an administrative procedure for state agencies and delegating to the Commission the power to review and approve—or disapprove—rules made by the Board. Accordingly, we reverse the trial court’s order and remand to the trial court for entry of judgment in favor of Defendants.

Procedural and Appellate History

On 7 November 2014, the Board commenced this action against Defendants based upon the North Carolina Constitution. The Board’s

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complaint sought a declaratory judgment preventing the Commission from exercising any authority over the Board and, specifically, controlling the Board's enactment of rules. The complaint alleged two as-applied challenges to the Commission's interpretation and application of N.C. Gen. Stat. § 150B-2(1a), the Administrative Procedure Act ("the APA"), one joint as-applied and facial challenge,¹ and four facial challenges to the Commission's enabling legislation.²

The complaint did not identify any specific Board rule that had been thwarted by the Commission. The complaint alleged, however, the following:

Since its inception in 1986, the [Commission] or its staff has objected to or modified every rule adopted by the Board and submitted to the [Commission] for approval. Moreover, the Board has declined to adopt a number of rules that it otherwise would have adopted but for the fact that the [Commission] would have objected to these rules or struck them down.

In addition, the [Commission] review process typically takes a minimum of six months and often longer. Thus, when the Board adopts rules, they do not have the force and effect of law until at least six months later. In the intervening months or, in some cases, years, statewide education policy is effectively enjoined by the [Commission] review process. In this regard, the [Commission's] exercise of authority over the Board's rulemaking erodes the Board's ability to timely address critical issues facing our State in the area of education.

1. The joint as-applied and facial constitutional challenge, which is not at issue on appeal, alleged that the Commission's determination of whether a rule is within a rulemaking entity's authority is both facially unconstitutional and unconstitutional as applied to the Board because it violates Article I, Section 6 and Article IV, Section 1 of the state constitution.

2. The facial challenges, which are not at issue on appeal, alleged: (1) the Commission improperly exercises legislative power by striking down agency rules without bicameral passage and presentment of a bill as required by Article I, Section 6 of the state constitution; (2) the General Assembly has not provided the Commission with adequate guiding standards in violation of Article I, Section 6 and Article II, Section I of the state constitution; (3) the Commission encroaches on the executive function of rulemaking in violation of Article I, Section 6 and Article III, Section 1 of the state constitution; and (4) the Board is a coequal of the executive and legislative branches of government and not an agency subject to the APA.

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The complaint asserted that the Board would no longer voluntarily submit its rules to the Commission for approval and would nevertheless deem its rules to have the immediate full force and effect of law. The complaint acknowledged that the Board's position is in direct conflict with the Commission's interpretation and application of the APA and the Commission's enabling legislation.

On 12 January 2015, Defendants moved to dismiss the Board's complaint. The Board voluntarily dismissed without prejudice five of its seven claims, leaving only two as-applied challenges. The Board moved for affirmative summary judgment and the case was assigned to a single superior court judge. In a brief supporting their motion to dismiss and opposing the Board's motion for summary judgment, Defendants also argued that they were entitled to summary judgment in their favor.

On 29 June 2015, the trial court heard Defendants' motion to dismiss the Board's remaining two claims and the Board's motion for summary judgment on those claims. The first of these claims specifically asserts that the Commission's interpretation and application of N.C. Gen. Stat. § 150B-2(1a) to the Board violates Article IX, Section 5 of the North Carolina Constitution, the constitutional provision that grants the Board rulemaking authority. The second claim asserts that the Commission's interpretation and application of N.C. Gen. Stat. § 150B-2(1a) to the Board also violates Article I, Section 6, which requires the separation of powers, and Article II, Section 1, under which the General Assembly "may delegate a limited portion of its legislative power . . ." *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965).

On 2 July 2015, the trial court entered an order allowing the Board's motion for summary judgment,³ concluding:

Upon consideration of the plain language of the North Carolina Constitution, and the verified complaint, there is no genuine issue of material fact and Plaintiff is entitled

3. Although the State references the motion to dismiss in a heading of its brief and cites the appropriate standard of review, the State fails to offer any substantive analysis in support of its argument that the trial court erred in denying Defendants' motion to dismiss. We therefore deem that issue abandoned. N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *N.C. Farm Bureau Mut. Ins. Co. v. Smith*, 227 N.C. App. 288, 292, 743 S.E.2d 647, 649 (2013) ("[Appellant] fail[s] to cite any controlling authority in support of this contention or otherwise explain why it has merit, and we accordingly deem the issue abandoned.").

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to judgment as a matter of law pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

Defendants timely appealed to this Court.

The Board moved to dismiss Defendants' appeal pursuant to N.C. Gen. Stat. § 7A-27(a1), which provides that “[a]ppel lies of right directly to the Supreme Court from any order or judgment of a court, either final or interlocutory, that holds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law.” N.C. Gen. Stat. § 7A-27(a1) (2015). On 2 March 2016, this Court granted the Board's motion.

On 13 July 2016, the North Carolina Supreme Court entered a special order holding that the trial court's order did not facially invalidate an act of the General Assembly and remanded the appeal to this Court “for consideration of [D]efendants' challenges to the validity of the trial court's order on the merits.”

We therefore address the trial court's ruling and the parties' arguments on the Board's two remaining claims.

Analysis

To better guide our determination of the issues raised on appeal, we consider the historical background surrounding the Board, its creation and evolution, the General Assembly's adoption of the APA and creation of the Commission, and the relation of the Board to the Commission.

I. Historical Context

A. *Creation and Evolution of the Board*

Public education in North Carolina predates the Board. Our state's first constitution (the “1776 Constitution”) provided that “a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public” N.C. Const. of 1776, art. XLI.

In 1825, the General Assembly enacted a statute to “create a fund for the establishment of Common Schools.” Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4. The statute established “a body corporate and politic, under the name of the President and Directors of the Literary Fund[,]” to administer and invest money controlled by the Fund. Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4. The statute named the Governor as President of the Literary Fund's board—the first governing body for public education in North Carolina. Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4.

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The General Assembly allocated to the Literary Fund money from various revenue sources as well as all unoccupied swamp land in North Carolina, and vested the Literary Fund's board with the power to sell, invest, and otherwise exploit assets in the fund to generate revenue for public education and to build schools across the state. Act of Nov. 21, 1825, ch.1, 1825 N.C. Sess. Laws 3-4; Act of Feb. 10, 1855, ch. 27, 1854-55 N.C. Sess. Laws 50-62; *see also Bd. of Educ. Of Duplin Cnty. v. State Bd. of Educ.*, 114 N.C. 313, 317-19, 19 S.E. 277, 277-78 (1894).⁴ The Literary Fund was all but depleted as a result of the Civil War. *See* Jonathan Worth, *Report of the President & Directors of the Literary Fund of North Carolina*, Exec. Doc. 18, General Assembly Session 1866-67 (1867).⁵

Following the Civil War, North Carolina adopted a new state constitution (the "1868 Constitution") which for the first time provided in its Declaration of Rights "a right to the privilege of education." N.C. Const. of 1868, art. I, § 27.⁶ Unlike other declarations of rights, this provision did not restrict state government, but rather committed it to an affirmative duty. Orth, *supra*, at 52.

The 1868 Constitution also devoted a separate Article to education, beginning with the premise that "[r]eligion, morality and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged[,] and providing for tuition "free of charge to all children of the State between the ages of six and twenty-one years." N.C. Const. of 1868, art. IX, §§ 1-2. It also established the State Board of Education as follows:

The Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; but all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly,

4. This decision was reprinted in 1921 as 114 N.C. 202.

5. The Report was submitted to the General Assembly on 10 December 1866 and printed with other executive and legislative documents maintained during the 1866-67 legislative session.

6. The 1868 Constitution, unlike the state's 1776 Constitution, was ratified by voters and incorporated individual rights which previously had been provided as constitutional amendments. *See* John V. Orth, *The North Carolina State Constitution*, 13 (1st ed. 1993).

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and when so altered, amended or repealed they shall not be re-enacted by the Board.

N.C. Const. of 1868, art. IX, § 9. The Board was composed entirely of *ex-officio* members, specifically the Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction, and the Attorney General. N.C. Const. of 1868, art. IX, § 7.

In 1931, the General Assembly established the North Carolina Constitutional Commission, which recommended a constitutional amendment empowering the Board to “supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto[,]” eliminating the word “legislate” from the Board’s powers, and providing that “[a]ll the powers enumerated in this Section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.” *The Report of the North Carolina Constitutional Commission*, 33 (1932) (hereinafter the “1932 Report”). The Constitutional Commission proposed this amendment as part of an entirely rewritten state constitution. *Id.* at 5. A preamble to the proposed constitution noted that “the chief need is to relax many of the existing restrictions on the powers of the General Assembly, so as to allow more elasticity in shaping government policies, not only in respect to present conditions, but also in regard to future needed adjustments” *Id.* at 5. The General Assembly proposed the new constitution in 1933, but because of a technicality, the issue did not come before the voters.⁷ John L. Sanders, *Our Constitutions: A Historical Perspective*, in *North Carolina Manual* 73, 77 (Liz Proctor ed., 2011).

In 1938, the Governor’s Commission on Education issued a 63-page report recommending that the General Assembly propose to voters the

7. The enabling statute provided that the new state constitution could be ratified by voters in the “next general election.” Act of May 8, 1933, ch. 383, sec. 2, 1933 N.C. Pub. Laws, 573. An election was held in November 1933 for voters to consider the proposed 21st amendment to the United States Constitution, which would repeal Prohibition as established by the 18th Amendment. Act of May 9, 1933, ch. 403, sec. 1, 1933 N.C. Pub. Laws, 600. The revised state constitution was not on this ballot. *Opinions of the Justices in the Matter of Whether the Election Held on Tuesday After the First Monday in November, 1933, Was the Next General Election Following the Adjournment of the 1933 Session of the General Assembly*, 207 N.C. 879, 181 S.E. 557 (1934). After that election and prior to the next general election in November 1934, the North Carolina Supreme Court held in an advisory opinion that the proposed new state constitution could not be considered by voters because the enabling statute provided for an election date that had already passed. *Id.* at 880, 181 S.E. at 557-58; Sanders, *supra*, at 77; Orth, *supra*, at 20.

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1932 draft amendment regarding the powers of the Board, and urging that if the amendment was submitted to voters in an election “not entangled with other amendments which might be less worthy, the people of the state will adopt the amendment.” *Report and Recommendations of the Governor’s Commission on Education*, 31 (Dec. 1, 1938) (hereinafter the “1938 Report”).⁸

The Commission on Education reviewed the administrative challenge of a system governed by not only the Board but also by four other boards and commissions, and noted that “[t]here seems to be much duplication and some dual control in the workings of these various boards and unnecessary duplication in the work of school administrators.” *1938 Report* at 30. The Commission recommended that “all these boards should be consolidated under [the Board] and that the direction of all activities of the teaching profession should come from this central board.” *Id.* at 30. To provide the public school system “immediate relief from scattered administration rather than wait for the long time goal of the proposed constitutional amendment,” the Commission also proposed that the General Assembly enact legislation to consolidate the work of the various boards and commissions and transfer their duties to the Board. *Id.* at 31.⁹

In 1942, voters adopted a constitutional amendment proposed by the General Assembly making several changes to the governance and power of the Board. Thad Eure, *North Carolina Manual*, 239-43 (1943). One section of the amendment reduced the number of *ex-officio* members and provided for a majority of the Board to be appointed by the Governor. N.C. Const. of 1868 (amended 1942) art. IX, § 8; Act of March

8. The General Assembly in 1937 directed the governor to appoint a commission to examine North Carolina’s public education system and to recommend reforms to lawmakers. Act of March 22, 1937, ch. 379, 1937 N.C. Pub. Laws, 709.

9. Despite a provision in the 1868 Constitution for the state to be responsible for providing free public education, efforts by the General Assembly before 1942 to shift primary administrative and funding responsibilities from counties to the state were unsuccessful. *See 1938 Report* at 34. For example, the School Machinery Act implemented a new state-wide sales tax to support public schools with money for textbooks, supplies, and teacher salaries. Act of April 3, 1939, ch. 358, 1939 N.C. Pub. Laws, 771-91. Still, counties remained responsible for building schools. *Fletcher v. Comrs. of Buncombe*, 218 N.C. 1, 4, 9 S.E.2d 606, 608 (1940). “To call the resulting condition one of uniformity is to tax optimism. There are one hundred counties in the State, each with its own difficulties and problems, some of which seem to be almost unsolvable. There are one hundred governing boards, composed of men who have widely different ideas upon this subject and with a discretion which may be exercised and reflected in widely divergent standards throughout the State.” *Id.* at 7, 9 S.E.2d at 610.

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13, 1941, ch. 151, sec. 1-3, 1941 N.C. Pub. Laws, 240-41. Another section of the amendment, central to the matter at hand, revised the Board's authority as follows:

The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the text-books to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and *make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.*

N.C. Const. of 1868 (amended 1942), art. IX, § 9 (emphasis added).

The 1942 amendment eliminated the provision for the Board to have the "full power to legislate." *Id.* It also eliminated the provision that the Board's rules could be "altered, amended or repealed" by the General Assembly and instead provided that "[a]ll the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly." *Id.*

In an article advocating that voters adopt the 1942 amendment, one educator explained that because most of the Board's members were elected to fill other offices unrelated to education, the Board "could not possibly do the job of administering a growing public school system." Ralph W. McDonald, Guy B. Phillips, Roy W. Morrison & Edgar W. Knight, *The Constitutional Amendment for a State Board of Education in North Carolina*, 25 *The High Sch. J.*, no. 6, 265, 266 (Oct. 1942). "From time to time, therefore, the Legislature has been forced to set up boards and commissions to carry out duties and responsibilities which, under the Constitution, the State Board of Education was supposed to exercise." *Id.* at 266-67. The other boards and commissions included the State School Commission, the Board of Vocational Education, the Board of Commercial Education, and the State Textbook Commission. *Id.* Even the Literary Fund, which the Board was created to replace after the

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Civil War, remained vested with education funds and provided loans for school construction and improvements. N.C. Code 1935 (Michie), § 5683.

In 1955, the General Assembly reorganized public education laws and established a statewide uniform system of public schools in a chapter of the General Statutes. Act of May 26, 1955, ch. 1372, sec. 1, 1955 N.C. Sess. Laws 1527. These statutes have been amended over time and are now codified in Chapter 115C of the General Statutes, titled “Elementary and Secondary Education.” N.C. Gen. Stat. § 115C-1 (2015).

Our state constitutional provisions for public education have not materially changed since 1942. Following the General Assembly’s proposal in 1969 for a complete revision of the 1868 Constitution, Act of July 2, 1969, ch. 1258, sec. 1, 1969 N.C. Sess. Laws 1461, and the voters’ adoption of the revision in the general election of 1970, the Constitution was amended to its current form. N.C. Const. of 1970;¹⁰ *see also* Sanders, *supra*, at 80-87. The section delineating the Board’s powers was renumbered and revised to provide:

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. of 1970, art. IX, § 5. A report by the North Carolina State Constitution Study Commission stated that Article IX, Section 5 “restates, in much abbreviated form, the duties of the State Board of Education, but without any intention that its authority be reduced.” *Report of the State Constitutional Study Commission*, 87 (1968) (hereinafter the “1968 Report”).

B. Enactment of the APA and Creation of the Commission

In 1973, the General Assembly enacted the APA, initially adopted as Chapter 150A of the General Statutes. The original APA declared that its purpose “shall be to establish as nearly as possible a uniform system of administrative procedure for State agencies.” N.C. Gen. Stat.

10. The latest version of the North Carolina Constitution is referred to by different authorities as “the 1970 Constitution” or “the 1971 Constitution.” *Compare N.C. State Bar v. DuMont*, 304 N.C. 627, 633, 286 S.E.2d 89, 93 (1982), *with* Orth, *supra*, at 20. This opinion will refer to the document as the 1970 Constitution.

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§ 150A-1(b) (Cum. Supp. 1977). The APA provides a comprehensive statutory scheme for procedures to allow and require, *inter alia*, notice to the public of proposed rules, public input regarding proposed rules, and due process for individuals affected by administrative rules and decisions.

The APA was rewritten and recodified as Chapter 150B effective 1 January 1986, and its purpose restated to “establish[] a uniform system of administrative rule making and adjudicatory procedures for agencies” and to ensure that rulemaking, advocacy, and adjudication “are not all performed by the same person in the administrative process.” N.C. Gen. Stat. §§ 150B-1(a) and 150B-1(b) (Cum. Supp. 1985).

The APA does not explicitly list the Board as a state agency, but it defines “agency” as meaning “an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor’s Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch.” N.C. Gen. Stat. 150B-2(1a) (2015). The APA expressly and fully exempts from its application several state agencies listed in N.C. Gen. Stat. § 150B-1(c), exempts from its rulemaking provisions several other state agencies listed in N.C. Gen. Stat. § 150B-1(d), and exempts from its contested case provisions several other agencies or agency functions. The Board is not listed in any of the exemptions.

At the same time it recodified the APA, the General Assembly added a statute establishing the Rules Review Commission to review all rules promulgated by any state agency subject to the APA. Act of July 16, 1986, ch. 1028, sec. 32, 1985 N.C. Sess. Laws 1028 (originally codified at N.C. Gen. Stat. § 143B-30.1 (Interim Supp. 1986)). The statute as currently codified requires that temporary and permanent rules proposed by an agency be submitted and approved by the Commission before becoming effective. N.C. Gen. Stat. §§ 150B-21.8(b) and 150B-21.9 (2015).

C. Intersection of the Board’s and the Commission’s Authority

In 1981, following the General Assembly’s enactment of the APA, the General Assembly added to Article 1 of Chapter 115C, governing the public education system, a statute making all action by all agencies governed by the Chapter subject to all provisions of the APA. Act of May 20, 1981, ch. 423, sec. 1, 1981 N.C. Sess. Laws 510; N.C. Gen. Stat. § 115C-2 (Cum. Supp. 1981); *see* N.C. Gen. Stat. § 115C-2 (2015).

For more than a quarter century, the Board proposed rules to the Commission for review and otherwise participated in the rules

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review process. However, as evidenced by this dispute, the Board now challenges the Commission's authority to limit the Board's rule-making authority derived from the North Carolina Constitution. With this historical context in mind, we turn to the trial court's order and Defendants' appeal.

II. Standard of Review

We review a trial court's order denying or granting a motion for summary judgment *de novo*. *Rogerson v. Fitzpatrick*, 170 N.C. App. 387, 390, 612 S.E.2d 390, 392 (2005). A trial court's interpretation of the state constitution or a statute is also subject to *de novo* review. *See Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015); *see also Ennis v. Henderson*, 176 N.C. App. 762, 764, 627 S.E.2d 324, 325 (2006). *De novo* review allows this Court to substitute its judgment for that of the trial court. *Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009).

Even when applying *de novo* review, however, we must abide by the long established presumption that statutes—including all statutes implicated by the Board's challenge to the Commission's authority—are constitutional both facially and as applied to any party. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) ("Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond a reasonable doubt." (internal citations and quotation marks omitted)). "[T]he constitutional violation must be plain and clear." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citation omitted). Any doubt as to the constitutionality of a statute must be resolved in favor of the legislature. *Baker*, 330 N.C. at 338, 410 S.E.2d at 891.

Neither the trial court nor this Court possesses the authority to decide whether governmental action required or allowed by a statute fosters good or bad policy. "If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly." *Hart*, 368 N.C. at 126, 774 S.E.2d at 284 (citation omitted).

III. Discussion

A. *The Closest, But Not Controlling, Precedent*

No North Carolina appellate court has previously decided the issue presented in this appeal. The North Carolina Supreme Court came the closest in *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991), when it invalidated the Board's temporary rule prohibiting local school boards from contracting with a television content provider for short news segments that included commercial advertising. The

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Supreme Court held that because the General Assembly had enacted a statute delegating to local school boards the selection of supplemental educational materials, the Board had no authority to enact a rule on the subject. *Id.* at 466, 402 S.E.2d at 562.

The dispute in *Whittle* was prompted when the Commission disapproved of the rule on the ground that it exceeded the Board's statutory authority. *Id.* at 460, 402 S.E.2d at 558. A superior court judge reviewed the matter and held that the Board's rule was invalidly adopted in violation of the APA. The Board appealed, arguing, *inter alia*, that the APA rulemaking requirements did not apply to rules implementing the state constitution's grant of authority to the Board. *Id.* at 463-64, 402 S.E.2d at 560. The Supreme Court rejected the Board's argument on a narrower ground. *Id.* at 466-67, 402 S.E.2d at 562. It interpreted the statute authorizing local boards to select supplemental materials as leaving such selection "entirely to the discretion of local school boards[,] and held that the Board's rule necessarily conflicted with the existing statute. *Id.* at 465, 402 S.E.2d at 561. In light of the existing statute, the Supreme Court reasoned, "deciding whether the State Board had the authority, absent legislative action, to enact this rule through direct constitutional authority and deciding whether the APA provisions concerning the adoption of temporary rules apply are not necessary to a resolution of this issue." *Id.* at 466-67, 402 S.E.2d at 562.

Two dissenting justices, both prominent state constitutional scholars, offered no constitutional analysis to protect the Board's rulemaking authority. *Id.* at 471-77, 402 S.E.2d at 565-68 (Martin., J., joined by Exum, C.J., dissenting). The dissenting opinion noted that the statute cited by the majority did not grant the local boards *exclusive* authority to select and procure supplemental materials. *Id.* at 472, 402 S.E.2d at 565. The dissent also interpreted the Board's rule to constrain only the purchase of materials in a format limiting or impairing the authority of local boards and administrators to determine the content and timing of materials presented to students. *Id.* at 473-74, 402 S.E.2d at 566.

Because this appeal concerns the Commission's authority to review and approve all Board rules, the issue before us exceeds the parameters of *Whittle*.

B. Constitutional Powers and Limits of the Board

The Commission argues that the trial court erred in entering summary judgment rendering all rules promulgated by the Board exempt from the Commission's rules review and approval process. The Board argues, as it did successfully before the trial court, that Article IX, Section

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5 of the North Carolina Constitution endows it with broad rulemaking authority subject only to specific enactments of the General Assembly, and that review by the Commission is not a specific enactment of the General Assembly.

In reviewing this issue, we must consider the relationship between the Board's authority derived from the North Carolina Constitution, the General Assembly's authority to restrict the Board's authority, and the General Assembly's authority to delegate to the Commission the power to review, approve, and disapprove rules proposed by the Board.

Our analysis is guided by "the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *Berger*, 368 N.C. at 639, 781 S.E.2d at 252 (citation omitted); see also *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 505, 681 S.E.2d 278, 282 (2009) ("In interpreting our Constitution, we are bound to 'give effect to the intent of the framers of the organic law and of the people adopting it.' " (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953))); *DuMont* 304 N.C. at 634, 286 S.E.2d at 93-94 ("Reference may be had to unofficial contemporaneous discussions and expositions in arriving at a correct interpretation of the fundamental law.").

The 1868 Constitution vested in the Board the "full power to legislate and make all needful rules and regulations" for public schools, and provided that "all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly . . ." N.C. Const. of 1868, art. IX, §9. This language appears to limit the General Assembly to acting only once the Board has enacted some rule or regulation. Therefore, under the 1868 Constitution, the General Assembly would not, for example, be able to require the Board to gain legislators' approval of proposed rules before their enactment, because such action does not fall within the language of "alter," "amend," or "repeal." However, this aspect of the 1868 Constitution has not previously been examined by our appellate courts.

The only reported legal dispute about the 1868 constitutional provisions for education concerned how to pay for public schools. The North Carolina Supreme Court held in *Lane v. Stanly*, 65 N.C. 153, 157 (1871),¹¹ that "the Constitution establishes the public school system, and the General Assembly provides for it, by its own taxing power, and

11. This decision was reprinted in 1964 as 65 N.C. 117.

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by the taxing power of the counties, and the State board of education, by the aid of School committees, manage[s] it.” *Lane* held that county commissioners, but not town boards, could tax citizens for public schools concurrent with the General Assembly’s authority to impose taxes for public education. *Id.* at 156-58. It did not address the parameters of the Board’s authority to manage the public school system or the parameters of the General Assembly’s authority to enact public education rules.

The 1942 amendment to Article IX, Section 9 divested the Board of legislative authority and made the Board’s rulemaking authority subject to the General Assembly’s legislative authority. The amendment, as discussed *supra*, eliminated language vesting in the Board the “full power to legislate,” replacing it with enumerated specific duties and the authority “generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto.” N.C. Const. of 1868 (amended 1942), art. IX, § 9. The 1942 amendment also eliminated the language restricting the General Assembly’s authority over the Board to alter, amend, or repeal the Board’s rules and instead provided, more broadly, that the Board’s authority was “subject to such laws as may be enacted from time to time by the General Assembly.” N.C. Const. of 1868 (amended 1942), art. IX, § 9. The question before us is whether this change in language, ratified by voters in 1942 and substantially retained in the 1970 Constitution, permits the General Assembly to limit the Board’s rulemaking authority by requiring prior approval of the Board’s proposed rules by the General Assembly or an executive branch agency other than the Board.

The Board argues that the first sentence of the 1942 amendment to Article IX, Section 9, which defined the governance of the Board, “clarified that the Board retained all the powers it held under the 1868 Constitution”—including the power to legislate all matters related to public education—subject only to being altered, amended, or repealed by the General Assembly. The first sentence of Section 9 provided that “[t]he State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted.” N.C. Const. of 1868 (amended 1942), art. IX, § 9. The Board’s interpretation conflicts with the amendment’s deletion of the Board’s power to legislate and its added grant to the General Assembly of broader oversight of the Board.

“[I]n case of ambiguity the whole Constitution is to be examined in order to determine the meaning of any part and the construction is to be such as to give effect to the entire instrument and not to raise any

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conflict between its parts which can be avoided.” *State v. Baskerville*, 141 N.C. 811, 818, 53 S.E. 742, 744 (1906).¹²

Construing the first sentence of the 1942 amendment to revive and preserve the full scope of authority provided to the Board in the 1868 Constitution, as the Board argues, directly conflicts with the 1942 amendment’s limitation on that authority by deleting the provision for “full power to legislate.” The Board’s argument also conflicts with the amendment’s final full sentence providing that the Board’s authority is wholly subject to laws enacted by the General Assembly. To interpret an amendment that reallocates powers between the Board and the General Assembly as preserving the Board’s previous powers fails the test of common sense.

These competing provisions in the 1942 amendment can be harmonized by interpreting the first sentence to establish that the Board, and none of the other then-existing education boards and commissions created by the General Assembly since 1868, was authorized to regulate public schools. Reciting that the Board succeeded to all the powers of the Literary Fund’s board nullified the authority of other boards and commissions to perform duties initially assigned to the Board. This interpretation is also consistent with the amendment’s additional provisions listing specific powers vested in the Board which previously had been exercised by the other, “scattered” administrative agencies.

In addition to the basic canon of constitutional construction to interpret separate provisions in harmony, history also favors our interpretation of the 1942 amendment. “A court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration, to determine the extent and nature of the remedy sought to be provided.” *Perry*, 237 N.C. at 444, 75 S.E.2d at 514. As discussed *supra*, at the time the 1942 amendment was ratified, there had been a decade-long push, evidenced by the 1931 Constitutional Commission’s preamble to its proposed constitutional rewrite, to “relax many of the existing restrictions on the powers of the General Assembly,” as a way “to allow more elasticity in shaping governmental policies . . . in regard to future needed adjustments . . .” *1932 Report* at 5. The intent of the General Assembly in proposing the 1932 Constitution can be extended to the 1942 amendment because the underlying reasoning for the amendment, as discussed in intervening years, had not changed.

12. This decision was reprinted in 1921 as 141 N.C. 617.

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The General Assembly's declared purpose of the APA upon its recodification was to "establish[] a uniform system of administrative rule-making and adjudicatory procedures for agencies" and to ensure that rulemaking, advocacy, and adjudication "are not all performed by the same person in the administrative process." N.C. Gen. Stat. §§ 150B-1(a) and 150B-1(b) (Cum. Supp. 1985). The need for uniformity in agency rulemaking procedures is simply one such "future needed adjustment" fostered by the 1942 amendment.

Based on the plain language of the constitutional text, further bolstered by supplemental authorities, we hold that by the 1942 amendment to the North Carolina Constitution, the framers and voters consolidated in the Board all administrative authority governing a statewide public school system, limited the Board's authority to making rules and regulations subject to laws enacted by the General Assembly, eliminated the Board's authority to legislate, and thereby restored to the General Assembly all legislative authority regarding public education.

We are not persuaded by the Board's argument that the 1942 amendment could not divest the Board of authority derived from the 1868 Constitution. The Board has cited no judicial decision, no statute, and no other authority supporting its contention that the framers of the 1868 Constitution intended to preclude a later constitutional amendment modifying the Board's authority and the manner in which the General Assembly ultimately governs the Board. We are aware of no authority that prohibits a state constitution from diminishing the constitutionally derived authority of any agency by constitutional amendment so long as the amendment does not violate the United States Constitution.

"[U]nder our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom." *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970) (alteration in original) (quoting *Thomas v. Sanderlin*, 173 N.C. 329, 332, 91 S.E. 1028, 1029 (1917)). Although the General Assembly was restrained by the 1868 Constitution from making public education laws except by altering, amending, or repealing legislation by the Board, the 1942 amendment expanded the General Assembly's legislative authority, and the prior restrictions no longer apply.

The 1970 Constitution did not in any meaningful way amend the Board's authority to make rules and regulations, as it still provides that the Board "shall make all needed rules and regulations . . . subject to laws enacted by the General Assembly." N.C. Const. of 1970, art. IX, § 5.

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The North Carolina Supreme Court declared that the intent of the 1970 Constitution was merely to “update, modernize and revise editorially the 1868 Constitution.” *DuMont*, 304 N.C. at 636, 286 S.E.2d at 95 (citing the *1968 Report*).¹³ Among the extraneous and obsolete provisions deleted in the 1970 Constitution was the first sentence in the 1942 amended section describing the powers and duties of the Board, which provided that the Board “shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted.” N.C. Const. of 1970, art. IX, § 5. That the deletion of this section in 1970 was viewed as merely editorial confirms our interpretation of the sentence as clarifying that the Board, and not any other administrative agency existing in 1942, would establish rules and regulations for the public schools.

The Board relies on *DuMont*’s holding that “the 1970 framers intended to preserve intact all rights under the 1868 Constitution” for the assertion that the Board maintains its powers under the 1868 Constitution. 304 N.C. at 636, 286 S.E.2d at 95. This argument is misplaced. Unlike the provision for the right to a jury trial, which was unchanged between 1868 and 1970 and was at issue in *DuMont*, our state constitution’s provision for the power and duties of the Board was substantively amended in 1942. *DuMont* did not address that pivotal amendment or the 1942 framers’ intent. And unlike *DuMont*, this case does not concern the scope of an individual right rooted in the state constitution. The North Carolina Constitution vests individual citizens with the right to free public education. N.C. Const. of 1970, art. I, § 15; see also *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 616-17, 599 S.E.2d 365, 377-78 (2004) (“*Leandro II*”) (holding that the constitutional right to public education is vested in children and not in state entities); *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997) (“*Leandro I*”). It does not vest the Board with any rights, but rather with power and responsibilities.

Our interpretation of the 1942 amendment requires that we reject the Board’s argument that it is vested with broad authority that cannot be limited except as through alteration, amendment, and repeal by the General Assembly.

13. Constitutional scholars share the view that the 1970 Constitution primarily addressed editorial, and not substantive, concerns. Orth, *supra*, at 20-21 (describing the 1970 Constitution as “a good-government measure, long matured and carefully crafted by the state’s lawyers and politicians, designed to consolidate and conserve the best features of the past, not to break with it.”); Sanders, *supra*, at 81-82 (referring to the amendments as “extensive editorial changes” and “substantive changes that the commission judged would not be controversial or fundamental in nature[.]”).

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The North Carolina Supreme Court considered the Board's rulemaking authority, as amended in 1942, in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971). In *Guthrie*, the plaintiff, a public school teacher, challenged a Board regulation requiring teachers to complete certain courses to qualify to renew their teaching certificates. *Id.* at 709, 185 S.E.2d at 198. The Supreme Court noted that the last sentence of Article IX, Section 9 "was designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly." *Id.* at 710, 185 S.E.2d at 198. But because the General Assembly had not limited the Board's rulemaking powers regarding teacher certification, the Board's regulation was valid. The Supreme Court explained:

The Constitution, itself, . . . conferred upon the State Board of Education the powers so enumerated, including the powers to regulate the salaries and qualifications of teachers and to make needful rules and regulations in relation to this and other aspects of the administration of the public school system. Thus, *in the silence of the General Assembly*, the authority of the State Board to promulgate and administer regulations concerning the certification of teachers in the public schools was limited only by other provisions in the Constitution, itself.

Id. at 710, 135 S.E.2d at 198-99 (emphasis added).

Here, the General Assembly has not been silent, but rather has exercised its authority to limit the Board's rulemaking powers. The General Assembly, by enacting laws adopting a uniform statutory scheme governing administrative procedure, including the establishment of the Commission to review administrative rules, has imposed the requirement that the Board's rules be reviewed and approved prior to becoming effective. Our holding that the Board's rulemaking authority is subject to statutes providing for review and approval is therefore consistent with the holding in *Guthrie* and falls within the 1942 amendment's delineation of the General Assembly's authority over the Board.

C. Delegated Powers of the Commission

As discussed *supra*, the General Assembly has delegated to the Commission the procedural process through which the Board's rules are reviewed and approved before becoming effective. The Board contends that statutes making its rules subject to the Commission's review and approval result in an unconstitutional delegation of authority by the General Assembly in violation of Article I, Section 6 (separation of

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powers provision), Article II, Section 1 (vesting legislative power in the General Assembly), and Article IX, Section 5 (vesting rulemaking power in the Board). We disagree.

Article II, Section 1 of the North Carolina Constitution vests the General Assembly with the broad power to legislate. N.C. Const. of 1970, art. II, § 1. It also permits the General Assembly to delegate “a *limited* portion of its legislative powers,” *N.C. Tpk. Auth.*, 265 N.C. at 114, 143 S.E.2d at 323 (emphasis in original), in contrast with its “supreme legislative power,” *id.*, to certain agencies “so long as adequate guiding standards are provided.” *Adams v. N.C. Dep’t of Nat. & Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978); *see also* N.C. Const. of 1970, art. II, § 1.

As explained by the North Carolina Supreme Court in *Adams*:

[W]e have repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers.

295 N.C. at 697, 249 S.E.2d at 410 (internal citations omitted).

The *Adams* Court explained why the General Assembly’s delegation of authority is necessary: “A modern legislature must be able to delegate—in proper instances—‘a limited portion of its legislative powers’ to administrative bodies which are equipped to adapt legislation ‘to complex conditions involving numerous details with which the Legislature cannot deal directly.’ ” *Id.* at 697, 249 S.E.2d at 410 (quoting *N.C. Tpk. Auth.*, 265 N.C. at 114, 143 S.E.2d at 323).

The General Assembly’s and the Board’s authority specific to education are both derived from the same Article IX, Section 5 of the North Carolina Constitution. But unlike the Board, the General Assembly possesses power that exceeds the scope of Section 5. Article II, Section 1 of the North Carolina Constitution provides that “[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.” This plenary provision vests in the legislative branch the power to enact all laws not prohibited by the constitution, including the APA and the enabling statute for the Commission. The General Assembly has not delegated to the Commission the overarching authority to enact legislation limiting the Board’s rulemaking. Rather, the General Assembly exercised its

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authority by enacting statutes requiring the Board to obtain approval of proposed rules before they take effect. The General Assembly has merely delegated the implementation of its legislation to the Commission.

The Board argues, and our dissenting colleague agrees, that this Court should adopt the reasoning of the Supreme Court of Appeals of West Virginia, which held that any statutory provision interfering with the rulemaking authority of that state's board of education violated the separation of powers clause in that state's constitution. *West Va. Bd. of Educ. v. Hechler*, 180 W. Va. 451, 455-56, 376 S.E.2d 839, 843 (1988). The West Virginia court in *Hechler* invalidated a statutory amendment making rules promulgated by the board of education, which historically had been exempt from administrative review, subject to review and approval by a new legislative oversight commission on educational accountability. *Id.* at 455-56, 376 S.E.2d at 843. But West Virginia's constitutional provision for its board of education is not the same as ours, nor did it evolve in a manner similar to ours. Also, the Commission's structure differs materially from the review commission in West Virginia, which was composed solely of members of its legislature.¹⁴ For these reasons, we decline to follow *Hechler*.

The dissent also emphasizes that the North Carolina Constitution expressly vests in the Board the power to make "needed rules and regulations" relating to public education and asserts that by subjecting the Board's rules to review and approval by the Commission, the General Assembly has impermissibly transferred to the Commission an express power conferred upon it by our state constitution. But the General Assembly has by statute ensured that the Commission is unable to create and impose rules, and has made clear that the Commission does not have the authority to review the substantive efficacy of rules proposed by the Board. N.C. Gen. Stat. § 150B-21.9 (2015). The Commission's authority to implement the review and approval process is subordinate to the General Assembly's authority to create the review and approval process. Therefore, we are unpersuaded that the Commission's power is in conflict with the Board's broad rulemaking authority.

14. If the Commission here were solely composed of legislators, we would be presented with an entirely different issue concerning the separation of powers—namely, the legislature may not delegate powers to itself. *See State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982) (holding that "the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality").

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The “complex conditions” and “numerous details” considered by the Commission with respect to rules proposed by the Board, consistent with our Supreme Court’s holding in *Adams*, include the more than 100 local school districts across the state, more than 500 statutes in Chapter 115C of the General Statutes,¹⁵ and hundreds of administrative rules governing our public schools in Title 16 of the Administrative Code on topics ranging from teacher certification to curriculum to school buses. N.C. Admin. Code tit. 16, *et seq.* (April 2016).

The General Assembly is not always in session, and even when in session, legislators and their able staff have inadequate time and human resources to address the many specific needs and issues in the public school system by legislation. The General Assembly’s interest in uniformity among administrative agencies is served by making one central agency responsible for reviewing the rulemaking by all of the others. For this reason, delegation of adjudicative authority to the Commission is necessary. “The goals and policies set forth by the legislature for the agency to apply in exercising its powers need be only as specific as the circumstances permit.” *Matter of Broad and Gales Creek Cmty. Ass’n*, 300 N.C. 267, 273, 266 S.E.2d 645, 651 (1980) (internal citations omitted). “It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.” *Adams*, 295 N.C. at 698, 249 S.E.2d at 411.

In assessing whether the guiding standards provided by the General Assembly are adequate, “it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards.” *Id.* at 698, 249 S.E.2d at 411. “[T]he existence of adequate procedural safeguards supports the constitutionality of the delegated power and tends to insure that the decision-making by the agency is not arbitrary and unreasoned.” *In re Declaratory Ruling by N.C. Comm’r of Ins. Regarding 11 N.C.A.C. 12.0319*, 134 N.C. App. 22, 33, 517 S.E.2d 134, 142 (1999) (internal quotation marks and citation omitted).

The General Assembly has provided the Commission with criteria for reviewing the permanent rules submitted to it by state agencies, including the Board. These criteria include, *inter alia*, specific provisions in hundreds of statutes and administrative code sections

15. The General Assembly also has provided by statute for the Board’s authority by incorporating the provisions of the state constitution and adding dozens of specific powers and duties. N.C. Gen. Stat. § 115C-12 (Interim Supp. 2016).

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previously enacted. The Commission's review is limited to determining whether a proposed rule: (1) is "within the authority delegated to the agency by the General Assembly[;]" (2) is clear and unambiguous; (3) is "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency[;]" and (4) was adopted in accordance with the procedures prescribed by the APA for rulemaking. N.C. Gen. Stat. §§ 150B-21.9(a)(1)-(4).

The Board argues, and our dissenting colleague agrees, that the first of these criteria for review by the Commission, to determine whether a proposed rule is "within the authority delegated to the agency by the General Assembly," cannot apply to the Board because its authority is delegated not merely by the General Assembly, but by the North Carolina Constitution. This point, considered in isolation, is persuasive. But when the plain language of a statute appears to create a constitutional conflict, we must look to other statutes, to our state constitution, and to precedent for guidance. Considering the genesis and evolution of the Board, the APA, and the Commission, and the Supreme Court's reasoning in *Whittle*, which resolved a similar issue in favor of upholding the Commission's authority, we are not persuaded that the Board's authority to make rules in any subject area is beyond the reach of the APA.

The General Assembly has also expressly protected its legislative authority from encroachment by the Commission. N.C. Gen. Stat. § 150B-21.9 provides that "[t]he Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection[,]" which restricts the Commission from providing substantive review of proposed rules.

Additionally, the General Assembly has provided adequate procedural safeguards by subjecting the Commission's decisions regarding whether the Board (or any agency) has properly followed the APA's procedures for promulgating rules to judicial review. *See* N.C. Gen. Stat. § 150B-21.8(d). Indeed, the Board has employed this procedural safeguard to obtain judicial review in the trial and appellate courts. *See Whittle*, 328 N.C. 456, 402 S.E.2d 556.

We hold that the review and approval authority delegated to the Commission is an appropriate delegable power and that the General Assembly has adequately directed the Commission's review of the Board's proposed rules and limited the role of the Commission to evaluating those proposed rules to ensure compliance with the APA.

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By providing adequate guidelines for rules review, the General Assembly has ensured that the Commission's authority as it relates to the rules promulgated by the Board is not "arbitrary and unreasoned" and is sufficiently defined to maintain the separation of powers required by our state constitution. *In re Declaratory Ruling*, 134 N.C. App. at 33, 517 S.E.2d at 142. Accordingly, we reject the Board's challenge to the Commission's authority based on constitutional provisions for separations of power.

Conclusion

For the reasons we have explained, we hold that: (1) the 1942 amendment to Article IX of the North Carolina Constitution rebalanced the division of power between the Board and the General Assembly by limiting the Board's authority to be subject more broadly to enactments by the General Assembly; (2) the General Assembly, by enacting the APA and creating the Commission, acted within the scope of its constitutional authority to limit the Board's rulemaking authority by requiring approval of rules prior to enactment; (3) the General Assembly's delegation to the Commission of the authority to review and approve Board rules does not contravene the Board's general rulemaking authority; and (4) the General Assembly has delegated review and approval authority to the Commission without violating the separation of powers clause by providing adequate guidance and limiting the Commission's review and approval power.

Because the undisputed facts compel these conclusions, and because no other factual allegations can change the constitutional relationship of the Board, the General Assembly, and the Commission, the trial court erred in entering summary judgment in favor of the Board and in denying Defendants' motion for summary judgment. The trial court's order is reversed and this matter is remanded for entry of judgment in favor of Defendants.

REVERSED AND REMANDED.

Chief Judge McGEE concurs.

Judge TYSON dissents with separate opinion.

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TYSON, Judge, dissenting.

I respectfully dissent from the majority's opinion. Defendant has failed to show error in the superior court's ruling that the General Assembly has not constitutionally delegated its authority over rules and regulations adopted by the North Carolina State Board of Education ("State Board") to the Rules Review Commission ("RRC") by enacting the North Carolina Administrative Procedure Act ("NCAPA"). N.C. Gen. Stat. § 150B (2015).

I. Article IX, Section 5

The plain language of Article IX, Section 5 of the North Carolina Constitution states:

The State Board of Education *shall supervise and administer* the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and *shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.*

N.C. Const. art. IX, § 5 (emphasis supplied).

Our Supreme Court has established the proper standard of review: "In interpreting our Constitution[,]. . . where the meaning is clear from the words used, we will not search for a meaning elsewhere." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) (citation omitted). Under the plain language of this article, only "laws enacted by the General Assembly" may take precedent over "needed rules and regulations" promulgated by the constitutionally established State Board. N.C. Const. art. IX, § 5.

The RRC is not the General Assembly. *See* N.C. Const. art. II, § 1 ("The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives."). Review by and decisions of the RRC are not "laws enacted by the General Assembly." N.C. Const. art. IX, § 5.

The RRC was created by statute in 1986, long subsequent to the ratification of the current version of Article IX, § 5, and consists of ten non-elected members appointed by the General Assembly. N.C. Gen. Stat. § 143B-30.1(a) (2015); 1985 N.C. Sess. Law 1028. The RRC members purported to act on their own accord in delaying and striking down "needed rules and regulations" established under constitutionally mandated

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policy of the State Board, without bicameral review and presentment of a bill.

The RRC's purpose is to "review[] administrative rules in accordance with Chapter 150B of the General Statutes." N.C. Gen. Stat. § 143B-30.2 (2015). The NCAPA defines "rule" as "*any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency.*" N.C. Gen. Stat. § 150B-2(8a) (2015) (emphasis supplied).

The majority's opinion accepts Defendants' usurpation of the plain language of Article IX and the framers' intent, and holds the various laws which establish the RRC and its review process are "laws enacted by the General Assembly," and that the policies and procedures of the State Board are "subject to" RRC review and authority. *See* N.C. Const. art. IX, § 5.

Under the plain language of Article IX, the People established the State Board and intended its educational policy and rulemaking authority to be limited only by "laws enacted by the General Assembly," which requires bicameral review and presentation of a bill. The People did not intend the constitutional rulemaking authority of the State Board to be "subject to" delays and veto by a commission of non-elected officials, who are statutorily tasked under the NCAPA to review proposed "agency rules." *See* N.C. Gen. Stat. § 143B-30.2; N.C. Gen. Stat. § 150B-2(8a). The General Assembly cannot either usurp nor delegate the specific constitutional authority vested in the State Board by the People.

II. *West Va. Bd. of Educ. v. Hechler*

This issue appears to be of first impression in our State. The sound analysis and holding of the Supreme Court of Appeals of West Virginia, which ruled upon this issue, is persuasive. *See West Va. Bd. of Educ. v. Hechler*, 180 W. Va. 451, 376 S.E.2d 839 (1988). The Constitution of West Virginia provides: "The general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be prescribed by law." W. Va. Const. art. XII, § 2. The West Virginia legislature created a "legislative oversight commission on education accountability." *Hechler*, 180 W. Va. at 452, 376 S.E.2d at 840. As here, the Board of Education was purportedly required to submit its proposed rules to the oversight commission for review, and the commission would recommend that the legislature either promulgate the rule or the rule be withdrawn. *Id.* at 453, 376 S.E.2d at 840.

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The West Virginia Supreme Court of Appeals held the state constitution granted the West Virginia Board of Education rulemaking powers, “and any statutory provision that interferes with such rule-making is unconstitutional,” and the legislature’s “attempt to undertake the Board’s general supervisory powers” violates the separation of powers clause of the West Virginia Constitution. *Id.* at 455-56, 376 S.E.2d at 843.

In support of its holding, the court explained:

Decisions that pertain to education must be faced by those who possess expertise in the educational area. These issues are critical to the progress of schools in this state, and, ultimately, the welfare of its citizens. . . . [T]he citizens of this state conferred general supervisory powers over education and one need not look further than art. XII, § 2 of the State *Constitution* to see that the “general supervision” of state schools is vested in the State Board of Education. *Unlike most other administrative agencies which are constituents of the executive branch, the Board enjoys a special standing because such a constitutional provision exists.*

Id. at 455, 376 S.E.2d at 842-43 (second emphasis supplied).

Our Constitution *specifically* gives the State Board the power to promulgate “needed rules and regulations” to set policy and to “*supervise and administer* the free public school system.” See N.C. Const. art. IX, § 5 (emphasis supplied). The State Board is the only constitutionally created board, yet the RRC admitted during oral argument that it treats the Board and its proposed rules the same as any other “executive agency.”

As explained in *Hechler*, the General Assembly’s purported transfer of the State Board’s constitutional authority to promulgate its own rules and regulations to an agency rule review entity denies the State Board an express power, which has been constitutionally conferred upon the State Board by the People.

Under the plain language of Article IX, the rulemaking authority of the State Board is “subject to limitation and revision by acts of the General Assembly.” *Guthrie v. Taylor*, 279 N.C. 703, 710, 185 S.E.2d 193, 198 (1971), *cert. denied*, 406 U.S. 920, 32 L. Ed. 2d 119 (1972). While the General Assembly may “limit and revise,” the State Board’s exercise of its primary authority under Article IX, *see id.*, the State Board’s power to establish educational policy and to promulgate its own rules and regulations does not derive its authority from, nor depend upon the General

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Assembly. By enacting the NCAPA, the General Assembly could not and did not transfer the State Board's constitutionally specified rulemaking power to an agency rule oversight commission under the NCAPA.

The legislative, executive, and judicial branches of government "shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. In interpreting this clause, our courts have long recognized that "a modern legislature must be able to delegate – in proper instances – a limited portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the Legislature cannot deal directly." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978) (citations and internal quotation marks omitted).

The rule in *Adams*, allowing the General Assembly to delegate a "limited portion of its legislative powers," does not apply here. "[S]uch powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law." Thomas M. Cooley, *Cooley's Constitutional Limitations* 215 (8th ed. 1927). The People of North Carolina granted and conveyed to the State Board powers, which are not intended to be, and cannot be, removed from the State Board and subordinated to or overruled by an executive agency review body. *Id.*

Furthermore, in reviewing an agency's rule, the RRC determines whether the rule meets the following NCAPA criteria:

- (1) It is within the authority *delegated to the agency by the General Assembly*.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article [which governs the rulemaking procedure].

N.C. Gen. Stat. § 150B-21.9(a) (2015) (emphasis supplied).

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The authority of the State Board to promulgate its own rules and regulations to establish educational policy are constitutionally established and cannot be “delegated by the General Assembly.” *See id.* Reviewing the plain language of the NCAPA, the RRC’s mandate and standard for reviewing agency rules does not include rules that are promulgated *by a constitutionally created and empowered Board* expressly acting under their *constitutionally mandated authority*. The General Assembly’s guiding standards to the RRC and definitions in the NCAPA support the State Board’s position and the correctness of the superior court’s ruling.

The Board of Education alleged and argues the RRC unreasonably delayed and has objected to or modified *every rule* adopted by the State Board and brought before the RRC since 1986. The State Board is tasked by the People with “constitutional obligations to provide the state’s school children with an opportunity for a sound basic education.” *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 614-15, 599 S.E.2d 365, 376 (2004).

The members of the RRC are not required to have acquired or demonstrate any background or experience in public education, and need only be endorsed by the Speaker of the House or President of the Senate to serve on the RRC. N.C. Gen. Stat. § 143B-30.1(a) (2015). The asserted RRC delays, review, and rejection of State Board proposals unconstitutionally hinders the State Board’s authority and mandate to “make all needed rules and regulations” to meet its constitutionally mandated obligations to “supervise and administer the free public school system and the educational funds provided for its support.” N.C. Const. art. IX § 5.

Under the NCAPA, when the RRC strikes down a rule promulgated by the State Board, the only procedural safeguard and remedy is for the State Board to file suit to challenge the RRC in the Wake County Superior Court. *See* N.C. Gen. Stat. § 150B-21.8(d) (2015). This is a wholly untenable process for our school children, our citizens, and for establishing the constitutionally mandated “needed rules and regulations” that are required to implement the public educational policy of our State. N.C. Const. art. IX, § 5.

III. Conclusion

By establishing a Board of Education with the specific constitutional authority to promulgate its own rules and regulations, the framers of Article IX and the People, upon ratifying the Constitution, vested the authority to administer and supervise public education to the State Board, not the RRC. This intention is clearly set forth in the plain language of the Constitution in Article IX. The RRC review process has delayed and frustrated the State Board in accomplishing its constitutionally mandated mission.

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The General Assembly cannot prohibit State Board from exercising its rulemaking powers under its constitutional grant of authority. The General Assembly also cannot accomplish the same result by delegating the State Board's constitutional rulemaking authority to a statutory entity the General Assembly has created for review of proposed executive agency rules under the NCAPA.

The State Board's constitutional authority and obligation to "make all needed rules and regulations" for the supervision and administration of the public school system does not function, and is not included, as a statutory or executive rulemaking agency under the NCAPA, with its rules subject to review by the RRC. The NCAPA cannot be applied to trump the constitutional rulemaking authority of the State Board of Education, and subject the State Board to the oversight authority the RRC applies to statutory State agencies.

Defendants have failed to show error in the superior court's judgment. The superior court's grant of summary judgment in favor of the State Board is properly affirmed. I respectfully dissent.

MICHELLE D. SARNO, PLAINTIFF

v.

VINCENT J. SARNO, DEFENDANT

No. COA16-1267

Filed 19 September 2017

1. Appeal and Error—notice of appeal—untimely

The Court of Appeals treated a notice of appeal as a petition for certiorari, which it granted, where the filing date of the judgment was not clear.

2. Child Custody and Support—child support—deviation from guidelines—findings

Although a trial court's child support orders are afforded substantial deference, the trial court in this case failed to make the requisite findings to support deviation from the Child Support Guidelines.

3. Attorney Fees—child support action

A trial court order awarding attorney fees in a child support action met the requisite requirements where it found that defendant

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was an interested party acting in good faith and had insufficient funds to defray the cost of the suit.

4. Attorney Fees—award—ability to pay—estates of the parties

An award of attorney fees does not require a comparison of the relative estates of the parties.

5. Attorney Fees—response to writ of mandamus

The trial court did not err by awarding defendant attorney fees for a response to plaintiff's writ of mandamus where plaintiff alleged that the response was unnecessary and moot. Notwithstanding any alleged errors in two findings, the remaining finding showed that the trial court did not abuse its discretion. Moreover, while the petition may have been moot, it could not be said that defendant's filing was wholly unnecessary.

6. Costs—not requested in pleadings—supporting evidence not challenged

The trial court did not err by awarding defendant costs in a child support action where defendant did not plead a request for costs. Defendant was entitled to the relief justified by the allegations in the pleadings, and plaintiff challenged only the findings for being without a legal basis and not for lack of supporting competent evidence.

7. Child Custody and Support—overpayment—findings not supported by evidence

The evidence did not support a credit for overpayment of child support where neither plaintiff nor defendant testified; counsel's arguments are not evidence.

Judge MURPHY dissenting.

Appeal by Plaintiff from order entered 24 April 2013 by Judge Ronald L. Chapman in Mecklenburg County District Court. Heard in the Court of Appeals 9 August 2017.

Plumides, Romano, Johnson & Cacheris, PC, by Richard B. Johnson, for plaintiff-appellant.

Krusch & Sellers, P.A., by Leigh B. Sellers, for defendant-appellee.

HUNTER, JR., Robert N., Judge.

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Michelle D. Sarno (“Plaintiff”) appeals an order awarding child support, attorney’s fees, and costs to her ex-husband, Vincent J. Sarno (“Defendant”). On appeal, Plaintiff argues the trial court committed the following errors: (1) deviating from the North Carolina Child Support Guidelines (“the Guidelines”) without making the proper findings; (2) awarding Defendant attorney’s fees; (3) awarding Defendant costs; and (4) crediting Defendant for overpaying child support. We vacate and remand in part and affirm in part.

I. Factual and Procedural Background

This case arises from a protracted dispute between Plaintiff and Defendant. Plaintiff and Defendant married on 15 July 2000 and have one child together. Plaintiff works as a teacher, and Defendant works at Rack Room Shoes, “in an accounting capacity.” During the summer of 2006,¹ the parties separated.

On 3 March 2009, Plaintiff filed a complaint, seeking child custody, child support, and equitable distribution of the parties’ property. On 14 March 2009, Defendant filed an answer and motion to dismiss. On 23 September 2009, the trial court entered an order for temporary child support. The trial court directed Defendant pay Plaintiff \$558.31 monthly in child support. On or about 16 June 2010, the parties entered into a consent order for equitable distribution. On 15 September 2010, Defendant filed an amended answer and counterclaim. Defendant requested child custody, child support, and attorney’s fees. Defendant alleged Plaintiff “repeated a desire” to move away, possibly to Vermont.

On 6 and 7 June 2011, the trial court began trial for child custody, child support, and attorney’s fees. On 14 June 2011, the trial court rendered its judgment in open court, and referenced findings of fact it would make in a later order. On 11 August 2011, the trial court held a hearing to address “some issues that have come up with the visitation and custody schedule[,]” child support, and attorney’s fees.

On 31 August 2011, *nunc pro tunc* to 14 June 2011, the trial court entered an order terminating temporary child support. Plaintiff filed a petition for a writ of mandamus in October 2011, requesting the trial court to issue “its finding of fact or its ‘other reasons’ for its [August 2011] ruling.” The trial court held a hearing on 19 October 2011. At the hearing, the trial court stated it was “uncertain as to whether [it has]

1. Plaintiff asserted the parties separated on 6 July 2006. Defendant initially asserted the parties separated on 31 August 2006. In his amended answer and counterclaim, Defendant described the date of separation as “on or about mid-August of 2006.”

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any authority whatsoever on that case at [that] point.” Although the trial court had “findings of fact ready[,]” it was unsure how to proceed, due to the procedural posture of the case.

On 23 March 2012, the trial court entered an order of permanent child custody, specifically reserving the issue of child support for later determination. The trial court found Plaintiff, now engaged to a man from Vermont, still “explored” the Vermont area as a possible new home. Additionally, Plaintiff planned to relocate to Vermont around 15 July 2011, and “expressed minimal, if any, concern about the effect [her] move away from [the child] would have on [the child].” The trial court expressed “concern[]” and noted Plaintiff’s “failure to give recognition to [the child]’s need for stability and a relationship with both parents[.]” Accordingly, the trial court ordered the parties to share joint, legal custody. The trial court awarded Defendant primary physical custody, starting at Plaintiff’s relocation on 15 July 2011, and Plaintiff secondary physical custody. In the order, the trial court concluded “[t]here was insufficient time to hear evidence and rule on claims for child support and attorney fees and the court retains jurisdiction to rule on this issue.”

On 24 July 2012, Plaintiff filed a motion to modify child custody. Plaintiff alleged a change of circumstances, namely she planned to remain in North Carolina, instead of moving to Vermont, as stated at the June 2011 hearings.

On 14 September 2012, the trial court resumed trial to determine permanent child support. The hearing largely consisted of arguments from counsel, not testimony from either party.

On 24 April 2013, the trial court entered an order for permanent child support and attorney’s fees. The trial court found Plaintiff’s motion to modify custody was still pending. Additionally, the trial court found the parties deviated from the visitation schedule set in the custody order. Because Plaintiff did not move to Vermont, as originally maintained, Plaintiff exercised additional weekend visitation. However, the trial court found “[Plaintiff]’s testimony of her overnights did not convince the court of an exact amount of parenting time.” Additionally, Defendant’s theory for calculating overnights “was confusing.” The trial court based its child support “on the current order and practice of the parties[,]” although a motion to modify custody was pending.

The trial court calculated child support should be “between a Worksheet A and a Worksheet B[.]” The trial court calculated the monthly child support amount at \$380.50, between 15 July 2011 and 31 December

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2011. The trial court awarded Defendant \$425.00 in monthly child support, effective 1 January 2012. The trial court also awarded Defendant \$2,000 for “reimbursement of overpayment of child support[.]” The trial court ordered Plaintiff to pay \$9,400 in attorney’s fees and costs.

On 20 May 2013, Defendant’s counsel filed a certificate of service for the 24 April 2013 order. On 19 and 28 June 2013, Plaintiff and Defendant filed notices of appeal, respectively.

In an opinion filed 19 August 2014 and an order entered 10 September 2014, this Court dismissed Plaintiff’s and Defendant’s appeals regarding the order for permanent child support and attorney’s fees. *Sarno v. Sarno*, 235 N.C. App. 597, 762 S.E.2d 371 (2014). This Court held the appeals were interlocutory, because the child support order was a temporary order. *Id.* at 599-601, 762 S.E.2d at 372-74.

On 16 April and 14 May 2014, the trial court held hearings on Plaintiff’s motion to modify child custody. In an order entered 31 October 2014, the trial court modified custody and awarded primary physical and legal custody to Defendant. On 17 November 2014, Defendant filed a “Rule 52 Motion to Amend Findings and to Make Additional Findings; Rule 60 Motion to Correct Clerical Errors[.]” On 1 April 2016, the trial court sent a notice of hearing regarding Defendant’s motions. In an order file stamped 19 and 20 April 2016, the trial court dismissed, with prejudice, Defendant’s motions, after Defendant’s counsel failed to appear at the hearing.

On 20 May 2016, Defendant filed a Rule 60 Motion to correct clerical errors. Defendant requested the trial court strike “with prejudice” from its April order, and dismiss Defendant’s motions without prejudice. Additionally, Defendant’s counsel alleged she reviewed the court file on 12 May 2016. However, the “Memorandum of Judgment/Order had not yet been filed.” On 15 June 2016, Plaintiff filed notice of appeal.

II. Jurisdiction

[1] Defendant alludes to an untimely notice of appeal by Plaintiff. The record evinces confusion regarding the file date of the judgment. The judgment is stamped on both 19 and 20 April 2016. Additionally, the record indicates the judgment was not filed on 12 May 2016. Plaintiff alleges she did not receive the judgment until on or about 20 May 2016. To confuse matters even further, there is no certificate of service attached to the judgment.

Regardless of any defect in Plaintiff’s notice of appeal, we treat her appeal as a petition for writ of certiorari. In our discretion, we grant her petition for writ of certiorari and address the merits of her appeal.

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III. Standard of Review

“Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion.” *Mason v. Erwin*, 157 N.C. App. 284, 287, 579 S.E.2d 120, 122 (2003) (citation and quotation marks omitted). “Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute . . . will establish an abuse of discretion.” *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (internal citations omitted). However, “[t]he trial court must . . . make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.” *Ludlam v. Miller*, 225 N.C. App. 350, 355, 739 S.E.2d 555, 558 (2013) (quoting *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005))

We typically review an award of attorney’s fees under N.C. Gen. Stat. § 50-13.6 (2016) for abuse of discretion. However, when reviewing whether the statutory requirements under section 50-13.6 are satisfied, we review *de novo*. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980) (citation omitted). Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney’s fees awarded. *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citing *Hudson*, 229 N.C. at 472, 263 S.E.2d at 724).

IV. Analysis

We review Plaintiff’s contention in four parts: (A) deviation from the Guidelines; (B) attorney’s fees; (C) costs awarded to Defendant; and (D) credit for overpayment of child support.

A. Deviation from the Guidelines

[2] Plaintiff argues the trial court failed to make proper findings when it deviated from the Guidelines. We agree.

N.C. Gen. Stat. § 50-13.4(c) (2012)² includes a presumption that the trial court shall apply the Guidelines. *Id.* However, if the trial court completes the following four-step process, it may deviate from the Guidelines:

2. We review under the version of the Guidelines effective in 2013, as those were controlling when the trial court entered its order.

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[f]irst, the trial court must determine the presumptive child support amount under the Guidelines. Second, the trial court must hear evidence as to the reasonable needs of the child for support and the relative ability of each parent to provide support. Third, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate. Fourth, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the child or would be otherwise unjust or inappropriate.

Spicer, 168 N.C. App. at 292, 607 S.E.2d at 685 (quoting *Sain v. Sain*, 134 N.C. App. 460, 465-66, 517 S.E.2d 921, 926 (1999), *disapproved of on other grounds*, *O'Connor v. Zelinske*, 193 N.C. App. 683, 693, 668 S.E.2d 615, 621 (2008)).

Our Court thoroughly summarized what we review for when a trial court deviates from the Guidelines:

“[i]f the trial court imposes the presumptive amount of child support under the Guidelines, it is not . . . required to take any evidence, make any findings of fact, or enter any conclusions of law ‘relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support.’” *Biggs v. Greer*, 136 N.C. App. 294, 297, 524 S.E.2d 577, 581 (2000) (quoting *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991)). “However, upon a party’s request that the trial court deviate from the Guidelines . . . or the court’s decision on its own initiative to deviate from the presumptive amounts . . . [,] the court must hear evidence and find facts related to the reasonable needs of the child for support and the parent’s ability to pay.” *Id.* at 297, 524 S.E.2d at 581; *Gowing v. Gowing*, 111 N.C. App. 613, 618, 432 S.E.2d 911, 914 (1993) (stating that “[t]he second paragraph of N.C. [Gen. Stat. §] 50-13.4(c) provides that [,] when a

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request to deviate is made and such evidence is taken, the court should hear the evidence and ‘find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support’ ”). In other words, “evidence of, and findings of fact on, the parties’ income, estates, and present reasonable expenses are necessary to determine their relative abilities to pay.” *Brooker v. Brooker*, 133 N.C. App. 285, 291, 515 S.E.2d 234, 239 (1999) (quoting *Norton v. Norton*, 76 N.C. App. 213, 218, 332 S.E.2d 724, 728 (1985)). In the course of making the required findings, “the trial court must consider ‘the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.’ ” *Beamer*, 169 N.C. App. at 598, 610 S.E.2d at 224 (quoting *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 645, 507 S.E.2d 591, 594 (1998)). “These ‘factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines.’ ” *Spicer*, 168 N.C. App. at 293, 607 S.E.2d at 685 (quoting *Gowing*, 111 N.C. App. at 618, 432 S.E.2d at 914).

Ferguson v. Ferguson, 238 N.C. App. 257, 260-61, 768 S.E.2d 30, 33-34 (2014) (all alterations in original).

Plaintiff argues the trial court erred in deviating from the Guidelines without making the necessary findings. Specifically, Plaintiff argues the order lacks findings “regarding the appropriate amount of Guideline support . . . [or] about the needs of the child and ability of the parties to pay that amount.” Defendant agrees the trial court “failed to satisfy steps two, three, or four of the four-step deviation analysis.”³

The trial court made findings regarding the parties’ average monthly incomes, health insurance costs for the child, and work related child care costs for the child. The trial court further found it could deviate from the Guidelines on its own motion. In another finding, the trial court stated, “No evidence as to the actual expenditures of the child outside of

3. After conceding the trial court erred in its findings, Defendant continues and argues we should direct the trial court to enter child support pursuant to Worksheet A. We decline to make an advisory opinion on *what amount* of child support we believe the evidence warrants, as that is within the discretion of the trial court and not at issue on appeal.

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work related child care and health care insurance. There is no evidence of any extraordinary expenses of the child.”

The trial court failed to make the requisite findings to support deviation from the Guidelines. Although a trial court’s child support orders are accorded substantial deference, the order fails to meet our statutory and case law requirements. Accordingly, we vacate this portion of the order and remand for further findings. The trial court may, in its discretion, conduct a new hearing and receive additional evidence.

B. Attorney’s Fees

Plaintiff next argues the trial court erred in ordering her to pay attorney’s fees to Defendant. Plaintiff’s argument is four-fold, and we address it in three parts: (i) findings supporting the award of attorney’s fees; (ii) Plaintiff’s arguments regarding the relative income of the parties; and (iii) fees awarded regarding Defendant’s response to Plaintiff’s petition for a writ of mandamus.

i. Findings Supporting the Award of Attorney’s Fees

[3] N.C. Gen. Stat. § 50-13.6 provides:

[i]n an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney’s fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney’s fees to an interested party as deemed appropriate under the circumstances.

Id. There is a distinction between fee awards in proceedings solely for child support and fee awards in actions involving both custody and support:

[b]efore a court may award fees in an action solely for child support, the court must make the required finding under the second sentence of the statute: that the party required to furnish adequate support failed to do so when

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the action was initiated. On the other hand, when the proceeding or action is for both custody and support, the court is not required to make that finding. A case is considered one for both custody and support when both of those issues were contested before the trial court, even if the custody issue is resolved prior to the support issue being decided.

Spicer, 168 N.C. App. at 296-97, 607 S.E.2d at 687 (citations omitted). Although typically labeled findings, these findings are “in reality, [] conclusion[s] of law[.]” *Dixon v. Gordon*, 223 N.C. App. 365, 372, 734 S.E.2d 299, 304 (2012) (citing *Atwell v. Atwell*, 74 N.C. App. 231, 238, 328 S.E.2d 47, 51 (1985)).

Turning to the attorney’s fees, the trial court found, *inter alia*:

48. Defendant is an interested party in both the custody of his son and the financial support of his son.

49. Defendant acted in good faith to object to the Plaintiff’s proposed relocation of the child to Vermont.

....

51. Defendant has insufficient means to defray the costs of the suit.

52. Procedurally, this case has been slowed by the heavy case load of the court system, trial strategy decisions by the Plaintiff’s counsel, the health issues of prior trial counsel, as well as personal decisions by Plaintiff.

53. When the case was first set for trial, September 2010, former counsel for plaintiff sought to limit Defendant’s evidence or a continuance until such time as Defendant served an amended answer and counterclaim. This delayed the trial.

....

55. After receiving an undesirable result in the custody [case], Plaintiff changed course, and opted to stay in North Carolina, presumably believing that this would negate the effects of the Court’s ruling.

56. This created delay in executing an Order resulting from the hearing, as counsel and the Court made decisions as to how procedurally to move forward.

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57. Plaintiff then filed a Writ of Mandamus which was denied by the Court of Appeals, seeking an Order, despite the fact that it was Plaintiff's actions after trial which had complicated and slowed the process.

58. Defendant was forced to respond to this filing and incurred additional expenses.

59. Defendant has depleted all of his inheritance to cover fees and borrowed money from family.

60. Defendant has no estate, no retirement accounts, or other assets outside of his income.

61. Defendant supported the child without Plaintiff's assistance since July 15, 2011 and was garnished child support until the middle of September 2011 that went to the Plaintiff pursuant to an earlier child support ordered when she had temporary custody.

62. Plaintiff acknowledged that she made no payments.

Plaintiff contends the findings "do not reflect the evidence before the Court nor . . . are they sufficient findings of fact." Although Plaintiff recognizes "the trial court's findings of fact have more than the bare statutory language," she asks us to reverse and remand the trial court's award.

We conclude the trial court's order meets the statutory requirements, as it found Defendant is an interested party acting in good faith and has insufficient means to defray the expense of the suit.⁴ Additionally, while these findings are properly treated as conclusions, we hold the trial court's conclusions are supported by the evidence. The order includes, in Finding of Fact Number 22, Defendant's gross income. Finding of Fact Number 23 discussed how Defendant "has borne all of the expenses associated with the child while in his primary care." Defendant's counsel filed an affidavit, outlining costs and fees incurred by Defendant in this action. Accordingly, the trial court's order contains more than "a bald statement that a party has insufficient means to defray the expenses of the suit[,]" and does not run afoul of our case law. *Cameron v. Cameron*, 94 N.C. App. 168, 172, 380 S.E.2d 121, 124 (1989) (citations omitted).

4. While Plaintiff points to other alleged required findings the trial court must make, we note those additional findings go to the *reasonableness* of the amount of attorney's fees awarded. However, Plaintiff did not appeal the reasonableness of the amount of fees awarded.

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ii. The Relative Incomes of the Parties

[4] Plaintiff, throughout her brief and explicitly in assignment of error II. C., asks this Court to consider her ability to pay Defendant's attorney's fees. Plaintiff requests this Court consider and compare the parties' estates when reviewing the trial court's award of attorney's fees. Plaintiff cites to no case law in support of this contention.

We note our case law states "we do not believe that the determination of whether a party has sufficient means to defray the necessary expenses of the action requires a comparison of the relative estates of the parties" and N.C. Gen. Stat. § 50-13.6 "does not require the trial court to compare the relative estates of the parties[.]" *Van Every v. McGuire*, 348 N.C. 58, 59-60, 497 S.E.2d 689, 690 (1988) (citation omitted).⁵ See also *Respass v. Respass*, 232 N.C. 611, 635, 754 S.E.2d 691, 707 (2014) (citations omitted). Accordingly, we hold this assignment of error is without merit.

iii. Fees Regarding Legal Services for the Writ of Mandamus

[5] Plaintiff next argues the trial court erred in awarding attorney's fees related to Plaintiff's Writ of Mandamus. Specifically, Plaintiff argues Defendant's response to her writ of mandamus was "an unnecessary filing[.]" and, thus, Defendant is not entitled to attorney's fees.

Plaintiff argues Findings of Fact Numbers 55 through 62 are unsupported by the evidence. However, Plaintiff does not challenge Finding of Fact Number 65,⁶ which states, "A total of \$2,920.00 was spent related to responding to the writ of mandamus filed by Plaintiff. I find that Defendant is entitled to an award of \$2,900.00 for those fees and expenses."

Plaintiff argues Defendant's response was moot, which he admitted in his response, and, thus, Defendant is not entitled to attorney's fees for the filing. Defendant points to evidence showing the trial court "did not understand the impact of the Petition[.]"

5. This quote is from the North Carolina Supreme Court's summary of the Court of Appeals' decision. The North Carolina Supreme Court largely approved of the Court of Appeals' opinion and modified the opinion to hold although the trial court does not have to compare the parties' estates, it is permitted to do so. *Van Every*, 348 N.C. at 60, 497 S.E.2d at 690.

6. We note Plaintiff does challenge Finding of Fact Number 65 in her argument regarding costs. However, she does not argue Finding of Fact Number 65 is unsupported by the evidence, and, instead argues there is no legal basis for the finding, because Defendant did not plead for costs, which we discuss *infra*.

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As stated *supra* the trial court made the statutorily mandated findings to award attorney's fees. Notwithstanding any alleged errors in Findings of Fact Numbers 55 through 62, the remaining findings show the trial court's decision was not an abuse of discretion. In Defendant's response to Plaintiff's petition for a writ of mandamus, Defendant argued the petition is moot. Defendant then addressed the merits of the petition, in case this Court concluded the petition was not moot. Although the petition may have been moot, we cannot say Defendant's filing was wholly unnecessary. We note the confusion of the trial court regarding its jurisdiction because Plaintiff filed her petition for a writ of mandamus. It was in the discretion of the trial court to award fees for this filing, and we cannot say the trial court's decision to award attorney's fees for Defendant's response to the petition for writ of mandamus was manifestly unsupported by reason. We overrule this assignment of error.

C. Costs Awarded to Defendant

[6] Plaintiff next argues the trial court erred in awarding Defendant \$3,500 in costs. Specifically, Plaintiff argues "Defendant-Appellee did not plead a request for costs nor was there a legal basis for costs, therefore, the award of costs to Defendant-Appellee must be reversed." Defendant argues his general prayer for relief in his original answer entitles him to costs.

Rule 8 of the North Carolina Rules of Civil Procedure requires pleadings to contain: "[a] demand for judgment for relief to which he deems himself entitled." N.C. R. Civ. P. 8(a)(2) (2016). However, "[i]t is well-settled law in North Carolina that the party is entitled to relief which the allegations in the pleadings will justify It is not necessary that there be a prayer for relief or that the prayer for relief contain a correct statement of the relief to which the party is entitled." *Harris v. Ashley*, 38 N.C. App. 494, 498-99, 248 S.E.2d 393, 396 (1978) (quoting *East Coast Oil Co. v. Fair*, 3 N.C. App. 175, 178, 164 S.E.2d 482, 485 (1968)) (other citations omitted).

We note Defendant filed an amended answer and counterclaim. In his controlling, amended pleading, he neither requests costs nor included a general prayer for relief. *Hughes v. Anchor Enters., Inc.*, 245 N.C. 131, 135, 95 S.E.2d 577, 581 (1956) (citation omitted) (holding the amended pleading superseded the original pleading and controlled). However, because Defendant is "entitled to relief which the allegations in the pleadings will justify[.]" we affirm the trial court's award of costs to Defendant. *Harris*, 38 N.C. App. at 498-99, 248 S.E.2d at 396 (citation omitted). We note Plaintiff only challenges the findings of fact

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supporting the award of costs for being without “a legal basis” and not for lack of supporting competent evidence.⁷ Because we hold there is a legal basis for the award, we overrule this assignment of error.

D. Credit for Overpayment of Child Support

[7] Finally, Plaintiff argues the trial court erred in awarding Defendant a \$2,000 credit for overpayment of child support. Specifically, Plaintiff contends the trial court did not receive evidence, beyond Defendant’s counsel’s argument, regarding an overpayment of child support. Essentially, Plaintiff argues Findings of Fact Numbers 39 through 45 are unsupported by the evidence. We agree.

“This Court’s review is limited to a consideration of whether there is sufficient competent evidence to support the findings of fact, and whether, based on these findings, the Court properly computed the child support obligations.” *Miller v. Miller*, 153 N.C. App. 40, 47, 568 S.E.2d 914, 918-19 (2002) (citation omitted). However, “it is axiomatic that the arguments of counsel are not evidence.” *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) (citations omitted).

Plaintiff argues the record contains no sufficient, competent evidence to support the following findings:

Overpayment Temporary Order for Child Support Through Order of Permanent Custody

39. Pursuant to a temporary Order for child support, entered without prejudice on September 24, 2009, Defendant paid an amount for child support of \$558.31, that was a median between a schedule A and B calculations as plaintiff contended that Defendant did not have more than 123 overnights.

40. At trial in 2011, Plaintiff’s own trial Exhibit (10) introduced at the custody trial reveals that Defendant had approximately 140-145 overnights a year and provided 100% of the transportation for his visits with the minor child, in addition to health insurance and a portion of a secondary policy that Mother provided, which the court ultimately found unnecessary.

7. Additionally, we note Plaintiff does not argue the types of costs awarded were not permitted by statute. It is not our duty to supplement a party’s brief. N.C. R. App. P. 28(a) (2016).

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41. Defendant seeks a reimbursement of overpayment of child support and asks the Court to assume that he should have paid the worksheet B number included in the temporary order.

42. Defendant paid child support via wage withholding pursuant to this temporary order through September 2011 although an order terminating his support effect July 15, 2011 was entered in August 2011.

43. Defendant claims that from the entry of the order effective August 2009, through the order terminating his child support obligation, he over paid child support in the amount of \$4,392.00 based on the number calculated for a B within the order.

44. The Court finds that it is appropriate to give the Defendant some credit for paying more than the guideline amount.

45. The Court finds that it will be too burdensome to have Plaintiff repay all of the overages paid and finds in its discretion to award a credit of less than one half that amount, the sum of \$2,000.00.

Plaintiff contends “there was no evidence offered regarding Defendant-Appellee’s alleged overpayment of child support” beyond arguments from counsel at the 14 September 2012 hearing. Defendant argues the 14 September 2012 hearing “was the resumption of testimony and evidence presented on June 6 & 7 2011[.]” Defendant then highlights portions of testimony from the 6 and 7 June 2011 hearings.

We conclude there is insufficient evidence in the record to support the findings regarding Defendant’s overpayment of child support. Neither Plaintiff nor Defendant presented testimony at the 14 September 2012 hearing regarding Defendant’s overpayment. Although Defendant’s counsel argued Defendant overpaid under the Guidelines worksheet B amount, counsel’s arguments are not evidence. *Collins*, 345 N.C. at 173, 478 S.E.2d at 193 (citations omitted). Additionally, the record does not include the transcripts from the 6 or 7 June 2011 hearings, to which Defendant cites. We are bound by the record on appeal. *In re Savage*, 163 N.C. App. 195, 196, 592 S.E.2d 610, 610-11 (2004) (citation omitted). Thus, we hold the trial court’s findings are not supported by the evidence. Accordingly, we vacate this portion of the order and remand for further findings. The trial court may, in its discretion, conduct a new hearing and receive additional evidence.

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V. Conclusion

For the reasons stated above, we remand the trial court's deviation from the Guidelines and award of overpayment of child support for further findings consistent with this opinion. We affirm the trial court's award of attorney's fees and costs to Defendant.

VACATED AND REMANDED IN PART; AFFIRMED IN PART.

Judge DAVIS concurs.

Judge MURPHY dissents in a separate opinion.

MURPHY, Judge, dissenting

I agree with the Majority's analysis of the merits of this case. However, I do not join the Majority in treating the Appellant's brief as a petition for writ of *certiorari* as she failed to request for us to do so or file a petition in conformity with N.C. R. App. P. 21(a) and consequently would not reach the merits. I am persuaded that this situation is no different from the situation in the unpublished decision we issued in *State v. Scott*, No. COA 15-559, ___ N.C. App. ___, 781 S.E.2d. 351, 2015 WL 8750613 (N.C. Ct. App. December 15, 2015) (unpublished), applying *State v. Inman*, 206 N.C. App 324, 696 S.E.2d. 567 (2010). Further, I "decline to exercise [my] discretion under Rule 2 to correct the defects in [Appellant]'s purported petition for writ of *certiorari*." *State v. McCoy*, 171 N.C. App. 636, 639, 615 S.E.2d 319, 321 (2005). "It is not the role of the appellate courts . . . to create an appeal for an [A]ppellant." *Krause v. RK Motors, LLC*, ___ N.C. App. ___, ___, 797 S.E.2d. 335, 339 (2017) (citing *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d. 360, 361 (2005)). Accordingly, I respectfully dissent and would dismiss the appeal.

SILVER v. HALIFAX CTY. BD. OF COMM'RS

[255 N.C. App. 559 (2017)]

LOTONYA SILVER, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF BRIANNA SILVER, LARRY SILVER, III AND DOMINICK SILVER; BRENDA SLEDGE, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF ALICIA JONES; FELICIA SCOTT, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF JAMIER SCOTT; HALIFAX COUNTY BRANCH #5401, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; AND COALITION FOR EDUCATION AND ECONOMIC SECURITY, PLAINTIFFS

v.

THE HALIFAX COUNTY BOARD OF COMMISSIONERS, DEFENDANT

No. COA16-313

Filed 19 September 2017

**Schools and Education—right to sound basic public education—
local board of county commissioners not responsible**

The trial court did not err by granting a local board of county commissioners' motion to dismiss under Rule 12(b)(6) of a claim by North Carolina schoolchildren asserting a violation of their right to a sound basic public education, guaranteed by the North Carolina Constitution, based on the board's alleged failure to adequately fund certain aspects of public schools. The board did not bear the constitutional duty to provide a sound basic education, and the correct avenue for addressing plaintiffs' concerns in the present case was through the ongoing litigation in *Leandro I* and *Leandro II*.

Chief Judge McGEE dissenting.

Appeal by plaintiffs from order entered 2 February 2016 by Judge W. Russell Duke, Jr. in Superior Court, Halifax County. Heard in the Court of Appeals 19 September 2016.

UNC Center for Civil Rights, by Mark Dorosin and Elizabeth Haddix, for plaintiffs-appellants.

Yarborough, Winters & Neville, by Garris Neil Yarborough; Office of County Attorney, by County Attorney M. Glynn Rollins, Jr., for defendant-appellee.

Youth Justice Project of the Southern Coalition for Social Justice, by K. Ricky Watson, Jr. and Peggy Nicholson, for Public Schools First NC, amicus curiae.

Legal Aid of North Carolina, Inc., by George R. Hausen, Jr.; Legal Aid of North Carolina, Inc. - Advocates for Children's Services, by

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Seth Ascher and Jennifer Story, for Legal Aid of North Carolina, Inc., amicus curiae.

STROUD, Judge.

I. Introduction

The North Carolina Supreme Court described the State's constitutional obligation to provide each student a "sound basic education" in *Leandro v. State*¹, which was filed in 1997; the Halifax County Board of Education was one of several plaintiffs in that case. In *Leandro I*, our Supreme Court declared that the State bears the constitutional obligation to provide a "sound basic education" to each student; the Court then explained in later *Leandro* litigation that "by the State we mean the legislative and executive branches[.]"² The legislative branch is the North Carolina General Assembly; the executive branch includes the Governor, State Board of Education, and Department of Public Instruction. The Supreme Court also explained that our state courts are not well-equipped to solve the problems in North Carolina's public schools. The Court approved of the trial court's approach, which deferred to "the expertise of the executive and legislative branches of government in matters concerning the mechanics of the public education process."³ The Supreme Court then assigned a superior court judge to oversee the efforts to improve public education in several counties, including Halifax County, and the court oversight started by *Leandro* still continues today.

In this case, plaintiffs are students in the Halifax County Public Schools and organizations interested in promoting public education. They claim that despite years of *Leandro* court oversight, including countless hearings and orders by the trial court and two extensive opinions from the North Carolina Supreme Court, many of the educational deficiencies described in *Leandro I* and *II* still exist in Halifax County. But in this case, plaintiffs claim that the Halifax County *Board of Commissioners* – alone – bears the constitutional obligation for providing all children in the county with a sound basic education. This claim is not supported by our Supreme Court's holdings in *Leandro I* and *II*. And the courts are still ill-equipped to solve the problems of North Carolina's

1. *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro I*").

2. *Id.* at 345, 488 S.E.2d at 254; *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 635, 599 S.E.2d 365, 389 (2004) ("*Leandro II*").

3. *Leandro II*, 358 N.C. at 638, 599 S.E.2d at 390.

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public schools today, while the State – “the legislative and executive branches” – still has the constitutional duty to provide a sound basic education for every child in North Carolina. The defendant Halifax County Board of Commissioners was created by the State, and the State has legal power to control it. Plaintiffs’ complaint describes serious problems in the schools in Halifax County, but because this defendant – the Halifax County Board of Commissioners – does not bear the constitutional duty to provide a sound basic education, we affirm the trial court’s order dismissing this action.

II. Plaintiffs’ claim**a. Procedural background**

This case presents a question of first impression in our Court: whether North Carolina schoolchildren may assert a violation of their right to a sound basic public education, guaranteed by the North Carolina Constitution, against a local board of county commissioners for their alleged failure to adequately fund aspects of public schools. This case has come before this Court at an early stage of the proceedings, as the trial court granted defendant’s motion to dismiss under Rule 12(b)(6). At this early stage, this Court must take the factual allegations from plaintiffs’ complaint, and treat them as true to determine the legal question of whether the trial court properly dismissed this case. *See Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) (noting that in an appeal from a trial court’s grant of a motion to dismiss under Rule 12(b)(6), “[w]e consider whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.” (citation and quotation marks omitted)).

Brianna Silver, Larry Silver III, Dominick Silver, Alicia Jones, and Jamier Scott (“the students”) are five students in school systems within the geographic boundaries of Halifax County, North Carolina. Latonya Silver, Brenda Sledge, and Felicia Scott are the students’ respective parents or legal guardians. The students and their parents and legal guardians, as well as with two interested organizations – the local chapter of the National Association for the Advancement of Colored People and the Coalition for Education and Economic Security (collectively, “plaintiffs”) – filed a complaint against the Halifax County Board of Commissioners (“defendant” or “the Board”) asserting that the Board’s ineffective and inefficient allocation of financial resources resulted in a failure to provide a “sound basic education” to all school children within Halifax County, and that such failure violated the students’ rights under Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution.

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Plaintiffs filed their lawsuit in Halifax County Superior Court on 24 August 2015. In their complaint, plaintiffs asserted that, due to the “educational deficiencies” in the three Halifax County school districts, “merely adding resources to the defective three-district system cannot remedy its constitutional deficiencies.” Plaintiffs also claim that the Board’s “decision to maintain three racially identifiable school districts prevents students from the opportunity to receive a sound basic education.” Plaintiffs asserted two claims for relief, both based on Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution, and requested in part: (1) “[t]hat the Court find and conclude that Defendant’s maintenance of three separate school districts obstructs Halifax County’s students from securing the opportunity to receive a sound basic education;” and (2) “[t]hat the Court exercise its equitable powers and order the Board to develop and implement a plan to remedy the constitutional violations of its present education delivery mechanism and to ensure that every student in Halifax County is provided the opportunity to receive a sound basic education[.]”

Under Rule 2.1 of the General Rules of Practice for the Superior and District Courts, this case was designated as exceptional by the Chief Justice of the Supreme Court of North Carolina, and a special superior court judge was designated to hear the case. Defendant moved to dismiss plaintiffs’ complaint under Rule 12(b)(6) on 2 November 2015, asserting that the complaint failed to state a claim upon which relief may be granted. After a hearing, the trial court granted defendant’s motion to dismiss under Rule 12(b)(6), reasoning it is not “the constitutional responsibility of [the Board] to implement and maintain a public education system for Halifax County.” Plaintiffs appealed to this Court.

b. Facts as alleged by plaintiffs

We recite these factual allegations from plaintiffs’ complaint and treat them as true for the purposes of our decision. *Bridges*, 366 N.C. at 541, 742 S.E.2d at 796. Three separate school districts exist wholly within the geographical boundaries of Halifax County: Halifax County Public Schools (“Halifax County Schools”), Weldon City Schools (“Weldon City Schools”), and Roanoke Rapids Graded School District (“Roanoke Rapids Schools”). This tripartite school system was created in the 1960s.

As of 2015, the student population of Halifax County Schools was 85% African-American and 4% Caucasian; the student population of Weldon City Schools was 94% African-American and 4% Caucasian; and the student population of Roanoke Rapids Schools was 26% African-American and 65% Caucasian. According to plaintiffs’ complaint, the three school

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districts receive an unequal amount of funding, with Roanoke Rapids Schools – the only school district with a majority of Caucasian students – receiving the most financial support. Plaintiffs allege this funding disparity flows directly from the choices made by the Board.

Plaintiffs also allege the Board has financial responsibility for public education in Halifax County, and has the authority to use local revenues to maintain or supplement public school programs. Various North Carolina General Statutes assign to local governments the responsibility to pay for certain school-related expenditures for the school districts within its borders; the complaint alleges that the Board is responsible for providing furniture and apparatus needs; library, science, and classroom equipment; instructional supplies and books; and water supply and sanitary facilities. To fund these financial responsibilities, North Carolina law allows local governments, if they choose, to collect a one-cent sales and use tax. N.C. Gen. Stat. § 105-463 *et seq.* This tax is collected by retailers and remitted to the North Carolina Department of Revenue. N.C. Gen. Stat. §§ 105-469(a); 105-471 (2015). The Secretary of the Department of Revenue then allocates the net proceeds of the taxes collected to each individual county. N.C. Gen. Stat. § 105-472 (2015).

In distributing the local government sales and use tax proceeds, the General Statutes allow the Board, by resolution, to choose one of two methods of tax distribution: the Per Capita Method, or the Ad Valorem Method. *See* N.C. Gen. Stat. §§ 105-472(b)(1)-(2) (2015). For counties that choose the Per Capita Method, the “net proceeds of the [sales and use] tax collected in a taxing county” is distributed “to that county and to the municipalities in the county on a per capita basis according to the total population of the taxing county, plus the total population of the municipalities in the county.” N.C. Gen. Stat. § 105-472(b)(1). For counties using the Ad Valorem Method, the “net proceeds of the [sales and use] tax collected in a taxing county” is distributed “to that county and the municipalities in the county in proportion to the total amount of ad valorem taxes levied by each on property having a tax situs in the taxing county during the fiscal year next preceding the distribution.” N.C. Gen. Stat. § 105-472(b)(2). According to the complaint, both Roanoke Rapids Schools and Weldon City Schools levy ad valorem “supplemental property taxes,” while Halifax County Schools do not.

The Board distributes local sales and use tax revenue under the Ad Valorem Method. Plaintiffs’ complaint alleges that because the Board chooses the Ad Valorem Method, a funding disparity exists among the three school districts. Between 2006 and 2014, it is alleged that Roanoke Rapids Schools received approximately \$4.5 million in local sales and use

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tax revenue, Weldon City Schools received approximately \$2.5 million in local sales and use tax revenue, and Halifax County Schools received no local sales and use tax revenue, because it does not collect ad valorem taxes and was therefore not entitled to a share of the local sales and use taxes distributed under the Ad Valorem Method. Plaintiffs allege the Board has “repeatedly refused to adopt” the Per Capita Method, “preferring to maintain a public education system that denies additional funding” to Halifax County Schools.

The Board’s choice not to adopt the Per Capita Method “exacerbates funding disparities already in place,” according to plaintiffs, by the fact that Roanoke Rapids Schools and Weldon City Schools collect ad valorem supplemental property tax revenue, while Halifax County Schools does not. Roanoke Rapids Schools has “authority to levy its own taxes,” and plaintiffs allege it set a supplemental property tax rate at \$0.21 per \$100.00 of taxable property value within the school district, which resulted in Roanoke Rapids Schools receiving approximately \$15 million in additional revenue through supplemental property taxes between 2006 and 2014. Plaintiffs allege Weldon City Schools “relies on the Board to set its supplemental property tax rate,” and the Board set the rate at \$0.17 per \$100.00 of taxable property value, resulting in Weldon City Schools receiving approximately \$11 million in additional revenue through supplemental property taxes during the same time period. In contrast, Halifax County Schools do “not have a supplemental property tax and thus receive[] no additional revenue,” according to plaintiffs’ complaint. Plaintiffs allege these funding disparities have had an appreciable effect on each of the school districts’ facilities, quality of teachers, and learning materials, briefly summarized below.

The complaint alleges that many of Halifax County Schools’ buildings are in subpar condition, resulting in: toilets flooding hallways, forcing students to walk through sewage to travel between their lockers and classes; a ceiling occasionally crumbling and falling onto students’ desks mid-lesson; heating and air conditioning systems regularly failing; and school buses breaking down, affecting class schedules and school attendance. The complaint further alleges that Weldon City Schools are not much better off. The high school in the Weldon City School system has a mold infestation, crumbling ceilings, an invasive pest problem, and rodents. An elementary school in the Weldon City Schools system has bathrooms with no bathroom stall doors and routinely has no soap in the soap dispensers. Plaintiffs allege, in stark contrast, that Roanoke Rapids Schools have been renovated regularly; feature computer labs,

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art rooms, music rooms, and physical education spaces; and have “pristine athletic field[s].”

Plaintiffs also allege that disparities extend to the quality of the faculty in the three school districts. They allege Halifax County Schools and Weldon City Schools (together, the “majority-minority districts”) are “unable to attract and retain a sufficient number of experienced, highly effective, or qualified teachers.” The complaint alleges 40 percent and 50 percent of the school districts’ teachers, respectively, reported that they have insufficient access to appropriate instructional materials, while only five percent of Roanoke Rapids Schools teachers reported the same problems. Plaintiffs allege the majority-minority districts must resort to teachers provided through Teach For America (“TFA”), while Roanoke Rapids Schools have no TFA teachers placed in its schools.

Plaintiffs further allege differences between the three school districts’ learning materials, curricular offerings, and extracurricular activities, with students in the majority-minority districts being “frequently forced to share old and worn down textbooks, workbooks, and other classroom materials[,]” and students are not permitted to take those materials home, making it difficult to complete homework assignments. Students in the majority-minority districts have minimal access to advanced academic courses. In contrast, students in Roanoke Rapids Schools have access to an “Outreach Academy” program designed to decrease the dropout rate, have wide access to advanced academic placement, and can participate in “educational inputs like extracurricular and athletic offerings[.]”

In addition, plaintiffs allege that the school funding choices made by the Board have also had a negative impact on student test scores in the three districts. Since 2008, Halifax County Schools and Weldon City Schools have had no more than 31.7% and 47.7%, respectively, of their students score at or above grade level on statewide standardized tests. They allege students in these two school districts have consistently scored significantly lower on the SAT college entrance exams than their peers at Roanoke Rapids Schools. While students at Roanoke Rapids Schools have fared better, all three districts have higher dropout rates than the state average, with half of the dropouts in Roanoke Rapids Schools being African-American, despite that group constituting less than 25 percent of the total student population.

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III. Analysis

a. The *Leandro* cases established a constitutional right to a sound basic education.

"[T]he right to education provided in the state constitution is a right to a sound basic education. Leandro I, 346 N.C. at 345, 488 S.E.2d at 254.

Plaintiffs argue that their complaint, taken as true, states a claim against defendant for violating their rights conferred by Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution, and the Board's choices "deprived Plaintiffs of their constitutionally-guaranteed opportunity to receive a sound basic education." "It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro I, 346 N.C. at 345, 488 S.E.2d at 253.* To determine whether plaintiffs' claims against the Board, if true, constitute a violation of the North Carolina Constitution, we first consider the language of the two constitutional provisions involved. Article I, Section 15 of the North Carolina Constitution provides: "**Education.** The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. CONST. art. I, § 15 (emphasis in original). Article IX, section 2 provides:

Uniform system of schools.

(1) **General and uniform system: term.** -- The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

(2) **Local responsibility.** -- The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

N.C. CONST. art. IX, § 2 (emphasis in original). The contours of these constitutional provisions have been examined in two landmark opinions of our Supreme Court: *Leandro I, 346 N.C. 336, 488 S.E.2d 249*; and *Leandro II, 358 N.C. 605, 599 S.E.2d 365.*

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In *Leandro I*, students, their parents or legal guardians, and their school districts⁴ (“the plaintiffs”), sued the State and the North Carolina State Board of Education (“SBOE”) (collectively, “the defendants”) alleging: (1) that the children in five relatively poor school districts had a right to adequate educational opportunities which the defendants had denied under the then-existing school funding system; and (2) the North Carolina Constitution “not only creates a fundamental right to an education, but it also guarantees that every child, no matter where he or she resides, is entitled to equal educational opportunities.” 346 N.C. at 342, 488 S.E.2d at 252. Much like the present case, the plaintiffs in *Leandro I* “complain[ed] of inadequate school facilities with insufficient space, poor lighting, leaking roofs, erratic heating and air conditioning, peeling paint, cracked plaster, and rusting exposed pipes.” *Id.* at 343, 488 S.E.2d at 252. The plaintiff school districts asserted that “they [were] unable to compete for high quality teachers because local salary supplements in their poor districts [were] well below those provided in wealthy districts.” *Id.*

After examining the plain language, purpose, and history of Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution, our Supreme Court held these provisions provide a right to “a qualitatively adequate education[.]” *Leandro I*, 346 N.C. at 345, 488 S.E.2d at 254. The Court explained:

Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools. For purposes of our Constitution, a “sound basic education” is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student’s community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational

4. One of the plaintiffs was the Halifax County Board of Education. *Leandro I*, 346 N.C. at 336; 488 S.E.2d at 249.

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training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Leandro I, 346 N.C. at 347, 488 S.E.2d at 255 (citations omitted).

In addition to considering the qualitative aspect inherent in the two constitutional provisions when combined, the Supreme Court also considered whether the equal opportunities clause of Article IX, Section 2, alone, “mandates equality in the educational programs and resources offered the children in all school districts in North Carolina.” *See Leandro I*, 346 N.C. at 348, 488 S.E.2d at 255. In answering that question in the negative, the Court explained:

The issue here . . . is [the] plaintiffs’ contention that North Carolina’s system of school funding, based in part on funding by the county in which the district is located, necessarily denies the students in plaintiffs’ relatively poor school districts educational opportunities equal to those available in relatively wealthy districts and thereby violates the equal opportunities clause of Article IX, Section 2(1). Although we have concluded that the North Carolina Constitution requires that access to a sound basic education be provided equally in every school district, we are convinced that the equal opportunities clause of Article IX, Section 2(1) *does not require substantially equal funding or educational advantages in all school districts*. . . . [W]e conclude that provisions of the current state system for funding schools which require or allow counties to help finance their school systems and result in unequal funding among the school districts of the state do not violate constitutional principles.

Leandro I, 346 N.C. at 348-49, 488 S.E.2d at 256 (emphasis added). Our Supreme Court also addressed local responsibility for school funding, and held that differences in school funding between school districts resulting from local supplements do not violate Article IX, Section 2(2):

Article IX, Section 2(2) of the North Carolina Constitution expressly authorizes the General Assembly to require that local governments bear part of the costs of their local public schools. Further, it expressly provides that local governments may add to or supplement their school programs as much as they wish. . . . Because the North

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Carolina Constitution expressly states that units of local governments with financial responsibility for public education may provide additional funding to supplement the educational programs provided by the state, *there can be nothing unconstitutional about their doing so or in any inequality of opportunity occurring as a result.*

Leandro I, 346 N.C. at 349-50, 488 S.E.2d at 256 (emphasis added). This holding was grounded, in part, in practical concerns; because the Constitution permits local supplements, “ ‘[c]learly . . . a county with greater financial resources will be able to supplement its programs to a greater degree than less wealthy counties, resulting in enhanced educational opportunity for its students. [Article IX, Section 2(2)] obviously precludes the possibility that exactly equal educational opportunities can be offered’ ” in all school districts throughout the State. *Id.* at 350, 488 S.E.2d at 256 (quoting *Britt v. N.C. State Bd. of Educ.*, 86 N.C. App. 282, 288, 357 S.E.2d 432, 435-36 (1987)) (ellipses and brackets omitted).

Upon concluding that the plaintiffs had stated a claim upon which relief could have been granted, our Supreme Court held that “[i]f on remand of this case to the trial court, that court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established.” *Id.* at 357, 488 S.E.2d at 261. Unless the State could show that its actions denying a fundamental right were necessary to promote a compelling governmental interest, the Court held that it would be “the duty of the [trial] court to enter a judgment granting declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government.” *Id.* (citation omitted).

As directed by *Leandro I*, on remand the trial court heard extensive evidence and ultimately entered a declaratory judgment favorable to the *Leandro* plaintiffs; our Supreme Court considered the appeal of that judgment in *Leandro II*. *Leandro II*, 358 N.C. at 612-13, 599 S.E.2d at 375. In *Leandro II*, our Supreme Court encountered a “continuation of the landmark decision by this Court, [*Leandro I*,] unanimously interpreting the North Carolina Constitution to recognize that the legislative and executive branches have the duty to provide all the children of North Carolina the opportunity for a sound basic education.” *Leandro II*, 358 N.C. at 609, 599 S.E.2d at 373. The Court considered, for the first time, what measures are to be used to determine whether a student’s right to a sound basic public education had been violated.

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While the plaintiffs in *Leandro I* and *Leandro II* hailed from many poor school districts in North Carolina – including Halifax County – the evidence primarily focused on a single district, Hoke County, which was designated as a “representative plaintiff district.” *See id.* at 613, 599 S.E.2d at 375. The Court noted that the evidence presented by the *Leandro II* plaintiffs included four general types of evidence: “(1) comparative standardized test score data; (2) student graduation rates, employment potential, post-secondary education success (and/or lack thereof); (3) deficiencies pertaining to the educational offerings in Hoke County schools; and (4) deficiencies pertaining to the educational administration of Hoke County schools.” *Id.* at 623, 599 S.E.2d at 381. The Court called the first two categories “outputs,” and the second two categories as “inputs.” *Id.* “Outputs” is “a term used by educators that, in sum, measures student performance[.]” while “inputs” is “a term used by educators that, in sum, describes what the State and local boards provide to students attending public schools.” *Id.*

After discussing the evidence in the case regarding “outputs” and “inputs,” our Supreme Court held that the plaintiffs had made a “clear evidentiary showing” of the inadequacy of both. *See id.* at 630, 599 S.E.2d 386. The Court stated:

In our view, the trial court conducted an appropriate and informative path of inquiry concerning the issue at hand. After determining that the evidence clearly showed that Hoke County students were failing, at an alarming rate, to obtain a sound basic education, the trial court in turn determined that the evidence presented also demonstrated that a combination of State action and inaction contributed significantly to the students’ failings. Then, after concluding that the State’s overall funding and resource provisions scheme was adequate on a statewide basis, the trial court determined that the evidence showed that the State’s method of funding and providing for individual school districts such as Hoke County was such that it did not comply with *Leandro’s* mandate of ensuring that all children of the state be provided with the opportunity for a sound basic education.

Id. at 637, 599 S.E.2d at 390. Accordingly, our Supreme Court affirmed “those portions of the trial court’s order that conclude[d] that there [had] been a clear showing of a denial of the established right of Hoke County students to gain their opportunity for a sound basic education” and also affirmed the portions of the order which required “the State to

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assess its education-related allocations to the county's schools so as to correct any deficiencies that . . . prevent[ed] the county from offering its students the opportunity to obtain a *Leandro*-conforming education." *Id.* at 638, 599 S.E.2d at 391.

With these principles in mind, we consider plaintiffs' complaint. In their complaint, plaintiffs allege that Halifax County Schools and Weldon City Schools lack the necessary resources to provide fundamental educational opportunities to the children in their school districts. Plaintiffs further complain of inadequate school facilities, crumbling ceilings, leaking pipes, sewage in the hallways, and a lack of adequate instructional materials in the majority-minority districts. These deficiencies result from defendant's funding choices and have led to poor test scores and the inability to retain qualified teachers. Plaintiffs requested, in their complaint, that the Court "exercise its equitable powers and order the Board to develop and implement a plan to remedy the constitutional violations of its present education delivery mechanism and to ensure that every student in Halifax County is provided the opportunity to receive a sound basic education."

The educational deficiencies as described in the plaintiffs' complaint, which we accept as true for the motion to dismiss, are serious and intolerable. But rather than filing this separate lawsuit, the correct avenue for addressing plaintiffs' concerns in the present case would appear to be through the ongoing litigation in *Leandro I* and *Leandro II*. The *Leandro* cases defined not only the essential requirements for a "sound basic education" under the North Carolina constitution, but also the entities with the constitutional responsibility to provide that education. In addition, these cases answer the essential question in this case of whether a local board of county commissioners has the constitutional obligation for providing a sound basic public education for the students in its county. The Halifax County schools are addressed in many orders in the ongoing court supervision in the *Leandro* cases. As noted above, several plaintiffs in *Leandro I* and *II* are local boards of education, including the Halifax County Board of Education. *See Leandro I*, 346 N.C. at 346, 488 S.E.2d at 249; *Leandro II*, 358 N.C. at 605, 599 S.E.2d at 365. Furthermore, plaintiffs' complaint refers to a 2009 consent order that "determined that students in HCPS were not being provided the opportunity to receive a sound basic education and required the North Carolina Department of Public Instruction's [sic] ('DPI') to implement a 'turnaround' intervention plan in HCPS." Oddly, the complaint does not identify the case or court in which the "2009 consent order" was entered, but we believe it is entirely appropriate for this Court to take judicial notice it was a court order in the ongoing *Leandro* litigation.

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On plaintiffs' argument that this defendant -- a county board of commissioners -- has the constitutional obligation to provide a sound basic education, we cannot lose sight of the fact that the *Leandro* cases began as a declaratory judgment action with the express purpose of determining the extent of the state constitutional right to a sound basic education *and* the entities responsible for providing that education. *Leandro II*, 358 N.C. at 611, 599 S.E.2d at 374. *Leandro I* and *Leandro II* determined the correct parties and the entities legally responsible for providing a sound basic education under the North Carolina Constitution; county commissioners were not included as parties in either case. *Leandro II* addressed the responsibilities of the various entities -- the State, the local school boards, and the State Board of Education -- and held that the local entities, as creatures of the State, did *not* bear the constitutional obligation regarding education, yet found the school boards to still be proper parties to the ongoing litigation, since the case was based significantly on their role as the providers of education and the outcome would have a great effect on that role. *Leandro II*, 358 N.C. at 617, 599 S.E.2d at 378. In *Leandro II*, the Supreme Court also clarified that the constitutional duty is on the State, and "by the State we mean the legislative and executive branches which are constitutionally responsible for public education[.]" *Id.* at 635, 599 S.E.2d at 389. Although the county boards of commissioners were not parties to *Leandro I* or *II*, they are creatures of the State just as the local school boards.

We cannot discern why deficiencies in education alleged here have not been raised with the superior court in the ongoing *Leandro II* matter. And even if these particular deficiencies cannot be addressed in the ongoing *Leandro II* case, plaintiffs simply have not stated a constitutional claim against *this* defendant, the Halifax County Board of Commissioners, because *this* defendant on its own does not have the constitutional duty identified in *Leandro I* to provide a sound basic education. The State does, *and the State has total control over this defendant*. We will review briefly the basic principles of *Leandro I* and *II* specifically as applied to the plaintiffs' claims and the schools in Halifax County.

b. *Leandro I* and *II* established that the State is constitutionally responsible for public education.

"[B]y the State we mean the legislative and executive branches which are constitutionally responsible for public education." *Leandro II*, 358 N.C. at 635, 599 S.E.2d at 389.

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The seminal case in North Carolina which establishes the constitutional right to sound basic education is *Leandro I*, 346 N.C. at 345, 488 S.E.2d at 254, with further analysis and clarification in *Leandro II*, 358 N.C. at 614-15, 599 S.E.2d at 376. The questions of how to correct educational deficiencies and which entities bear the responsibility for improving education have been addressed many times and in excruciating detail in *Leandro I*, *Leandro II*, and continuing litigation that has followed these decisions over the years.⁵ *Leandro I*, as described in *Leandro II*, was “initiated as a declaratory judgment action pursuant to [N.C. Gen. Stat.] § 1-253 (2003).” *Leandro II*, 358 N.C. at 611, 599 S.E.2d at 374.

[T]he case included five distinct parties: (1) plaintiff school children (and their respective guardians), (2) plaintiff local school boards, (3) plaintiff-intervenors, (4) the State Board of Education, and (5) the State. *At that juncture, all participants sought a decree defining what rights and obligations were at stake, which parties had obligations, and which parties had rights as a result of such obligations.* In *Leandro*, this Court, in sum, decreed that the State and State Board of Education had constitutional obligations to provide the state’s school children with an opportunity for a sound basic education, and that the state’s school children had a fundamental right to such an opportunity. As a result of the decree, adversarial sides were clearly drawn for four of the five parties – plaintiff school children and plaintiff-intervenor school children (who, under the decree, enjoyed the right of educational opportunity), versus the State and State Board of Education (which, under the decree, were obligated to provide such opportunity).

Id. at 614-15, 599 S.E.2d at 376 (citation omitted) (emphasis added). One of the plaintiff school boards in *Leandro I* and *II* was – and still is

5. The Supreme Court noted in *Leandro II* that “the ensuing trial [on remand in *Leandro I*] lasted approximately fourteen months and resulted in over fifty boxes of exhibits and transcripts, an eight-volume record on appeal, and a memorandum of decision that exceeds 400 pages. The time and financial resources devoted to litigating these issues over the past ten years undoubtedly [sic] have cost the taxpayers of this state an incalculable sum of money. While obtaining judicial interpretation of our Constitution in this matter and applying it to the context of the facts in this case is a critical process, one can only wonder how many additional teachers, books, classrooms, and programs could have been provided by that money in furtherance of the requirement to provide the school children of North Carolina with the opportunity for a sound basic education.” *Leandro II*, 358 N.C. at 610, 599 S.E.2d at 373.

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-- the Halifax County Board of Education. *Leandro I*, 346 N.C. at 336, 488 S.E.2d at 249.

In *Leandro II*, the Supreme Court addressed an issue which developed after the *Leandro I* ruling regarding the status of the school boards as parties, since “as state-created entities, they enjoyed no entitlement to the right established in *Leandro* – namely, a child’s individual right of an opportunity to a sound basic education.” *Leandro II*, 358 N.C. at 617, 599 S.E.2d at 378. In the *Leandro I* and *II* litigation, the school boards being complained about were plaintiffs, not defendants, but the Supreme Court nevertheless considered the proper constitutional role and responsibility of the school boards as local entities which share in the provision of public education. *See Leandro II*, 358 N.C. at 617, 599 S.E.2d at 378. The Supreme Court agreed that the school boards were properly named as parties since “the ultimate decision of the trial court was likely to: (1) be based, in significant part, on their role as education providers; and (2) have an effect on that role in the wake of the proceedings.” *Id.* In other words, the school boards are not entitled to the benefit of the constitutional right to an education, nor do they alone bear the constitutional responsibility of providing education, but since they have statutory duties to participate as education providers, they remained as parties to the lawsuit. The Supreme Court also noted that the very purpose of the declaratory judgment action was

by definition, . . . premised on providing parties with a means for courts of record to declare rights, status, and other legal relations” among such parties. In addition, section 1-260 of the General Statutes declares plainly that when declaratory relief is sought, *all persons shall be made parties who have or claim any interest which would be affected by the declaration.* Thus, while the precise party designation – i.e., plaintiffs – of the school boards may not have been readily discernible at the time of the trial, the nature of the parties’ claims was such that: (1) they sought a declaration of rights, status, and legal relations of and among the parties; and (2) any declaration of the rights, status, and legal relations of and among the parties would affect the role played by the school boards in providing the state’s children with the opportunity to obtain a sound basic education.

Id. at 617-18, 599 S.E.2d at 378 (citations, quotation marks, brackets, ellipses, and emphasis omitted) (emphasis added). We have found no mention in *Leandro I* or *II* of adding county boards of commissioners as parties.

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The Supreme Court also noted in *Leandro II* the central roles played by the legislative and executive branches in providing public education. *Id.* at 635-38, 599 S.E.2d at 389-91. In affirming the trial court's order directing the State to reassess educational priorities and correct "any and all education-related deficiencies[.]" the Court noted that

the trial court refused to step in and direct the "nuts and bolts" of the reassessment effort. Acknowledging that the state's courts are ill-equipped to conduct, or even to participate directly in, any reassessment effort, the trial court deferred to the expertise of the executive and legislative branches of government in matters concerning the mechanics of the public education process.

. . . . [W]e note that the trial court also demonstrated admirable restraint by refusing to dictate how existing problems should be approached and resolved. Recognizing that education concerns were the shared province of the legislative and executive branches, the trial court instead afforded the two branches an unimpeded chance, "initially at least," see *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261, to correct constitutional deficiencies revealed at trial. In our view, the trial court's approach to the issue was sound and its order reflects both findings of fact that were supported by the evidence and conclusions that were supported by ample and adequate findings of fact.

Id. at 638, 599 S.E.2d at 390-91.

When the *Leandro* cases were decided, North Carolina's laws regarding school district finance were essentially the same as they are now, and Halifax County schools were organized just as they are now. *Leandro II* noted that *Leandro I* carefully distinguished the responsibilities and rights of the "five distinct parties: (1) plaintiff school children (and their respective guardians), (2) plaintiff local school boards, (3) plaintiff-intervenors, (4) the State Board of Education, and (5) the State." *Leandro II*, 358 N.C. at 614, 599 S.E.2d at 376. Although county commissioners levied property taxes and budgeted funds for schools at the time of the *Leandro* cases, just as they do now, the county commissioners for the counties in which the plaintiff local school boards were located were not parties to *Leandro I*, nor were they discussed, at least not initially. *Leandro I*, 346 N.C. at 336, 488 S.E.2d at 249.

In *Leandro II*, the Supreme Court stressed that the duty to provide a sound basic education is the State's duty, but the local entities, including

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the school boards, are simply creatures of the State. *Leandro II*, 358 N.C. at 635, 599 S.E.2d at 389. In fact, the trial court had even excluded “the Hoke County School System from responsibility for correcting allocation deficiencies” because the “Local Educational Area” was a “subdivision of the State created solely by the State.”⁶

Concerning the State’s argument that the trial court erred in concluding that the State was liable for its failings in Hoke County schools, we note that the trial court later modified this portion of its order to exclude the Hoke County School System from responsibility for correcting allocation deficiencies, reasoning that since the [Local Educational Area, hereinafter LEA] was a subdivision of the State created solely by the State, it held no authority beyond that accorded it by the State. As a consequence of the LEA’s limited authority, the trial court concluded that the State bore ultimate responsibility for the actions and/or inactions of the local school board, and that it was the State that must act to correct those actions and/or inactions of the school board that fail to provide a *Leandro*-conforming educational opportunity to students.

In the State’s view, any holding that renders the State, and by the State we mean the legislative and executive branches which are constitutionally responsible for public education, accountable for local school board decisions somehow serves to undermine the authority of such school boards. This Court, however, fails to see any such cause and effect. By holding the State accountable for the failings of local school boards, the trial court did not limit either: (1) the State’s authority to create and empower local school boards through legislative or administrative enactments, or (2) the extent of any powers granted to such local

6. The term “local education agency,” or “LEA,” was first described in a *Leandro II* trial court order as follows: “In its data collection system, the State of North Carolina uses the term local education agency (“LEA”) instead of the more familiar term school district. Accordingly, the Court’s reference to school districts will use the term LEA so as to match up with the data.” *Hoke Cnty. Bd. of Educ. v. State*, No. 95 CVS 1158, 2000 WL 1639686, at *28 (N.C. Super. Oct. 12, 2000) (unpublished), *aff’d in part as modified, rev’d in part*, 358 N.C. 605, 599 S.E.2d 365 (2004) (“*Leandro II*”). In *Leandro II*, the Supreme Court used the acronym “LEA,” but defined it as “Local Educational Area” instead. *Leandro II*, 358 N.C. at 623, 599 S.E.2d at 381. But regardless of how an “LEA” is defined, *Leandro I* and *II* clearly placed the constitutional responsibility to provide a sound basic education on the *State* and not any local entity. See *Leandro II*, 358 N.C. at 635-36, 599 S.E.2d at 389.

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school boards by the State. Thus, the power of the State to create local agencies to administer educational functions is unaffected by the trial court's ruling, and any powers bestowed on such agencies are similarly unaffected. In short, the trial court's ruling simply placed responsibility for the school board's actions on the entity – the State – that created the school board and that authorized the school board to act on the State's behalf. In our view, such a conclusion bears no effect whatsoever on the local school board's ability to continue in administering those functions it currently oversees or to be given broader and/or more independent authority. As a consequence, we hold that the State's argument concerning a diminished role for local school boards as a result of the trial court's ruling is without merit.

Id. at 635-36, 599 S.E.2d at 388-89.

The plaintiffs' complaint here seeks to invoke the constitutional rights established by *Leandro I*, but then asks the trial court to assign that constitutional responsibility to the defendant county commissioners alone – despite the Supreme Court's very specific rulings on the allocation of the constitutional duties from *Leandro I* in *Leandro II*. *Leandro II*, 358 N.C. at 617, 599 S.E.2d at 378 (“While it is true that the school boards are not among those endowed with [the constitutional right to a sound basic education] . . . , the school boards were properly maintained as parties because the ultimate decision of the trial court was likely to: (1) be based, in significant part, on their role as education providers; and (2) have an effect on that role in the wake of the proceedings.”). Plaintiffs allege:

Defendant Halifax County Board of Commissioners (“Board” or “Defendant”) is constitutionally obligated to structure a system of public education that meets the qualitative mandates established by the North Carolina Supreme Court in *Leandro v. State* (“*Leandro I*”) and *Hoke County v. State* (“*Leandro II*”). The Board must provide a system that ensures the opportunity to receive a sound basic education to *every* child in Halifax County. But instead . . . of complying with *Leandro's* mandate, it has chosen to maintain and fund an inefficient three-district system that divides its children along racial lines into “good” and “bad” school districts. By choosing to maintain three racially identifiable and inadequately

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funded school districts to serve this low-income community's declining population of fewer than seven thousand students, the Board violates the constitutional rights of its schoolchildren.

Other allegations of the plaintiff's complaint seem to recognize the State's role -- through the State Board of Education and North Carolina Department of Public Instruction -- in securing the constitutional rights to education in Halifax County, but then seek to assign that obligation, once again, to defendant and solely to defendant, although no case has ever assigned this duty to a board of county commissioners:

17. A 2009 consent order between HCPS and the State Board of Education determined that students in HCPS were not being provided the opportunity to receive a sound, basic education and required the North Carolina Department of Public Instruction's [sic] ("DPI") to implement a "turnaround" intervention plan in HCPS.

18. Because of persistently low student achievement, DPI also implemented a turnaround plan in WCS.

19. The limited academic improvement in both HCPS and WCS since the implementation of the DPI turnaround plans demonstrates that the Board's education delivery mechanism is an insurmountable impediment to addressing the ongoing violation of Halifax County schoolchildren's constitutional right to the opportunity to receive a sound basic education.

And although the trial court, and this Court, must take the factual allegations of the complaint as true, the courts do not accept allegations of legal conclusions as correct for a motion to dismiss under Rule 12(b)(6).

[T]he sufficiency of a claim to withstand a motion to dismiss is tested by its success or failure in setting out a state of facts which, when liberally considered, would entitle plaintiff to some relief. In testing the legal sufficiency of the complaint the well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of facts are not admitted. In [*Sutton v. Duke*, 277 N.C. 94, 102-03 176 S.E.2d 161, 166 (1970)], the Supreme Court quoted the following passage from 2A Moore's Federal Practice § 12.08 (2d ed. 1968) in stating the rule as to when dismissal is proper: "A

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[complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.’ ” (Emphasis added).

Boyce v. Boyce, 60 N.C. App. 685, 687, 299 S.E.2d 805, 806-07 (1983) (citations, quotation marks, and emphasis omitted). Many allegations of plaintiffs’ complaint are allegations of legal conclusions which purport to be based upon *Leandro I* and *II*. For example, the complaint alleges that “Defendant Halifax County Board of Commissioners (‘Board’ or ‘Defendant’) is constitutionally obligated to structure a system of public education that meets the qualitative mandates established by the North Carolina Supreme Court in *Leandro v. State* (‘*Leandro I*’) and *Hoke County v. State* (‘*Leandro II*’)[,]” but this is an allegation of a legal conclusion and it is not correct. This allegation of the constitutional responsibilities under the *Leandro* cases is simply not the law, as noted above.

Again, if the 2009 consent order has been violated as the complaint alleges, the court that entered the order should address the violation. At this early pleading stage, the only thing clear from plaintiffs’ complaint is that their factual allegations regarding substandard school facilities and poor educational opportunities and outputs are essentially the same ones raised and addressed in *Leandro I*, *Leandro II*, and the *Leandro* court supervision of the provision of public education in Halifax County is still ongoing.

c. The ongoing court supervision in *Leandro* includes Halifax County.

“The State must step in with an iron hand and get the mess straight.” Hoke Cnty. Bd. of Educ. v. State, No. 95 CVS 1158, 2002 WL 34165636 (N.C. Super. Ct. Apr. 4, 2002) (“Judge Manning 2002 Memorandum”).

Court supervision of education which began in *Leandro I* is still continuing, and the Halifax County Board of Education is a party to that litigation, although the defendant here and the other boards of education in Halifax County are not. Trial court orders after *Leandro I* and *Leandro II* have emphasized the responsibility of the State and soundly rejected arguments that the constitutional responsibility may be shifted to a local entity. For example, in an order issued in 2002 – just one of many orders issued in that litigation – Judge Howard E. Manning, Jr. summarized the local and state entities involved in providing education and their statutory and constitutional responsibilities. *See Judge*

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Manning 2002 Memorandum, 2002 WL 34165636. Halifax County was one of the counties specifically addressed by this 2002 order. *Id.* While orders issued by lower courts are not binding precedent on this Court, we cannot improve upon Judge Manning's summary of *Leandro I* and his overview of the statutory framework assigning responsibilities in education, so we quote that order at length and with the portions Judge Manning emphasized in all capital letters as it was written:

[] WHO IS RESPONSIBLE FOR SEEING THAT THESE BASIC EDUCATIONAL NEEDS OF ALL CHILDREN ARE MET IN EACH CLASSROOM AND SCHOOL IN NORTH CAROLINA? THE ANSWER IS FOUND IN *LEANDRO*.

Because we conclude that the General Assembly, under Article IX, Section 2(1), has the duty of providing the children of every school district with access to a sound basic education, we also conclude that it has inherent power to do those things reasonably related to meeting that constitutionally prescribed duty. *Leandro*, p. 353.

THE STATE OF NORTH CAROLINA IS ULTIMATELY RESPONSIBLE TO ENSURE THAT THE CONSTITUTIONAL GUARANTEE TO EACH CHILD OF THE OPPORTUNITY TO RECEIVE A SOUND BASIC EDUCATION IS MET. THE STATE OF NORTH CAROLINA ALSO HAS THE INHERENT POWER TO DO THOSE THINGS REASONABLY RELATED TO MEETING THAT CONSTITUTIONAL DUTY.

In attempting to meet its constitutional duty to provide each child with the equal opportunity to obtain a sound basic education and to provide a General and Uniform System of schools, the Legislature has enacted legislation creating a system for delivering educational services to children, governance for that system, and has delegated responsibilities to local boards of education. The Legislature has also adopted educational goals and standards that this Court may properly consider in determining whether any children are being denied their right to a sound basic education. *Leandro*, p. 355.

Chapter 115C of the North Carolina General Statutes is home to many educational goals and polices, as well as the structure of the general and uniform system of schools. The Court has previously discussed newly enacted and recent legislation. Additional, pertinent sections of

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Chapter 115C follow and provide additional, clear and convincing evidence that the State of North Carolina is in fact, and in law, ultimately responsible for providing every child with the equal opportunity to obtain a sound basic education and that the educational goals adopted as policy closely align with the constitutional definition of a sound basic education[.]

Id.

Judge Manning then listed various statutes setting forth the State's policies on education and the duties of the various entities in providing education, including the following, with headings from the order in capital letters:

N.C.G.S. 115C-1. General and uniform system of schools.

STATE BOARD OF EDUCATION, N.C.G.S. 115C-12. Powers and duties of the Board generally.

LOCAL BOARDS OF EDUCATION

115C-35, et seq.

115-36. Designation of board.

115C-47. Powers and duties generally.

GENERAL EDUCATION

115C-81. Basic Education Program.

115C-81.2. Comprehensive plan for reading achievement.

115C-105.20. School-Based Management and Accountability Program.

N.C.G.S. 115C-105.21. Local participation in the Program.

N.C.G.S. 115C-105.27. Development and approval of school improvement plans.

N.C.G.S. 115C-105.37. Identification of low-performing schools.

N.C.G.S. 115C-105.37A. Continually low-performing schools; definition; assistance and intervention; reassignment of students.

N.C.G.S. 115C-105.38. Assistance teams; review by State Board.

N.C.G.S. 115C-105.38A. Teacher competency assurance.

N.C.G.S. 115C-105.39. Dismissal or removal of personnel; appointment of interim superintendent.

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N.C.G.S. 115C-105.40. Student academic performance standards.

SAFE SCHOOLS - MAINTAINING SAFE & ORDERLY SCHOOLS. Article 8C.

N.C.G.S. 115C-105.45. Legislative findings.

ACADEMICALLY OR INTELLECTUALLY GIFTED STUDENTS. Article 9B.

115C-150.5. Academically or intellectually gifted students.

FUNDS FOR ACADEMICALLY GIFTED STUDENTS. Budget Section 28.3

FINANCIAL POLICY OF THE STATE OF NORTH CAROLINA AS IT RELATES TO THE PUBLIC SCHOOL SYSTEM.

N.C.G.S. 115C-408. Funds under the control of the State Board of Education.

Id.

Judge Manning then summarized the responsibilities set forth in the above statutes:

Under Chapter 115C's statutory scheme, the responsibility for administering and operating a general and uniform system of public schools is delegated to the State Board of Education, and the local boards of education (LEAs). Thus, by law, each LEA is statutorily responsible for providing the children within the district with the constitutionally mandated opportunity to receive the sound basic education.

Under the Constitution, however, the obligation to provide each child with the equal opportunity to obtain a sound basic education may not be abdicated by the State of North Carolina nor may the ultimate responsibility be transferred to and placed on the LEAs.

The State acknowledges that it may not abdicate its obligation to assure that every child has the opportunity to a sound basic education in its brief. "But, while emphasizing local control, the General Assembly, the State Board of Education and the Department of Public Instruction are not abdicating their constitutional responsibility to provide every student with the opportunity to acquire a sound basic education."

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It is, therefore, undisputed that the constitutional responsibility to provide each child with the equal opportunity to obtain a sound basic education remains with the State of North Carolina acting through its General Assembly. *Leandro*, p 353.

Id. (record citations and italic emphasis omitted).

Judge Manning completely rejected the State's arguments which sought to place the responsibilities upon local entities and described the State's responsibilities in no uncertain terms:

The bottom line is that the State of North Carolina has consistently tried to avoid responsibility for the failures to provide at-risk students with the equal opportunity for a sound basic education in LEAs throughout the state by blaming the failures on lack of leadership and effort by the individual LEAs.

The Supreme Court in *Leandro* clearly and unmistakably held to the contrary and found that the North Carolina Constitution provides every child with the right to receive an equal opportunity to a sound basic education and that it was the General Assembly, under Article IX, Section 2(1) that "has the duty of providing the children of every school district with access to a sound basic education." (*Leandro* p. 353)

This Court, following *Leandro's* mandate, has rejected the State of North Carolina's flawed argument that "it" is not responsible for educational failures in LEAs that are not providing their at-risk children with the equal opportunity to receive a sound basic education and has determined, just like the Supreme Court did on July 24, 1997, that the State is ultimately responsible and cannot abdicate its responsibility to the LEA.

That having been said, the State's denial of responsibility fails as a matter of law. It is now, and always has been, the ultimate responsibility of the State to provide the equal opportunity to a sound basic education to all children. (Article I, Section 15; Article IX, Section 2(1), North Carolina Constitution)

This Court has, in accordance with *Leandro*, Ordered the State, not the LEAs, to fix the deficiencies that

exist with at-risk children. This is so because the LEAs, like the counties themselves, are mere subdivisions of the State. The LEAs were created by the State for its own convenience in order to assist the State in performing its constitutional duty to provide each and every child with the equal opportunity to obtain a sound basic education through its free public school system. It is up to the Executive and Legislative Branches to provide the solution to the constitutional deficits with at-risk children. These branches can no longer stand back and point their fingers at individual LEAs, such as HCSS, and escape responsibility for lack of leadership and effort, lack of effective implementation of educational strategies, the lack of competent, certified, well-trained teachers effectively teaching children, or the lack of effective management of the resources that the State is providing to each LEA.

The State of North Carolina must roll up its sleeves, step in, and utilizing its constitutional authority and power over the LEAs, cause effective educational change when and where required. It does not matter whether the lack of an equal opportunity to obtain a sound basic education is caused by teachers, principals, lack of instructional materials or other resources, or a lack of leadership and effort.

The State must step in with an iron hand and get the mess straight. If it takes removing an ineffective Superintendent, Principal, teacher, or group of teachers and putting effective, competent ones in their place, so be it. If the deficiencies are due to a lack of effective management practices, then it is the State's responsibility to see that effective management practices are put in place.

The State of North Carolina cannot shirk or delegate its ultimate responsibility to provide each and every child in the State with the equal opportunity to obtain a sound basic education, even if it requires the State to spend additional monies to do so.

The State of North Carolina has steadfastly represented to this Court and to the citizens of North Carolina that the State is "continuing to appropriate additional funds and

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initiate new programs to assure that students enrolled in North Carolina public schools are receiving the opportunity to acquire a sound basic education.”

In the final analysis, if the State is true to its word about providing sufficient appropriate funding for each child to have the equal opportunity to obtain a sound basic education, the State should be able to correct the educational deficiencies which are denying at-risk children the equal opportunity to obtain a sound basic education by requiring LEAs that are not getting the job done to implement and maintain cost-effective, successful educational programs in their schools as required by *Leandro*. If not, then the State will have to look for other resources to get the job done.

Make no mistake. While the State can require the LEAs to take corrective action, it remains the State's responsibility, through forceful leadership and effective management, to show an ineffective LEA, or an ineffective school within an LEA: (1) how to get the job done if the LEA's leadership and educational staff is ineffective and inept; (2) how to cost-effectively manage the resources which the State contends it so adequately provides to support each child's equal opportunity to receive a sound basic education; and (3) how to implement effective educational programs, using competent, well-trained certified teachers and principals.

Id. (Italics omitted; bold added).

Although plaintiffs are understandably not satisfied with the results produced by the orders in *Leandro I* and *II*, this Court cannot create a new constitutional right or a new claim where the Supreme Court has addressed the right in detail and the subject of this lawsuit is already under court oversight in another case.

d. Defendant acting alone does not have the power to merge school districts, but the State does.

“By holding the State accountable for the failings of local school boards, the trial court did not limit either: (1) the State's authority to create and empower local school boards through legislative or administrative enactments, or (2) the extent of any powers granted to such local school boards by the State.” *Leandro II*, 358 N.C. at 635, 599 S.E.2d at 389.

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Plaintiffs necessarily rely upon *Leandro I* and *Leandro II* for the constitutional basis for their claim, but they also seek to distinguish this case from the *Leandro* cases by focusing on the taxing authority of the counties, the allocation of local tax revenues, and the existence of three school districts within Halifax County. Certainly, local tax revenues are an important factor in education, but that does not change our Supreme Court's rulings in *Leandro I* and *Leandro II*. North Carolina's system of taxation and school finance was essentially the same when *Leandro* was decided as it is now. In addition, financing of public schools is a complex system which extends from the federal government all the way down to the local school district, so we attempt only a brief and oversimplified overview of that system.

The constitutional duty to provide a sound basic education rests upon the State, as directed by *Leandro I*, 346 N.C. at 353, 488 S.E.2d at 258, and *Leandro II*, 358 N.C. at 614-15, 635, 599 S.E.2d at 376, 389; obviously funding is an essential part of that responsibility. The State carries out this duty through the budget adopted by the General Assembly and administered through the State Board of Education and Department of Public Instruction. At the local level, the responsibility to provide public education is vested in the local boards of education.⁷ The county commissioners have taxing authority and along with the Boards of Education, they establish the local county budget for the schools. *See, e.g.*, N.C. Gen. Stat. § 115C-429 (2015) ("Approval of budget; submission to county commissioners; commissioners' action on budget"). If a board of education believes the funds appropriated by a county to be inadequate, the remedy is in N.C. Gen. Stat. § 115C-431 (2015) ("Procedure for resolution of dispute between board of education and board of county commissioners"), which sets forth the exclusive process for mediation and litigation, if necessary. If the mediation fails, ultimately a jury may determine the proper budget for the schools. *Id.* Of course, federal funding and regulation also play important roles in public education. But regardless of the taxing authority of the county, the *Leandro* cases have answered the question of who bears the constitutional responsibility and have addressed issues of school funding at great length.

7. "[N.C. Gen. Stat.] § 115C-47. Powers and duties generally. In addition to the powers and duties designated in G.S. 115C-36, local boards of education shall have the power or duty: (1) To Provide the Opportunity to Receive a Sound Basic Education.—It shall be the duty of local boards of education to provide students with the opportunity to receive a sound basic education and to make all policy decisions with that objective in mind, including employment decisions, budget development, and other administrative actions, within their respective local school administrative units, as directed by law." N.C. Gen. Stat. § 115C-47(1) (2015).

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Plaintiffs also stress the existence of three school districts within Halifax County: Halifax County Schools, Weldon City Schools, and Roanoke Rapids Schools. Plaintiffs allege that “Defendant’s continued maintenance of three inadequately and inefficiently resourced and racially identifiable school districts prevents students in Halifax County from obtaining the opportunity to receive a sound basic education.” In the Request for Relief, plaintiffs ask:

1. That the Court find and conclude that Defendant’s maintenance of three separate school districts obstructs Halifax County’s students from securing the opportunity to receive a sound basic education;
2. That the Court find and conclude that Defendant’s maintenance of three separate school districts denies at-risk students in Halifax County the opportunity to receive a sound basic education;
3. That the Court exercise its equitable powers and order the Board to develop and implement a plan to remedy the constitutional violations of its present education delivery mechanism and to ensure that every student in Halifax County is provided the opportunity to receive a sound basic education.

As a practical matter, plaintiffs are asking this Court to require that the three school systems be merged, and we must take as true plaintiffs’ allegations that having a single school district in Halifax County would allow a more equitable allocation of tax revenues and a better school administration. But the relief requested in Request 3 as quoted above is essentially what the court is already doing in the ongoing *Leandro I* and *Leandro II* litigation. Beyond that, even if merger of the local administration units in Halifax County would ameliorate the problems noted by plaintiffs, this defendant does not, on its own, have the authority to provide that relief. Under N.C. Gen. Stat. § 115C-67 (2015):

City school administrative units may be consolidated and merged with contiguous city school administrative units and with county school administrative units upon approval by the State Board of Education of a plan for consolidation and merger submitted by the boards of education involved and bearing the approval of the board of county commissioners.

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County and city boards of education desiring to consolidate and merge their school administrative units may do so by entering into a written plan which shall set forth the conditions of merger. . . .

The plan referred to above shall be mutually agreed upon by the city and county boards of education involved and shall be accompanied by a certification that the plan was approved by the board of education on a given day and that the action has been duly recorded in the minutes of said board, together with a certification to the effect that the public hearing required above was announced and held. The plan, together with the required certifications, shall then be submitted to the board of county commissioners for its concurrence and approval. After such approval has been received, the plan shall be submitted to the State Board of Education for the approval of said State Board and the plan shall not become effective until such approval is granted. Upon approval by the State Board of Education, the plan of consolidation and merger shall become final and shall be deemed to have been made by authority of law and shall not be changed or amended except by an act of the General Assembly. The written plan of agreement shall be placed in the custody of the board of education operating and administering the public schools in the merged unit and a copy filed with the Secretary of State.

Boards of Education can be merged in other ways. For example, a “city board of education” may dissolve itself:

If a city board of education notifies the State Board of Education that it is dissolving itself, the State Board of Education shall adopt a plan of consolidation and merger of that city school administrative unit with the county school administrative unit in the county in which the city unit is located; provided, however, if a city school administrative unit located in more than one county notifies the State Board of Education that it is dissolving itself, the State Board shall adopt a plan that divides the city unit along the county line and consolidates and merges the part of the city unit in each county with the county unit in that county and the plans shall take effect on the same day. The plans shall be prepared and approved in

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accordance with G.S. 115C-67 as provided by general law, and G.S. 115C-68 as provided by general law, as applicable, except that the county and city boards of education and the boards of commissioners shall not participate by preparing, entering into, submitting, or agreeing to a plan, and the plan shall not be contingent upon approval by the voters.

N.C. Gen. Stat. Ann. § 115C-68.2 (2015).

In other words, the General Assembly has adopted a comprehensive set of statutes addressing the organization and merger of school districts, and the State retains the power to control the school districts and counties. Plaintiffs argue that only the county commissioners can *initiate* a merger plan for the school districts, but they acknowledge in their reply brief that such a plan must still be approved by the State and cannot be accomplished by the county commissioners alone. Plaintiffs here ask this Court to overlook the complex statutory framework governing educational administration and finance and to take on the role of the legislature in correcting the deficiencies in Halifax County by ordering the consolidation of the three school districts. In addition, plaintiffs ask the Court to order defendants to make this merger happen *without* the participation as parties of all three Boards of Education in Halifax County and the entities comprising “the State” vested with the constitutional and statutory responsibilities to provide education. Under *Leandro I* and *II*, this Court does not have that authority, and this defendant – the Halifax County Board of Commissioners – does not have that constitutional duty described in *Leandro I* or even the ability *on its own* to do what the plaintiffs ask. Although the Board of Commissioners surely has statutory duties related to education, still the State and all of the school boards within Halifax County would be necessary parties to any lawsuit seeking consolidation of the school boards.

e. Counties are creatures of the State.

“[C]ounties are merely instrumentalities and agencies of the State government.” *Martin Cnty. v. Wachovia Bank & Trust Co.*, 178 N.C. 26, 31-32, 100 S.E. 134, 137 (1919).

Leandro II stressed that the constitutional duty is upon the State and not the school boards, which are creatures of the State. *Leandro II*, 358 N.C. at 635, 599 S.E.2d at 389. Counties do not differ from local school boards in this regard. Counties are also creatures of and instrumentalities of the State, with specific statutorily-assigned roles, but ultimately created by and controlled by the State:

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Counties are creatures of the General Assembly and serve as agents and instrumentalities of State government. Counties are subject to almost unlimited legislative control, except to the extent set out in the State Constitution. The powers and functions of a county bear reference to the general policy of the State, and are in fact an integral portion of the general administration of State policy.

Counties serve as the State's agents in administering statewide programs, while also functioning as local governments that devise rules and provide essential services to their citizens.

Stephenson v. Bartlett, 355 N.C. 354, 364-65, 562 S.E.2d 377, 385 (2002) (citations, quotation marks, and brackets omitted).

This Court clearly has stated that: In the exercise of ordinary governmental functions, counties are simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such functions they are subject to almost unlimited legislative control except where this power is restricted by constitutional provision. As such, a county's powers[,] both express and implied, are conferred by statutes, enacted from time to time by the General Assembly. A county is not, in a strict legal sense, a municipal corporation, as a city or town. It is rather an instrumentality of the State, by means of which the State performs certain of its governmental functions within its territorial limits.

Lanvale Props., LLC v. Cnty. of Cabarrus, 366 N.C. 142, 150, 731 S.E.2d 800, 807 (2012) (citations, quotation marks, brackets, and ellipses omitted).

The North Carolina Constitution does not limit the State in its control over local educational matters, including county taxation or school district organization, in any manner which would allow the State to abdicate its duties under *Leandro I* and *II* to provide a sound basic education or to give the defendant here a constitutional duty to provide a sound basic education. The General Assembly can create counties, change their boundaries, and prescribe their duties:

The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental

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subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. CONST. art. VII, § 1.

Our Supreme Court has long recognized the plenary power of the General Assembly over counties and over the creation and organization of school districts:

In [a previous] case the Legislature had authorized the establishment of a graded school in two public school districts of Robeson County, subject to the will of the people to be ascertained in an election to be held. The board of commissioners undertook by order to include additional territory within the district. Denying this authority to be in the board of county commissioners, and speaking to the question, the Court said: "That it is within the power and is the province of the Legislature to subdivide the territory of the State and invest the inhabitants of such subdivisions with corporate functions, more or less extensive and varied in their character, for the purposes of government, is too well settled to admit of any serious question. Indeed, it seems to be a fundamental feature of our system of free government that such a power is inherent in the legislative branch of the government, limited and regulated, as it may be, only by the organic law. The Constitution of the State was formed in view of this and like fundamental principles. They permeate its provisions, and all statutory enactments should be interpreted in the light of them when they apply.

"It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, townships, school districts, road districts, and the like subdivisions, and invest them, and agencies in them, with powers corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both. Such organizations are intended to be instrumentalities and agencies employed to aid in the administration of the government, and are always under the control of the power that created them, unless the same shall be restricted by some constitutional limitation. Hence, the Legislature may, from time to time, in its

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discretion, abolish them, enlarge or diminish their boundaries, or increase, modify or abrogate their powers[.]”

“Whenever such agencies are created, whatever their purpose or the extent or character of their powers, they are the creatures of the legislative will and subject to its control, and such agencies can only exercise such powers as may be conferred upon them and in the way and manner prescribed by law[.]”

“[The Boards of County Commissioners] powers as the county board of education are derived from public school laws[.]”

The decisions of this Court through the years since have been uniform in holding that the mandate of Art. IX of the Constitution of North Carolina for the establishment and maintenance of a general and uniform system of public schools is upon and exclusively within the province of the General Assembly. Laws passed in obedience to such mandate have been repeatedly approved and upheld by the decisions of this Court.

Moore v. Bd. of Educ. of Iredell Cnty., 212 N.C. 499, 501-02, 193 S.E. 723, 733-34 (1937) (citations omitted).

This Court has recognized the extent of the power the General Assembly has over counties: “The power to create, abolish, enlarge or diminish the boundaries of a county is vested exclusively in the legislature.” *Rowe v. Walker*, 114 N.C. App. 36, 41, 441 S.E.2d 156, 159 (1994), *aff'd per curiam*, 340 N.C. 107, 455 S.E.2d 160 (1995). There are some constitutional prohibitions which prevent certain actions by the State regarding counties, but there is no constitutional prohibition on the State’s power that would change the responsibility of the county commissioners in any manner relevant to this case.

Speaking of the counties of this State, this Court has said . . . [t]hese counties are not, strictly speaking, municipal corporations at all, in the ordinary acceptance of that term. They have many of the features of such corporations, but they are usually termed *quasi*-public corporations. In the exercise of ordinary governmental functions, they are simply agencies of the State, constituted for the convenience of local administration in certain portions of the State’s territory; and, in the exercise of such functions, they are subject to almost unlimited legislative control, except

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when the power is restricted by constitutional provisions. . . . The weight of authority is to the effect that all the powers and functions of a county bear reference to the general policy of the state, and are in fact an integral portion of the general administration of state policy.

Martin v. Bd. of Comm'rs of Wake Cnty., 208 N.C. 354, 365, 180 S.E. 777, 783 (1935) (citations and quotation marks omitted).

The State has created, abolished, merged, and changed the boundaries of counties many times throughout North Carolina's history. *See generally* David Leroy Corbitt, *The Formation of the North Carolina Counties 1663-1943*, State Department of Archives and History (1950). In fact, the General Assembly created Halifax County in 1758 from a portion of Edgecombe County. *See Martin Cty. v. Wachovia Bank & Trust Co.*, 178 N.C. 26, 31-32, 100 S.E. 134, 137 (1919), (“[T]he boundary of Martin County is the low-water mark on the south side of the river. This appears from ch. 4, Laws 1729; 25 St. Records, 212; 2 Rev. Stat. 164; which boundary is recognized by the subsequent acts creating Edgecombe County out of Tyrrell, Laws 1741, ch. 7; 23 St. Records, 164; 2 Rev. Stat. 124; the act creating Halifax [C]ounty out of the territory of Edgecombe, Laws 1758, ch. 13; 23 St. Records, 496; 2 Rev. Stat. 133; and, finally, the act creating Martin County out of Halifax and Tyrrell, Laws 1774, ch. 32; 25 St. Records, 976; 2 Rev. Stat. 145. Indeed, it has been the usual procedure by the act establishing new counties that where a river or other stream is the dividing line said river has remained within the limits of the county from which the new county has been taken. But counties are merely instrumentalities and agencies of the State government.”).

The General Assembly has in the past adopted legislation to accomplish the merger of school districts within a county. At oral argument, plaintiffs noted the constitutional limitations of N.C. Const. Art. II, § 24(1)(h) on local legislation “changing the lines of school districts[,]” but our courts have held that the type of legislation which could address the merger of school systems in Halifax County is not unconstitutional. For example, in *Guilford Cnty. Bd. of Educ. v. Guilford Cnty. Bd. of Elections*, 110 N.C. App. 506, 508, 430 S.E.2d 681, 683 (1993), the Guilford County Board of Education sought a declaratory judgment that a law entitled “An Act to Consolidate All of the School Administrative Units in Guilford County or to Provide for the Two City School Administrative Units in that County to have Boundaries Coterminous With the Cities, Subject to a Referendum” was unconstitutional as a local act. The Act in question was adopted to address the same types of problems with education opportunities as alleged by plaintiffs here:

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The Act recited that it was promulgated in order to better pursue the Guilford County school administrative units' common goals of excellence and equity in educational opportunity for all children "regardless of where the children reside or attend school within Guilford County, in order that the needs of all children attending school in Guilford County are met, regardless of the children's race, gender, or social or economic condition."

Id.

This Court found the law to be constitutional and not a "local act" even though it dealt only with Guilford County:

The simple fact that the Act affects only Guilford County, rather than all of the counties in North Carolina, does not compel the conclusion that it is a local act. The number of counties excluded or included is not necessarily determinative, and a statute may be general even if it includes only one county. For the purposes of legislating, the General Assembly may and does classify conditions, persons, places and things, and classification does not render a statute "local" if the classification is reasonable and based on rational difference of situation or condition. We agree with the trial court that the Act meets the definition of a general law under both the *Adams* and the *Emerald Isle* tests. The students in Guilford County are a class which reasonably warrants special legislative attention and the provisions of the Act apply uniformly to all of the students. In deciding to consolidate the school administrative units of Guilford County, the Legislature made a rational distinction reasonably related to the Act's purpose to pursue the goals of excellence and equity in educational opportunity for all children of Guilford County. Merely because other counties in the State may have similar goals or needs does not preclude the General Assembly from passing legislation designed to address the needs of all students in a single county. Thus, we hold that the Act withstands the reasonable classification analysis.

Application of the general public welfare analysis which the Supreme Court recognized in *Emerald Isle* also leads to the conclusion that the Act is a constitutional general law. Legislation which promotes equitable access to educational opportunity among all children attending

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public schools even in a single county is rationally related to the overall purpose of excellence and equity in our school system, which in turn promotes the general welfare of all citizens. Our Constitution specifically provides that religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.

Id. at 513-14, 430 S.E.2d at 686-87 (citations, quotation marks, and brackets omitted).

The State may, by legislation, allow school districts or local governments authority to merge or change school districts, but the General Assembly still retains the power to change or revoke that authority. *See, e.g., Kings Mountain Bd. of Educ. v. N. Carolina State Bd. of Educ.*, 159 N.C. App. 568, 572, 583 S.E.2d 629, 633 (2003) (“The ability to create the boundaries of a school district is vested solely within the power of the legislature, however. Thus, a municipality may not expand its school district boundaries without an express or implied delegation of legislative authority.” (Citations omitted)). Indeed, consistent with Article IX, Section 2(2), the General Assembly has, by statute, assigned to units of local government the financial responsibility for many aspects of the free public schools. Our General Assembly has assigned to local governments, such as the Board, responsibility for: (1) “facilities requirements” for “a public education system,” N.C. Gen. Stat. § 115C-408(b) (2015); (2) “the cost[s] of . . . buildings, equipment, and apparatus” that the “boards of commissioners . . . find to be necessary[.]” N.C. Gen. Stat. § 115C-521(b) (2015); (3) school buses and service vehicles, N.C. Gen. Stat. § 115C-249(a)-(b) (2015); (4) suitable supplies for the school buildings, including “instructional supplies, proper window shades, blackboards, reference books, library equipment, maps, and equipment for teaching the sciences,” N.C. Gen. Stat. § 115C-522(c) (2015); and (5) providing “every school with a good supply of water,” N.C. Gen. Stat. § 115C-522(c) (2015). Local boards of county commissioners are also responsible for “keep[ing] all school buildings in good repair,” and ensuring that school buildings are “at all times in proper condition for use.” N.C. Gen. Stat. § 115C-524(b) (2015).⁸

8. Some of the statutes listed above dictate that the financial responsibilities are to be shared between the “local boards of education” and the “tax-levying authorities.” *See, e.g.,* N.C. Gen. Stat. § 115C-522(c); N.C. Gen. Stat. § 115C-524(b). The definition of “tax-levying authority” provided in the General Statutes includes, as relevant here, “the board of county commissioners of the county or counties in which an administrative unit is located[.]” N.C. Gen. Stat. § 115C-5(10) (2015).

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The General Assembly created Halifax County and granted it any powers it may have; and the General Assembly retains its power to carry out its constitutional obligations under *Leandro I* and *II* to provide a sound basic education in Halifax County, regardless of the current arrangement of the school districts. In conclusion, *Leandro I* has answered the question of the State's constitutional obligation to provide a sound basic education, and defendant on its own simply does not have the power or authority to do what plaintiffs ask. Accordingly, the trial court's order granting defendant's motion to dismiss is affirmed.

IV. Conclusion

For the foregoing reasons, the trial court's order granting defendant's motion to dismiss is affirmed.

AFFIRMED.

Judge INMAN concurs.

Chief Judge McGEE dissents with separate opinion.

McGEE, Chief Judge, dissenting.

This case requires us to decide whether a board of county commissioners has a constitutional duty to provide for a sound basic public education, consistent with *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) ("*Leandro I*") and *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) ("*Leandro II*"), when aspects of the funding of public education have been statutorily assigned to those boards, consistent with Article IX, Section 2(2) of the North Carolina Constitution. The case arrives at this Court at a very early stage of the proceedings; the trial court granted defendant's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

Accepting plaintiff's factual allegations as true for the purposes of this appeal – as we must, see *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) – and for the reasons that follow, I conclude that plaintiffs have stated a claim against defendant, and that a board of county commissioners is a proper defendant in a lawsuit seeking to assert a schoolchild's right to a sound basic public education under the North Carolina Constitution, when the inability to receive such an education is alleged to have resulted from actions or inactions of the board. This conclusion is not foreclosed by *Leandro I* or *Leandro II*, neither of

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which decided the question we confront in this case. I respectfully dissent from the majority's contrary holding.

I.

Plaintiffs argue that their complaint, taken as true, states a claim against defendant for a violation of the rights conferred by Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution, and the Board's choices "deprived plaintiffs of their constitutionally-guaranteed opportunity to receive a sound basic education." "It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Mason v. Dwinnell*, 190 N.C. App. 209, 217, 600 S.E.2d 58, 63 (2008) (citation omitted). The majority aptly describes the facts and holdings of our Supreme Court in *Leandro I* and *Leandro II*, which need not be repeated at length. While the Supreme Court's interpretation of Article I, Section 15 and Article IX, Section 2 in *Leandro I*, and its analysis of what evidence is sufficient to prove a violation of the right to a sound basic education in *Leandro II*, provide guidance to this Court, neither of those decisions answers the precise question posited in this case – whether a local board of county commissioners may be held responsible for providing a sound basic public education for the students within their county. That question was not at issue in *Leandro I* nor *Leandro II*. See *Leandro I*, 356 N.C. at 341-42, 488 S.E.2d at 251; *Leandro II*, 358 N.C. at 609-10, 599 S.E.2d at 373-74. After examining the constitutional text, the applicable General Statutes, and our Supreme Court's precedent on the matter, I would hold that plaintiffs have asserted allegations in their complaint that, if true, state a claim upon which relief may be granted against defendant.

I begin with the fundamental principle, established by our Supreme Court in *Leandro I*, that Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution "combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Leandro I*, 346 N.C. at 347, 488 S.E.2d at 255. This right is enforceable against the State and the State Board of Education, as our Supreme Court held in *Leandro I* and *Leandro II*. See N.C. CONST. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."); N.C. CONST. art. IX, § 2(1) ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools"); *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 255. The enforceability of the right, however, does not end there. Under Article IX, Section 2(2), boards of county commissioners have a role to play, if the General Assembly so instructs, as they may be assigned part of the responsibility for financial support

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of the public schools: “The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate.” N.C. CONST. art. IX §2(2); *see also Leandro I*, 346 N.C. at 349, 488 S.E.2d at 256 (“Article IX, Section 2(2) of the North Carolina Constitution expressly authorizes the General Assembly to require that local governments bear part of the costs of their local public schools.”).

Consistent with Article IX, Section 2(2), the General Assembly has, by statute, assigned to units of local government the financial responsibility for many aspects of the free public schools. The General Assembly has assigned to boards of county commissioners, such as the Board in this case, responsibility for, *inter alia*: (1) “facilities requirements” for “a public education system,” N.C. Gen. Stat. § 115C-408(b) (2015); (2) “the costs of . . . buildings, equipment, and apparatus” that the “boards of commissioners . . . find to be necessary,” N.C. Gen. Stat. § 115C-521(b) (2015); (3) school buses and service vehicles, N.C. Gen. Stat. § 115C-249(a)-(b) (2015); (4) suitable supplies for the school buildings, including “instructional supplies, proper window shades, blackboards, reference books, library equipment, maps, and equipment for teaching the sciences,” N.C. Gen. Stat. § 115C-522(c) (2015); and (5) providing “every school with a good supply of water,” N.C. Gen. Stat. § 115C-522(c) (2015). Local boards of county commissioners are also responsible for “keep[ing] all school buildings in good repair,” and ensuring that school buildings are “at all times in proper condition for use.” N.C. Gen. Stat. § 115C-524(b) (2015).¹

Article I, Section 15 and Article IX, Section 2 “combine” to impose on the State the responsibility to provide for a sound basic education for the children of North Carolina. *Leandro I*, 346 N.C. at 347, 488 S.E.2d at 255. Also, pursuant to the explicit terms of Article IX, Section 2(2), the State may assign to local boards of county commissioners – in the Constitution’s language, the “units of local government” – financial responsibility for public schools. N.C. CONST. art. IX, §2(2). Given this right, established in *Leandro I*, and this assignment authority provided by the Constitution, I would hold that the guarantee of a sound basic education follows the assignment of financial responsibility, if made by

1. Some of the statutes listed above dictate that the financial responsibilities are to be shared between the “local boards of education” and the “tax-levying authorities.” *See, e.g.*, N.C. Gen. Stat. § 115C-522(c); N.C. Gen. Stat. § 115C-524(b). The definition of “tax-levying authority” provided in the General Statutes includes, as relevant here, “the board of county commissioners of the county or counties in which an administrative unit is located[.]” N.C. Gen. Stat. § 115C-5(10) (2015).

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the General Assembly. When the General Assembly assigns to boards of county commissioners the financial responsibility for aspects of public education, such as adequate facilities, equipment, water supplies, and learning materials, North Carolina schoolchildren must be able to pursue a declaratory action against those boards to assert that it has failed to adequately fund the aspects of public schooling assigned to it, and that such a failure has resulted in the lack of “an opportunity to receive a sound basic education in our public schools.” *Leandro I*, 346 N.C. at 347, 488 S.E.2d at 255.

With these principles in mind, I consider plaintiffs’ complaint in the present case. In their complaint, plaintiffs allege that Halifax County Schools and Weldon City Schools lack the necessary resources to provide fundamental educational opportunities to the children in their school districts. Plaintiffs further complain of inadequate school facilities, crumbling ceilings, leaking pipes, sewage in the hallways, and a lack of adequate instructional materials in the majority-minority districts. These deficiencies, plaintiffs allege, are a direct result of defendant’s funding choices, and have led to poor test scores by the schoolchildren and the inability to retain qualified teachers. Plaintiffs requested, in their complaint, that the court “exercise its equitable powers and order the Board to develop and implement a plan to remedy the constitutional violations of its present education delivery mechanism and to ensure that every student in Halifax County is provided the opportunity to receive a sound basic education.” I would hold that, to the extent plaintiffs’ complaint asserts that the children’s inability to receive a sound basic public education is a result of the Board’s inadequate funding of buildings, supplies, and other resources, responsibility for which was assigned to it by the General Assembly pursuant to Article IX, Section 2(2) of the North Carolina Constitution, plaintiffs have stated a claim upon which relief may be granted to assert their constitutional rights to a sound basic public education.

II.

The majority makes a variety of thoughtful arguments as to why plaintiffs’ claims are foreclosed by our Supreme Court’s holdings in *Leandro I* and *Leandro II*. I disagree, and briefly address those arguments. The majority opinion first asserts that the *Leandro* cases “began as a declaratory judgment action with the express purpose of determining the extent of the state constitutional right to a sound basic education and the entities responsible for providing that education,” and that “*Leandro I* and *Leandro II* determined the correct parties and the entities legally responsible for providing a sound basic education under the

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North Carolina Constitution.” (emphasis in original) (citing *Leandro II*, 358 N.C. at 611, 599 S.E.2d at 374). However, the Court in *Leandro II* did not decide such a sweeping question; as explained by the Court, the *Leandro* cases were

initiated as a declaratory judgment action . . . [, and] commenced in 1994 when select students from Cumberland, Halifax, Hoke, Robeson, and Vance Counties, their respective guardians ad litem, and the corresponding local boards of education, denominated as plaintiffs, sought declaratory and other relief for alleged violations of the educational provisions of the North Carolina Constitution and the North Carolina General Statutes.

Leandro II, 358 N.C. at 611, 599 S.E.2d at 374. Our Supreme Court never stated that it was determining the entire or exclusive group of entities responsible for providing a sound basic education. Rather, the Court determined the discrete legal question presented to it: whether the plaintiffs in that case “[had] a right to adequate educational opportunities which [was] being denied them by defendants[, the State of North Carolina and the State Board of Education,] under the current school funding system.” *Leandro I*, 346 N.C. at 341, 488 S.E.2d at 252. *Leandro I* and *Leandro II* do not address whether other entities may be responsible under our Constitution for a sound basic public education.

It is not surprising that the *Leandro* Courts did not address whether boards of county commissioners had any responsibility for a sound basic education under our Constitution, nor is it surprising that those Courts did not hold that a board of county commissioners may be held responsible if a student’s inability to obtain a sound basic education is due to the board’s funding decisions. No board of county commissioners was a party to that litigation, and the Court was not asked to determine whether a board of county commissioners had that responsibility. That question remains unanswered by our Courts.

The majority opinion holds that all of the deficiencies alleged in plaintiffs’ complaint, including poor educational performance, inadequate buildings, and lack of school supplies at the three school systems located within Halifax County, have already been addressed within the context of *Leandro I* and *Leandro II*, and that “if the 2009 consent order” that was entered by the superior court on remand from our Supreme Court’s decision in *Leandro I* “has been violated, the court which entered that order should address the violation.” However, as the majority opinion notes, the Board was not a party to the *Leandro*

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litigation. Therefore, the 2009 consent order – along with all of the ongoing supervision in that case – does not, and cannot, bind the Board or force it to act. While the Halifax County Board of Education was a party to the Leandro litigation, it was a plaintiff, not a defendant.

The majority suggests a path forward for plaintiffs, writing that “rather than filing this separate lawsuit, the correct avenue for addressing plaintiffs’ concerns in the present case *would appear to be* through the ongoing litigation in *Leandro I* and *Leandro II*.” (emphasis added).² But the *Leandro* cases’ sole focus was on the funding provided by the State, *not* the local revenues collected and disbursed by boards of county commissioners, including the Board in the present case. It is *these* revenues that plaintiffs allege the Board is failing to disburse to the three school systems in Halifax County consistent with the constitutional right to a public education in the schools in this State. I do not see how plaintiffs, who were not parties in *Leandro*, could assert a claim in the ongoing *Leandro* litigation against defendant, also not a party in *Leandro*, seeking a larger portion of local revenues, which were not at issue in *Leandro*.

The plain language of Article IX, Section 2(2) clearly recognizes “local responsibility” in public education, and provides that if the General Assembly assigns to “units of local government such responsibility for the financial support of the free public schools,” those units of local government may use “local revenues to add to or supplement any public school[.]” N.C. CONST. ART. IX §2(2). The drafters of the Constitution contemplated that local revenues, which do not originate from the State, could be used to fund aspects of public education. As explained above, at this early stage in the proceedings plaintiffs have sufficiently alleged that the local boards of county commissioners must disburse these local revenues in a way that does not violate the constitutional right to a sound basic education established by our Supreme Court in *Leandro I*, and must be able to be held accountable for their failure to do so.

III.

The majority opinion states that, “[a]s a practical matter, plaintiffs are asking this Court to require that the three school systems [in Halifax County] be merged, and notes that defendant “does not, on

2. Note that the majority does not definitively determine that plaintiffs may obtain relief through the suggested avenue. Just as the obligations of county commissioners was not at issue in *Leandro I* or *Leandro II*, whether plaintiffs may assert some sort of claim in the ongoing *Leandro* court supervision is not an issue presented for adjudication in the present case.

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its own, have the authority to provide that relief.” See generally Section III(d), *supra*. I concur in that assessment, as I too, believe that plaintiffs have requested something – the merging of the three school systems geographically located in Halifax County – that defendant and this Court have no authority to provide. However, plaintiffs also requested that the court “exercise its equitable powers and order the Board to develop and implement a plan to remedy the constitutional violations . . . to ensure that every student in Halifax County is provided the opportunity to receive a sound basic public education,” and have also requested “such other and further relief as the [c]ourt may deem just and proper.”

This prayer for relief is broad and if, on remand, the trial court were to make findings and conclusions from competent evidence that the Board had violated a student’s right to a sound basic education, the trial court would be able, as our Supreme Court held in *Leandro I* after declaring a right to a sound basic education, to “enter[] a judgment granting declaratory relief and such other relief as needed to correct” the constitutional violation. *Leandro I*, 346 N.C. at 357, 488 S.E.2d at 261 (citation omitted).³ The trial court would be entrusted with the duty to fashion an appropriate remedy which “minimiz[ed] the encroachment upon the other branches of government,” including the Board and the General Assembly. *Id.* (citation omitted).

IV.

I respectfully dissent from the majority opinion’s conclusion that the Board is not constitutionally responsible for public education, not even for those aspects of public education the General Assembly has seen fit to statutorily assign financial responsibility for, consistent with Article IX, Section 2(2) of the North Carolina Constitution. I would hold that plaintiffs have stated a claim upon which relief may be granted, to the extent that their complaint alleges that the schoolchildren are unable to receive a sound basic public education, and that inability is a result of the Board’s inadequate funding of buildings, supplies, and other resources, responsibility for which was assigned to the Board by the General Assembly consistent with Article IX, Section 2(2) of the North Carolina Constitution. I would therefore reverse the trial court’s order granting defendant’s motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), and remand for further proceedings. I respectfully dissent.

3. It is important to note that this discussion is not focused on the *right* to a sound basic education – and whether such a right may be enforceable against the Board – but rather on what *remedy* may be available once a violation of that right is established.

SOLESBEE v. BROWN

[255 N.C. App. 603 (2017)]

JANET H. SOLESBEE AND HUSBAND CARL SOLESBEE, PETITIONERS

v.

CHERYL H. BROWN AND HUSBAND ROGER BROWN, GWENDA H. ANGEL AND HUSBAND WESLEY ANGEL, AND LISA H. DEBRUHL AND HUSBAND J. DELAINE DEBRUHL,

RESPONDENTS

No. COA16-1214

Filed 19 September 2017

1. Real Property—partition by sale—actual partition—substantial injury—specific findings of fact required—value

The trial court erred in a partition by sale of real property by determining that an actual partition of the pertinent property could not be made without causing substantial injury to one or more of the interested parties. The trial court failed to make specific findings of fact necessary to support an order for partition by sale of the parcels under N.C.G.S. § 46-22, including the value of each individual parcel and the value of each share of the parcels if they were to be physically partitioned.

2. Real Property—partition by sale—factors—personal value—difficulty of physical partition—highest and best use of parcels—substantial injury—owelty

The trial court erred in a partition by sale of real property by utilizing factors such as the personal value of the parcels to the parties, the difficulty of physical partition, and the “highest and best use” of the parcels in concluding that substantial injury would result by physical partition. Until the trial court made the requisite findings regarding the fair market value of the parcels, it could not decide whether owelty (the ability of a court to order that a cotenant who receives a portion of the land with greater value than his proportionate share of the property’s total value to pay his former cotenants money to equalize the value) was appropriate under N.C.G.S. § 46-22(b1).

Appeal by Lisa H. Debruhl and J. Delaine Debruhl (collectively, “the Debruhls”) from the Order entered on 28 April 2016¹ and the Corrected

1. We note that this Order is unsigned and undated, and that the Order’s file stamp is illegible so it cannot be confirmed that it was entered on 28 April 2016 as the Notice of Appeal alleges. The record index bears an alternative entry date of 12 April 2016. However, since the Order was amended by the Corrected Order issued on 3 May 2016, there are no jurisdictional issues with this appeal.

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[255 N.C. App. 603 (2017)]

Order entered on 3 May 2016 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 3 May 2017.

Deutsch & Gottschalk, P.A., by Tikkun A.S. Gottschalk, for Petitioners-Appellees Janet H. Solesbee and Carl Solesbee.

Westall, Gray & Connolly, P.A., by J. Wiley Westall, III, for Respondents-Appellees Cheryl H. Brown, Roger Brown, Gwenda H. Angel, and Wesley Angel.

Long, Parker, Warren, Anderson, Payne & McClellan, P.A., by Robert B. Long, Jr., for Respondents-Appellants Lisa H. Debruhl and J. Delaine Debruhl.

MURPHY, Judge.

The Debruhls appeal from an order requiring the partition by sale of all parcels at issue in this action. On appeal, the Debruhls argue that the trial court erred in finding and concluding that: (1) a partial physical partition of the lands cannot be made without causing substantial injury to one or more of the interested parties; and (2) Janet H. Solesbee and Carl Solesbee (collectively, “the Solesbees”), who sought a partition by sale of the real property, could later pursue an in-kind allotment if the trial court decided against ordering the sale of the parcels, thereby complicating the partial actual allotment sought by the Debruhls. After careful review, we reverse the trial court’s decision and remand the case so that the trial court can make the specific findings of fact required by law and then re-examine its conclusions of law.

I. Background

Janet H. Solesbee, Cheryl H. Brown, Gwenda H. Angel, and Lisa H. Debruhl are sisters (collectively, “the Sisters”). Each sister inherited a one-fourth, undivided interest in the real property at issue, located in Asheville, as tenants in common from their father, Walter Honeycutt. The property is comprised of multiple parcels, which were designated as Parcel One, Parcel Two, and Parcel Three by the trial court (collectively, “the Parcels”). The Solesbees and the Debruhls individually own and reside on real property adjacent to Parcels Two and Three. The Parcels and the residences are all zoned for residential use.

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On 9 January 2015, the Solesbees petitioned for a partition by sale of the Parcels.² The Browns and Angels filed a response to the petition, and they also admitted that a sale was necessary. The Debruhs filed a separate answer to the petition, acknowledging that Parcel One should be sold but also requesting an in-kind allotment of Parcels Two and Three that adjoin their residential property.

On 28 December 2015, the Clerk of Buncombe County Superior Court ordered the Parcels be sold by private sale. The Debruhs timely appealed to the Superior Court. On 3 May 2016, the trial court issued its Corrected Order, in which it concluded that: (1) an actual partition of the lands could not be made without causing substantial injury; and (2) the fair market value of each cotenant's share in an actual partition would be materially less than the amount each cotenant would receive from the sale of the whole.

The trial court arrived at this conclusion after comparing the fair market value of Parcels Two and Three to one-fourth of the combined fair market value of all of the Parcels as a whole. Since the trial court found that “[i]t is inevitable” that the Parcels will be rezoned for commercial use, which would bring “a far higher value for the property than residential use,” it assigned a range of fair market values for each Parcel as opposed to a specific value. Specifically, the trial court found that, since “Parcel One is currently zoned for residential use, but could likely be re-zoned for commercial use,” the “fair and reasonable market value of Parcel One . . . [was somewhere between] \$190,000.00 to \$300,000.00.” For Parcel Two, the trial court found that “[i]n light of the nature of Parcel Two, including being encumbered by numerous sewer line and road easements, extremely steep and rocky terrain, flood plains, and erratic shape, there is practically no useable land on Parcel Two, except as presently being used,” making the “fair and reasonable market value of Parcel Two . . . \$19,550 to \$20,000.” Finally, the trial court found that there was “practically no or very limited useable land on Parcel [Three],” making the “fair and reasonable market value . . . \$16,800.00 to \$30,000.00.”

The trial court then found that the combined value of Parcels Two and Three was \$36,350 to \$50,000, and that the fair market value of all the Parcels was “\$225,350 to \$350,000, with a one-fourth interest in

2. Although the Sisters' husbands are not record owners of the Parcels, each husband is a proper party to this action because they have inchoate marital interests in the Parcels.

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all the Parcels being \$56,337.50 to \$87,500.”³ Accordingly, the trial court found that “[t]he fair market value of Parcels Two and Three combined (\$36,500⁴ to \$50,000) is substantially less than one-fourth of the total fair market value (\$56,337.50 to \$87,500).”

In determining that actual partition would result in substantial injury, the trial court considered these values as well as: (1) the personal value of the Parcels to the parties; (2) the difficulty of physical partition; and (3) the “highest and best use” of the Parcels. Based on these considerations, the trial court ordered that all of the Parcels be sold together as one, or, alternatively, that Parcel One be sold individually and Parcels Two and Three be sold together, whichever would bring the highest sale price. The Debruhs timely appealed from the Corrected Order.

II. Standard of Review

When the trial court sits without a jury:

[T]he standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court’s conclusions of law, however, are reviewable de novo.

Lyons-Hart v. Hart, 205 N.C. App. 232, 235-36, 695 S.E.2d 818, 821 (2010) (emphasis omitted). “[W]hether a partition order and sale should issue is within the sole province and discretion of the trial judge and such determination will not be disturbed absent some error of law.” *Whatley v. Whatley*, 126 N.C. App. 193, 194, 484 S.E.2d 420, 421 (1997).

III. Analysis

The Debruhs do not dispute any of the trial court’s findings of fact regarding the valuation of the Parcels, and therefore those findings are binding on appeal. *Greenshields, Inc. v. Travelers Prop. Cas. Co. of Am.*, ___ N.C. App. ___, ___, 781 S.E.2d 840, 842 (2016). However, the Debruhs do dispute: (1) whether some of the findings are truly conclusions of

3. We note that the sum of \$36,350 and \$190,000, the value of Parcel One, is \$226,350, not \$225,350, making the one-fourth interest in all Parcels \$56,587.50, not \$56,337.50.

4. We also note that the trial court refers to the combined fair market value of Parcels Two and Three as \$36,500 here, but that the earlier reference to those same Parcels noted their valuation was \$36,350, as the sum of \$19,550 and \$16,800 is \$36,350, not \$36,500.

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law; and (2) whether the findings support the trial court's conclusion that substantial injury would occur if a partition in kind were ordered.

We conclude that the trial court erred in its determination that an actual partition cannot be made without causing substantial injury to one or more of the interested parties because the trial court failed to make the specific findings of fact necessary to support an order for partition by sale of the Parcels. Particularly, the trial court failed to make specific findings of fact as to: (1) the value of each individual Parcel; and (2) the value of each share of Parcels Two and Three, were those Parcels to be physically partitioned. Accordingly, we need not address the issue of whether the trial court erred in concluding that the Solesbees could seek an in-kind allotment post judgment.

A tenant in common is entitled, as a matter of right, to a partition of lands in which she has an interest so that she may enjoy her share. *Brown v. Boger*, 263 N.C. 248, 256, 139 S.E.2d 577, 582 (1965). The law favors partition in kind because it “does not . . . compel a person to sell his property against his will, which . . . should not be done except in cases of imperious necessity.” *Id.* at 256, 139 S.E.2d at 582-83. On that basis, a court will not deny a property owner's right to a partition in kind simply because her cotenants prefer a sale of the property over physical partition or because there are slight disadvantages to it. *Id.* at 256, 139 S.E.2d at 583. Further, “[s]ince partition in kind is favored, such partition will be ordered, even though there may be some slight disadvantages . . . in pursuing such method.” *Id.* at 256, 139 S.E.2d at 583.

Before a trial court can order a partition by sale, then, the trial court must consider whether, by a preponderance of the evidence, “an actual partition of the lands cannot be made without *substantial injury* to any of the interested parties.” N.C.G.S. § 46-22(a) (2015) (emphasis added). To overcome the presumption in favor of physical partition, the law requires:

(b) In determining whether an actual partition would cause “substantial injury” to any of the interested parties, the court shall consider the following:

(1) Whether the *fair market value* of each cotenant's share in an actual partition of the property would be *materially less* than the amount each cotenant would receive from the sale of the whole.

(2) Whether an actual partition would result in *material* impairment of any cotenant's rights.

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(b1) The court, in its discretion, shall consider the remedy of owelty where such remedy can aid in making an actual partition occur without substantial injury to the parties.

(c) The court shall *make specific findings of fact* and conclusions of law supporting an order of sale of the property.

(d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section.

N.C.G.S. § 46-22(b)-(d) (emphasis added).⁵ In parsing the language of this statute, this state's appellate courts have addressed: (1) whether slight economic disadvantage or convenience are sufficient justifications for ordering a partition in kind; (2) what specific findings a trial court must make before ordering partition in kind; and (3) whether those requisite findings may be circumvented based on the difficulty of physically partitioning the property at issue.

At times, physical partition can be hampered by the nature of the property at issue. The issue of difficulty of physical partition was addressed by our Supreme Court in *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965). In that case, our Supreme Court considered the appropriateness of a partition by sale of a roughly 1,250 acre property with irregular boundaries as well as different types and grades of land. *Id.* at 252, 139 S.E.2d at 580. The trial court had found that, "from an economic standpoint," it was in the best interest of the petitioners to sell the property as a whole as actual partition of the lands would cause "financial detriment to those who want to sell," and that the petitioners would "receive more from the sale of the lands as a whole" than they would receive from "the sale of that portion of the lands which would be allotted to them in an actual partition." *Id.* at 253-54, 139 S.E.2d at 581.

On review, our Supreme Court, however, held that "[s]ince partition in kind is favored, such partition will be ordered, even though there may be some slight disadvantages . . . in pursuing such method." *Id.* at 256, 139 S.E.2d at 583. Furthermore, "[a] sale will not be ordered merely for the convenience of one of the cotenants" because "[t]he physical difficulty

5. In 2009, the General Assembly amended N.C.G.S. § 46-22(c) to "clarify the standard for determining what constitutes 'substantial injury.'" 2009 North Carolina Laws S.L. 2009-512 (H.B. 578). The phrasing changed from "the court shall specifically find the facts supporting an order of the sale of the property" to "the court shall *make specific findings of fact* and conclusions of law supporting an order of sale of the property." *Id.* (emphasis added).

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of division is only a circumstance for the consideration of the court.” *Id.* at 256, 139 S.E.2d at 583. In that case, the trial court failed to find “that the 1250 acres of land [could] not be divided so that seven-tenths in value could be allotted to the plaintiffs and three-tenths in value to defendants.” *Id.* at 257, 139 S.E.2d at 583. As such, the Supreme Court asked, “[i]f the land will bring more as a whole, how much more? Will the difference be so material and substantial as to make an actual partition unjust and inequitable?” *Id.* at 259, 139 S.E.2d at 585. As the trial court’s findings failed to answer those questions, our Supreme Court reversed and remanded the case so that the trial court could make the requisite findings. *Id.* at 259, 139 S.E.2d at 585.

Almost three decades later, in *Partin v. Dalton*, 122 N.C. App. 807, 436 S.E.2d 903 (1993), this Court later considered whether a partition by sale was proper where “neither party presented any evidence as to the current value of the land at the time of trial, nor as to what the value of the land would be were it to be actually partitioned.” *Id.* at 809, 436 S.E.2d at 905. Petitioners in that case only presented evidence that “the acreage nearest Haystack Road was worth roughly \$700 per acre” and then provided that “the acreage at the eastern end of the property” was “worth \$200 or \$400 per acre depending on whether there was a means of access to the property.” *Id.* at 809, 436 S.E.2d at 905. Based on this evidence, that trial court concluded that an actual partition could not be made without causing substantial injury. *Id.* at 812, 436 S.E.2d at 906.

On appeal, however, this Court disagreed and held that, to be upheld, the trial court’s findings of fact “must be supported by evidence of the value of the property in its unpartitioned state *and evidence of what the value of each share of the property would be were an actual partition to take place.*” *Id.* at 812, 436 S.E.2d at 906 (emphasis added). As such, based on the lack of evidence before it, this Court concluded that the “trial court failed to make the required findings of fact that actual partition would result in one of the cotenants receiving a share with a value materially less than the value of the share he would receive were the property partitioned by sale.” *Id.* at 812, 436 S.E.2d at 906. Accordingly, we reversed and remanded the case for a new trial. *Id.* at 812, 436 S.E.2d at 906.

This Court also recently addressed whether the requirement of specific findings can be circumvented based on the difficulty of physically partitioning the land. In *Lyons-Hart*, the trial court’s findings only established that “the property would be difficult to partition in-kind” because, among other things, the property was “very irregular” and the boundary was “not well established.” 205 N.C. App. 232, 238, 695 S.E.2d 818, 822

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(2010). Once again, “the trial court made no findings regarding the value of the property in its unpartitioned state [or] the value of the land should it be divided” before it concluded that a physical partition could not be made without causing substantial injury to some or all interested parties. *Id.* at 235, 238, 695 S.E.2d at 820, 822.

As in *Partin*, this Court reversed the decision of the trial court and held that it “must consider evidence of fair market value in determining whether a substantial injury would result from a partition in-kind.” *Id.* at 235, 695 S.E.2d at 820. Thus, “despite evidence that the partition in-kind would be difficult, this Court required a showing of fair market value” in order to sustain a conclusion regarding substantial injury even where there was testimony concerning the value of the property. *Id.* at 235, 695 S.E.2d at 820.

A. Specific Findings

[1] In the instant case, just as in *Brown*, *Partin*, and *Lyons-Hart*, the trial court erred in determining that physical partition would cause substantial injury when it did not first consider the fair market value of the Parcels should they be physically divided. Although the trial court considered the combined fair market value of Parcels Two and Three in comparison to the one-fourth interest in *all* parcels, those assessments only indicate the value of the land should it be transferred to only one of the tenants in common. However, there was no evidence as to what the value of the land would be if Parcels Two and Three were physically divided and transferred to several of the tenants in common.

Since the trial court found in finding of fact 21 that, if it were to order a partition in kind of Parcels Two and Three, one or more of the other tenants in common could also request a portion, the trial court necessarily needed to determine the value of those Parcels if that possibility came to fruition. As the trial court’s findings fail to indicate the fair market value of Parcels Two and Three if they were divided, they cannot support that court’s conclusion that each cotenant’s share would be “*materially* less [upon physical partition] than the amount each cotenant would receive from the sale of the whole.” N.C.G.S. § 46-22(b)(1) (emphasis added).

As this matter will be remanded, for purposes of judicial economy we also note that the trial court’s findings as to the fair market value of the Parcels additionally fail to satisfy the requirements of N.C.G.S. § 46-22 in that, although the trial court acknowledged that the current zoning classification of the Parcels “does not allow commercial or industrial use,” it nevertheless considered the possibility that the Parcels

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would be rezoned for commercial use at a later date to determine the fair market value of each Parcel. Since commercial use would bring “a far higher value for the property than residential use,” the trial court assessed each Parcel’s value based on the lower residential and higher commercial value. As a result, instead of assigning precise fair market values, each Parcel was assigned a sweeping range of possible values. For example, the largest discrepancy existed in relation to Parcel One, which the trial court found was valued somewhere between \$190,000 and \$300,000 – with a \$110,000 difference between the lowest and highest possible fair market value. Since it is clear from the language of N.C.G.S. § 46-22 and our caselaw that *specific* findings of fact must support an order for the sale of property based on substantial injury, these sweeping ranges cannot be upheld.

B. Substantial Injury

[2] Instead of looking at the fair market value were it physically partitioned, the trial court in this case considered: (1) the personal value of the Parcels to the parties; (2) the difficulty of physically partitioning the land; and (3) the “highest and best use” of the Parcels.

In regard to the personal value of the property, the trial court considered the conflicting desires of the Debruhs and Solesbees and how their ownership of adjacent property affects their interests in the Parcels at issue. Specifically, it considered the fact that the Debruhs hope to continue living on their property and “want[] all or a portion of Parcels Two and Three as a buffer to the growing commercial use of the properties,” while the Solesbees desire to sell Parcels Two and Three for commercial use in order to increase the fair market value of their residential property. As such, the trial court found that transferring Parcels Two and Three to the Debruhs “would be an improper favoritism to [them]” and “unequitable and unfair to the other tenants in common,” especially the Solesbees, since they also reside near the Parcels.

It is clear from N.C.G.S. § 46-22 and our caselaw that economic factors alone control whether substantial injury exists to disturb the status quo of partition-in-kind. *Partin*, 112 N.C. App. 807, 436 S.E.2d 903; *Lyons-Hart*, 205 N.C. App. 232, 695 S.E.2d 818. Although *material* impairment of any cotenant’s rights must be considered in determining whether an actual partition should be ordered, personal value or desired use of the property does not affect *material* impairment of any rights.

Second, the trial court considered the difficulty of physical partition. Specifically, the trial court found that “[d]ue to the saturation of

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Parcels Two and Three with easements, and their geographical and shape limitations on use and access across these Parcels, there is no practical way to fairly and equitably divide these parcels into two to four parcels.” However, as we have already established, *Brown* makes clear that specific findings as to the fair market value of a piece of property cannot be circumvented by the difficulty of physical partition. In order to deal with land that is difficult to partition physically and to help balance each party’s share, N.C.G.S. § 46-22(b1) requires a court to consider owelty. Owelty refers to the ability of a court to order that “a cotenant who receives a portion of the land which has a greater value than his proportionate share of the property’s total value, to pay his former cotenants money to equalize the value received by each cotenant.” *Partin*, 112 N.C. App. at 812, 436 S.E.2d at 906.

Specifically, N.C.G.S. § 46-22(b1) requires that “the court, in its discretion, *shall* consider the remedy of owelty where such remedy can *aid in making an actual partition occur* without substantial injury to the parties.” (Emphasis added). Although in the present case the trial court did conclude that owelty was not an appropriate remedy, that determination cannot be upheld, even with the discretion granted to the trial court, because the trial court’s conclusion was based on inappropriate findings. Until the trial court makes the requisite findings regarding the fair market value of the Parcels, it cannot decide whether owelty is an appropriate.

Finally, the trial court determined that “[o]ffering Parcels Two and Three with Parcel One for sale [would] bring the tenants in common the highest value for the property as a whole” and that “[i]n reality the highest and best use of Parcels Two and Three is to combine them with adjoining property for commercial use.” However, such conclusions fail to satisfy the standards required by N.C.G.S. § 46-22. N.C.G.S. § 46-22 does not state that “highest and best use” of the land should factor into the determination of whether actual partition would cause substantial injury. As such, physical partition does not work a substantial injury simply because it would not be the “highest and best use” of the land.

The trial court erred by failing to make specific findings as to the value of each Parcel and the value of each share of the Parcels were those Parcels physically partitioned. It further erred in utilizing factors such as the personal value of the Parcels to the parties, the difficulty of physical partition, and the “highest and best use” of the Parcels in concluding that substantial injury would result by physical partition.

STATE EX REL. UTILS. COMM'N v. N.C. WASTE AWARENESS & REDUCTION NETWORK

[255 N.C. App. 613 (2017)]

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order and remand with instructions for the trial court to make the specific findings of fact required by N.C.G.S. § 46-22 and our caselaw.

REVERSED AND REMANDED.

Judge CALABRIA and DIETZ concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF-
NORTH CAROLINA UTILITIES COMMISSION; DUKE ENERGY CAROLINAS, LLC;
DUKE ENERGY PROGRESS, LLC; VIRGINIA ELECTRIC AND POWER COMPANY,
d/B/A DOMINION NORTH CAROLINA POWER, DEFENDANTS

v.

NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK, PLAINTIFF

No. COA16-811

Filed 19 September 2017

**Utilities—solar panels on church—electricity sold to church—
public utility**

Plaintiff was operating as a public utility and was subject to regulation by the Utilities Commission when it placed solar panels on the roof of a church, retained ownership of the panels, and sold the electricity to the church. Although plaintiff only sought to provide affordable solar electricity to non-profits, a subset of the population, approval of its activity would open the door for other organizations to offer similar arrangements to other classes of the public, upsetting the balance of the marketplace and jeopardizing regulation of the industry. Its activity was contrary to the North Carolina public policy intended to provide electricity to all at affordable rates.

Judge DILLON dissenting.

Appeal by Plaintiff from order entered 15 April 2016 by the North Carolina Utilities Commission. Heard in the Court of Appeals 23 February 2017.

Staff Attorney Robert B. Josey, Jr. and Staff Attorney David T. Drooz, for Defendant-Appellee Public Staff – North Carolina Utilities Commission.

STATE EX REL. UTILS. COMM'N v. N.C. WASTE AWARENESS & REDUCTION NETWORK

[255 N.C. App. 613 (2017)]

Allen Law Offices, PLLC, by Dwight W. Allen and Lawrence B. Somers, for Defendants-Appellees Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC.

McGuireWoods, LLP, by Brett Breitschwerdt and Andrea R. Kells, for Defendant-Appellee Virginia Electric & Power Company, d/b/a Dominion North Carolina Power.

The Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn and John D. Runkle for Plaintiff-Appellant North Carolina Waste Awareness and Reduction Network.

Burns, Day & Presnell, P.A., by Daniel C. Higgins, for amicus curiae North Carolina Eastern Municipal Power Agency, North Carolina Municipal Power Agency Number 1 and Electricities of North Carolina, Inc.

Nelson Mullins Riley & Scarborough LLP, by Joseph W. Eason, for amicus curiae North Carolina Electric Membership Corporation.

Southern Environmental Law Center, by David Neal and Lauren Bowen, for amicus curiae North Carolina Interfaith Power and Light, North Carolina Council of Churches, Greenfaith, The Christian Coalition of America, Young Evangelicals for Climate Action, and Creation Care Alliance of Western North Carolina.

MURPHY, Judge.

Plaintiff North Carolina Waste Awareness and Reduction Network (“NC WARN”) appeals from an order of the North Carolina Utilities Commission (the “Commission”) concluding that NC WARN was operating as a “public utility,” subject to the Commission’s jurisdiction, when it entered into an agreement with a Greensboro church (the “Church”) to install and maintain a solar panel system on the Church’s property and to charge the Church based on the amount of electricity that the system generated. The Commission also concluded that NC WARN’s actions constituted a provision of “electric service” to the Church, infringing on the utility monopoly of Duke Energy Progress, LLC, and Duke Energy Carolinas, LLC, (collectively “Duke Energy”) in violation of Chapter 62 of the North Carolina General Statutes.

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We agree and conclude that NC WARN is acting as a “public utility” by operating its system of solar panels for the Church on the Church’s property. Therefore, we affirm the order of the Commission.

Background

In December 2014, NC WARN entered into a “Power Purchase Agreement” (the “Agreement”) with the Church. The Agreement provided that NC WARN would install and maintain a system of solar panels on the Church’s property. Under the Agreement, the solar panels would “remain the property of NC WARN” and the Agreement did not “constitute a contract to sell or lease” the solar panels to the Church. In exchange, the Church agreed to compensate NC WARN based on the amount of “electricity produced by the system” at a rate of \$0.05 per kWh.

In June 2015, NC WARN filed a request with the Commission for a declaratory ruling that its proposed activities under the Agreement would not cause it to be regarded as a “public utility” pursuant to the Public Utilities Act (the “Act”).

The Commission, however, concluded that NC WARN’s arrangement with the Church constituted a public utility in violation of the Act. In addition, the Commission ordered that NC WARN refund its charges to the Church and pay a fine of \$200 for each day that NC WARN provided electric service to the Church through the solar panel system.¹ NC WARN timely appealed the Commission’s order.

Analysis

The dispositive issue on appeal is whether the Commission correctly determined that NC WARN was operating as a “public utility.” See *State ex rel. N.C. Utils. Comm’n v. New Hope Rd. Water Co.*, 248 N.C. 27, 29, 102 S.E.2d 377, 379 (1958) (“The Commission has no jurisdiction over these respondents unless they are public utilities within the meaning of [the Public Utilities Act].”). This issue is a question of law, which is reviewed de novo by our Court. N.C.G.S. § 62-94(b) (2015) (“[T]he court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions.”); *New Hope*, 248 N.C. at 30, 102 S.E.2d at 379 (“[T]he question of whether or not a particular company or service is a public utility is a judicial one which must be determined as

1. The Commission also provided that all penalties imposed “shall be waived upon NC WARN’s honoring its commitment to refund all billings to the Church and ceasing all future sales.”

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such by a court of competent jurisdiction.”); *State ex rel. Utils. Comm'n v. Envir. Defense Fund*, 214 N.C. App. 364, 366, 716 S.E.2d 370, 372 (2011) (“Questions of law are reviewed *de novo*.”).

The Public Utilities Act, found in Chapter 62 of our General Statutes, gives the Commission the power to supervise and control the “public utilities” in our State. N.C.G.S. § 62-30 (2015). A “public utility” as defined in the Act is any entity which owns and operates “equipment and facilities” that provides electricity “to or for the public for compensation.” N.C.G.S. § 62-3(23)(a) (2015).

In the present case, there is no doubt that NC WARN owns and operates equipment (a system of solar panels) which produces electricity and that NC WARN receives compensation from the Church in exchange for the electricity produced by the system. The dispute here is whether NC WARN is producing electricity “for the public,” therefore, making it a “public utility.”

“The public does not mean everybody all the time.” *State ex rel. Utils. Comm'n v. Simpson*, 295 N.C. 519, 522, 246 S.E.2d 753, 755 (holding that the defendant was offering his two-way radio communication service to “the public” even though he was offering the service exclusively to members of the Cleveland County Medical Society, which was comprised of only 55 to 60 people) (citation omitted). Instead:

One offers service to the ‘public’ within the meaning of [N.C.G.S. § 62-3(23)(a)(1)] when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that his service is limited to a specified area and his facilities are limited in capacity. For example, the operator of a single vehicle within a single community may be a common carrier.

State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 271, 148 S.E.2d 100, 111 (1966) (offering his mobile radio telephone service in the Kinston area to an anticipated 33 subscribers). However, this framework “is merely the beginning and not the end of our inquiry[,]” as a person might still be offering his services to the “public” even when he serves only a selected class of persons. *Simpson*, 295 N.C. at 525, 246 S.E.2d at 757. In further deconstructing the definition of “public,” within the context of a selected class of consumers our Supreme Court instructed that whether an entity or individual is providing service to the “public”:

depends . . . on the regulatory circumstances of the case
. . . [including] (1) nature of the industry sought to be

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regulated; (2) type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) effect of non-regulation or exemption from regulation of one or more persons engaged in the industry.

Id. at 524, 246 S.E.2d at 756. This interpretation is meant to be flexible so as to adjust according to “the variable nature of modern technology,” and, ultimately, the touchstone of our analysis is: what “accomplish[es] the legislature’s purpose and comports with its public policy.” *Id.* at 524, 246 S.E.2d at 757 (citation and internal quotation marks omitted).

i. *The Simpson Factors*

In the instant case, NC WARN seeks “to provide affordable solar electricity to non-profits.” If we uphold the Agreement NC WARN has in place with the Church, NC WARN would like “to provide similar projects to other non-profits in the future.” In that way, NC WARN serves, or seeks to serve, a subset of the population, just as the defendant did in *Simpson*. Therefore, in order to evaluate whether this activity violates the Act, we must consider the factors outlined by our Supreme Court.²

Discussion of (1) the nature of the industry and (2) type of market served by the industry overlap. The Greensboro area has been assigned exclusively to Duke Energy, just as other regions of the state are exclusively assigned to other electricity suppliers. North Carolina law precludes retail electric competition and establishes regional monopolies on the sale of electricity based on the premise that the provision of electricity to the public is imperative and that competition within the marketplace results in duplication of investment, economic waste, inefficient service, and high rates. *Carolina Tel. & Tel. Co.*, 267 N.C. at 271, 148 S.E.2d at 111 (“[N]othing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service.”). In particular, although the provision of electricity might be lucrative in some areas, it may also be costly in others. Monopolies exist

2. Even though NC WARN is only offering its services to a subset of the population, it has offered to provide all of the energy produced by the solar system located on the Church’s roof to the Church itself, and in this way NC WARN has shown itself to be willing to serve the Church up to the full capacity of NC WARN’s facility – in this case up to the full capacity of the solar system at issue. Moreover, the Agreement provides that “any electricity generated by the system, for example, during times of low on-site usage, will be put onto the power grid and credited against the kilowatt (kWh) sold to [the Church] by Duke Energy.” The transfer of energy produced by the solar system to the energy grid for unrestricted use by any and all of Duke Energy’s Greensboro customers leads us to conclude that NC WARN is in fact “hold[ing itself] out as willing to serve all who apply up to the capacity of [its] facilities.” *Id.* at 522, 246 S.E.2d at 755.

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in North Carolina so that it makes financial sense for utilities to serve all North Carolinians and so that service can be provided at a reasonable price. See *Simpson*, 295 N.C. at 525, 246 S.E.2d at 757 (recognizing that exempting certain radio service providers from regulation would “leave burdensome, less profitable service on the regulated portion resulting inevitably in higher prices for the service”).

For these reasons, the legislature has elected to prohibit (3) any competition that might otherwise naturally exist in the market and to limit providers of electricity to specific providers in different regions of the state. *Id.* at 271, 148 S.E.2d at 111. NC WARN’s activities are in direct competition with Duke Energy’s services, as both entities are selling kilowatt hours of electricity to Duke Energy’s customers.

Perhaps most importantly to our review of this case, however, is an evaluation of (4) the effect of non-regulation or exemption from regulation of one or more persons engaged in the industry. NC WARN maintains that it only intends to provide its services “to self-selected non-profit organizations” and has no desire to offer its services to all of Duke Energy’s customers.³ However, the Supreme Court of North Carolina previously rejected this same argument in *Simpson* when the defendant argued that he was spared from regulation because he only endeavored to provide his services to the Cleveland County Medical Society. 295 N.C. at 525, 246 S.E.2d at 757. In that case, the Supreme Court concluded, “[w]ere a definition of ‘public’ adopted that allowed prospective offerors of services to approach these separate classes without falling under the statute, the industry could easily shift from a regulated to a largely unregulated one.” *Id.* at 525, 246 S.E.2d at 757.

Simply put, Duke Energy has been granted an exclusive right to provide electricity in return for compensation within its designated territory and with that right comes the obligation to serve all customers at rates and service requirements established by the Commission. NC WARN desires to serve customers of its own choosing within Duke Energy’s territory at whatever rates and service requirements it sets for itself without oversight. Although NC WARN at the present date is only providing its services to a small number of organizations in the Greensboro area, if it were allowed to generate and sell electricity to cherry-picked non-profit organizations throughout the area or state, that

3. In its request for declaratory judgment, NC WARN acknowledges its intent to expand this program in stating, “An adverse ruling by the Commission would restrict NC WARN’s ability to enter into similar funding mechanisms through [Power Purchase Agreements] with other churches and non-profits, as funds become available.” {R. p. 9}

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activity stands to upset the balance of the marketplace. Specifically, such a stamp of approval by this Court would open the door for other organizations like NC WARN to offer similar arrangements to other classes of the public, including large commercial establishments, which would jeopardize regulation of the industry itself.⁴

ii. *Legislative Intent*

Under *Simpson*, our analysis of whether an entity is selling energy to the “public” ultimately hinges on the query: what accomplishes the legislature’s purpose and comports with public policy? *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756-57 (citation omitted). Chapter 62 of the North Carolina General Statutes contains the Public Utilities Act, which establishes a comprehensive set of regulations for public utilities in the state. The “Declaration of policy” proclaims, *inter alia*, that “[i]t is hereby declared to be the policy of the State of North Carolina: . . . (2) To promote the inherent advantage of regulated public utilities[.]” N.C.G.S. § 62-2(a)(2) (2015). Doing so allows for the “availability of an adequate and reliable supply of electric power . . . to the people, economy and government of North Carolina[.]” *Id.* § 62-2(b). In that way, the declaration clearly reflects the policy adopted by the legislature that a regulated monopoly best serves the public, as opposed to competing suppliers of utility services. *Carolina Tel. & Tel. Co.*, 267 N.C. at 271, 148 S.E.2d at 111.

It is also true that the General Assembly has recently declared that it is also the policy of this state “[t]o promote the development of renewable energy and energy efficiency.” N.C.G.S. § 62-2(a)(10); *see also* N.C.G.S. § 105-277 (2015) (exempting from taxation solar systems used to heat a property). However, statutory pronouncements of policy are meant to coexist with North Carolina’s well-established ban on third-party sales of electricity rather than supersede it until such time as the monopoly model is abandoned by our legislature. *See Taylor v. City of Lenoir*, 129 N.C. App. 174, 178, 497 S.E.2d 715, 719 (1998) (“[S]tatutes relating to the same subject or having the same general purpose, are to be read together, as constituting one law . . . such that equal dignity and importance will be given to each.” (citation and internal quotation marks omitted)).

4. The Dissent notes that within the last decade the Commission concluded in two separate cases that “similar” arrangements by third-party solar services providers did not turn those providers into public utilities. However, those cases are not before us now, nor are “past decisions of a previous panel of the North Carolina Utilities Commission . . . binding on later panels of the Commission or this Court.” *Utils. Comm’n v. Carolina Water Serv., Inc. of N.C.*, 225 N.C. App. 120, 131 n. 6, 738 S.E.2d 187, 194 n. 6 (2013). Accordingly, they have no bearing on the present appeal.

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If the legislature desires to except these types of third-party sales, it is within its province to do so and it is not for this Court to determine the advisability of any change in the law now declared in the Public Utilities Act. *See State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 257, 166 S.E.2d 663, 668 (1969) (“It is for the Legislature, not for this Court or the Utilities Commission, to determine whether the policy of free competition between suppliers of electric power or the policy of territorial monopoly or an intermediate policy is in the public interest.”).

Conclusion

We hold, therefore, that NC WARN is operating as a public utility within the meaning of N.C.G.S. § 62-3. Consequently, NC WARN is subject to regulation by the Commission. Accordingly, we affirm the order of the Commission from which NC WARN appealed.

AFFIRMED.

Judge STROUD concurs.

Judge DILLON dissents by a separate opinion.

DILLON, Judge, dissenting.

I conclude that NC WARN is not acting as a “public utility” because the solar panel system at issue is not serving “the public,” but rather is designed to generate power for a single customer (the “Church”) from the Church’s property. Therefore, I respectfully dissent.

The Public Utilities Act gives the Commission the power to supervise and control the “public utilities” in our State. N.C. Gen. Stat. § 62-30 (2015). A “public utility” as defined by our General Assembly is any entity which “own[s] or operate[s]” “equipment or facilities” that provide “electricity” “to or for the public for compensation.” N.C. Gen. Stat. § 62-3(23)(a) (2015) (emphasis added).

I agree with the majority that NC WARN “owns and operates” “equipment” (a system of solar panels) which provides “electricity” “for compensation.” However, I disagree with the majority that the equipment at issue here is designed to produce electricity “for the public,” because the system of solar panels in this case is designed to produce electricity on the property of a single customer for that customer’s sole use.

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Our Supreme Court has had occasion to define the contours of what constitutes a “public utility,” subject to regulation by our Utilities Commission. But every instance cited by the majority where our Supreme Court has determined that a “public utility” exists involved equipment or a facility which served *multiple customers*. The majority’s decision today appears to be the first in North Carolina where equipment designed to generate power (or other utility-type service) for a single customer from the customer’s own property is held to be a “public utility” subject to regulation by our Utilities Commission.

In 1958, for instance, our Supreme Court stated that “the true criterion by which to determine whether a plant or system is a public utility is whether or not the public may enjoy it of right or by permission only[.]” *Utilities Comm’n v. New Hope*, 248 N.C. 27, 30, 102 S.E.2d 377, 379 (1958). The Court further stated that “an attempt to declare a company or enterprise to be a public utility, where it is inherently not such, is, by virtue of the guaranties of the federal Constitution, void wherever it interferes with private rights of property or contract.” *Id.* NC WARN’s solar panel equipment at issue here is not designed to be enjoyed by the public either by right or by permission; rather, the system was designed only to be enjoyed by the Church, pursuant to a private contractual agreement.

Ten years later, in 1968, our Supreme Court considered the definition of “the public” in the context of utilities regulation in *Utilities Comm’n v. Carolina Telegraph Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966), a case in which a company sought to establish a mobile radio telephone service for a small area with an estimated thirty-three (33) customers. Our Supreme Court held that the operation was a public utility, stating:

One offers service [to] the “public” within the meaning of th[e] statute when he holds himself out as willing to serve all who apply up to the capacity of [his] facilities. . . . For example, the operator of a single vehicle within a single community may be a common carrier.

Id. at 268, 148 S.E.2d at 109. However, NC WARN’s solar panel “facility” is markedly different than the “public utility” described by the Supreme Court in this 1968 opinion. Where the “single vehicle” in the Supreme Court’s example is designed to serve multiple members of the public, the solar panel equipment at issue here is designed to serve only one customer, and has not been made available to any other customer.

A decade later, in 1978, in the case relied upon by the majority today, our Supreme Court clarified *Carolina Telegraph* by holding that a

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system may be serving “the public” even where it serves only a “selected class of persons” and is not designed to serve “everybody all the time.” *Utilities Comm’n v. Simpson*, 295 N.C. 519, 522, 246 S.E.2d 753, 755 (1978). In *Simpson*, the Court articulated a list of factors, cited by the majority, which inform whether a particular enterprise is considered a “public utility.” I believe the majority applied these factors much more broadly than *Simpson* intends.

In *Simpson*, our Supreme Court provides a guide as to the application of these factors by referencing a number of cases from other jurisdictions, concluding that those cases all “seem correctly decided.” *Id.* at 524, 246 S.E.2d at 756. Several of those cases cited concluded that certain operations – each of which were designed to serve multiple customers – constituted “public utilities,” where each operation was designed to serve a select class of customers rather than the public at large. However, our Supreme Court also cited a Pennsylvania case which concluded that the furnishing of electric service to tenants of a single apartment building by the building owner (where the owner bought electricity from the public utility company and then resold it to its tenants) did *not* constitute the operation of a public utility: “Here . . . those to be serviced consist only of a special class of persons – those to be selected as tenants – *and not a class opened to the indefinite public*. Such persons clearly constitute a defined, privileged[,] and limited group and the proposed service to them would be private in nature.” *Id.* at 524-25, 246 S.E.2d at 756 (quoting *Drexelbrook v. Pennsylvania Public Utility Comm’n*, 418 Pa. 430, 436, 212 A.2d 237, 240 (1965)). NC WARN’s system is designed to serve a group even more limited (a single customer) than the group served by the system in the Pennsylvania case (tenants in a single building).

In the years since *Simpson* was decided, our appellate courts have applied *Simpson* to determine whether a certain enterprise constituted a “public utility.” Many of these cases are cited by the Commission in support of its order. However, unlike the present case, each of those cases involved a system which provided some utility service to *multiple* consumers accessing the system. *See Simpson*, 295 N.C. at 520, 246 S.E.2d at 754 (two-way radio service operated in conjunction with telephone answering service, using tower that serves *multiple* subscribers); *Bellsouth Carolinas PCS, L.P. v. Henderson Cty. Zoning Bd. Of Adjustment*, 174 N.C. App. 574, 621 S.E.2d 270 (2005) (cellular telephone company operating cellular telephone tower serving multiple customers); *Utilities Comm’n v. Mackie*, 79 N.C. App. 19, 338 S.E.2d 888 (1986), *aff’d as modified*, 318 N.C. 686, 351 S.E.2d 289 (1987) (sewer and water

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service with approximately twenty-five (25) customers served from a single tank); *Utilities Comm'n v. Buck Island, Inc.*, 162 N.C. App. 568, 592 S.E.2d 244 (2004) (facilities used to produce water and treat sewage in housing development); *Shepard v. Bonita Vista Properties, L.P.*, 191 N.C. App. 614, 664 S.E.2d 388 (2008), *aff'd*, 363 N.C. 252, 675 S.E.2d 332 (2009) (campground charging the occupants of each campsite for use of electricity from a single system at above-market price).

In conclusion, I believe that our Supreme Court's jurisprudence compels the conclusion in the present case that NC WARN's equipment, which is designed to generate power for a single customer, is *not* a "public utility." This conclusion is also consistent with the General Assembly's declared policy in the Public Utilities Act "[t]o promote the development of renewable energy" and "encourage private investment in renewable energy and energy efficiency." See N.C. Gen. Stat. § 62-2(a)(10); see also N.C. Gen. Stat. 105-277 (exempting solar panel systems used to heat a property from taxation); see also *Simpson*, 295 N.C. at 524, 246 S.E.2d at 757 (stating that the definition of "public" must "accomplish the legislature's purpose and comport[] with its public policy") (internal marks and citation omitted)).

Further, this conclusion is consistent with the prior opinions of the Commission in *In re Application of FLS YK Farm, LLC*, N.C.U.C. Docket No. RET-4, Sub 0 (April 22, 2009) and *In re Request by Progress Solar Investments, LLC*, N.C.U.C. Docket No. SP-100, Sub 24 (Nov. 25, 2009). In those cases, the Commission concluded that the entities at issue were *not* public utilities where the entities "owne[d] or operat[ed] solar thermal panels located on-site to a single entity pursuant to a 'bargained for' transaction[.]" *Progress Solar*, N.C.U.C. Docket No. SP 100, Sub 24; *FLS YK Farm*, N.C.U.C. Docket No. RET-4, Sub 0. And in *FLS YK Farm*, the Commission noted that "FLS YK Farm will not be holding itself out to provide solar thermal heat production to the general public, but rather plans to sell the BTUs ("British Thermal Units") created by its on-site thermal panels only to the [Inn] and solely for the purpose of heating water owned by [the Inn]."

In the present case, however, the Commission has reached an opposite conclusion in spite of the fact that, like the providers in *FLS YK Farm* and *Progress Solar*, NC WARN owns and maintains the equipment on the property of a single customer which is designed to generate power from the customer's property for the sole use of that customer (and for no other NC WARN customer). The Commission seems to distinguish NC WARN's arrangement with the Church from its prior decisions merely based on the manner NC WARN is being *compensated*

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by the Church. Indeed, at oral argument, counsel for the Commission stated that if NC WARN's arrangement with the Church were structured as a lease agreement, rather than as a contract where NC WARN was compensated based on the Church's usage, the Commission would not be challenging the arrangement in court.

However, to me, the manner in which NC WARN and the Church choose for NC WARN to be compensated – based on usage rather than based on a flat rate per month – does not convert NC WARN's solar panel system on the Church's property into a public utility. Indeed, a hardware store renting a portable generator to a homeowner would not be acting as a public utility if it chose to charge the customer, at least in part, based on the power generated by the generator rather than solely at a flat daily rate. Such billing is a logical method by which private parties should be free to contract to account for wear and tear on the system itself. Certainly it is true that the more the system operates, the quicker its components deteriorate and need maintenance, repair, or replacement. And N.C. Gen. Stat. § 62-3(23) does not deem the *form of compensation* relevant to the determination of whether a system is serving “the public.” Certainly, the Commission would not argue that Duke Energy would cease operating as a public utility subject to regulation if it changed its billing method to a flat monthly rate for unlimited access to its power grid.

Additionally, I would point out that the fact that NC WARN might, in the future, enter into similar private contracts with other entities seeking to install other solar panel systems does not compel the conclusion that NC WARN is holding itself out as willing to serve “all who apply up to the capacity of [the] facilit[y]” *at issue here*. Indeed, a hardware store does not act as a public utility simply because it leases out more than one generator. The *Simpson* factors focus on the *function of the single system or facility at issue*, not the company offering the service, the company's marketing of its service, or the manner of compensation given to the company in exchange for the service. Here, NC WARN is not holding itself out as willing to serve others up to the capacity of the Church's solar system. NC WARN's system will produce electricity solely for the Church and the power generated by the system is not accessible by NC WARN or any other party or entity.¹ I disagree with the

1. The majority notes, in a footnote, that the fact that the excess energy created by the Church's system will be transferred to Duke Energy's power grid “leads us to conclude that NC WARN is in fact ‘hold[ing itself] out as willing to serve all who apply up to the capacity of [its] facilities.’” I am wholly unpersuaded by this characterization, and do not believe there is sufficient information in the record from which we could undertake an informed interpretation of Duke Energy's voluntary net metering credit program.

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majority's characterization of the Church itself – a single customer – as “the public.” See *Simpson*, 295 N.C. at 524, 246 S.E.2d at 757.

In conclusion, this case does not involve a solar panel farm providing power to multiple customers off-site. It involves solar panel equipment located on the property of a single customer designed to produce power for that customer where no adjacent property owners or other members of the public have the right to tap into the system. Based on the General Assembly's current definition of “public utility,” I conclude that NC WARN's system is not a public utility and is thus not subject to regulation by our Utilities Commission. The General Assembly is certainly free to broaden the definition of “public utility” (within constitutional limits). However, based on the General Assembly's current definition and our Supreme Court's jurisprudence, I vote to reverse the Commission's decision regarding this private contract between NC WARN and the Church. See *New Hope*, 248 N.C. at 30, 102 S.E.2d at 380 (“[A]n attempt to declare [NC WARN] to be a public utility where it is inherently not such, is . . . void wherever it interferes with private rights of . . . contract.”).

STATE OF NORTH CAROLINA

v.

ERICA DEANNA BRADSHER, DEFENDANT

No. COA16-1321

Filed 19 September 2017

1. Appeal and Error—record—transcript not provided

The trial court did not err in a prosecution for misdemeanor larceny and injury to personal property, arising from defendant's removal of appliances from a rental property from which she was being evicted, by concluding that defendant was not entitled to a new trial based on the State's inability to provide her with a transcript of the proceedings. An alternative was available that would fulfill the same functions as a transcript and provided the defendant with a meaningful appeal.

2. Larceny—motion to dismiss—sufficiency of evidence—lawful possession of property—conceded error

The State conceded that the trial court erred by denying defendant's motion to dismiss a larceny charge, arising from defendant's removal of appliances from a rental property from which she was

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being evicted, where she was in lawful possession of the property at the time she carried it away.

3. Personal Property—injury to personal property—motion to dismiss—sufficiency of evidence—willful and wanton conduct—causation

The trial court erred by denying defendant’s motion to dismiss the charge of injury to personal property where the State failed to meet its burden of sufficiently establishing that defendant intended to willfully and wantonly cause injury to the personal property, or that defendant actually caused the damage.

Appeal by Defendant from judgment entered 3 September 2014 by Judge Michael R. Morgan in Alamance County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Kathy LaMotte, for the Defendant.

MURPHY, Judge.

Erica Deanna Bradsher (“Defendant”) appeals from her convictions for misdemeanor larceny and injury to personal property. On appeal, Defendant first contends that she is entitled to a new trial due to the State’s inability to provide her with a transcript of the proceedings in her case, depriving her of her constitutional rights to effective appellate review, effective assistance of counsel, equal protection under the law, and due process of law. Next, Defendant argues, and the State concedes, that the trial court erred in denying her motion to dismiss the larceny charge when she was in lawful possession of the property at the time she carried it away. Finally, Defendant claims that the trial court erred in denying her motion to dismiss when the State failed to meet its burden of sufficiently establishing the elements of injury to personal property causing damage more than \$200. We agree that both charges should have been dismissed, and vacate Defendant’s convictions.

Background

On 3 September 2014, Erica Bradsher (“Defendant”) was found guilty of misdemeanor larceny and injury to personal property causing damage more than \$200. She had been renting a home (“old house”), and eventually had difficulty paying her rent. She found a new home

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(“new house”) to live in; however, this home did not yet have appliances installed. Defendant was evicted and ordered to vacate the premises by 2 February 2015. She decided to move some appliances from the old house to the new house until the new appliances arrived. She had planned on returning the appliances before the eviction date; however, she was arrested for felony larceny and injury to personal property before she was able to do so. Defendant was convicted by a jury of non-felonious larceny and injury to personal property causing damage more than \$200, and gave oral notice of appeal.

On 23 September 2014, Defendant was appointed Kathy LaMotte as her appellate counsel. Trial counsel mailed notes to the Appellate Defender’s Office on 21 October 2014 in response to a request from the Office of the Appellate Defender. Appellate counsel then attempted to contact the court reporter, Wendy Ricard, to obtain the transcript. Between 14 November 2014 and 11 August 2016, Superior Court Judge (now Supreme Court Justice) Morgan granted over twenty orders extending time to prepare and deliver the transcript. During this time, appellate counsel continued attempting to obtain the transcript from Ms. Ricard, who eventually moved to New York and became unresponsive. Appellate counsel sought advice from the Office of Appellate Defender and involved Court Reporting Manager David Jester to no avail. On 12 November 2015, appellate counsel requested the prosecutor’s notes, and repeated this request on 11 February 2016. Appellate counsel also requested notes from Judge (now Justice) Morgan on 18 February 2016, who was unable to produce any given the passage of time. The prosecutor finally agreed to send trial notes to appellate counsel on 17 October 2016. Due to the dereliction of duty by Ms. Ricard, there is no transcript available; however, due to the diligence of appellate counsel, a summary is set out in narrative form along with the trial exhibits. The available narration, as stipulated to by all parties, is presented as follows:

Summary: The case involves charges of Felony Larceny and Injury to Personal Property, based on [Defendant’s] undisputed removal of appliances from a rental property she leased (“old house”), but from which she was being evicted. The electricity had been shut off at the old house and she had groceries and an infant. [Defendant] had arranged for a new house (“new house”), which had functioning electricity, but the new house’s kitchen appliances had not yet been delivered. Once the new appliances were delivered, she made arrangements to return the old appliances to the old house. Before she could return the

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appliances, she was arrested. The arrest occurred on 29 January 2013, after the eviction hearing on 23 January 2013 and before 02 February 2013, ten days later, the date on which she was required to vacate the premises.

Officer Kyle Tippins testified as follows: A Ms. Paylor had seen a refrigerator being loaded about a week prior to 29 January. He found [Defendant] at the new house. All the appliances were located in [Defendant's] new house. She said that she was "about done moving" and asked, "Is this about the fridge?" The power at the old house was off. He was unable to determine whether [Defendant] had fully moved out. [Defendant] stated to him that she felt she still had time left on her eviction, and had the right to use them until the eviction date. [Defendant] stated to him that she had \$300 worth of groceries and didn't want them to spoil. [Defendant] stated to him that she was temporarily using them and planned to return them. He noticed no damage to the stove. He noticed a white dishwasher and refrigerator being used. [Defendant] told him that she needed the stove and microwave to heat the baby's bottle. He did not recall [Defendant] saying anything about the power being cut off, and there was nothing in his report about her stating that. The property was released to the landlord that night.

Patrice Wade (Landlord) testified as follows: The house was a starter home. [Defendant] had a baby and stopped working. Ms. Wade worked with her when she stopped paying, would pay half, then pay the other. In December, she contacted [Defendant] but "she would not leave." In January 2013, she began eviction proceedings. The eviction process allowed [Defendant] ten days to vacate the premises. The papers were served on 14 January 2013. On 29 January, she saw a neighbor, Terri Paylor, at a ball game. Ms. Paylor told her that a black refrigerator had been removed about a week earlier. She went to the old house, found the appliances missing and contacted the police. There was no power in the home. She assumed [Defendant] would be there because she still had time left. She described a dent near the top on the side of the refrigerator, and a problem with a hinge on the door, causing a lack of support for the door. She admitted that the damage

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could have been caused during moving the refrigerator. She described some scratches on top of the stove, and admitted that the damage could have been caused during the moving of the stove. She filed an insurance claim because of other things also. The homeowner's insurance policy covered the items. She threw out the appliances. The refrigerator was new when they bought it in 2007. [Defendant] replaced the carpet and cloroxed the floor before she left. The electric bill was in [Defendant's] name. The appliances [Defendant] removed were black and the new (replacement) appliances were white.

Judge Morgan denied [Defendant's] motion to dismiss both charges for insufficiency.

Erica Bradsher (Appellant-Defendant) testified as follows: She entered into the lease in November 2011. It was a good relationship at first. Ms. Wade worked with her until July 2013, when [Defendant] had a baby. [The notes are unclear: She and/or the baby were hospitalized for two months.] She began to have trouble paying the rent. On 22 January 2013, the power was disconnected at her old house. At that point, she had a six-month-old baby and a 12-year-old son, plus two other children for whom she shared joint custody. She had a freezer full of breast milk. She had just gotten food stamps and had just purchased groceries. She called her new landlord and received permission to move in early, but was told that the new appliances had not yet been delivered. She did not own appliances, and could not afford to purchase a small refrigerator. She had friends move the old appliances from the old house to the new house on 22 January 2013. It was necessary to remove the refrigerator door to get it into the house. The new appliances were delivered to the new house on 24 January 2013. She sent an email to her father the same day, asking for his help returning the appliances by 02 February. He agreed to help her on 01 February. [This email was read into evidence, and is in the clerk's file.] When the new appliances arrived at the new house, she moved the old refrigerator to the back deck to make room in the kitchen. When the police arrived on 29 January 2013, she let the officer in and cooperated with him. She told the officer that the lights and heat had

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been cut off at the old house, and that she needed the stove to cook and the microwave to heat up bottles. She told the officer that she was just using the appliances temporarily and intended to return them. She was still using the old stove on the day the officer came. The new stove was in a closet, not yet installed. She wanted to get the appliances back to the old house as quickly as she could. The eviction order gave her until 02 February 2013 to vacate, and she needed to get the appliances back by then. She finished moving on 30 January and 01 February. She thought that “they would never know because I would return it before.” She knew the appliances were not hers but believed she had a right to use them until 02 February 2013.

In arguing his motion to dismiss, Trial Counsel offered three cases: *State v. Brackett*, 306 N.C. 138, 291 S.E.2d 660; *State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473; and *State v. Sims*, 247 N.C. 751, 102 S.E.2d 143.

Judge Morgan denied [Defendant’s] renewed motion to dismiss both charges.

Nothing further is known regarding instructions or other motions.

The jury found [Defendant] guilty of Misdemeanor Larceny and Injury to Personal Property. Judge Morgan sentenced [Defendant] to 120 days on each conviction, with sentences suspended in favor of 36 months supervised probation.

The following exhibits are also present in the record: The exhibit showing date of tenancy from 16 November 2012 to 16 November 2013, the exhibit showing date of service of Magistrate Summons as 10 January 2013, the exhibit showing date of Magistrate’s Order as 23 January 2013 along with the vacate date of 2 February 2013.

Defendant appeals the trial court’s denials of her motions to dismiss.

Analysis

[1] Defendant argues that she is entitled to a new trial due to the lack of transcript of the proceedings in the case. She claims that the failure to provide appellate counsel with a transcript violated her right to effective appellate review, effective assistance of counsel, due process of law, and equal protection of the law. We disagree.

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“The unavailability of a verbatim transcript does not automatically constitute error.” *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006). Instead, in order to show error, “a party must demonstrate that the missing recorded evidence resulted in prejudice. General allegations of prejudice are insufficient to show reversible error.” *Id.* at 651, 634 S.E.2d at 918. Our Supreme Court has stated, “the absence of a complete transcript does not prejudice the defendant where alternatives are available that would fulfill the same functions as a transcript and provide the defendant with a meaningful appeal.” *State v. Lawrence*, 352, N.C. 1, 16, 530 S.E.2d 807, 817 (2000).

In the absence of a verbatim transcript, the parties have the alternative option of creating a narration to reconstruct the testimonial evidence and other proceedings of the trial. N.C. R. App. P. 9(c)(1) (2015); *see also Quick*, 179 N.C. App. at 651, 634 S.E.2d at 918 (“[A] party has the means to compile a narration of the evidence through a reconstruction of the testimony given.”). Either party may object to issues with the narration, and any disputes are to be settled by the trial court. *Id.* at 651, 634 S.E.2d at 918. Overall, the narration and record must have the evidence “necessary for an understanding of all issues presented on appeal.” N.C. R. App. P. 9(a)(1)(e).

In the present case, both parties stipulated to the narrative which contains sufficient evidence to understand all issues presented on appeal. Defendant, however, claims to be prejudiced in that “it is impossible to know whether [defendant’s] issues were preserved for appeal.” This amounts to nothing more than a general allegation of prejudice as there is no concern or dispute over the issues preserved for appeal. There are three main issues raised on appeal by Defendant, one of which being the lack of transcript. There is no debate as to whether the other two issues were preserved for trial. While we acknowledge the difficult circumstance that appellate counsel was put in due to Ms. Ricard’s dereliction, we do not find any prejudice. We find that both parties stipulated to the narrative present in the record, and that it paints a sufficient picture for us to provide adequate review of these issues.

[2] In regards to the merits, Defendant assigns error to the trial court for denying her motion to dismiss the charges of misdemeanor larceny and injury to personal property. As the State concedes, and we agree, the trial court erred in denying Defendant’s motion to dismiss the charge of larceny as she was in lawful possession of the property at the time she removed it from the real property. *See State v. Bailey*, 25 N.C. App. 412, 416, 213 S.E.2d 400, 402 (1975) (holding there was no taking by trespass where defendant removed furniture from the trailer he was renting

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because he was in lawful possession by virtue of his tenancy, and did not have an intent to convert the furniture to his own uses). Defendant also argues that the State failed to meet its burden of sufficiently establishing the elements of injury to personal property causing damage more than \$200. 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). When ruling on a defendant’s motion to dismiss, “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 [d]efendant’s being the perpetrator of such offense.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925 (1980).

When reviewing the sufficiency of evidence, “we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455. “The [C]ourt is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State.” *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982) (citation omitted). However, “[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed.” *Id.* at 66, 296 S.E.2d at 652 (citation omitted).

[3] Defendant was charged with injury to personal property causing damage more than \$200 in violation of N.C.G.S. § 14-160(b) (2015). The State must prove the following four elements for the crime of injury to personal property: “(1) personal property was injured; (2) the personal property was that ‘of another’; (3) the injury was inflicted ‘wantonly and willfully’; and (4) the injury was inflicted by the person or persons accused.” *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015). The State must also show that the injury exceeded \$200 to escalate the crime from a Class 2 misdemeanor to a Class 1 misdemeanor. *State v. Hardy*, 242 N.C. App. 146, 155, 774 S.E.2d 410, 416-17 (2015). In the present case, it is undisputed that the property was injured, and while Defendant was in lawful possession of the property at the time, the property was in fact owned by Mrs. Wade. Therefore, our relevant inquiries are (1) whether the State proved that the injury was inflicted “wantonly and willfully,” (2) whether Defendant is indeed the person who inflicted the injury, and (3) whether the State proved the injury was in excess of \$200.

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I. Wantonly and Willfully

When used in criminal statutes, “willful” has been defined as “the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law.” *State v. Brackett*, 306 N.C. 138, 142, 291 S.E.2d 660, 662 (1982) (citation omitted). “Conduct is wanton when [it is] in conscious and intentional disregard of and indifference to the rights and safety of others.” *Id.* at 142, 291 S.E.2d at 662 (citation omitted). These two words are meant to refer to elements of a single crime, and generally connote intentional wrongdoing. *State v. Casey*, 60 N.C. App. 414, 416, 299 S.E.2d 235, 237 (1983) (citing *State v. Williams*, 284 N.C. 67, 72-73, 199 S.E.2d 409, 412 (1973)). “When intent is an essential element of a crime the State is required to prove the act was done with the requisite specific intent, and it is not enough to show that the [d]efendant merely intended to do that act.” *Brackett*, 306 N.C. at 141, 291 S.E.2d at 662.

In the present case, the State failed to present sufficient evidence to show Defendant intended to cause injury to the personal property. The only evidence found in the record comes from the narration of Mrs. Wade, in which she acknowledges the damage could have occurred during moving. Despite no indication Mrs. Wade was present during any of the moving, there still was not enough to find that Defendant willfully and wantonly injured the property. In its brief, the State attempts to show intent by claiming that since Defendant removed the door to get the refrigerator into the new residence, “[i]t can reasonably be inferred that [Defendant] also had to remove the door of the refrigerator again when she placed it onto her back porch,” and as a result, caused a problem with the door hinge. Even assuming, *arguendo*, that this is a reasonable inference from the evidence, it still in no way shows intent to damage, only intent to remove the door. At most, this would illustrate negligence in an attempt to protect the personal property by removing the door in order to fit the refrigerator into the house, rather than risking any scratches or dents by keeping it attached. Further, there is no evidence in the record as to how the stove was dented.

II. The Injury Was Inflicted by the Person Accused

The next element of the injury to personal property at issue here requires the State to prove beyond a reasonable doubt that Defendant was indeed the one who caused the damage to the appliances. The State has failed to provide sufficient evidence of this element. Again, the only evidence the State has presented is the narration of Mrs. Wade claiming that the damage could have occurred during moving. It is unclear

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whether this is meant to apply to the moving from the old to the new house, from one area of the new house to another, or from the new house back to the old house. Officer Tippins testified that he “noticed no damage to the stove” when he arrived at the new house on 29 January 2013. This would tend to imply that the damage occurred when the appliances were being returned to the old house. However, nothing in the record infers that Defendant inflicted this damage.

Regardless of when the damage occurred, the State failed to put forth any evidence that Defendant is indeed the one who caused the injury. The record indicates that Defendant was assisted by friends in moving the appliances from the old to the new house, and that she asked her father to assist in moving them back to the old house. Even considered in the light most favorable to the State, there is no evidence that indicates Defendant, not one of her friends, her father, or anyone else who may have helped in moving the appliances, was the individual who caused the damage. The State has failed to meet its burden.

As there was not sufficient evidence as to the elements of the crime, we need not address the valuation of the damage or the proper classification of the misdemeanor.

Conclusion

The State concedes that Defendant should not have been found guilty of larceny, and has failed to present substantial evidence for two of the four elements of injury to personal property. Therefore, we hold that the trial court erred in denying Defendant’s motions to dismiss both charges.

VACATED

Judges Hunter, Jr. and Davis concur.

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STATE OF NORTH CAROLINA
v.
SERGIO MONTEZ CULBERTSON

No. COA17-136

Filed 19 September 2017

1. Appeal and Error—appealability—writ of certiorari—lack of subject matter jurisdiction

The Court of Appeals exercised its discretion under N.C. R. App. P. 2 to suspend N.C. R. App. P. 21 to allow defendant's petition and to issue a writ of certiorari solely to address the trial court's lack of subject matter jurisdiction to enter judgment following defendant's guilty plea.

2. Drugs—possession with intent to sell and distribute—marijuana—heroin—near a park—lack of subject matter jurisdiction—failure to allege over age of 21

The trial court lacked jurisdiction to accept defendant's guilty plea or to impose judgments for possession with intent to sell and distribute (PWISD) marijuana near a park or PWISD heroin near a park where the State conceded that neither indictment set forth an allegation that defendant was over the age of 21 and nothing in the record showed any stipulation or admission concerning defendant's age at the time of his arrest.

Appeal by defendant from judgment entered 6 September 2016 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 23 August 2017.

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

Joseph P. Lattimore for defendant-appellant.

TYSON, Judge.

Sergio Montez Culbertson (“Defendant”) appeals from judgment entered following his guilty plea to assault inflicting serious physical injury on a law enforcement officer, assault inflicting injury on a law enforcement officer, five drug related charges, resisting arrest, driving while license revoked and a parking violation. The State has filed a

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motion to dismiss Defendant's appeal. Defendant also filed a petition for writ of certiorari seeking our review contemporaneously with his brief.

The State's motion to dismiss the appeal is allowed. In our discretion, we invoke N.C. R. App. P. 2 to suspend Rule 21 of the appellate rules, allow Defendant's petition and issue our writ of certiorari. Defendant's petition seeks review of judgments entered upon indictments, which the State concedes are facially invalid and do not provide the trial court with jurisdiction on two charges.

I. Factual Background

At the entry of Defendant's guilty plea, the State forecast the following evidence. On 21 January 2015, Concord Police Officer M. Hanson was on patrol when he saw a truck parked in the street and facing the wrong direction of travel. The truck was parked approximately 900 feet from the boundary of Caldwell Park. Officer Hanson observed Defendant walking away from the truck. Officer Hanson called other officers to inform them he had stopped Defendant and exited his vehicle to speak with Defendant. Concord Police Officer A. J. Vandevoorde arrived at the scene, and the officers conversed with Defendant near Defendant's truck.

Officer Vandevoorde smelled marijuana inside Defendant's truck and asked Defendant for consent to search the vehicle. Defendant consented, but claimed he was having trouble opening the truck door with the key in his possession. Officer Vandevoorde opened the passenger door of the truck. Officer Vandevoorde asked Defendant not to reach inside the truck after they opened the door.

Against Officer Vandevoorde's instruction, Defendant reached into the car as the officer was opening the door. Both officers moved to restrain Defendant from putting his arm inside the truck. Defendant became combative and began to struggle with both officers. The officers discharged their tasers on Defendant several times, but Defendant continued to resist them. Officer Vandevoorde eventually wrestled Defendant onto the ground, where Officer Hanson attempted to place him in handcuffs. During the fight, Defendant yelled "Momma, get my weed out from under the car seat, under the driver's seat."

The officers called in for backup. Several other officers responded to the request for backup and assisted to restrain Defendant and secure him on the backseat of a police car. Officer Vandevoorde searched Defendant's truck and found a diaper bag containing more than 300 grams of marijuana, which was packaged in several smaller bags. Officer Vandevoorde also found a plastic bag, under the driver's seat, which contained several smaller bags of heroin.

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Officers Hanson and Vandevoorde both sustained injuries in the fight with Defendant. Officer Vandevoorde sustained scrapes and lacerations on his knees and hands. Officer Hanson injured his anterior cruciate ligament (ACL) and the meniscus of his knee, which led to several surgeries and rehabilitation time to recover.

II. Procedural history

On 29 August 2016, Defendant entered guilty pleas to: assault inflicting serious physical injury on a law enforcement officer (Hanson); assault inflicting injury on a law enforcement officer (Vandevoorde); possession of drug paraphernalia; maintaining a vehicle/dwelling place for the purpose of keeping and selling controlled substances; trafficking in opium or heroin; possession with intent to sell or deliver (“PWISD”) marijuana within 1000 feet of a park; PWISD heroin within 1000 feet of a park; and, possession of marijuana.

Defendant was sentenced as a prior record level II offender. Defendant received an active sentence of 90 to 120 months and a fine for the trafficking charge. The court consolidated the offense of PWISD marijuana near a park with one count of assault inflicting serious injury on a law enforcement officer and sentenced Defendant to 29 to 47 months active imprisonment to run consecutively to the trafficking sentence. Defendant’s sentences on the remaining counts were suspended, with two consecutive 60 month terms of probation to follow the active sentences.

Subsequently, the parties realized the court and parties had stated incorrect offense class levels and sentences for some of the offenses. In order to correct the sentence, the court did not adjourn the session of court where Defendant’s plea was accepted. The court informed Defendant that the resentencing would reduce the amount of active time he would serve, if his probationary sentences were revoked. Defendant nor his counsel asked for and Defendant was not afforded an opportunity to withdraw his guilty plea. Defendant was re-sentenced on 6 September 2016 as follows:

[T]he Court recognizes that we needed to correct the judgment from last week because we did have an incorrect class on one of the cases in which the Court sentenced. The trafficking sentence will remain the same. The Court will then sentence under the possession with intent to sell or deliver marijuana within a thousand feet of a school in [15 CRS] 50339, to the 29 – minimum 29 maximum 47 months. The Court would then consolidate the felony

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assault on a law enforcement officer inflicting physical injury with that charge. And then with respect to the assault inflicting serious personal injury – physical injury on a law enforcement officer, the Class F, the Court sentences him to the minimum 25 maximum 47 months, suspended for five years, I believe it was, supervised probation.

Upon the rendering of his new sentence, Defendant orally entered notice of appeal. Defendant filed his brief and a petition for writ of certiorari at the same time to seek review of the judgments and sentences imposed against him.

III. Issues raised by Defendant

In his brief and in his petition for writ of certiorari, Defendant contends the trial court lacked jurisdiction to accept his guilty pleas on the charges of trafficking, PWISD marijuana within 1000 feet of a park and PWISD heroin within 1000 feet of a park. Defendant also asserts that his pleas to these charges were not voluntary, because of erroneous statements made at the time of the entry of his pleas.

Further, Defendant argues the State failed to present a sufficient factual basis to support his guilty plea to the assault charges.

IV. Right of Appeal

A. N.C. Gen. Stat. § 15A-1444

[1] Defendant acknowledges he has no right to appeal the judgments entered. “A defendant’s right to appeal in a criminal proceeding is entirely a creation of state statute.” *State v. Biddix*, __ N.C. App. __, __, 780 S.E.2d 863, 865 (2015) (citing *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002)). Without express statutory authority, a criminal defendant does not have a right to appeal a judgment entered under N.C. Gen. Stat. § 15A-1444. *Id.*; *see also State v. Ahern*, 307 N.C. 584, 605, 300 S.E.2d 689, 702 (1989).

N.C. Gen. Stat. § 15A-1444 provides:

(a1) A defendant who has . . . entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant’s prior record or conviction level and class of offense. Otherwise,

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the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

(1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;

(2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

(3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

....

(e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari

N.C. Gen. Stat. § 15A-1444 (2015).

Defendant correctly recognizes he raises no issues which provide him an appeal as of right pursuant to N.C. Gen. Stat. § 15A-1444(a2). The State's motion to dismiss Defendant's appeal is allowed. Defendant's purported appeal is dismissed.

B. Appellate Rule 21

To support his petition that a writ of certiorari should be allowed, Defendant cites our Supreme Court in *State v. Wallace* that "where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at

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any time, even if it was not contested in the trial court.” *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2001).

Defendant asserts the trial court lacked subject matter jurisdiction to accept his guilty plea to the two charges of PWISD marijuana and heroin within 1000 feet of a park. He argues the indictments for these offenses failed to allege the essential element of his age being over 21 at the time of the offenses. Defendant argues indictments charging statutory offenses must allege all of the essential elements of the offenses. Defendant also asserts the trafficking indictment failed to specifically name heroin instead of the general category of opium derivative.

With respect to the two indictments for PWISD, Defendant would present a meritorious claim, were both raised on a motion for appropriate relief. Defendant claims and the State concedes that the indictments for PWISD within 1000 feet of a park failed to allege and did not state that the Defendant’s age was over 21 years.

While N.C. Gen. Stat. § 15A-1444(e) provides jurisdiction and affords a defendant the opportunity to seek discretionary appellate review by petition for certiorari, Defendant’s petition does not assert any claim or grounds to qualify it for appellate review by certiorari under Appellate Rule 21. N.C. R. App. P. 21.

As such, Defendant’s petition for writ of certiorari is subject to dismissal. *See e.g., State v. Nance*, 155 N.C. App. 773, 774-75, 574 S.E.2d 692, 693-94 (2003) (“Defendant [sought] to bring forth a claim that he did not knowingly and voluntarily plead guilty to having attained the status of habitual felon. However, defendant has sought neither to withdraw his guilty plea, nor to obtain any other relief by motion in the superior court. Defendant’s claim [was] not one that he may raise on direct appeal pursuant to G.S. § 15A-1444(a)(1) or (a)(2). Further, defendant [had] not lost his right of appeal through untimely action, nor is he attempting to appeal an interlocutory order or seeking review of an order denying a motion for appropriate relief under G.S. § 15A-1422(c)(3).”).

Under these facts, we conclude Defendant does not have a right to appeal the issue presented here under N.C. Gen. Stat. § 15A-1444(a)(1) or (a)(2), and Defendant has not asserted any stated grounds under N.C. R. App. P. 21(a)(1) for this Court to issue a writ of certiorari.

Rule 21 “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.” *Biddix*, ___ N.C. at ___, 780 S.E.2d at 870; *see also, State v. Pennell*,

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367 N.C. 466, 472, 758 S.E.2d 383, 387 (2014) (“The proper procedure through which defendant may challenge the facial validity of the original indictment is by filing a motion for appropriate relief under [N.C. Gen. Stat.] § 15A-1415(b) or petitioning for a writ of habeas corpus.”).

C. Appellate Rule 2

Under N.C. R. App. P. 2, this Court possesses the discretionary authority to suspend requirements of the North Carolina Rules of Appellate Procedure and issue a writ of certiorari. “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.” *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999).

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. 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.

State v. Campbell, __ N.C. __, __, 799 S.E.2d 600, 602-03 (2017) (emphasis original) (footnote, internal citations and quotation marks omitted).

This Court must “independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise its discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure, suspend [the] Rule . . . and consider the merits of defendant’s fatal variance argument.” *Campbell*, __. N.C. at __, 799 S.E.2d at 603.

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

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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.*

State v. Anderson, __ N.C. App. __, __, __ S.E.2d __, __, 2017 WL 3254414, at *7.

In *State v. Biddix*, the defendant asserted the trial court erred in accepting his guilty plea as a product of his informed choice where the terms of his plea arrangement were contradictory. *Biddix*, __ N.C. App. at __, 780 S.E.2d at 865. We held the defendant did not demonstrate and we did not find “ ‘exceptional circumstances’ necessary to exercise our discretion to invoke Appellate Rule 2” *Id.* at __, 780 S.E.2d at 868.

In *Anderson*, the defendant pled guilty to a statute which had been determined to be overbroad in another case. On appeal, the State had not offered argument contrary to that previous decision. This Court utilized Rule 2 and suspended our rules where “an independent determination of the specific circumstances of defendant’s case reveals that [the] case [was] one of the rare instances appropriate for Rule 2 review in that defendant’s substantial rights are affected.” *Anderson*, __ N.C. App. at __, __ S.E.2d at __, 2017 WL 3254414, at *7 (citation and internal quotation marks omitted).

The State concedes both indictments for PWISD marijuana and PWISD heroin near a park failed to contain the essential allegation that Defendant was over the age of 21. The State also concedes and it is well settled that “[a]n indictment charging a statutory offense must allege all of the essential elements of the offense.” *State v. De La Sancha Cobos*, 211 N.C. App. 536, 540, 711 S.E.2d 464, 468 (2011) (citing *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975)); see also *State v. Perry*, 291 N.C. 586, 597, 231 S.E.2d 262, 269 (1977) (holding the age of the defendant was an essential element for first degree rape and a conviction could not stand where the State failed to allege the defendant was over the age of 16); *State v. Byrd*, __ N.C. __, 796 S.E.2d 405, No. COA16-619, 2017 WL 676960, at *2 (unpublished) (holding the offenses listed in N.C. Gen. Stat. § 90-95(e)(8), PWISD near a child care center, required the State to allege and prove that Byrd was “21 years of age or older” at the time of commission).

Invalid indictments deprive the trial court of its jurisdiction. *Wallace*, 351 N.C. at 503, 528 S.E.2d at 341. Appellate courts may consider challenges to facially invalid indictments at any time, even when not contested at trial. *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S.1130, 148 L. Ed. 2d 797 (2001) (citation

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omitted); *see also State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003) (“Our Supreme Court has stated that an indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense.”).

After reviewing Defendant’s claims and the State’s concession of error, in our discretion and in the interest of judicial economy, manifest injustice would occur if Defendant’s convictions were allowed to stand on charges, which the trial court did not possess jurisdiction to impose sentence. For these reasons and in the exercise of our discretion under Rule 2, we suspend Rule 21, and issue the writ of certiorari solely to address the trial court’s lack of subject matter jurisdiction.

V. Analysis of Merits of Claims

[2] N.C. Gen. Stat. § 90-95(e)(10) provides, “any person 21 years of age or older who commits an offense under [N.C. Gen. Stat. §] 90-95(a)(1) on property that is a public park . . . shall be punished as a Class E felon.”

Defendant was charged in count III of the indictment in 15 CRS 50339 as follows,

the defendant named above unlawfully, willfully, and feloniously did commit a violation of North Carolina General Statute 90-95, possess with the intent to sell and deliver marijuana, which is included in Schedule VI of the North Carolina Controlled Substances Act, within 1000 feet of the boundary of real property used as a playground, Caldwell Park, located at 362 Georgia Street Southwest, Concord, North Carolina.

Similarly in count I of the indictment in 15 CRS 50451, Defendant was charged with PWISD heroin in the same park location. Neither indictment sets forth an allegation of Defendant’s age or alleges that he is over the age of 21. Nothing in the record shows any stipulation or admission concerning Defendant’s age at the time of his arrest.

Based upon the State’s concession and this Court’s prior holdings, count III in the multicount indictment in 15 CRS 50339 and count I in the multicount indictment in 15 CRS 50451 are fatally deficient. The superior court did not possess jurisdiction to accept Defendant’s plea and sentence him on these two counts.

Because these convictions must be vacated, Defendant’s entire plea agreement and the judgments entered thereon must be set aside and this matter remanded to the trial court. We express no opinion on the

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merits of these two charges. Nothing in this opinion binds the State or Defendant to the set aside vacated pleas or sentences previously entered and vacated or restricts re-indictment.

VI. Conclusion

Defendant's purported appeal of right is dismissed. In the exercise of our discretion under Rule 2, and in the interest of judicial economy, Defendant's petition for writ of certiorari is allowed as set out above.

The trial court did not possess jurisdiction to accept Defendant's plea or to impose judgments to PWISD marijuana near a park in count III of 15 CRS 50339 or PWISD heroin near a park in count I of 15 CRS 50451. These convictions and judgments thereon are vacated.

Since the Defendant pled guilty to these offenses pursuant to a plea arrangement, and the superior court entered consolidated judgments, the entire plea arrangement must be set aside and this matter is remanded to the superior court for further proceedings. In light of our decision, it is unnecessary to and we do not address Defendant's remaining arguments, which are rendered moot with the set aside of the plea arrangement. *It is so ordered.*

APPEAL DISMISSED. PETITION FOR WRIT OF CERTIORARI ALLOWED. VACATED IN PART AND REMANDED.

Judges ELMORE and STROUD concur.

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[255 N.C. App. 645 (2017)]

STATE OF NORTH CAROLINA

v.

TRAVIS TAYLOR DAIL

No. COA16-1324

Filed 19 September 2017

Sentencing—suspended sentence—conditional discharge—burden of proof—eligibility

The trial court erred in a driving while impaired and drug possession case by entering a suspended sentence rather than a conditional discharge under N.C.G.S. § 90-96 where, notwithstanding the fact that the State had the burden at trial, the trial court did not afford either party the opportunity to establish defendant's eligibility or lack thereof.

Judge BRYANT concurring in separate opinion.

Appeal by defendant from judgment entered 17 November 2015 and order entered 29 March 2016 by Judge Patrice A. Hinnant in Guilford County Superior Court. Heard in the Court of Appeals 6 June 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant-appellant.

CALABRIA, Judge.

Where the trial court failed to consider evidence of defendant's eligibility for conditional discharge pursuant to N.C. Gen. Stat. § 90-96, the judgment is vacated and the matter remanded for resentencing.

I. Factual and Procedural Background

On 17 November 2015, Travis Taylor Dail ("defendant") pleaded guilty to driving while impaired ("DWI") and possession of lysergic acid diethylamide ("LSD"). Per the plea agreement, defendant stipulated that he was a record level 1 for felony sentencing purposes, a record level 5 for DWI sentencing purposes, and that he would be placed on probation. In exchange, the State agreed to dismiss multiple additional drug possession charges against defendant. Pursuant to this plea agreement, on

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20 November 2015, the trial court sentenced defendant to a minimum of 3 months and a maximum of 13 months' imprisonment in the custody of the North Carolina Department of Adult Correction on the possession of LSD offense. The trial court suspended this sentence, instead sentencing defendant to 12 months of supervised probation. For the DWI offense, the trial court entered a suspended sentence, ordering defendant to be imprisoned for 30 days in the custody of the Misdemeanant Confinement program, and to surrender his license. In both judgments, the trial court entered findings on mitigating factors, finding that these outweighed any aggravating factors.

On 25 November 2015, defendant filed a motion for appropriate relief ("MAR"), alleging that, at the plea hearing, defendant requested to be placed on conditional discharge probation pursuant to N.C. Gen. Stat. § 90-96, given that defendant had not previously been convicted of a felony. In his MAR, defendant further alleged that the trial court erred in both failing to permit conditional discharge, and in failing to make findings as to why conditional discharge was inappropriate. Defendant therefore moved to have his guilty plea withdrawn and the judgment stricken.

On 29 March 2016, the trial court entered an order on defendant's MAR. The trial court found that, pursuant to the plea agreement, defendant stipulated that he was a record level 1 for felony purposes, record level 5 for DWI purposes, and that he would be placed on probation. The trial court also noted that "the defendant enjoyed the benefit of the dismissal of the following charges: felony possession of MDPV; possession of marijuana up to 1/2 ounce; possession of drug paraphernalia; simple possession of clonazepam 90-95 (D) (2); and, felony prescription and labeling 90-106." The trial court determined that defendant, in subsequently requesting conditional discharge, was asking the trial court "to act outside of the plea agreement by placing defendant on the 90-96 deferral program in contradiction to the terms of the plea agreement, a term not negotiated with the State." The trial court also stated that "defendant could not then and cannot now argue for something outside of the plea agreement. While the 90-96 program requires the consent of the defendant, the plea undercuts or supersedes consent to the 90-96 program because the defendant consented to probation as a term of his plea in lieu of the 90-96 program." The trial court concluded that defendant was barred from relief, and denied his MAR.

On 12 April 2016, defendant filed a petition for writ of certiorari, alleging that the judgment against him was entered in error. Also on 12 April 2016, defendant appealed the judgment and denial of his

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MAR. On 29 April 2016, this Court granted defendant's petition for writ of certiorari.

On 10 May 2016, the State filed a petition in the North Carolina Supreme Court for writ of certiorari, alleging that this Court lacked jurisdiction to review the denial of defendant's MAR, and seeking review of the 29 April 2016 order granting defendant's petition for certiorari. The State also filed a petition for a writ of supersedeas and motion for temporary stay, pending review of its petition for writ of certiorari. The Supreme Court granted the motion for temporary stay on 16 May 2016.

On 19 August 2016, the Supreme Court entered its order on the State's motions. It dissolved the temporary stay, and denied supersedeas and certiorari. Correspondingly, this Court entered an order recognizing the denial of supersedeas and certiorari by the Supreme Court.

II. Standard of Review

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Jones*, 237 N.C. App. 526, 530, 767 S.E.2d 341, 344 (2014) (quoting *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009)).

"[U]nder N.C.G.S. § 15A-1444(e), a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea." *State v. Pimental*, 153 N.C. App. 69, 73, 568 S.E.2d 867, 870, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002).

III. Conditional Discharge

In his first argument, defendant contends that the trial court erred in entering a suspended sentence rather than a conditional discharge. We agree.

Conditional discharge is an alternative sentence made available in N.C. Gen. Stat. § 90-96 (2015). This statute provides that:

Whenever any person who has not previously been convicted of (i) any felony offense under any state or federal laws; (ii) any offense under this Article; or (iii) an offense under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 of the General Statutes pleads guilty to or is found guilty of (i) a misdemeanor under this Article

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by possessing a controlled substance included within Schedules I through VI of this Article or by possessing drug paraphernalia as prohibited by G.S. 90-113.22, or (ii) a felony under G.S. 90-95(a)(3), the court shall, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require, unless the court determines with a written finding, and with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.

N.C. Gen. Stat. § 90-96(a).

In the instant case, during the plea hearing, defense counsel alleged mitigating factors, and offered the following argument:

This is his first conviction of any kind. I don't think he has even had a speeding ticket. He's eligible for 90-96, and I'd ask The Court to allow him to participate in that. He will be drug tested regularly while he is in that program, and I'm confident he could stay away from controlled substances. If he doesn't, he will have a conviction on his record.

After discussing some additional mitigating factors, defense counsel once again requested that the trial court "allow [defendant] to participate in the 90-96 probation." Defense counsel also offered to present the court with the paperwork authorizing conditional discharge.

In ruling on the plea agreement, the trial court would not permit conditional discharge, "in that [defendant] has already endured the benefit of dismissal for something else[,]” namely the other drug-related charges. After the trial court orally entered judgment, defense counsel once again raised the issue of conditional discharge. The trial court declined to reconsider. At no point did the State offer any opinion in favor of or against conditional discharge.

Defendant contends that he was eligible to participate in the conditional discharge program, and that the trial court erred in refusing to let him participate in the program. Citing the statute, defendant contends that he was a first-time offender, and he consented to participation in the conditional discharge program, meaning that the statutory language "the court *shall*" constituted a mandate that the trial court could not ignore. In an affidavit filed after the trial court denied defendant's MAR, the assistant district attorney, Jodi Barlow ("Barlow"), also cited the

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statute, and explained that the court made no written findings of fact at the time of sentencing as to why defendant was an inappropriate candidate for sentencing under N.C. Gen. Stat. § 90-96. In addition, the plea agreement did not contemplate that the defendant could not be placed on probation pursuant to § 90-96. Finally, according to the affidavit, Barlow also “[did] not agree that the defendant is an inappropriate candidate for 90-96 probation[,]” in reference to the statutory requirement that the trial court could only refuse conditional discharge with the agreement of the district attorney.

“This Court has held that ‘use of the language ‘shall’ is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error.’” *State v. Antone*, 240 N.C. App. 408, 410, 770 S.E.2d 128, 130 (2015) (quoting *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001)). It is clear, therefore, that where an eligible first-time offender consents to sentencing under the conditional discharge program, the “shall” language of N.C. Gen. Stat. § 90-96 constitutes a “mandate to trial judges,” and that failure to comply with that mandate constitutes reversible error.

It is undisputed that, at the plea hearing, defendant sought sentencing under N.C. Gen. Stat. § 90-96, and that such a motion could constitute consent to the statute’s provisions. The State contends, however, that defendant did not present evidence that he qualified under N.C. Gen. Stat. § 90-96 for conditional discharge. The State notes that N.C. Gen. Stat. § 90-96 does not explicitly state whether the burden is on a defendant to show that he qualifies for conditional discharge, or on the State to show that he does not. As such, the State contends that the burden is on the defendant, and that in the instant case, defendant failed to meet that burden.

N.C. Gen. Stat. § 90-96 is in Chapter 90 of the General Statutes, a chapter entitled “MEDICINE, ALLIED OCCUPATIONS[.]” The applicable article is Article 5, “CONTROLLED SUBSTANCES ACT[.]” See N.C. Gen. Stat. § 90-96. Our Court has stated that

[t]his statute [, North Carolina General Statute § 90-96] does not discuss in further detail the procedures the court should follow when a defendant violates a term or condition. In the absence of specifically enumerated procedures, those procedures set forth in Article 82 of Chapter 15A of our General Statutes regarding probation violations should apply.

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State v. Burns, 171 N.C. App. 759, 761, 615 S.E.2d 347, 349 (2005). While North Carolina General Statute § 90-96 has been amended since 2005 when *Burns* was filed, and this case does not deal with the violation portion of North Carolina General Statute § 90-96, we still find *Burns* instructive because it indicates that the general criminal sentencing statutes fill in the gaps in North Carolina General Statute § 90-96. *See id.*

While the State relies upon a series of cases for its argument that the burden of proving a prior record, including a prior expungement, should be upon the defendant, none of the cases address sentencing under North Carolina General Statute § 90-96 or prior record levels; in fact, but for three cases regarding mitigating factors none of the cases are even regarding sentencing. Noticeably missing from the State's citation list is the controlling statute. *See generally* N.C. Gen. Stat. § 15A-1340.14(f) (2015) (requiring the State to bear the burden of proving prior convictions). The general sentencing statutes, which control here, *see Burns*, 171 N.C. App. at 761, 615 S.E.2d at 349, place the burden of demonstrating prior convictions on the State: "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). We hold that, pursuant to the logic in *Burns*, the Chapter 15A provisions control where North Carolina General Statute § 90-96 is silent; therefore, the burden is on the State to establish that defendant is not eligible for conditional discharge by proving defendant's prior record.

Notwithstanding the fact that the State had the burden at trial, it is clear that the trial court did not afford either party the opportunity to establish defendant's eligibility or lack thereof. According to the transcript, since multiple charges against defendant were dismissed pursuant to the plea agreement, the trial court had no inclination to consider conditional discharge. At no point in the proceedings did the trial court acknowledge defense counsel's argument with respect to conditional discharge, except for one remark, when the court stated that it "will not entertain the deferred prosecution in that [defendant] has already endured the benefit of dismissal for something else." Since the trial court used the outdated term "deferred prosecution" instead of "conditional discharge," it is questionable whether the court even recognized defense counsel's argument with respect to N.C. Gen. Stat. § 90-96.

We therefore vacate the trial court's judgment, and remand this matter to the trial court for a new sentencing hearing. The trial court shall follow the procedure for the consideration of eligibility for conditional discharge as prescribed by statute.

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North Carolina General Statute § 90-96 addresses the procedure for determining a defendant's eligibility, as is reflected on Form AOC-CR-237, Rev. 12/15. See N.C. Gen. Stat. § 90-96. In fact, the form provides for the trial court to request a report from the Administrative Office of the Courts to determine a defendant's eligibility for a conditional discharge under North Carolina General Statute § 90-96. This report can be requested either in advance of a defendant's trial or guilty plea or at the time of a guilty plea or verdict, the latter situation being applicable to this case. If the report is requested in advance of the trial or plea, *both* the defendant and State must jointly complete the form for entry by the trial court. This procedure ought to have been followed in the instant case, and upon remand, the trial court shall request a report from the Administrative Office of the Courts, as mandated by statute.

IV. Written Finding

In his second argument, defendant contends that the trial court erred in failing to make a written finding regarding whether conditional discharge was appropriate for defendant's sentence. Because we vacate the trial court's judgment, we need not address this argument.

VACATED AND REMANDED.

Judge STROUD concurs.

Judge BRYANT concurs in separate opinion.

BRYANT, Judge, concurring by separate opinion.

I concur with the majority opinion that the trial court erred by failing to follow the mandate of section 90-96. Because defendant met the eligibility requirements of section 90-96 and the assistant district attorney ("ADA") did not state that defendant was "inappropriate for conditional discharge," the statutory mandate required the trial court to enter a conditional discharge.

I write separately to express my concern about how a trial judge can be sandbagged by a defendant who enters a plea agreement that does not expressly include conditional discharge. I use the term "sandbagged" here to mean that a defendant may enter a plea before a judge pursuant to a plea agreement; the agreement may place him within the eligibility requirements of section 90-96, even though the plea agreement does not expressly reference the conditional discharge; and (notwithstanding the

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judge's desire) if the ADA does not agree that the conditional discharge is inappropriate, the trial judge may be compelled to enter the conditional discharge. Thus, if a section 90-96 conditional discharge is to be included in a plea agreement between the prosecutor and a defendant, it should be made known to the judge prior to entry of the plea. Otherwise, once a trial judge accepts the plea of a defendant who is statutorily eligible for a section 90-96 conditional discharge, even if the trial judge considers the defendant an inappropriate candidate due to factors related to the offense, the trial judge has no discretion but to allow the conditional discharge, unless the ADA agrees that the offender is inappropriate.

In this case, defendant had prior charges for possessing a weapon on educational property and reckless driving. Both charges were dismissed after completing a deferral program. At the time of the plea agreement, defendant had pending charges for DWI, felony possession of LSD, felony possession of MDPV, felony prescription and labeling, possession of marijuana, possession of drug paraphernalia, and simple possession of clonazepam. The plea agreement allowed defendant to plead guilty to DWI and possession of LSD, and dismiss the remaining drug charges. Because defendant had no prior felony or drug *convictions*, he was eligible for a section 90-96 conditional discharge. Notwithstanding his technical eligibility, it is clear that a reasonable trial judge could consider defendant inappropriate for a section 90-96 conditional discharge because of his other drug charges (involving different types of drugs), which were dismissed as part of the plea agreement and his prior deferments.

As discussed in the majority opinion, there is a form procedure that can be used to determine a defendant's eligibility for the section 90-96 conditional discharge prior to entry of a plea. It appears that District Court judges regularly use this process, while Superior Court judges use it less so. Such a procedure should be used to help ensure that errors of this type do not recur. Also, judges should be vigilant to make sure they maintain their discretion to determine whether to accept or reject a plea by understanding the full extent of the plea bargain. Otherwise, pursuant to the statute, unless the prosecutor (and the defendant) agree that an eligible defendant is not appropriate for a section 90-96 conditional discharge, once the plea is entered, the trial judge must allow the conditional discharge.

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STATE OF NORTH CAROLINA

v.

MARVIN BURTON HARRIS, JR., DEFENDANT

No. COA16-1115

Filed 19 September 2017

1. Constitutional Law—effective assistance of counsel—failure to give notice of alibi defense—no trial court order requiring information

Defendant did not receive ineffective assistance of counsel by his counsel's failure to give timely notice of an alibi defense where the trial court never entered an order requiring defendant to disclose the information. Further, defendant was not prejudiced since the jury heard the alibi evidence and the trial court's charge afforded defendant the same benefits as a formal charge on alibi.

2. Sentencing—prior record level—erroneous calculation—harmless error—sentencing within presumptive range

The trial court committed harmless error by its calculation of defendant's prior record level where the trial court's sentence was within the presumptive range at the correct record level.

3. Attorney Fees—indigent defendant—taxing court costs and attorney fees—failure to discuss in open court

A civil judgment imposing fees for court costs and attorney fees against an indigent defendant was vacated without prejudice where neither defense counsel's total attorney fee amount nor the appointment fee were discussed in open court with defendant or in his presence.

Appeal by Defendant from judgment entered 30 October 2015 by Judge Arnold O. Jones, II in Superior Court, Carteret County. Heard in the Court of Appeals 1 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin O'Kane Scott, for the State.

Guy J. Loranger for Defendant.

McGEE, Chief Judge.

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Marvin Burton Harris, Jr. (“Defendant”) appeals from judgments entered after a jury found him guilty of possession of a firearm by a felon, carrying a concealed weapon, and resisting a public officer.

I. Background

Officer Joshua Scales (“Officer Scales”), of the Morehead City Police Department, received a radio dispatch at approximately 2:00 a.m. on 13 November 2014 about a “suspicious subject” in the vicinity of Brook Street in Morehead City, North Carolina. An anonymous female caller described the suspicious person to a 911 operator as a black male with dreadlocks, and reported that the man might have put a black handgun into a backpack. Officer Scales responded to the scene, and saw a man fitting the description given by the caller. Officer Scales stopped his patrol car, identified himself to the man as a police officer, and informed the man that he had “received a call from someone saying that [the man] possibly had a gun on [him].” Officer Scales testified the man “instantly” replied, “[m]an, that girl just mad because I didn’t stay the night with her.”

Based on the man’s actions and body language, Officer Scales testified he had a “real eerie feeling” interacting with the man. Officer Scales repeatedly asked the man if he had something on him that he was not supposed to have. The suspect replied “no,” and Officer Scales responded by grabbing the man’s backpack. Officer Scales put the backpack on the hood of his patrol car and in doing so “heard a solid thump sound, as in metal . . . hitting metal.” This “solid thump” sound allowed Officer Scales to “automatically kn[ow] it was a gun” in the man’s backpack. The man took off running towards a tree line. Officer Scales gave chase, but slipped and the man escaped. Officer Scales notified dispatch about the encounter and then opened the backpack.

Among other contents of the backpack, Officer Scales found a black Glock .40 caliber handgun and forty-five pages of documents, including hospital records and a traffic collision report, all of which listed Defendant’s full name and birthday. After searching for the man for fifteen to twenty minutes, Officer Scales returned to the police station where he placed the gun in evidence, identified Defendant from a Department of Motor Vehicles’ photo as the man he had encountered,¹ and issued a “BOLO” (“Be On The Lookout For”) for Defendant. An arrest warrant was issued for Defendant that same night, 13 November 2014, and Defendant later turned himself in to authorities.

1. At trial, Officer Scales identified Defendant in open court as the man he encountered on 13 November 2014.

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Defendant was indicted on charges of possession of a firearm by a felon, carrying a concealed weapon, resisting a public officer, and attaining the status of a habitual felon. Prior to trial, the State filed two motions that requested, *inter alia*, “[n]otice to the State of any defenses enumerated in N.C. Gen. Stat. § 15A-905 that the Defendant intends to offer at trial” as well as the “[d]isclosure of the identity of any alibi witnesses no later than two weeks before trial.” Defendant’s trial began on 29 October 2015. At trial, Brittany Hart (“Hart”) testified to being the 911 caller on 13 November 2014 and to being “absolutely certain” that the man she encountered that night was not Defendant, but rather was a man named Demetris Nolan (“Nolan”).

Hart testified that Nolan knocked on her door on 13 November 2014, sometime between 11:00 p.m. and 12:00 a.m., and entered her home. Once Nolan was inside, Hart noticed he was carrying a gun, and Hart asked Nolan to leave. Nolan responded by grabbing a bag that was in her apartment, and quickly leaving. Hart called 911. Hart testified that she observed Nolan placing a gun into the bag he had taken from her apartment. Hart described Nolan as similar in appearance to Defendant: “a tall, skinny, African-American male with dreadlocks.” Hart testified Defendant had been at her home two or three days before the incident, and that his bag was at her apartment because she had previously taken him to the hospital. Hart testified she had looked into the bag at some point and had observed only documents therein. Hart testified Defendant had not been in her apartment on the night of 13 November 2014.

Defendant testified that on 13 November 2014 he was in Pamlico County with his girlfriend. He denied being in Hart’s apartment, having a weapon, encountering Officer Scales, or running away from anyone in the early morning hours of 13 November 2014. Defendant testified that he had been diagnosed with bilateral pulmonary emboli, or blood clots in the lungs, which caused him to have problems with exertion and physical exercise. Defendant testified he could not run, had trouble speaking, and could barely breathe. Defendant testified that Hart had taken him to the hospital after he was in a hit-and-run accident about a month prior to 13 November 2014. Defendant admitted to owning a blue book bag that he left at Hart’s home and that had his accident report and insurance company letters inside.

The trial court initially included a pattern jury instruction on alibi, N.C.P.I. – Crim. 301.10, in its proposed jury instructions. During the charge conference, the State objected to the inclusion of N.C.P.I. – Crim. 301.10, and the following colloquy occurred between the prosecutor, the trial court, and Defendant’s counsel:

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[Prosecutor:] . . . Since [Defendant’s counsel] didn’t give me notice of alibi, I’m going to object to [an instruction on alibi, N.C.P.I – Crim.] 301.10.

THE COURT: There was no notice given. I agree with that. [Defendant’s counsel], do you agree that there was no notice given? It just came up here in trial?

[Defendant’s counsel:] I certainly would have to agree with that. That’s the first time.

THE COURT: I will not instruct on that, but certainly during [closing] argument, I’m sure you will argue what you believe the evidence forecasts in this case. Okay.

The jury found Defendant guilty of possession of a firearm by a felon, carrying a concealed handgun, and resisting, or obstructing or delaying a public officer. The State presented, without objection, certified copies of the three judgments that were used to establish Defendant’s prior felony convictions, and Defendant entered a plea of guilty to attaining habitual felon status.

During sentencing, Defendant’s counsel informed the trial court that Defendant admitted to the convictions listed on a Form AOC-CR-600B Prior Record Level Worksheet (“the worksheet”). Section I of the worksheet, entitled “Scoring Prior Record/Felony Sentencing,” awarded Defendant 8 points for two “Prior Felony Class E or F or G Conviction[s],” 2 points for one “Prior Felony Class H or I Conviction,” and 6 points for six “Prior Class A1 or 1 Misdemeanor Conviction[s.]” Despite these numbers totaling 16 points, the trial court made an arithmetic error, and awarded Defendant 17 total points in Section I of the worksheet. An additional point was then added to the total due to “all the elements of the present offense” being “included in any prior offense whether or not the prior offenses were used in determining prior record level.”

With the additional point, Defendant’s total prior record level points totaled 18 under the trial court’s calculation, placing Defendant in the category of a Prior Record Level VI offender. As noted on the worksheet, a Prior Record Level VI offender is any offender with 18 or more prior record level points. Defendant was sentenced to a minimum of 117 months and a maximum of 153 months in prison, in the presumptive range for a Prior Record Level VI offender convicted of a Class C felony. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2015).

At the conclusion of the sentencing hearing, the trial court ordered that Defendant was to be taxed “with the costs of court and attorney fees,

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if applicable, if [Defendant's counsel was] court appointed." Defendant's counsel confirmed he was court appointed and informed the trial court that he would prepare the appropriate order for the trial court judge's signature. The trial court ordered that the counsel fees were to be "m[ade] . . . a civil judgment."

On 30 October 2015, Defendant's counsel filed the appropriate form, signed by the trial court judge, which approved 52 hours of work by Defendant's counsel. In Line 4 of Section II of the form, next to "Total Amount," a total of \$3,640.00 was ordered to be paid to Defendant's attorney. A criminal bill of costs, dated 2 November 2015, lists \$3,640.00 in the "attorney fee and expenses" category and \$60.00 in the "attorney appointment fee" category. Defendant appeals.

II. Analysis

Defendant argues the trial court erred by: (1) depriving Defendant of his state and federal constitutional right to effective assistance of counsel where his counsel's failure to give timely notice of his alibi defense led the trial court, upon the State's motion, to decline to give an alibi jury instruction; (2) sentencing Defendant as a prior record level VI offender where, due to a miscalculation, the court incorrectly found Defendant had 18 prior conviction points; and (3) imposing attorney's fees and an appointment fee without providing Defendant with sufficient notice and the opportunity to be heard concerning those fees.

A. Ineffective Assistance of Counsel

[1] Defendant argues he received ineffective assistance of counsel when his trial counsel committed a discovery violation, which led the trial court to refuse to give a jury instruction on alibi. In order to show ineffective assistance of counsel, a defendant must satisfy the two-prong test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). This test for ineffective assistance of counsel has also been explicitly adopted by the Supreme Court of North Carolina for state constitutional purposes. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Pursuant to *Strickland*:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This

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requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 80 L. Ed. 2d at 693; *accord Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248.

In general, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, an ineffective assistance of counsel claim brought on direct review "will be decided on the merits when the cold record reveals that no further investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). "[O]n direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated." *Id.* at 167, 557 S.E.2d at 524-25 (citation omitted). Because the cold record reveals that no further investigation is needed, we determine Defendant's ineffective assistance of counsel claim on direct review.

We first examine whether Defendant's counsel was deficient, in that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Defendant argues his trial counsel was deficient because he failed to give notice to the State of Defendant's intent to offer an alibi witness. Defendant reasons that this failure was a violation of the discovery rules contained in N.C. Gen. Stat. § 15A-905, and resulted in the trial court declining to give an alibi jury instruction. We find that Defendant's argument on appeal is trained on the wrong target: the trial court's decision to decline to give an alibi jury instruction was not due to trial counsel's ineffectiveness, but rather due to the trial court's error.

North Carolina's superior court discovery procedures are codified at N.C. Gen. Stat. §§ 15A-901 – 15A-910. A party seeking discovery in superior court must first make a written request that the opposing party voluntarily comply with a discovery request. *See* N.C. Gen. Stat. § 15A-902(a) (2015). If the opposing party provides a "negative or unsatisfactory response" to the discovery request, or fails to respond, then the "party requesting discovery may file a motion for discovery[.]" *Id.* Once the State in a criminal case has provided discovery – either voluntarily

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or under a court order – reciprocal discovery by a defendant is governed by N.C. Gen. Stat. § 15A-905. N.C.G.S. § 15A-905 provides, in pertinent part:

If the court grants any relief sought by the defendant under [N.C. Gen. Stat. §] 15A-903, or if disclosure is voluntarily made by the State pursuant to [N.C. Gen. Stat. §] 15A-902(a), *the court must, upon motion of the State, order the defendant to . . . [g]ive notice to the State of the intent to offer at trial a defense of alibi . . . within 20 working days after the date the case is set for trial . . . or such other later time as set by the court[.] . . . As to the defense of alibi, the court may order, upon motion by the State, the disclosure of the identity of alibi witnesses no later than two weeks before trial.*

N.C. Gen. Stat. § 15A-905(c)(1) (2015) (emphases added).

In the present case, the State filed a document on 27 January 2015 styled as an “answer to Defendant’s motion for discovery, notice, and State’s request for discovery and disclosure and alternatively motion to compel discovery and disclosure” (all caps omitted) (the “27 January 2015 answer and motion”).² The 27 January 2015 answer and motion made several disclosures “pursuant to N.C. Gen. Stat. § 15A-901, *et seq.*,” such as the State’s intent to: (1) call an expert witness; (2) “introduce into evidence a juvenile conviction of [Defendant];” and (3) “introduce a statement . . . made by [Defendant].” The 27 January 2015 answer and motion also requested that Defendant voluntarily provide, among other things, “[d]isclosure of the identity of any alibi witnesses no later than two weeks before trial.” If Defendant “fail[ed] to give a satisfactory response or refuse[d] to provide the requested voluntary discovery,” the State “respectfully pray[ed] that the [trial court] . . . treat the [State’s disclosure requests] as a Motion for Discovery and Disclosure and . . . issue an order compelling [Defendant] to provide the foregoing items,” including notice about an alibi witness. The State filed a supplement to its 27 January 2015 answer and motion on 1 September 2015, which included an identical request with respect to Defendant’s intent to call an alibi witness.

2. It is unclear whether the 27 January 2015 answer and motion was filed voluntarily in response to a written request by Defendant for voluntary disclosure, or after a motion for discovery was filed by Defendant pursuant to N.C.G.S. § 15A-902(a). The 27 January 2015 answer and motion is labeled as an “answer to Defendant’s motion for discovery,” but no such motion by Defendant appears in the record on appeal.

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No discovery by Defendant, voluntary or otherwise, appears in the record on appeal in the present case, and Defendant's trial counsel admitted during the charge conference that he did not provide any notice to the State of Defendant's intent to offer an alibi witness. However, a defendant is only required to give notice of an alibi witness after being ordered to do so by the trial court. *See* N.C.G.S. 15A-905 (providing that, after the State has provided discovery to a defendant, "*the court must, upon motion of the State, order the defendant to . . . [g]ive notice to the State of the intent to offer at trial a defense of alibi*" (emphases added)). In the present case, it appears – after a review of the record on appeal and transcript of the trial proceedings – that the trial court never entered an order requiring Defendant to disclose the information requested by the State in its 27 January 2015 answer and motion. N.C.G.S. § 15A-905(c)(1) unambiguously states that, once the State has made discovery disclosures, "the court must, upon motion of the State, *order the defendant to . . . [g]ive notice to the State of the intent to offer at trial a defense of alibi[.]*" N.C.G.S. § 15A-901(c)(1). (emphasis added).

A defendant is under no duty to provide discovery until ordered to do so by the trial court, and because the trial court did not order Defendant to "give notice to the State of the intent to offer at trial a defense of alibi," he was under no duty or requirement to do so. Therefore, Defendant's counsel was not deficient in failing to disclose Defendant's intent to offer an alibi witness. Even if the trial court had ordered Defendant to disclose his intent to offer an alibi, the trial court is statutorily required to "make specific findings justifying the imposed sanction" before imposing "any sanction." N.C. Gen. Stat. § 15A-910(d) (2015). The trial court made no findings of fact justifying a discovery sanction and was therefore mistaken in sanctioning Defendant's failure to disclose his alibi witness to the State. This further demonstrates that Defendant's grievance is not with his own counsel, as he argues in his brief, but with the trial court's erroneous imposition of discovery sanctions and failure to give an instruction on alibi.

Even if we were to find that trial counsel's performance was deficient, Defendant is unable to demonstrate that counsel's "deficient performance prejudiced the defense" in that his counsel made "errors . . . so serious as to deprive [Defendant] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Although the trial court declined to give a jury instruction on alibi, the alibi evidence – Defendant's testimony that he was in Pamlico County with his girlfriend at the time of the offense – was heard and considered by the jury.

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State v. Hood, 332 N.C. 611, 422 S.E.2d 679 (1992), is instructive. In *Hood*, the defendant presented evidence that he was in another city at the time of the crime with which he was charged. *Hood*, 332 N.C. at 617, 422 S.E.2d at 682. The defendant requested a jury instruction on alibi, and the trial court declined to give such an instruction. *Id.* Although the trial court erred in failing to give the requested instruction, our Supreme Court held that the error did not prejudice the defense due to the instructions that were given to the jury:

the trial court instructed the jury that the defendant is presumed innocent, that he is not required to prove his innocence, and that the State bears the burden of proving guilt beyond a reasonable doubt. The trial court instructed the jury on the essential elements of the crimes charged, telling the jury that it could not return guilty verdicts unless it found that every element had been established beyond a reasonable doubt. . . . The trial court made it clear that the burden was on the State to prove every element of the crimes charged beyond a reasonable doubt, and the jury was not led to believe that the defendant had to prove anything in order to be found not guilty. *Because the trial court's charge afforded the defendant the same benefits a formal charge on alibi would have afforded, the defendant was not prejudiced by the trial court's error.*

Id. at 617-18, 422 S.E.2d at 682 (citation omitted) (emphasis added).

In the present case, as in *Hood*, the trial court instructed the jury that Defendant was not required to prove his innocence, that Defendant was presumed innocent, and that the State needed to prove beyond a reasonable doubt that Defendant was the perpetrator of the charged offenses. The trial court then instructed the jury as to each element that the State was required to prove beyond a reasonable doubt for each of the charged offenses. The trial court reiterated in its outlining of these elements that, if the jury did not find these elements or have a reasonable doubt about them, then they should find Defendant not guilty.

Even assuming Defendant's trial counsel's performance was deficient, Defendant has not shown that the deficient performance likely affected the jury's verdict. The alibi evidence was presented to the jury at trial. The trial court correctly instructed the jury that Defendant was presumed to be innocent, and that the burden was on the State to prove every element of every crime beyond a reasonable doubt. Because "the trial court's charge afforded [D]efendant the same benefits a formal

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charge on alibi would have afforded, [Defendant] was not prejudiced” by the absence of the alibi jury instruction. *Hood*, 332 N.C. at 617-18, 422 S.E.2d at 682. Therefore, Defendant has not shown he was afforded ineffective assistance of counsel.

B. Prior Record Level Determination

[2] Defendant argues the trial court erred in sentencing him as a Prior Record Level VI offender where, due to a miscalculation, the court incorrectly found that Defendant had 18 prior conviction points. “The determination of an offender’s prior record level is a conclusion of law that is subject to *de novo* review on appeal.” *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009). “It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court’s determination of a defendant’s prior record level to be preserved for appellate review.” *Id.*

In sentencing a defendant, a trial court must “determine the prior record level for the offender pursuant to [N.C. Gen. Stat. §] 15A-1340.14” before imposing a sentence. N.C. Gen. Stat. § 15A-1340.13(b) (2015). “The prior record level of a felony offender 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). Convictions “used to establish a person’s status as an habitual felon shall not be used.” N.C. Gen. Stat. § 14-7.6 (2015). Prior convictions may be proven, as relevant here, by stipulation of the parties. N.C. Gen. Stat. § 15A-1340.14(f) (2015).

In the present case, the trial court calculated the sum of the points assigned to each of Defendant’s prior convictions and, excluding those convictions used as predicates for Defendant’s habitual felon status, determined Defendant had earned 18 prior record level points. Defendant is correct that the trial court committed an arithmetic error in “calculating the sum of the points assigned to each of” Defendant’s prior convictions. The trial court assessed 8 points for two “Prior Felony Class E or F or G Conviction[s],” 2 points for one “Prior Felony Class H or I Conviction,” 6 points for six “Prior Class A1 or 1 Misdemeanor Conviction[s],” and 1 point for “all the elements of the present offense” being included in “any prior offense.” Despite these numbers totaling 17 points, the trial court found the total to be 18.³ This mathematical

3. We note that Defendant stipulated to the total number of points, 18, and to his prior record level, VI. However, a trial court’s assignment of an incorrect record level is “an improper conclusion of law, which we review *de novo*.” *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). “Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.”

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error lead the trial court to sentence Defendant as a Prior Record Level VI offender, as opposed to a Prior Record Level V offender.

The State concedes the mathematical error in Defendant's prior record level calculation, but argues the error was harmless. *See State v. Lindsay*, 185 N.C. App. 314, 315, 647 S.E.2d 473, 474 (2007) ("This Court applies a harmless error analysis to improper calculations of prior record level points." (citations omitted)). Our precedent compels us to agree. "[T]his Court repeatedly has held that an erroneous record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct record level." *State v. Ballard*, ___ N.C. App. ___, ___, 781 S.E.2d 75, 79 (2015), *disc. review denied*, 368 N.C. 763, 782 S.E.2d 514 (2016) (citing *State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005)); *see also State v. Rexach*, ___ N.C. App. ___, 772 S.E.2d 13, 2015 WL 1201250, at *2 (2015) (unpublished) ("An error in the calculation of a defendant's prior record level points is deemed harmless if the sentence imposed by the trial court is within the range provided for the correct prior record level.").

The presumptive range of minimum sentences for a Prior Record Level V offender convicted of a Class C felony is between 101 and 127 months' imprisonment, and the presumptive range of minimum sentences for a Prior Record Level VI offender convicted of a Class C felony is between 117 and 146 months' imprisonment. *See* N.C.G.S. § 15A-1340.17(c). In the present case, Defendant was sentenced to a minimum of 117 months' imprisonment, which is within the presumptive range of minimum sentences for both a Prior Record Level V and VI offender. Therefore the trial court's error, if present, was harmless. *Ballard*, ___ N.C. App. at ___, 781 S.E.2d at 79.

C. Attorney's and Appointment Fees

[3] Defendant argues the civil judgment imposing fees against him should be vacated because neither Defendant's counsel's total attorney fee amount nor the appointment fee were discussed in open court with Defendant or in his presence. We agree. In *State v. Jacobs*, 172 N.C. App. 220, 616 S.E.2d 306 (2005), this Court held that where there is "no indication in the record that [a] defendant was notified of and given an

State v. Prevette, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (citation omitted), *disc. review denied and appeal dismissed*, 297 N.C. 179, 254 S.E.2d 38 (1979). Therefore, Defendant's stipulation of his prior record level "does not preclude our *de novo* appellate review of the trial court's calculation of [D]efendant's prior record level[.]" *State v. Massey*, 195 N.C. App. 423, 429, 672 S.E.2d 696, 699 (2009)

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opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed," the imposition of attorney's fees must be vacated, even when "the transcript reveals that attorney's fees were discussed following defendant's conviction." *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317.

Following Defendant's conviction and sentencing in the present case, the trial court simply stated that Defendant was to be taxed, "with the costs of court and attorney fees, if applicable, if [Defendant's counsel was] court appointed." Defendant's counsel confirmed he was court appointed, and the trial court responded that the counsel fees were to be "m[ade] . . . a civil judgment." The total hours and amount of attorney's fees imposed – 52 and \$3,640.00, respectively – were not known at the time of the sentencing hearing, as Defendant's counsel had not yet calculated the number of hours he had worked. Because there is no indication in the record that Defendant "was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed," the imposition of attorney's fees must be vacated. *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317. "On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that [D]efendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Id.*

Defendant was also ordered to pay a \$60.00 appointment fee, in accordance with N.C. Gen. Stat. § 7A-455.1 (2015). As with the attorney's fees, the appointment fee was never discussed with Defendant in open court. Our Supreme Court has held that "[c]osts are imposed only at sentencing, so any convicted indigent defendant is given notice of the appointment fee at the sentencing hearing and is also given an opportunity to be heard and object to the imposition of this cost." *State v. Webb*, 358 N.C. 92, 101-02, 591 S.E.2d 505, 513 (2004). Because Defendant was not given notice of the appointment fee and an opportunity to object to the imposition of the fee at his sentencing hearing, the appointment fee is also vacated without prejudice to the State again seeking appointment fee on remand. *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317; *see also State v. Mosteller*, ___ N.C. App. ___, 790 S.E.2d 753, 2016 N.C. App. LEXIS 697, at *9-10 (vacating the imposition of appointment fee "without prejudice to the State's right to seek the imposition of . . . [the] appointment fee" on remand, "provided that the defendant is given notice and an opportunity to be heard").

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III. Conclusion

For the reasons stated, Defendant did not receive ineffective assistance of trial counsel from his counsel's failure to give timely notice of an alibi defense, and any error in Defendant's prior record level calculation was harmless under precedents of this Court. However, we vacate the trial court's award of attorney's fees and appointment fee, without prejudice to the State's ability to again seek them on remand.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART; VACATED AND REMANDED IN PART.

Judges HUNTER, JR. and ZACHARY concur.

STATE OF NORTH CAROLINA

v.

AHMAD JAMIL NICHOLSON, DEFENDANT

No. COA17-28

Filed 19 September 2017

1. Search and Seizure—motion to suppress—traffic stop—lack of reasonable suspicion

The trial court erred in a common law robbery case by denying defendant's motion to suppress evidence obtained by law enforcement officers following an investigatory stop, based on lack of reasonable suspicion. The officers had no evidence of any criminal activity to which they could objectively point, and the series of activities did not provide reasonable suspicion.

2. Search and Seizure—denial of motion to suppress—traffic stop—prejudicial error—fruit of poisonous tree

The trial court's denial of defendant's motion to suppress evidence obtained by law enforcement officers following a traffic stop was prejudicial error where most of the evidence used to support defendant's conviction was derived from an officer's unconstitutional seizure and thus was fruit of the poisonous tree.

Judge MURPHY dissenting.

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Appeal by Defendant from judgment entered 13 May 2016 by Judge John O. Craig, III in Forsyth County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

On 4 May 2016, Ahmad Jamil Nicholson (“Defendant”) filed a motion to suppress evidence obtained by law enforcement officers following a traffic stop. On 9 May 2016, the trial court orally denied Defendant’s motion to suppress.¹ Defendant appeals following a 12 May 2016 verdict convicting him of common law robbery. On appeal, Defendant contends the trial court erred by denying his motion to suppress evidence. We find prejudicial error and grant a new trial for Defendant.

I. Factual and Procedural History

On 14 March 2016, a Forsyth County Grand Jury indicted Defendant for robbery with a dangerous weapon. On 4 May 2016, Defendant filed a written, verified motion to suppress “any and all statements obtained from the defendant” while he was “seized” on the morning of 23 December 2015. On 9 May 2016, the Forsyth County Superior Court called Defendant’s case for trial. After addressing other pretrial motions (not in contention on appeal), the trial court heard Defendant’s motion to suppress.

In opposition to the motion, the State called Lieutenant Damien Marotz, the arresting officer. Around 4:00 a.m., on 23 December 2015, Lt. Marotz drove west down West Mountain Street in Kernersville, North Carolina. As he approached the intersection of West Mountain Street and West Bodenhamer Street, he noticed a car parked in the road, facing east, just past the Petro 66 gas station. “It was just sitting there in the turn lane, with its headlights on and no turn signals” There were no reports of criminal activity in the area that morning.²

1. We note, the trial court suggested a written order would be prepared by Mr. Matthew H. Breeding, counsel for the State, but no written order is included in the record.

2. Lt. Marotz did not specify how he knew there were no reports of criminal activity, but testified there were no reports and confirmed he was conducting a “routine” patrol.

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As Lt. Marotz drove towards the stationary car, he saw two African American men inside the car; one man sat in the driver's seat, and the other passenger sat directly behind the driver, with the front passenger seat empty. Lt. Marotz later identified the passenger as Defendant. Although it was "in the 40s" and "misting rain[,]," both windows on the driver's side of the car were down. Defendant began to pull down "a toboggan-style mask of some kind" to approximately "the bridge of [his] nose[,] but "pushed it back up" as Lt. Marotz pulled up next to the car. However, Lt. Marotz did not know if the garment actually had eyeholes.

Lt. Marotz rolled his window down and asked both men if everything was okay. Both men confirmed everything was okay, and the driver, Quentin Chavis, explained "[Defendant] was his brother and . . . they had gotten into an argument and that everything was okay now, that they were not arguing anymore." Defendant agreed, stating, "Yes, Officer, everything's fine."

Lt. Marotz "did not observe a sign of struggle" between the men. However, "something just didn't seem quite right." He asked, again, if the men were sure everything was okay. Both men "[shook] their head[s] and agree[d]" everything was okay. Lt. Marotz noticed Chavis "move [] his hand up . . . scratching" or "making a motion with his hand[.]" Lt. Marotz specifically recalled this action because he "kept watching everybody's hands to make sure they didn't have any weapons." Lt. Marotz inquired, again, if they needed any help, and the men continued to confirm "everything was fine."

Lt. Marotz drove into the gas station parking lot. He decided to continue watching the car because he "felt like something wasn't quite right" and he "wanted to make sure that they didn't continue to argue[.]" Approximately thirty seconds elapsed, and the car did not move. Lt. Marotz decided to speak with the men again and got out of his car to walk over to them. Lt. Marotz "thought it was odd that they were just still sitting in the middle of the road." Lt. Marotz activated his body-worn camera³ and called for backup.

As Lt. Marotz walked towards the car, Defendant got out of the backseat. Chavis pulled the car forward approximately two feet and stopped. Lt. Marotz called out to Chavis, "Hey. Where are you going? Are you going to leave your brother just out here?" Chavis replied he was late and needed to get to work.

3. Lt. Marotz's body-worn camera did not activate the first time he attempted to turn it on. He had to hit it two additional times before it activated.

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Again, Lt. Marotz inquired if everything was okay. Initially, both men continued to confirm everything was okay. However, the second time Lt. Marotz inquired, Chavis shook his head, as if to indicate “No.” But Defendant continued to say, “No, Officer. Everything is fine.” Lt. Marotz responded, “Well, your brother here in the driver’s seat is shaking his head. He’s telling me everything’s not fine. Is everything fine or not? Is everything good?” Chavis interrupted Lt. Marotz and stated, “No, Officer, everything’s fine. I’ve just got to get to work.” Chavis explained he worked at FedEx. Lt. Marotz described Chavis as “hurried” and “just ready to go[.]” noting he “edged the vehicle forward a couple of feet[.]” After Defendant confirmed again everything was okay, Lt. Marotz told the driver, “Okay. Go to work.” Lt. Marotz explained “if I wanted to continue the investigation, I could have went [to FedEx]” to speak with Chavis. However, Lt. Marotz did not know the identity of the driver at this time.

Defendant continued to “st[and] there[.]” but stated he was going to go to the store. Lt. Marotz responded, “Hang on a minute Do you have any weapons on you?” Lt. Marotz confirmed this was a command, and Defendant was thereafter “detained.” He wanted to make sure he was not being followed “with any sort of weapon” and it was not unusual for him to ask such a question, given the darkness and early morning hour. Defendant told Lt. Marotz he had a knife. Defendant explained “he normally carries a knife because he wants to make sure he doesn’t get robbed.” Lt. Marotz asked Defendant where the knife was, but advised him not to reach for it. Despite Lt. Marotz’s instruction, Defendant moved “his hand into his left pants pocket.” At that point, Lt. Marotz drew his firearm, but kept it lowered by his side.

Officers Oriana and Feldman arrived on the scene. Defendant removed his hand from his pocket and stated, “Just don’t shoot me.” Lt. Marotz asked Defendant several times to put his hands on his head and to step out of the road to avoid approaching traffic before he complied. Defendant appeared confused and “slow . . . to listen to . . . instructions and . . . commands.” Defendant asked several times, “What am I doing?” Defendant also had “a moderate odor of alcohol on his person, and his speech was slurred.”

One of the backup officers asked Defendant where the knife was. Defendant responded, “It’s in my waistband” and began to reach for it. Lt. Marotz and the backup officers told Defendant to put his hands back on top of his head. Defendant complied. Officer Feldman performed a pat-down, but he could not locate a knife. Throughout the process, Defendant attempted to lower his hands repeatedly, and officers advised

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him multiple times to keep his hands on the top of his head. Officer Feldman performed a second pat-down, but he still could not find a knife on Defendant. Lt. Marotz told Defendant they could not locate a knife. Defendant replied, “he didn’t have the knife on him, that he used to carry this knife but that sometimes he carries a knife.”

Then, Lt. Marotz asked Defendant for his identification.⁴ Officer Feldman provided Defendant’s information over the radio. Lt. Marotz continued to question Defendant about “what was going on with him and his brother” because he “wanted to make sure that there wasn’t any problems and that he wasn’t injured, [and] his brother wasn’t injured . . . because something did not seem quite right.” When asked why he continued to question Defendant when “[he] had no evidence of any criminal activity that [he] was able to objectively point to[,]” Lt. Marotz answered he “wanted to make sure that both [Defendant] and also [Chavis] were safe and that nothing had happened to either one of them.”

Officer Oriana also asked Defendant where he lived. Defendant did not answer the question and instead asked several times whether Officer Oriana was going to give him a ride home. Defendant became “angry” and “aggressive.” Lt. Marotz instructed Officer Oriana not to give Defendant a ride home because Defendant appeared to be “impaired.”

Defendant also made several other statements, including he was late for work and his brother had let him borrow the car so he could go to work. However, Defendant refused to say where he worked, and Defendant’s statement regarding borrowing the car “didn’t make any sense because [Chavis] was driving the vehicle.”

After determining there were no active warrants against Defendant, Lt. Marotz told Defendant, “You’re free to go.” Defendant told officers he was going to the store. However, he remained with Lt. Marotz and the two officers for approximately another thirty seconds. He asked for a cigarette and a lighter, but they did not have any. Defendant started heading towards the store, but one of the officers informed Lt. Marotz the store was closed. Lt. Marotz called out to Defendant, “I’m sorry, sir. I didn’t realize the store is closed.” The entire encounter lasted approximately eight to ten minutes.

4. Based on Lt. Marotz’s testimony during the motion to suppress hearing, we are unable to ascertain exactly how Defendant’s identification was produced. Lt. Marotz’s testimony during trial provided further clarification. It appears Officer Feldman removed Defendant’s wallet from Defendant’s pocket and Defendant “reached over and grabbed the ID – or the wallet out of the officer’s hand and says, ‘I can give you my ID.’”

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Lt. Marotz confirmed his body-worn camera recorded the entire encounter, and the video footage “fairly and accurately” depicted the interaction. The defense “stipulate[d] for [the] hearing [the video was] admissible to play.” The trial court viewed the video.

Following arguments from the defense, the trial court denied Defendant’s motion to suppress. The trial court reconvened on 10 May 2016 and proceeded to trial.

The State first called Chavis to testify.⁵ On 23 December 2015, at around 3:00 a.m., Chavis woke up for work. Around 3:40 a.m., he drove out of his parents’ neighborhood, towards the intersection of Westlo Drive and Mountain Street. There, he saw Defendant waving at him. Chavis did not know Defendant. However, he stopped because he thought Defendant might need help. Defendant asked for a ride to a nearby gas station. Chavis told Defendant he could not give him a ride because he was going to be late for work. Defendant then asked for a “blunt[,]” and Chavis told him he did not have one. When Defendant again asked for a ride, Chavis again refused.

Then, Defendant “just got in the car” and said, “I’ll just sit in the back.” Chavis decided to give Defendant a ride to the gas station because he believed “[Defendant was] not going to get out because he really need[ed] a ride” and “it was raining” Defendant told Chavis, “I see you’re living good” and he liked his shoes that were in a bag. Defendant explained that his phone died and he just needed a ride.

The two arrived “in front of the Petro 66 gas station[.]” Chavis said, “Here you go, man. Can you just get out because I’m late for work.” At that point, Defendant placed a knife against Chavis’s neck and said, “Well, let’s just make this easy. Give me everything you have, any money you have.” Chavis told Defendant he did not have any cash. Defendant ordered Chavis to give him his credit card. Chavis gave Defendant his State Employees’ Credit Union savings card. Defendant asked for Chavis’s pin number, and Chavis told him a fake number. Defendant then said he would not be able to remember the number and told Chavis to write it down. Defendant rummaged through the middle console and found a pen and paper to write on. Defendant wrote the pin down.⁶

5. The State also called the following witnesses: (1) Bobby Chavis, Quentin Chavis’s father; (2) Sergeant Dan Wemyss, who administered the photographic lineup; and (3) Detective Alan Cox, who interviewed Quentin Chavis.

6. In his initial testimony and his written statement to police, Chavis said he wrote the pin down, not Defendant.

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Defendant leaned forward and warned Chavis not to cancel the card. Chavis confirmed he would not. During this time, Chavis felt “nervous and scared[,]” but explained he “was always taught” not to show any fear “because when you show fear, that’s when – that’s when it makes it easier for the person.”

Defendant moved the knife “as if he was going to stab [Chavis.]” Defendant said, “he had nothing to lose” and he “didn’t have a problem sticking [Chavis.]” At that point, Chavis noticed a car approaching. Defendant “tried to pull his toboggan over his face[.]” Lt. Marotz pulled up beside the car in the opposite lane. Chavis spoke with Lt. Marotz, but he did not tell the officer what was going on because he “didn’t know what the defendant was going to do[,]” or whether “he still had a knife on him[,]” and “[t]here was only one officer.”⁷ However, Chavis attempted to signal to Lt. Marotz “to show him that everything wasn’t okay” by “winking real hard . . . to see if he could identify I was trying to wink at him on purpose[.]” He also made a “cut throat” gesture.

Chavis called his mother and told her and his father about the incident. Then he went to work, arriving at around 4:15 a.m. Chavis returned home around 6:30 a.m. and then went to the police station with his father.

Upon arriving at the police station at approximately 7:00 or 7:15 a.m., Chavis conveyed the same story and provided a written statement. Chavis identified Defendant as the person who robbed him, from a photographic lineup⁸ containing seven⁹ photos.¹⁰ An officer searched Chavis’s car and found a knife¹¹ in the backseat, behind the passenger seat.¹² After returning home, Chavis began to clean out his car and found

7. Chavis testified, “[Defendant] still had the knife to my neck.” We note, although Lt. Marotz testified he was trying to keep an eye on everyone’s hands, he could not actually see Defendant’s hands, and only knew they were down, and he did not see a knife. He did note, “It was dark out.”

8. Chavis also identified Defendant as the man who robbed him during his testimony.

9. Chavis’s testimony conflicts with Officer J.D. Serrin’s as to whether there were seven or eight photos in the lineup.

10. Chavis first chose the first photo, but considered the sixth photo. After determining the man in the sixth photo was too large to be his robber, he ultimately chose the first photo, Defendant’s photo.

11. The trial court admitted the knife into evidence, and it was shown to the jury.

12. Chavis rode to the police station with his father, in his father’s car. Initially, the officer told Chavis he would go to Chavis’s house to search Chavis’s car. However, officers later instructed Chavis to return to the police station. He returned to the station with his car around 8:00 a.m., approximately thirty minutes after he originally left.

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his bank card in an “envelope that [] had [his] pay stub from Fedex[.]”¹³ Chavis called police to notify them “[Defendant] didn’t take the card. He just left the card.”

Lt. Marotz also testified, providing largely the same information regarding his encounter with Defendant as he did during the motion to suppress hearing.¹⁴ The State published the footage from Lt. Marotz’s body-worn camera to the jury.

The State called Officer Serrin. Officer Serrin largely confirmed Chavis’s testimony regarding their interaction at the police station. He provided additional details regarding the knife he seized from Chavis’s car, describing it as a “steak knife.” He specifically recalled, “It had a logo on it, the J. A. Henckels logo on it. I recognized it because that’s the same brand of knife that I have.”

After obtaining a warrant for Defendant’s arrest, Officer Serrin and several other officers went to Defendant’s home and obtained permission to search the home.¹⁵ Officer Serrin found a J.A. Henckels knife block in the kitchen.¹⁶ “[T]he block [had] two sections. It had one section for steak knives, and above that was a section for other cooking knives.” A single steak knife was missing. “[He] pulled out one of the steak knives out of the block, and it looked identical to the knife [he] found in [Chavis’s] car.” When asked, Officer Serrin admitted the knife seized from Chavis’s car looked much older than the pictures of the knives in the block, but believed “the latent print dust” contributed to this appearance. He did not seize the knife block because “it wasn’t evidence of a crime. It was what [he] compared evidence to.” The State published pictures of the knife set to the jury.

13. Chavis explained he keeps his old pay stubs in his car, and the pay stub in the envelope in his card “was an older pay stub.”

14. Defendant requested a line objection with respect to evidence obtained from the encounter with Defendant after Lt. Marotz “seized” him, thus preserving the issue of admissibility for appeal. *State v. Randolph*, 224 N.C. App. 521, 528, 735 S.E.2d 845, 851 (2012) (quoting *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007)) (“[A] trial court’s evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.”).

15. Defendant’s mother, and owner of the home, gave consent.

16. Defendant moved *in limine* to “prohibit[] the State or any of its witnesses, from stating in the presence of the jury any information relating to an allegedly matching set of steak knives missing one which matched the knife recovered from the back of the complaining witness’ car” because police failed to seize the set of knives. The court denied Defendant’s motion, and Defendant does not raise this issue on appeal. Because this issue is not raised on appeal, we do not address it. N.C. R. App. P. 28(a) (2016) (“The scope of

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The State rested.¹⁷ Defendant offered no evidence on his behalf. On 12 May 2016, the jury found Defendant guilty of common law robbery. The trial court sentenced Defendant to a suspended sentence of ten to twenty-one months. On 13 May 2016, Defendant gave timely oral and written notice of appeal.

II. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

"[A]n error under the United States Constitution will be held harmless if 'the jury verdict would have been the same absent the error.'" *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012) (quoting *Neder v. United States*, 527 U.S. 1, 17, 144 L. Ed. 2d 35, 52 (1999)). "[T]he government bears the burden of showing that no prejudice resulted from the challenged federal constitutional error." *Id.* at 513, 723 S.E.2d at 331 (citations omitted).

III. Analysis

We review Defendant's contentions in two parts: (A) whether Lt. Marotz possessed reasonable suspicion to seize Defendant; and (B) whether the trial court's denial of Defendant's motion to suppress resulted in reversible error.

A. Reasonable Suspicion

[1] On appeal, Defendant contends the trial court erred in denying his motion to suppress. Specifically, Defendant argues Lt. Marotz lacked reasonable suspicion, and, accordingly, Defendant was "seized" in violation of his Fourth Amendment rights. We agree.

The Fourth Amendment protects "against unreasonable searches and seizures . . ." U.S. Const. amend. IV. Fourth Amendment protections

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.").

17. As noted *supra* in footnote 5, the State called several other witnesses whose testimonies are not included in this discussion.

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are “applicable to the states through the Due Process Clause of the Fourteenth Amendment.” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994) (citing *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (1961)). The North Carolina Constitution also affords individuals similar protections. *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008) (citing N.C. Const. art. I, § 20).

Under the Fourth Amendment, a “seizure” occurs when a police officer “restrains [an individual’s] freedom to walk away[.]” *Terry v. Ohio*, 392 U.S. 1, 16, 20 L. Ed. 2d 889, 903 (1968). Thus, Fourth Amendment protections are applicable to “police conduct [even] if the officers stop short of . . . a ‘technical arrest[.]’ ” *Id.* at 19, 20 L. Ed. 2d at 904; *Watkins*, 337 N.C. at 441, 446 S.E.2d at 69-70 (applying Fourth Amendment protections to a “brief” investigatory detention).

“An investigatory stop must be justified by ‘a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.’ ” *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). “[D]ue weight must be given not to [an officer’s] inchoate and unparticularized suspicion or ‘hunch.’ ” *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909 (citation omitted). Rather, reasonable suspicion must be based on “rational inferences” drawn from “specific and articulable facts . . . as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906; *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)). “[T]he totality of the circumstances—the whole picture—must be taken into account.” *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). “[W]holly lawful conduct [may in certain circumstances] justify the suspicion that criminal activity was afoot.” *United States v. Sokolow*, 490 U.S. 1, 9 104 L. Ed. 2d 1, 11-12 (1989) (citation omitted).

“In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.” *Ohio v. Robinette*, 519 U.S. 33, 39, 136 L. Ed. 2d 347, 354 (1996). However, “courts have recognized factors such as activity at an ‘unusual hour[.]’ and ‘an area’s disposition toward criminal activity’ as articulable circumstances which may be considered along with more particularized factors to support reasonable suspicion[.]” *State v. Parker*, 137 N.C. App. 590, 601, 530 S.E.2d 297, 304 (2000) (citations omitted). “Conflicting statements”, *State v. Johnson*, ___ N.C. App. ___, ___, 783 S.E.2d 758, 762-63 (2016) (citing *State v. Hernandez*, 170 N.C. App. 299, 308, 612 S.E.2d 420, 426 (2005)), as well as a vehicle “stopped in a lane of traffic

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on the road way” have also provided basis for reasonable suspicion. *State v. Evans*, ___ N.C. App. ___, ___, 795 S.E.2d 444, 454-56 (2017) (holding reasonable suspicion supported by: “(1) defendant[’s vehicle] stopped . . . in a lane of traffic on the roadway; (2) . . . an unknown pedestrian approach[ing] the car and lean[ing] in the window; and (3) th[e] incident occur[ing] at 4:00 a.m. in an area known . . . to be a location where drug sales frequently took place”).¹⁸

At the outset we note, the trial court denied Defendant’s motion to suppress orally.

If the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence, the court is not required to enter a written order. If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress. If there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows.

State v. Wainwright, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015) (internal citations and quotation marks omitted).

For the motion to suppress, only Lt. Marotz testified. Defendant declined the opportunity to present any evidence. Additionally, Defendant does not argue any material conflicts with Lt. Marotz’s testimony. Thus, “[t]he record is sufficient to permit appellate review of the [oral] denial of [D]efendant’s motion to suppress.” *Id.* at 83, 770 S.E.2d at 104.

18. We note both the State and Defendant cite *State v. Roberts*, 142 N.C. App. 424, 542 S.E.2d 703 (2001). However, *Roberts* is no longer binding precedent. The North Carolina Supreme Court allowed the Attorney General’s motion “to vacate judgment of Court of Appeals[.]” *State v. Roberts*, 353 N.C. 733, 551 S.E.2d 851 (2001). Defendant argues because the Supreme Court only vacated the judgment, not the opinion, *Roberts* is still binding precedent. Our research shows Roberts passed away while imprisoned on 10 January 2001. See North Carolina Department of Public Safety Offender Public Information, ([http://webapps6.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0346619&searchLastName=roberts&searchFirstName=James&searchMiddleName=d&listurl=page listoffendersearchresults&listpage=1](http://webapps6.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0346619&searchLastName=roberts&searchFirstName=James&searchMiddleName=d&listurl=page%20listoffendersearchresults&listpage=1)) (last visited August 9, 2017). “Under North Carolina Rule of Evidence 201, we take judicial notice of this fact from the Department of Public Safety website’s offender search results.” *State v. Harwood*, ___ N.C. App. ___, ___ n.2, 777 S.E.2d 116, 118 (2015) (citations omitted). Because Roberts passed away before this Court filed its opinion, and thus before his conviction was final, the entire prosecution is abated *ab initio*. See *State v. Dixon*, 265 N.C. 561, 561-62, 144 S.E.2d 622, 622-23 (1965).

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Defendant does not challenge the constitutionality of his initial interaction with Lt. Marotz, but rather the point at which Lt. Marotz stopped Defendant from going to the store. Lt. Marotz acknowledged Defendant was from that point forward, “detained,” and the State does not contest this on appeal.¹⁹ We therefore assume, without deciding, Defendant was from that point forward “seized” until Lt. Marotz told him he was free to leave.

We turn to whether Lt. Marotz possessed reasonable suspicion to seize Defendant. We begin with Lt. Marotz’s cross examination:

Q. And you, at that point, had no evidence of any criminal activity that you were able to objectively point to. Correct?

A. No. That’s why I was continuing to investigate.

Q. So you were looking to see if you could find anything, but you hadn’t yet seen anything?

A. That’s correct. I wanted to make sure that both your client and also the alleged victim were safe and that nothing had happened to either one of them.

State v. Murray, 192 N.C. App. 684, 666 S.E.2d 205 (2008) provides relevant guidance. In *Murray*, the law enforcement officer similarly testified, “he had no reason to believe that Defendant was engaged in any unlawful activity at the time of the stop.” *Id.* at 684, 666 S.E.2d at 206. Despite the reference to facts that “were general to the area, namely, the ‘break-ins of property at Motorsports Industrial Park . . . the businesses were closed . . . no residences were located there . . . [and it] was in the early hours of the morning;’” this Court concluded the officer did not have a basis for reasonable suspicion. *Id.* at 689, 666 S.E.2d at 208-09. The Court reasoned, “[the officer] never articulated any *specific facts* about the vehicle itself to justify the stop . . .” and “[t]o hold otherwise would make any individual in the Motorsports Industrial Park ‘subject to arbitrary invasions solely at the unfettered discretion of officers in the field.’” *Id.* at 689-90, 666 S.E.2d at 208-09 (emphasis added) (citation omitted).

Here, Lt. Marotz similarly confirmed he had no evidence of any criminal activity to which he could objectively point. However, unlike

19. The State does note in passing, perhaps it was not a “seizure” because Defendant remained with police even after he was told he was free to leave.

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Murray which relied solely on facts “general to the area,” Lt. Marotz pointed to Defendant’s toboggan, stating, “[t]he only thing I saw with [Defendant] was the -- what I was concerned about was the -- when he was pulling the toboggan down over his head. I wasn’t sure exactly what was going on at that point.” Notably, although Lt. Marotz initially suggested the garment appeared to be “a toboggan-style mask . . . the [kind] with the holes in the eyes[,]” Lt. Marotz confirmed he did not know whether the toboggan actually had any eyeholes.

The State points to several factors in support of its argument for reasonable suspicion, including: (1) the unoccupied front passenger seat—despite there being two occupants in the car—with Defendant seated in the backseat, directly behind Chavis; (2) the car’s stationary position “in the middle of the road”; (3) Lt. Marotz’s knowledge that Defendant and Chavis had just been engaged in “a heated argument”; (4) the inconsistent answers provided by Chavis when asked whether everything was okay; and (5) the early morning hour. However, unlike the “totality of the circumstances” present in *Evans*, the circumstances present here do not logically lead to the same conclusions. See *Evans*, ___ N.C. App. at ___, 795 S.E.2d at 454-56. This is especially true in light of the fact Lt. Marotz already questioned both Defendant and Chavis twice and subsequently released Chavis so he could go to work after he assessed the situation and concluded “[i]t was a heated argument between two brothers.”

Moreover, when asked why he seized Defendant and inquired whether Defendant was armed, Lt. Marotz stated, “Well, it’s just a common thing that I ask everybody that’s out at 4:00 A.M. in the morning, in the dark. And if you’re -- I just want to make sure that if I’m coming out with you, you don’t -- you’re not following me with any sort of weapon.” Such basis for a “seizure” would have made “any individual in the [area] subject to arbitrary invasions” as was contemplated in *Murray*. *Murray*, 192 N.C. App. at 689-90, 666 S.E.2d at 208-09 (emphasis added) (citation and quotation marks omitted).

“ ‘[A] series of acts, each of them perhaps innocent’ if viewed separately, ‘but which taken together’ ” can in certain circumstances “warrant[] further investigation.” *Sokolow*, 490 U.S. at 10, 104 L. Ed. 2d at 12 (citation and quotation marks omitted). However, the acts present here, when taken together do not provide a basis for reasonable suspicion. Accordingly, we conclude Lt. Marotz lacked reasonable suspicion to stop Defendant, and the trial court erred in denying Defendant’s motion to suppress.

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B. Prejudicial Error

[2] Defendant also contends the trial court's denial of his motion to suppress resulted in reversible error. We agree.

Some constitutional errors in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. In deciding what constituted harmless error . . . the [United States Supreme] Court said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

State v. Johnson, 29 N.C. App. 534, 537-38, 225 S.E.2d 113, 115-16 (1976) (citation and quotation marks omitted) (first alteration in original). If other "overwhelming evidence" supports the conviction beyond a reasonable doubt, the erroneous admission of the contested evidence is harmless error. *State v. Johnston*, 154 N.C. App. 500, 503, 572 S.E.2d 438, 441 (2002) (citations omitted) (holding erroneous admission of evidence was harmless due to the "overwhelming evidence of defendant's guilt" as established by the positive identification of defendant by various witnesses and defendant's presence at the crime scene). We must, therefore, determine whether the evidence, excluding "any and all statements obtained from the defendant as a result of the unlawful seizure and detention of the defendant[.]" supports Defendant's conviction of common law robbery. We note this only excludes the statements from Defendant during the time Lt. Marotz stopped him from going to the store and when officers conducted two pat-downs.

"Common law robbery 'is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.'" *State v. Carter*, 186 N.C. App. 259, 262, 650 S.E.2d 650, 653 (2007) (quoting *State v. Stewart*, 255 N.C. 571, 572, 122 S.E.2d 355, 356 (1961)). " 'It is not necessary to prove both violence and putting in fear-proof of *either* is sufficient.' " *Id.* at 262, 650 S.E.2d at 653 (quoting *State v. Moore*, 279 N.C. 455, 458, 183 S.E.2d 546, 547 (1971)).

Here, much of the evidence used to support Defendant's conviction was derived from Lt. Marotz's unconstitutional seizure; thus, it was fruit

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of the poisonous tree and should be suppressed. Fourth Amendment protections are enforced through the “exclusionary rule.” *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006). Under the exclusionary rule “evidence derived from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation.” *Id.* Additionally, the “fruit of the poisonous tree doctrine,” provides “when evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the ‘fruit’ of that unlawful conduct should be suppressed.” *State v. Pope*, 333 N.C. 106, 113–14, 423 S.E.2d 740, 744 (1992).

Defendant’s conviction is supported by the following: (1) Chavis’s testimony regarding the robbery; (2) Chavis’s positive identification of Defendant from a photographic lineup; (3) Chavis identifying Defendant as the robber in court; (4) the steak knife found in Chavis’s car; and (5) the block of knives found in Defendant’s residence, missing one steak knife and bearing a striking resemblance to the steak knife seized from Chavis’s car.

Had Lt. Marotz not seized Defendant, he would not have obtained Defendant’s identification.²⁰ Therefore Chavis’ subsequent identification of Defendant both in a photograph line-up and in open court would not have occurred. Additionally, while Defendant was unlawfully seized he disclosed his habit of often carrying a knife on his person. This information led to the seizure of the knife from Chavis’s car, and the subsequent search of Defendant’s home which revealed the block of knives. Because evidence that would not be discoverable but for the unconstitutional seizure must be suppressed, *McKinney*, 361 N.C. at 58, 637 S.E.2d at 872, this evidence should have been suppressed. We, therefore, conclude the evidence admitted from Defendant’s unlawful seizure resulted in prejudicial error.

IV. Conclusion

For the foregoing reasons, we conclude Defendant’s seizure violated his Fourth Amendment rights. Lt. Marotz lacked reasonable suspicion for the investigatory stop of Defendant. Additionally, the trial court’s

20. The record does not suggest the State would have been able to independently link the unknown suspect directly to Defendant, or obtain the evidence resulting from knowledge of Defendant’s name.

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denial of Defendant's motion to suppress was prejudicial error entitling Defendant to a new trial.

NEW TRIAL.

Judge DAVIS concurs.

Judge MURPHY dissents in a separate opinion.

Murphy, Judge, dissenting.

I accept the facts portion as set out by the Majority, however, the facts demonstrate that there was a reasonably articulable suspicion that criminal activity was afoot when Lt. Marotz seized Defendant. Therefore, I respectfully dissent from the Majority's holding that the trial court erred by denying Defendant's motion to suppress.

On appeal, Defendant argues, and the Majority agrees, that the trial court erred by denying Defendant's motion to suppress because Lt. Marotz lacked the reasonable suspicion that was required to stop Defendant. I disagree, because Lt. Marotz operated within the bounds of the Fourth Amendment's protections, only seizing Defendant once there was a reasonably articulable suspicion that criminal activity was afoot.

In *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968), the United States Supreme Court recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22, 20 L.Ed.2d at 906-07. This is because "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, 407 U.S. 143, 145, 32 L. Ed. 2d 612, 617 (1972). Thus, "[a] brief stop of a suspicious individual . . . may be most reasonable in light of the facts known to the officer at the time" so that the officer can "maintain the status quo momentarily" to gather more information. *Id.* at 146, 32 L. Ed. 2d at 617 (citations omitted).

We "consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion to make an investigatory stop exists." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quotation omitted). "An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Id.* at 441, 446 S.E.2d at 70 (quotation

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omitted). These facts must be “specific and articulable[,]” and we also consider “the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *Id.* at 441-42, 446 S.E.2d at 70 (citations omitted). Conduct may “justify the suspicion that criminal activity was afoot[,]” even if, in other circumstances, the conduct would be “wholly lawful.” *United States v. Sokolow*, 490 U.S. 1, 9, 104 L. Ed. 2d 1, 11 (1989) (quotation omitted). For example, when an activity occurs “at an unusual hour” we have considered it an articulable circumstance that may be considered “along with more particularized factors to support reasonable suspicion[.]” *State v. Parker*, 137 N.C. App. 590, 601, 530 S.E.2d 297, 304 (2000) (quotations and citations omitted).

Whether the requisite reasonable suspicion to stop Defendant existed is a conclusion of law. Thus, I apply the principles set forth above in a *de novo* determination of whether reasonable suspicion to make an investigatory stop existed, giving “due weight to inferences drawn from the facts by resident judges and local law enforcement officers, and view[ing] the facts through the eyes of a reasonable, cautious officer, guided by his experience and training, in light of the totality of the circumstances.” *Id.* at 598, 530 S.E.2d at 302 (quotations and alterations omitted). This analysis assumes the seizure occurred when Lt. Marotz stopped Defendant from going to the store.¹

At the outset, I emphasize that the objective facts are viewed through the lens of a *reasonable, cautious officer*, not based on Lt. Marotz’s subjective analysis of the law. I note this point as the Majority places too much weight on Lt. Marotz’s analysis on cross-examination as to whether there was evidence of criminal activity he could point to at the time of seizure. In doing so, the Majority relies on a case where the officer relied on a hunch and “*never articulated any specific facts* about the vehicle itself to justify the stop” *State v. Murray*, 192 N.C. App. 684, 689, 666 S.E.2d 205, 208 (2008) (emphasis added). In contrast, Lt. Marotz articulated *objective* facts about Defendant, from which a reasonable, cautious officer could infer that an individual is involved in criminal activity.

Lt. Marotz first noticed the vehicle from which Defendant emerged because it was parked in the middle of a turning lane at an unusual hour – 4 a.m. – with windows rolled down, even though there was “misting rain” and the temperature was in the “40s.” He also noted the unusual

1. I assume, without deciding, that this was the point at which the seizure occurred for the reasons articulated by the Majority.

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seating arrangement of the vehicle's two passengers, where one man sat directly behind the driver, and was "concerned" when Defendant pulled "a toboggan-style mask of some kind" – with what "looked like two cut-outs" – over his head to approximately "the bridge of [his] nose[.]" and then removed it when Lt. Marotz pulled his patrol car up next to the vehicle. When Lt. Marotz asked if the men were okay, they explained they were brothers who "had gotten into an argument[.]" but "that everything was okay now." Based on this answer, Lt. Marotz drove away, but parked at a nearby gas station, and continued watching the vehicle because he felt that something was not right, and wanted "to make sure that they didn't continue to argue[.]" The vehicle remained stationary, which Lt. Marotz thought was "odd[.]" so he decided to speak with them again. He left his patrol car, and walked over to the stationary vehicle.

As he approached, unusual events continued. Defendant got out of the backseat and stood in the middle of the road, and the driver immediately pulled the car forward two feet, then stopped. Lt. Marotz called out to the driver to inquire whether he was just going to leave his brother in the middle of the road, which notably was in the dark at 4 a.m., and no other people were present. The driver claimed he was late for work. In an eerie exchange, Lt. Marotz again asked if everything was okay, and although the men initially confirmed everything was okay, Lt. Marotz asked a second time, and the driver shook his head "no" while saying yes.

When Lt. Marotz told Defendant that the driver had indicated "no," the driver interrupted Lt. Marotz to say everything was fine, appearing "hurried[.]" "edg[ing] the vehicle forward[.]" Lt. Marotz told the driver to go to work, and the driver left. Defendant remained, just standing in the middle of the road. He then stated he was going to the store, which was closed.² Lt. Marotz testified that, in response, he told Defendant to "[h]ang on a minute[.]" which he testified was a command, and the point at which Defendant was seized.

In my review, there were objective facts related to the driver's fear and unease, including that he notified Lt. Marotz that he was not okay, while eager to leave Defendant behind. This fear was observed after Defendant had pulled a toboggan over his face as if it were a mask, which

2. Although Lt. Marotz subjectively did not know the store was closed at this point, review of Lt. Marotz's bodycam shows a closed store, and, when two other officers appeared on scene, they were able to observe that the store was closed, as one of the officers told Lt. Marotz it was closed.

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are routinely used in crimes.³ Defendant was then left in the middle of the road at 4 a.m., claiming he was going to a closed store. The totality of these circumstances leading up to this seizure demonstrate there was a reasonably articulable suspicion that criminal activity was afoot when Lt. Marotz seized Defendant and discovered his name and identity. Thus, the Fourth Amendment permitted Lt. Marotz to briefly stop Defendant in an attempt to dispel the suspicion. *See Adams*, 407 U.S. at 146, 32 L. Ed. 2d at 617 (“A brief stop of a suspicious individual, in order to . . . maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.”). Lt. Marotz rightly ended the encounter once he found no further signs that criminal activity was afoot.

3. “Toboggan” refers to a “stocking cap.” *In re N.J.*, No. COA13-53, 230 N.C. App. 140, 752 S.E.2d 255, 2013 WL 5460091 *1, fn. 2 (N.C. Ct. App. October 1, 2013) (unpublished) (citing Merriam–Webster’s Collegiate Dictionary 1313 (11th ed. 2004)).

Our case law demonstrates many crimes are committed while a ski mask is used. *See e.g. State v. Hall*, 165 N.C. App. 658, 664, 599 S.E.2d 104, 107 (2004) (“The robber wore a ski mask[.]”); *State v. Bellamy*, 172 N.C. App. 649, 654, 617 S.E.2d 81, 86 (2005) (“[The robber] wore a green ski mask[.]”); *State v. Taylor*, 80 N.C. App. 500, 502, 342 S.E.2d 539, 540 (1986) (“[The robber] was wearing the ski mask.”).

Even if the mask were a toboggan without eye holes, our review is based on the facts available to Lt. Marotz at the time, who could not definitively tell whether there were eye holes, but thought it looked like a mask with cutouts. Moreover, toboggan-style masks are also used to further crime. *See e.g. State v. Hagans*, 177 N.C. App. 17, 18, 628 S.E.2d 776, 778 (2006) (“[The] assailants were . . . dressed in . . . toboggan masks with the areas over the eyes cut out.”); *State v. Ford*, 194 N.C. App. 468, 470, 669 S.E.2d 832, 835 (2008) (“[They wore] toboggans over their faces. . . .”); *State v. Stephens*, 175 N.C. App. 328, 331, 623 S.E.2d 610, 612 (2006) (describing how “[a]nother man wearing . . . a black toboggan over his head and face, with home made eye holes cut into it” participated in the robbery).

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[255 N.C. App. 684 (2017)]

STATE OF NORTH CAROLINA, PLAINTIFF

v.

CATHY MANGUM SAULS, DEFENDANT

No. COA16-860

Filed 19 September 2017

1. Search and Seizure—vehicle stop—objective justification for stop—motion to suppress evidence—reasonable suspicion

The trial court did not commit plain error in a driving while impaired case by denying defendant's motion to suppress evidence resulting from the stop of her vehicle, including various field sobriety tests, where the evidence together provided an "objective justification" for stopping defendant. The totality of circumstances showed defendant's vehicle was idling in front of a closed business late at night, the business and surrounding properties had experienced several break-ins, and defendant pulled away when the deputy approached her car.

2. Motor Vehicles—driving while impaired—trooper testimony—HGN test—tender as an expert witness unnecessary

The trial court did not commit plain error in a driving while impaired case by allowing a trooper to testify at trial about a horizontal gaze nystagmus (HGN) test he administered on defendant during a stop. It was unnecessary for the State to make a formal tender of the trooper as an expert on HGN testing.

Judge MURPHY concurring in result only.

Appeal by defendant from order entered 5 February 2016 by Judge Thomas H. Lock and judgment entered 4 March 2016 by Judge Robert F. Floyd in Superior Court, Johnston County. Heard in the Court of Appeals 23 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Lee J. Miller, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

STROUD, Judge.

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Defendant appeals the order denying her motion to suppress based upon her contention that the evidence obtained from the stop of her vehicle should have been suppressed because the deputy lacked reasonable suspicion for the traffic stop and the judgment convicting her of driving while impaired (“DWI”) because the trooper involved should not have been allowed to testify on the results of the horizontal gaze nystagmus test (“HGN test”) because the State did not formally tender him as an expert witness. We affirm the order and determine there was no error as to the judgment.

I. Background

In January of 2014, a citation was issued against defendant for operating a vehicle while impaired. The case made its way through district court, and in September of 2017 defendant filed a motion in superior court

for an order suppressing and excluding the evidence seized . . . for the reason that . . . Deputy Thomas Sewell of the Johnston County Sheriff’s Department and Trooper M.D. Williams of the State Highway Patrol stopped the defendant in her motor vehicle on January 25, 2014 without reasonable suspicion that defendant had violated a criminal or traffic offense[.]

Defendant sought to suppress the evidence resulting from the stop of her vehicle, including various field sobriety tests. In February of 2016, the trial court denied defendant’s motion to suppress. Ultimately, defendant’s case went to trial, and the jury convicted her of driving while impaired. The trial court entered judgment, and defendant appeals both the order denying her motion to suppress and the judgment.

II. Motion to Suppress

[1] Defendant first argues that the trial court committed plain error by denying her motion to suppress. Defendant admits that she failed to properly preserve her appeal of her motion to suppress because she failed to object when the evidence was introduced. To be clear, defendant is actually challenging the denial of her motion to suppress as plain error and is *not* challenging the evidence admitted at trial because of the denial. Our Court recently addressed a case in the same posture:

Here, defendant filed a pretrial motion to suppress evidence of his arrest alleging that there was not sufficient evidence to establish probable cause for his arrest. That motion was decided after an evidentiary hearing and denied. Thereafter, the record is silent as to any further

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objection from defendant to the introduction of the same evidence at the trial of this case. Therefore, defendant has waived any objection to the denial of his motion to suppress, and it is not properly preserved for this Court's review. Defendant, however, attempts to cure this defect by arguing that the trial court committed plain error instead.

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.

The North Carolina Supreme Court has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of the evidence. Under the plain error rule, defendant must establish that a fundamental error occurred at trial and that absent the error, it is probable the jury would have returned a different verdict.

Our review of a trial court's denial of a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are exclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. The trial court's conclusions of law are fully reviewable on appeal.

State v. Williams, ___ N.C. App. ___, ___, 786 S.E.2d 419, 424-25 (2016) (citations quotation marks, and ellipses omitted). Ultimately, this Court concluded that the trial court did not commit plain error in denying the motion to suppress without considering the evidence actually presented at trial because the only issue on appeal was whether the trial court had plainly erred in denying the motion to dismiss to suppress. *See id.* at ___, 786 S.E.2d at 425.

The unchallenged and binding findings of fact, *see id.*, establish:

1. On 24 January 2014, at approximately 1:00 AM, Deputy Thomas Sewell of the Johnston County Sheriff's Office was in uniform and on duty in Johnston County, North Carolina.

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2. The time was very late at night, sometime after midnight.
3. The temperature was approximately twelve (12) degrees Fahrenheit with a negative wind chill.
4. Deputy Sewell was on patrol in the area of Don Lee's Store, a gas station and convenience store located on North Carolina Highway 50 in Johnston County, North Carolina.
5. Deputy Sewell was familiar with this area because it was his regular, assigned patrol district.
6. Deputy Sewell knew that Don Lee's Store was closed because he had patrolled the area several times prior to this occasion.
7. There is an automobile repair shop across the road from Don Lee's Store.
8. There are several residential homes in the area of Don Lee's Store.
9. Deputy Sewell had performed several business checks in the area including business checks at both Don Lee's Store and the automobile repair shop across the road from Don Lee's Store.
10. Deputy Sewell had personal knowledge of several break-ins that had occurred at Don Lee's Store prior to 24 January 2014.
11. Deputy Sewell recalled that the area surrounding Don Lee's Store was a "decently high break-in area."
12. While on routine patrol, Deputy Sewell saw the Defendant's vehicle close to the gasoline pumps in the parking lot of Don Lee's Store.
13. The Defendant's vehicle was the only vehicle in the parking lot at that time.
14. Deputy Sewell observed that the Defendant's vehicle's engine was running and that its headlights were on.

....

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16. When Deputy Sewell drove into the parking lot, he positioned his patrol vehicle directly behind the Defendant's vehicle.
17. The Defendant's vehicle attempted to leave the scene immediately upon Deputy Sewell's arrival.
18. When Deputy Sewell saw the Defendant's vehicle drive away, he immediately became concerned and felt that something must be wrong.
19. As soon as the vehicle began to move, Deputy Sewell activated his emergency vehicle lighting.
20. The vehicle traveled approximately ten to fifteen feet before it stopped.
21. The Defendant did not exit her vehicle at any time and the Defendant committed no traffic or equipment violations prior to Deputy Sewell initiating the stop.
22. When Deputy Sewell drove into the parking lot of Don Lee's Store, he had no intentions of turning on his emergency vehicle lighting; his only intent was to perform a welfare check on the Defendant's vehicle.
23. When Deputy Sewell drove up behind the Defendant's vehicle, he intended to get out [of] his patrol vehicle, walk to the driver's side window of the vehicle, check on the occupant(s) and ensure each was in good health, verify there were no mechanical problems with the vehicle, and then continue on with his regularly assigned patrol duties for that night.
24. Deputy Sewell did not think about turning on his emergency vehicle lighting until the moment that the Defendant's vehicle began to drive away.

Based upon the binding findings of fact the trial court concluded:

2. The facts of this case and the evidence presented by the State of North Carolina at this hearing are sufficient to establish a reasonable articulable suspicion to justify the investigative traffic stop of the Defendant's vehicle for Driving While Impaired.
3. The investigative traffic stop of the Defendant's vehicle for Driving While Impaired did not constitute any

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violation of the Defendant's Constitutional or statutory rights.

4. Under the totality of the circumstances, including the time of day, Deputy Sewell's personal knowledge concerning break-ins at Don Lee's Store, the automobile repair shop across the road from Don Lee's Store, the residential homes in the area (Deputy Sewell's regular patrol district), the manner in which the Defendant's vehicle was stopped (immediately adjacent to and parallel to the highway so that traffic on the highway would have been visible to occupants of the vehicle), and the fact that the Defendant's vehicle attempted to leave the scene immediately upon Deputy Sewell's arrival, Deputy Sewell had a reasonable and articulable suspicion to stop the Defendant's vehicle.

Defendant contends these conclusions of law are not supported by the evidence because the trial court's "findings of fact are insufficient to give rise to anything more than a generalized, inchoate and unparticularized suspicion or hunch that there was" criminal activity. Defendant heavily relies on the finding that the deputy's "only intent was to perform a welfare check on the Defendant's vehicle[,]" and the only reason he actually stopped her vehicle was because she pulled away when he approached which is not enough to validate the stop. While defendant's argument makes logical sense, it simply does not reflect the law as it exists: "[T]he Fourth Amendment does not include a consideration of the officer's subjective intent, and his motive will not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *State v. Icard*, 363 N.C. 303, 318, 677 S.E.2d 822, 832 (2009) (citations and quotation marks omitted); see also *State v. Johnson*, ___ N.C. App. ___, 783 S.E.2d 753 (2016) ("[I]f sufficient objective evidence exists to demonstrate reasonable suspicion, a *Terry* stop is justified regardless of a police officer's subjective intent." (citation and quotation marks omitted)).

Our Supreme Court has stated,

Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required. This Court has determined that the reasonable suspicion standard requires that the stop be based on specific and articulable

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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. Moreover, a court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists.

State v. Barnard, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (citations, quotation marks, brackets, and ellipses omitted). The objective “totality of the circumstances” showed: (1) it was very late at night; (2) defendant’s vehicle was idling in front of a closed business; (3) the business and surrounding properties had experienced several break-ins; and (4) defendant pulled away when the deputy approached her car. *Id.* Thus, the evidence together provides an “objective justification” for stopping defendant. *See id.* Therefore, the trial court did not err in denying defendant’s motion to suppress.

III. Testimony on HGN Test

[2] Defendant next argues that the trial court committed plain error by allowing the trooper to testify at trial about the HGN test he administered on defendant during the stop. Specifically, defendant argues that the State never formally tendered the trooper as an expert witness under Rule 702 of the North Carolina Rules of Evidence. Again, defendant requests this Court to review for plain error because she failed to preserve the issue for appellate review by objecting to the results of the HGN test at trial.

Rule 702(a1) includes specific provisions for expert witnesses who testify regarding results of HGN tests:

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.

North Carolina General Statute § 8C-1, Rule 702(a1) (2013).

During the pendency of this appeal, our Supreme Court addressed the specific issue before us: “In this appeal we consider whether North Carolina Rule of Evidence 702(a1) requires a law enforcement officer

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to be recognized explicitly as an expert witness pursuant to Rule 702(a) before he may testify to the results of a Horizontal Gaze Nystagmus (HGN) test.” *State v. Godwin*, ___ N.C. ___, ___ 800 S.E.2d 47, 48 (2017). The Supreme Court ultimately reversed this Court’s decision in *Godwin*, which defendant had relied upon here, to conclude that a law enforcement officer need not explicitly be tendered under Rule 702 to testify to the results of a HGN test. *See id.* at ___, 800 S.E.2d at 54. The Court in *Godwin* reasoned that because the officer had been tendered as an expert regarding his law enforcement knowledge, testified he had completed training on how to administer the HGN test and other follow-up courses, had experience with impaired driving investigations, was found to be reliable upon the trial court’s *voir dire*, and the defendant’s only contention was not that the officer was unqualified to testify as an expert regarding HGN testing but merely that he had to formally be tendered as an expert, the State was correct in asserting that the officer had been implicitly recognized as an expert witness in HGN testing and did not need to be formally tendered as such. *See id.* at ___, 800 S.E.2d at 50-53. This case is controlled by *Godwin*. *Compare id.*, ___ N.C. ___, 800 S.E.2d 47.

Here, Trooper Williams testified that he had been a trooper with the North Carolina State Highway Patrol since 2004 and that he had training in field sobriety testing, including the HGN test. Trooper Williams specifically testified about his training and qualifications to administer the HGN test, including refresher courses in standardized field sobriety testing every year. Over his career, Trooper Williams had participated in hundreds of DWI investigations. During *voir dire*, defendant’s counsel agreed “[t]he evidence rule says that he can certainly talk about the HGN if he has been trained in HGN, but I’m – my objection is that this – the trooper’s not qualified to testify about the medical effect of pupil dilation or the medical effect of these drugs.”¹ This portion of the transcript along with defendant’s brief parallels *Godwin*, since the defendant was not arguing the officer was not qualified to testify as an HGN testing expert, but only that he had to be formally tendered as such. *See id.* at ___, 800 S.E.2d at 52. Defendant does not argue that Trooper Williams was not properly trained and qualified to testify regarding HGN testing, and the evidence shows he “ha[d] successfully completed training in HGN.” N.C. Gen. Stat. § 8C-1, Rule 702(a1). Under *Godwin*, it was simply unnecessary for the State to make a formal tender of the trooper as

1. Based upon the *voir dire*, the trial court sustained defendant’s objection to Trooper Williams’s testimony regarding defendant’s possible impairment by drugs other than alcohol.

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an expert on HGN testing, and the trial court committed no error, much less plain error, in allowing the testimony. *See id.*

IV. Conclusion

We conclude defendant received a fair trial, free from reversible error.

AFFIRM AND NO ERROR.

Judge DILLON concurs.

Judge MURPHY concurs in result only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 SEPTEMBER 2017)

EDWARDS v. RICHARDSON No. 16-1178	Union (15CVS2821)	Affirmed
FOWLER v. FOWLER No. 17-178	Buncombe (16CVS253)	Dismissed
IN RE A.J.B. No. 17-379	Mecklenburg (16JA346)	Vacated.
IN RE A.L.G. No. 17-203	Stokes (15JT42-44)	Affirmed
IN RE A.P. No. 17-291	Johnston (14JA192)	Vacated and Remanded
IN RE C.S.H. No. 17-360	Johnston (16JT93)	Affirmed
IN RE D.L.W. No. 17-464	Mecklenburg (15JT355)	Affirmed
IN RE D.S. No. 17-290	Mecklenburg (15JA612)	Vacated and Remanded
IN RE J.E.J.B. No. 17-289	Wake (15JT167-168)	Remanded
IN RE L.L. No. 17-337	Surry (15JT66-67)	Affirmed
IN RE M.D.-W. No. 17-256	New Hanover (15JA206-207)	Affirmed.
IN RE S.M.C. No. 17-452	New Hanover (15JT186)	Affirmed
IN RE T.M.S. No. 17-380	Guilford (15JT222)	Affirmed
INTERNAL CREDIT SYS., INC. v. NAUTUFF LLC No. 17-54	Durham (16CVD2173)	Reversed
McLAWHORN v. N.C. DEP'T OF ENV'T & NAT. RES. No. 17-206	N.C. Industrial Commission (TA-23111)	Affirmed

PEOPLES v. TUCK No. 16-293-2	Vance (15CVS12)	Reversed
STATE v. CLARK No. 16-1194	Stanly (15CRS50129) (15CRS50132)	No Error
STATE v. ERVIN No. 17-324	Wake (13CRS219242)	REVERSED IN PART, NO ERROR IN PART, AND REMANDED.
STATE v. GREENE No. 16-1309	Mecklenburg (14CRS238553-54)	No prejudicial error.
STATE v. HEADEN No. 16-1196	Randolph (09CRS5778) (09CRS5782) (11CRS50457) (11CRS50696-97)	Dismissed
STATE v. HOWARD No. 17-77	Wayne (10CRS51358-62)	Dismissed in Part; No Error in Part.
STATE v. MATHIS No. 17-126	Rowan (11CRS53038) (11CRS53246) (13CRS2949-50)	No Error
STATE v. McINTYRE No. 16-801	New Hanover (15CRS54379) (15CRS6891)	No Error
STATE v. McKENITH No. 17-81	Duplin (13CRS51177-79) (13CRS882)	No Error
STATE v. McREED No. 17-229	Mecklenburg (14CRS243974-75) (14CRS243977)	No Error
STATE v. MILLER No. 17-216	Union (12CRS53801)	No Error
STATE v. NEWKIRK No. 17-2	Harnett (15CRS56050)	Affirmed
STATE v. SYDNOR No. 17-48	Wake (14CRS1819) (14CRS206568)	No Error

STATE v. THOMAS No. 17-140	Caldwell (13CRS1110-11)	Affirmed
STATE v. WALLACE No. 17-245	Guilford (14CRS75301)	No Error
STATE v. WELCH No. 16-1184	Anson (13CRS640)	Affirmed

DISCOVERY INS. CO. v. N.C. DEP'T OF INS.

[255 N.C. App. 696 (2017)]

DISCOVERY INSURANCE COMPANY, PETITIONER

v.

THE NORTH CAROLINA DEPARTMENT OF INSURANCE, COMMISSIONER
OF INSURANCE WAYNE GOODWIN AND THE NORTH CAROLINA
REINSURANCE FACILITY, RESPONDENTS

No. COA17-285

Filed 3 October 2017

1. Insurance—Reinsurance Facility—fraud by insurance executive—repayment to Facility

The Reinsurance Facility acted within its statutory authority when it ordered an insurance company to repay reimbursements to the insurance company by the Facility after fraud by an executive of the insurance company was discovered. Although the insurance company argued that there was no express authority that empowered the Facility to order the repayment, the Facility acted within its statutory authority to do what was necessary to accomplish the purpose of the Facility. N.C.G.S. § 58-37-35(g)(12).

2. Insurance—Reinsurance Facility—fraudulent reimbursement losses—recovery—civil action not necessary

The Reinsurance Facility was not required to bring suit to recover reimbursements it had made to an insurance company where fraud by an executive of the company was discovered after the reimbursements were made. The Facility has the authority to order a member company to correct claims reimbursements erroneously paid by the Facility due to fidelity losses arising from claims handling.

3. Insurance—Reinsurance Facility—reimbursement of fraudulent claims—recovery—findings

Findings and conclusions by the Insurance Commissioner were supported by the whole record in a case arising from fraud by an insurance company executive that was discovered after the Facility reimbursed the company for claims and the Facility sought repayment of the reimbursement.

4. Equity—Clean hands—reimbursement of Reinsurance Facility—fraud by executive—unclean hands

The Insurance Commissioner did not abuse his discretion by determining that estoppel, ratification, and general equitable relief would not preclude the Reinsurance Facility from requiring repayment by an insurance company of previously reimbursed claims

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that were fraudulent. Even though the insurance company argued that the Facility's audit process did not discover the fraud, the insurance company itself was in violation of its duty.

5. Insurance—prehearing discovery—hearing before Insurance Commissioner

Defendant was correctly denied prehearing discovery prior to a hearing before the Insurance Commissioner in a case that rose from the Reinsurance Facility's demand that an insurance company repay reimbursements after fraud by a company executive was discovered. The specific statute controlling the case, N.C.G.S. § 58-2-50, did not provide for formal discovery for this hearing, and the Commissioner had not promulgated any rules for formal discovery.

6. Appeal and Error—appealability—appeal to Insurance Commissioner not taken

The Insurance Commissioner correctly concluded that an action by the Reinsurance Facility that had never been appealed was not properly before him. The action was not the subject to judicial review at superior court and was not properly before the Court of Appeals.

Appeal by petitioner from order entered 18 November 2016 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 6 September 2017.

Graebe Hanna & Sullivan, PLLC, by Douglas W. Hanna, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson and Assistant Attorney General M. Denise Stanford, for respondent-appellee North Carolina Department of Insurance and the Commissioner of Insurance.

Young Moore and Henderson, P.A., by Marvin M. Spivey, Jr., Glenn C. Raynor and Angela Farag Craddock, for respondent-appellee North Carolina Reinsurance Facility.

TYSON, Judge.

I. Background

Respondent, the North Carolina Reinsurance Facility ("the Facility"), is a statutory entity, consisting of all motor vehicle liability insurers in

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North Carolina as required members. N.C. Gen. Stat. § 58-37-5 (2015). Discovery Insurance Company (“Discovery”) is a Kinston, North Carolina-based insurance company engaged in selling motor vehicle insurance. Discovery was a member of the Facility at all times relevant to this appeal.

“The Facility is a creation of North Carolina’s Compulsory Automobile Liability Insurance Law.” *State ex rel. Hunt v. N. Carolina Reinsurance Facility*, 302 N.C. 274, 283, 275 S.E.2d 399, 402 (1981). “The Facility is a pool of insurers which insures drivers who the insurers determine they do not want to individually insure.” *Id.* The pertinent provisions are codified in Article 37, Chapter 58 of the General Statutes. N.C. Gen. Stat. §§ 58-37-1 to 58-37-75 (2015) (hereinafter referred to as “the Facility Act”).

All insurance companies which write motor vehicle insurance in North Carolina, are required to issue motor vehicle liability coverage insurance to any “eligible risk,” as is defined in N.C. Gen. Stat. § 58-37-1, who applies for that coverage, if the coverage can be ceded to the Facility. N.C. Gen. Stat. § 58-37-25(a). After writing a motor vehicle policy, an insurer can retain it as a part of its voluntary business or cede it to the Facility. *Hunt*, 302 N.C. at 283, 275 S.E.2d at 402.

If the policy is ceded, the writing insurer pays the net premium to the Facility, less certain allowed expenses. The Facility becomes liable on that particular policy to reimburse the issuing insurer for claims paid. *Id.* at 283, 275 S.E.2d at 402-3.

When a loss and claim occurs under the policy, the ceding company settles the claim and is reimbursed by the Facility. *Id.* The Facility is only authorized to reinsure coverages arising under motor vehicle insurance policies required to satisfy The Motor Vehicle Safety and Financial Responsibility Act, N.C. Gen. Stat. §§ 20-279.1 *et seq.*, together with any other motor vehicle insurance as is required by federal law or regulation, state law, state administrative code, or rule adopted by the North Carolina Utilities Commission. N.C. Gen. Stat. § 58-37-35(b). The Facility is required to operate on a no profit-no loss basis. N.C. Gen. Stat. § 58-37-35(1).

In November 2011, Discovery uncovered a fraudulent scheme by one of its claims executives, Roland Steed (“Steed”). From early 2005 until November 2011, Steed issued Discovery claim checks to fictitious persons and entities in order to have the proceeds of those checks to be deposited into accounts he controlled. Steed reported the fraudulent payments as legitimate payments under his management and control.

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Under his scheme, Steed issued checks for fraudulent payments totaling approximately \$5.2 million. Of that total, Steed attributed approximately \$1.3 million of those payments to claims on auto liability policies, which had been ceded to the Facility by Discovery. Before Steed's scheme was uncovered, the Facility had reimbursed Discovery for the approximately \$1.3 million in claims paid under these ceded policies.

Discovery notified the Facility upon learning of Steed's fraudulent activity in November 2011. Discovery asked the Facility to keep Steed's fraud confidential from all, except a select few of the Facility's executives, to allow the Department of Insurance a period of time required to conduct a criminal fraud investigation.

The Facility honored Discovery's request and did not independently investigate Steed's fraudulent payments, until after Steed and his co-conspirators were indicted in August 2012. Following Steed's indictment, the Facility confirmed the net total of the claims payments attributable to Steed's fraud and reimbursed to Discovery was \$1,340,921.25.

In a letter to Discovery dated 25 October 2013, Facility staff noted the Facility only reimburses companies for payments of valid claims. The letter repeated the Facility's conclusion that \$1,340,921.25 in reported, but fraudulent, losses reimbursed by the Facility were not valid claim payments, but were fidelity losses that were ineligible for reimbursement. The Facility instructed Discovery to repay these losses to the Facility.

Discovery requested a hearing, pursuant to N.C. Gen. Stat. § 58-37-65(a), before the Facility's Board of Governors ("the Facility Board") to dispute the Facility's staff's 25 October 2013 letter requesting Discovery to repay the loss payments attributable to Steed's frauds. The Facility Board's hearing took place on 24 July 2013. On 19 August 2013, the Facility Board issued a final decision and held Discovery was obligated to repay the Facility the \$1,340,921.25 in fraudulent claims payments previously reimbursed by the Facility.

Discovery appealed the Facility Board's decision to the Commissioner of Insurance pursuant to N.C. Gen. Stat. § 58-37-65(b). At a December 2013 meeting, the Facility Board learned Discovery had appealed the Facility Board's 19 August 2013 ruling and had not repaid the fraudulent reimbursements made by the Facility. The Facility Board instructed Facility staff to issue a letter and a Supplemental Account Activity Statement to Discovery on 16 December 2013.

The Hearing Officer, on behalf of the Commissioner of Insurance ("the Commissioner"), issued an order which affirmed the ruling of the Facility Board on 20 October 2014.

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Discovery petitioned the Superior Court of Wake County for judicial review of the Commissioner's order pursuant to N.C. Gen. Stat. § 58-37-65(b). The trial court affirmed the Commissioner's Order on 18 November 2016. Discovery timely filed notice of appeal to this Court on 16 December 2016.

II. Jurisdiction

The trial court reviewed Discovery's appeal of the Hearing Officer's order as a civil case pursuant to N.C. Gen. Stat. § 58-2-75(b). Jurisdiction lies in this Court from a final order of the superior court pursuant to N.C. Gen. Stat. § 1-277 (2015) and § 7A-27(b) (2015).

III. Issues

Discovery requests this Court review whether the Commissioner erred by: (1) holding the Facility acted within its statutory authority by ordering Discovery to repay the disputed claim payments; (2) finding the Facility was not required to institute a separate civil action against Discovery to recover the approximately \$1.3 million at issue; (3) making findings of fact and conclusions of law regarding the audit responsibilities of the Facility, which are not supported by the whole record; (4) concluding that Discovery's affirmative defense of estoppel was not applicable; (5) not permitting pre-hearing discovery; and, (6) not considering the Facility's authority to issue the Supplemental Account Activity Statement.

IV. Standard of Review

N.C. Gen. Stat. § 58-37-65 of the Facility Act provides that “[a]ll rulings or orders of the Commissioner under this section shall be subject to judicial review as approved in G.S. 58-2-75.” This statute provides for judicial review of orders and decisions of the Commissioner by the filing of a petition within 30 days from the date of the delivery of a copy of the order or decision by the Commissioner. Pursuant to *N.C. Reinsurance Facility v. Long*, 98 N.C. App. 41, 390 S.E.2d 176 (1990), N.C. Gen. Stat. § 58-2-75 is to be read in conjunction with N.C. Gen. Stat. § 150B-51 of the Administrative Procedure Act (“APA”). *Long*, 98 N.C. App. at 46, 390 S.E.2d at 179.

Under N.C. Gen. Stat. 150B-51(b), the scope and standard of review is that in “reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency . . . for further proceedings.” The court:

may also reverse or modify the [agency's] decision . . . if the substantial rights of the petitioners may have been

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prejudiced because the [agency's] findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2015).

The 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. C. 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).

Errors asserted under subsections 150B-51(b)(1)-(4) are reviewed *de novo*. 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 applies 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

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a reasonable mind might accept as adequate to support a conclusion.” N.C. Gen. Stat. § 150B-2(8c) (2015).

V. Analysis

A. The Facility Board Did Not Exceed Its Authority
by Ordering Repayment

[1] Discovery argues the Facility Act does not authorize the Facility to issue an order of repayment. We disagree.

When reviewing an action of the Facility Board, the Commissioner determines whether the challenged Facility action was taken in accordance with the Facility Act, the Facility’s Plan of Operation and the Facility’s Standard Practice Manual. N.C. Gen. Stat. § 58-37-65(c). Rule E of Section 5 of the Standard Practice Manual states “[f]idelity losses arising out of claims handling shall be the sole responsibility of the member company.” Chapter 7.C of Section 4 of the Standard Practice Manual provides that “errors detected through the . . . functions of the Facility will be reported to the carrier with appropriate instructions for prompt correction.” Regarding the power of the Facility Board, the Facility Act provides in pertinent part:

(g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility *include but is not limited to* the following:

. . . .

(12) To adopt and enforce all rules and *to do anything else where the Board is not elsewhere herein specifically empowered which is otherwise necessary to accomplish the purpose of the Facility* and is not in conflict with the other provisions of this Article.

N.C. Gen. Stat. § 58-37-35(g)(12) (emphasis supplied).

1. Canons of Statutory Construction

The rules governing this Court’s review and construction of the General Statutes are well established. “[W]hen the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations

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not contained therein.” *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 43 N.C. App. 715, 719-20, 259 S.E.2d 922, 925 (1979) (quoting *Norris v. Home Security Life Insurance Co.*, 42 N.C. App. 719, 721, 257 S.E.2d 647, 648 (1979)).

“[A] statute, being remedial, should be construed liberally, in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope.” *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979) (citing *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973); *Weston v. Lumber Co.*, 160 N.C. 263, 75 S.E. 800 (1912)).

2. Discovery’s Contentions

Discovery contends the Commissioner erred by concluding as a matter of law “[t]he decision of the Board is thus not inconsistent with any provision of the Facility Act or with any provision of the Plan of Operation or the Manual.” Discovery asserts the Commissioner erred because no express authority empowers the Facility to order Discovery to repay the approximately \$1.3 million fraudulent payments at issue in the Facility Act, the Plan of Operation, and the Standard Practice Manual.

The Facility Act is remedial in nature and is to be construed liberally. *Burgess*, 298 N.C. 520 at 524, 259 S.E.2d at 251. The Facility Act was clearly enacted to serve the remedial purpose of establishing a system of reinsurance to ensure that North Carolina drivers can obtain vehicle liability coverage from insurers, which companies are otherwise unwilling to cover them. *See Hunt*, 302 N.C. at 283, 275 S.E.2d at 402 (stating the Facility “is a creature of North Carolina’s Compulsory Automobile Liability Insurance Law,” and is “[e]ssentially a pool of insurers which insures drivers who the insurers determine they do not want to individually insure.”).

3. Facility Board’s Authority

Discovery does not dispute that the approximately \$1.3 million of fraudulently paid claims was attributable to Steed’s actions of “fidelity losses arising out of claims handling.” Rule E of Section 5 of the Standard Practice Manual prohibits the Facility from being responsible for “fidelity losses arising out of claims handling” and squarely places the responsibility to absorb such losses upon the member company. The Commissioner properly concluded the Facility Board acted within the scope of its authority under the Facility Act, by ordering Discovery to repay the sums the Facility fraudulently paid.

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Although stated in general terms, N.C. Gen. Stat. § 58-37-35(g)(12) expressly grants the Facility Board the authority “to do anything else . . . which is otherwise necessary to accomplish the purpose of the Facility.” The superior court properly affirmed the Commissioner’s decision that the Facility Board had acted within its statutory authority to order Discovery to repay the approximately \$1.3 million. *See Burgess*, 298 N.C. at 524, 259 S.E.2d at 251 (construing a remedial statute liberally).

The Facility was informed that approximately \$1.3 million in reimbursements made to Discovery were actually fraudulent “fidelity losses arising out of claims handling” and attributable to Discovery’s employee, Steed. Discovery is required to bear these losses pursuant to Rule E of Section 5 of the Standard Practice Manual. In ordering Discovery to repay the approximately \$1.3 million in fraudulent payments, the Facility acted within its statutory authority to do what “is otherwise necessary to accomplish the purpose of the Facility” N.C. Gen. Stat. § 58-37-35(g)(12). Discovery’s argument that the Facility acted outside the scope of its statutory authority is overruled.

B. The Facility is Not Required to Commence a Civil Action
to Recover Reimbursements

[2] Discovery argues that because the Facility Act vests the Facility Board with authority “to sue and be sued in the name of the Facility[,]” the Facility’s proper and only means for seeking recovery of the fraudulent reimbursement losses would be for the Facility to institute a civil action in superior court. N.C. Gen. Stat. § 58-37-35(g)(1). We disagree.

N.C. Gen. Stat. § 58-37-35(g)(1) provides:

(g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility include but is not limited to the following:

(1) To sue and be sued in the name of the Facility. No judgment against the Facility shall create any direct liability in the individual member companies of the Facility.

Even though N.C. Gen. Stat. § 58-37-35(g)(1) provides statutory authority for the Facility Board to sue on behalf of the Facility, Discovery’s contention that this statute is the sole means under which the Facility can seek reimbursement from Discovery under these circumstances is without merit.

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Chapter 7.C of Section 4 of the Standard Practice Manual provides that “errors detected through the . . . functions of the Facility will be reported to the carrier with appropriate instructions for prompt correction.” Additionally, Rule E of Section 5 of the Standard Practice Manual prohibits the Facility from being responsible for “fidelity losses arising out of claims handling” and places the responsibility for such losses on the member company. Here, it is undisputed that over \$1.3 million in fraudulent reimbursement payments were specifically requested by Discovery, though Steed, and were paid by the Facility under the mistaken belief that these were reimbursements for *bona fide* claims under policies ceded to and covered by the Facility.

There is no dispute these reimbursements were paid for fraudulent claims attributable to the fidelity losses of Discovery specifically caused by their employee Steed. Chapter 7.C of Section 4 of the Standard Practice Manual permits the Facility to report errors in claims and give “appropriate instructions for prompt correction.” N.C. Gen. Stat. § 58-37-35(g)(12) grants the Facility Board the authority “to do anything else . . . which is otherwise necessary to accomplish the purpose of the Facility.”

N.C. Gen. Stat § 58-37-35(1) requires the Facility to operate on a no-profit no-loss basis. Chapter 7.C of Section 4 of the Standard Practice Manual, N.C. Gen. Stat. §§ 58-37-35(1) and 58-37-35(g)(12) construed together provides the Facility Board with the authority to order a member company to correct claims reimbursements erroneously paid by the Facility due to “fidelity losses arising out of claims handling.”

Discovery cites two cases it asserts are analogous to the case at bar. *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier* dealt with whether the Commissioner of Insurance had the authority to enforce an insurance rule by issuing a letter ordering an insurance company not to enter a proposed lease transaction. *Charlotte Liberty*, 16 N.C. App. 381, 381-83, 192 S.E.2d 57, 57-58 (1972). This Court determined, “[c]learly the statutes creating the Department of Insurance and prescribing the powers and duties of the Commissioner, do not purport to grant him the power of issuing restraining orders and injunctions.” *Id.* at 385, 192 S.E.2d at 59. The Court noted, “[i]n administering the laws relative to the insurance industry, the Commissioner, if he deems it necessary, may apply to the courts for restraining orders and injunctions . . .” *Id.*

The facts and holding in *Charlotte Liberty* are not analogous to this case. The statutes creating the Department of Insurance did not grant the Commissioner the direct power to issue restraining orders and injunctions. Chapter 7.C of Section 4 of the Standard Practice Manual

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reflects the authority of the Facility to instruct member companies to correct “errors detected through the . . . functions of the Facility.”

Before Steed’s fraudulent actions were uncovered, Discovery and the Facility both conducted business under the erroneous representation that the claim payments submitted by Steed to the Facility for reimbursement were for legitimate claims under ceded policies. The Facility Board acted within its statutory authority to order Discovery to reverse the reimbursement payments, and was neither limited nor required by N.C. Gen. Stat. § 58-37-35(g)(1) to bring suit in the courts to recover those reimbursements. Discovery’s argument is overruled.

C. The Commissioner’s Findings of Fact and Conclusions of Law
Are Supported by the Whole Record

[3] Defendant challenges the Commissioner’s Findings of Fact 12 and 13 and Conclusion of Law 13 regarding the Facility’s audit responsibilities and asserts the Findings of Fact are not supported by substantial evidence in the whole record. We disagree.

We first note that the majority of the Commissioner’s Findings of Fact are not challenged and are binding upon 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.”) (citations omitted). Because Findings of Fact 12 and 13 are the only findings, which are challenged by Discovery with specific arguments, any other issues concerning the remaining challenged findings are abandoned. N.C. R. App. P. 28(b)(6).

1. Finding of Fact 12

The Commissioner’s Finding of Fact 12 in the amended order states:

The Facility does not conduct claims audits for the purpose of identifying potential fraudulent claims activity by claims representatives of its member companies; and the Facility does not represent to its member companies that its claims audit process is designed to or capable of identifying fraudulent conduct by claims representatives of its member companies

Discovery contends substantial evidence contradicts the Commissioner’s Finding of “The Facility does not conduct claims audits for the purpose of identifying potential fraudulent claims activity by claims representatives of its member companies” Discovery cites

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the testimony of Edith Davis, the Chief Operating Officer of the Facility, to dispute Finding of Fact 12:

A: The audit responsibilities of the Facility are to audit the member companies and to verify, if you will, the transactions that are being reported to the Facility and look for, you know, poor claims-handling practices, poor underwriting – the answer I'm giving is in context to claims, not to premiums and underwriting.

Moreover, Discovery cites Section 6 of the Facility's Standard Practice Manual:

The Facility will review and examine statistical reports and comparisons in order to detect any adverse trends which shall be thoroughly investigated. The Claim Staff, Claim Quality Control Committee, the Audit Staff and both the Audit Committee and Compliance Committee shall coordinate the efforts and exchange information. If these reviews indicate any irregularities, appropriate action will be taken.

After reviewing the portion of Edith Davis' testimony and Section 6 of the Standard Practice Manual cited by Discovery in light of the whole record, the "poor claims-handling practices" referred to by Edith Davis and the "irregularities" referred to in Section 6 of the Standard Practice Manual do not refer to fraudulent claims made by member companies and their employees.

The Standard Practice Manual expressly states that the purpose of Facility audits of business reinsured with the Facility is "to determine that procedures established by the Plan of Operation and the Rules of Operation have been complied with, and that policies that have been reinsured are receiving the same service as those which are not reinsured."

Additional substantial evidence in the record supports Finding of Fact 12. The Facility Act vests the Facility Board with the "power and responsibility . . . to establish procedures for reviewing claims practices of member companies to the end that claims to the account of the Facility will be handled fairly and efficiently." N.C. Gen. Stat. § 58-37-35(g)(11). The Act requires "[e]ach member company shall authorize the Facility to audit that part of the company's business which is written subject to the Facility in a *manner and time prescribed by the Board of Governors.*" N.C. Gen. Stat. § 58-37-35(h) (emphasis supplied).

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The “manner and time” for audits conducted by the Facility are outlined in Section 6 of the Facility’s Standard Practice Manual. The Manual sets forth the internal audit responsibilities of its member companies and requires: “each member is *responsible to ensure that its own internal control and spot-check procedure is sufficient to detect any irregularity in handling business* which is either ceded to the Facility or with respect to which recoupment surcharges are applicable.” (Emphasis supplied.)

The Manual further specifies standards regarding each member’s internal control procedure:

These controls include, but are not restricted to, the following items:

1. That all cessions, premiums and claims are accurately and promptly reported to the Facility;
2. That all reports, whether on a regular basis or by special call, are filed accurately and promptly;
3. That all agents are fully complying with the Plan of Operation and Rules of Operation;
4. That ceded policies are properly rated and ceded claims properly handled; [and,]
5. That recoupment surcharges for all policies subject to recoupment are properly determined and promptly reported to the Facility.

Additionally, the Standard Practice Manual requires member companies “shall obtain claimant confirmation on a reasonably representative number of claim payments on Facility ceded business.” When requested by the Facility, member companies must provide reports of their claim confirmation activities. In addition to the member companies’ claim confirmation duties, the Facility retains the right to “confirm with the payee of claim payments made on ceded business[,]” but is not required to do so.

Furthermore, Edith Davis testified:

We have no responsibility for protecting the company in their claims-handling procedures I have three auditors and over a hundred member companies and about \$675 million worth of losses being reported to the Facility. We have no responsibility to protect the member company and their own claim-handling procedures. That responsibility is solely at the member company.

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After carefully reviewing the record, substantial evidence in the record supports the Commissioner's Finding of Fact 12.

2. Finding of Fact 13

Discovery also challenges the Commissioner's Finding of Fact 13, which states:

When a Facility claims auditor determines that there is not sufficient documentation to substantiate a payment made on a given claim, it is the policy and practice of the Facility to ask the appropriate claims contact person at the member company either to provide the appropriate documentation or to reverse the earlier reimbursement of that payment by the Facility.

Edith Davis testified that when the Facility conducts a claims audit, it looks for the appropriate documentation for a claim payment. Ms. Davis furthered testified:

Q: All right. Typically when an auditor asks the -- or notes for the company that there's -- they're not finding documentation in the claim file for a particular claim payment, what does your auditor ask the company to do?

A: Provide documentation.

Q: And what happens if the company does not provide documentation?

A: They're advised to reverse the transaction.

Q: So is it correct that it is a typical occurrence between the Facility staff and a company that if they don't -- if the Facility auditor doesn't see appropriate documentation in the claim file, that it asks the company to either provide the documentation or reverse the transaction?

A: Yes.

Discovery references a 2004 audit in which the Facility identified issues with Discovery's policy claims that were managed by Steed and ceded to the Facility. The Facility's 2004 Audit Summary report recommended:

Based on these 3 files with reporting errors admitted by the carrier and a previous audit which revealed 2 files with incorrectly reported accident dates, may wish to have

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claims dept [sic] review more files from this carrier due to possible reporting errors.

Discovery asserts cross-examination testimony of Edith Davis, given before the Hearing Officer, indicates the Facility failed to follow-up with Steed and Discovery regarding the discrepancies referred to in the 2004 Audit Summary report:

Q: And based on the information that we provided [. . .] but based on the information that we provided, did you -- was there any information in there that would provide that Mr. -- or that would support the fact that Mr. Steed, on behalf of Discovery at that time, provided an explanation for these discrepancies?

A: There was not. I --

Discovery characterizes this testimony as contradicting Finding of Fact 13 to the extent it indicates it was not the "practice of the Facility to ask the appropriate claims contact person at the member company either to provide the appropriate documentation or to reverse the earlier reimbursement of that payment[.]"

"It is for the agency, not a reviewing court, 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[,] if any." *Carroll*, 358 N.C. at 674, 599 S.E.2d at 904 (alteration in original) (internal quotation marks and citations omitted). To the extent contradictions exist in the evidence pertinent to Finding of Fact 13, the Hearing Officer, acting on behalf of the Commissioner, weighed the evidence, assessed witness' credibility, and drew inferences thereon to resolve those factual conflicts. *Id.*

The Hearing Officer's resolution of the material conflicts in the evidence has a rational basis in the evidence presented. The testimony of Edith Davis affirmatively states the practice of the Facility's auditor was to ask a member company to either provide claim documentation or reverse the transaction. Substantial evidence supports Finding of Fact 13. Discovery's argument is overruled.

Discovery additionally argues record evidence does not support Conclusion of Law 13. We disagree.

Conclusion of Law 13 states:

The Facility did not discover the fraudulent conduct of Discovery's employee Steed before 5 November 2011,

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and the Facility could not reasonably have discovered his fraud before that date.

Findings of Fact 7 through 11, and 16 through 19, none of which are challenged by Discovery on appeal, constitute substantial evidence to support this conclusion of law. “Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.” *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731 (citations omitted).

Those Findings of Fact are:

7. Before 5 November 2011, neither the Facility nor any person at Discovery other than Steed was aware of Steed’s fraudulent conduct.

8. Steed issued at least 936 fraudulent checks between 1 January 2005 and 5 November 2011 for a total sum exceeding \$5,200,000.00, which payments were actually paid to Steed and/or a number of co-conspirators involved in his fraudulent scheme. Of that total, Discovery submitted \$1,347,168.55 to the Facility for reimbursement, and obtained reimbursement from the Facility for fraudulent claim payments in the amount of \$1,347,168.55. During the normal course of operations in responding to Facility questions on its routine, random claims audit process, Discovery reversed one or more of the payments that resulted from Steed’s fraudulent claims activities, and one such reversal had been inadvertently included in this total. Thus at the time of the decision of the Board here at issue, the Facility had reimbursed to Discovery the net amount of \$1,340,921.25 for payments that had been confirmed to be fraudulent payments.

9. Each year [the] Facility receives and processes approximately \$675,000,000 in claims from its member companies. On average during the Relevant Timeframe, Discovery reported approximately \$13,500,000.00 in annual claims payments.

10. The Facility has a small audit staff that performs various different types of audits on the motor vehicle liability insurance policies ceded to it by its member companies. The audits include, among others, premium audits, recoupment audits, and claims audits. For claims audits,

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the Facility audits 10 to 20 claim files from each member company each year. This typically means that the Facility audits a very small percentage of the claim payments submitted for reimbursement by member companies each year. Discovery, for example, reports in excess of 6,000 loss transactions to the Facility on an annual basis.

11. The claim files selected for audit are generally randomly selected. The items checked during a typical claims audit include whether the policy was eligible for cession; whether the policy was properly ceded; whether the policy included coverage for the vehicle involved in the claim; whether the accident occurred during the period the policy was ceded to the Facility; whether the claim file included appropriate documentation for the claim payment; and whether any salvage and subrogation had been properly handled and reported to the Facility.

....

16. Discovery has identified a small number of fraudulent claim payments by Steed that occurred in claim files that happened to have been audited by the Facility and that were questioned by a Facility claims auditor due to the lack of appropriate documentation in the claims file.

17. Steed was designated by Discovery as the person to whom the Facility was directed to communicate regarding any claim-related issues, including questions relating to claim audits.

18. On each of the small number of occasions that a Facility auditor requested documentation for the payments that ultimately were determined to be fraudulent, Steed advised the Facility that these claim payments had been submitted inadvertently because of an administrative error and that Discovery would reverse the charges. During and before the Relevant Timeframe, Facility claims auditors also requested documentation of claim payments from Steed on numerous claims that were not fraudulent which requests resulted in Discovery's reversal of reimbursements for similar reasons.

19. The rate at which Facility auditors encountered documentation errors and reversals of charges based on the

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inadvertent submission of payments to the Facility by Discovery was not out of proportion to the rate of such errors among other similarly situated member companies.

Unchallenged findings of fact support the Commissioner's Conclusion of Law 13. *See Hershner v. N.C. Dep't of Admin.*, 232 N.C. App. 552, 553, 754 S.E.2d 847, 848 (2014) ("Where unchallenged findings of fact support the decisions of the administrative law judge . . . the trial court did not err in adopting their findings of fact and conclusions of law."). Discovery's arguments contesting the Commissioner's Findings of Fact 12 and 13 and Conclusion of Law 13 are without merit and are overruled.

D. The Doctrine of "Unclean Hands" Bars Discovery's
Equitable Defenses

[4] Discovery argues the Commissioner erred in concluding Discovery's appeal of the Board's decision is not a civil action and equitable doctrines of estoppel and ratification do not apply. Discovery asserts the Facility is estopped from seeking repayment for the fraudulent claims at issue, the Facility ratified Steed's fraudulent conduct, and Discovery should not be required to repay the reimbursed sums at issue under general equitable principles. We disagree.

The Commissioner made the following relevant Conclusions of Law:

16. Because this is not a civil action, common law doctrines, including the doctrines of estoppel, ratification, and general equitable relief are not applicable to this statutory appeal.

17. Even if this was a civil action, the doctrines of estoppel, ratification, and general equitable relief would not preclude the Facility from requiring repayment by Discovery of previously reimbursed fidelity losses.

"Equity is for the protection of innocent persons and is a tool used by the court to intervene where injustice would otherwise result. *See Cunningham v. Brigman*, 263 N.C. 208, 211, 139 S.E.2d 353, 355 (1964) (only innocent persons may claim the benefit of equitable estoppel)." *Swan Quarter Farms, Inc. v. Spencer*, 133 N.C. App. 106, 110, 514 S.E.2d 735, 738, *disc. review denied* 350 N.C. 850, 539 S.E.2d 651 (1999).

In determining whether the doctrine of estoppel applies, "the conduct of both parties must be weighed in the balances of equity and the party claiming the estoppel no less

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than the party sought to be estopped must conform to fixed standards of equity.” *Hawkins v. M & J Finance Corp.*, 238 N.C. 174, 177, 77 S.E.2d 669, 672 (1953). The essential elements of equitable estoppel relating to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. *Hawkins*, 238 N.C. at 177-78, 77 S.E.2d at 672. The elements relating to the party claiming estoppel are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially. *Id.*

. . . .

A party cannot rely on equitable estoppel if it “was put on inquiry as to the truth and had available the means for ascertaining it.” *Hawkins*, 238 N.C. at 179, 77 S.E.2d at 673 (citation omitted).

Wade S. Dunbar Ins. Agency, Inc. v. Barber, 147 N.C. App. 463, 470, 556 S.E.2d 331, 336 (2001). “[H]e who comes into equity must come with clean hands; otherwise his claim to equity will be barred by the doctrine of unclean hands.” *Hurston v. Hurston*, 179 N.C. App. 809, 814, 635 S.E.2d 451, 454 (2006).

Discovery asserts the equitable doctrines of estoppel, ratification, and quasi-estoppel bar the Facility from seeking repayment of the fraudulent claims previously reimbursed by the Facility. See *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 18, 591 S.E.2d 870, 881 (2004) (recognizing quasi-estoppel as a branch of equitable estoppel); *Pittman v. Barker*, 117 N.C. App. 580, 591, 452 S.E.2d 326, 332, (“[E]quitable defenses . . . [include] estoppel, laches, ratification, and waiver[.]”), *disc. review denied* 340 N.C. 261, 456 S.E.2d 833 (1995).

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Presuming, *arguendo*, that Discovery is correct in asserting common law equitable principles are applicable here, Discovery cannot claim the benefit of equitable defenses because of the doctrine of unclean hands.

Discovery argues the Facility is estopped from denying the legitimacy of the reimbursements paid to Discovery caused by Steed's fraud, because the Facility through its claims audit process did not discover Steed was committing fraud.

The Facility's Standard Practice Manual mandates "[m]ember companies shall obtain claimant confirmation on a reasonably representative number of claim payments on Facility ceded business." Discovery represented in annual Internal Control Questionnaires submitted to the Facility it had proper internal control procedures in place designed to detect fraudulent activity. The record shows Stuart Lindley, the President of Discovery, provided verbal information to the Facility Board indicating that:

At no time during the period 2005 through 2011 did Discovery have in place any internal audit procedure designed to routinely or randomly audit claims files under the management or control of Steed, nor any process to verify that claims checks generated by Steed were for payment of legitimate claims

Discovery cannot be heard to argue the Facility is precluded from seeking reimbursement for the fraudulent claim payments because the Facility allegedly did not follow its claims audit process. The record evidence shows Discovery itself was in violation of its duty under the Standard Practice Manual to "obtain claimant confirmation on a reasonably representative number of claim payments."

As between two innocent parties, the party who put the individual in a position to commit the fraudulent conduct, and failed to reasonably supervise his actions, should bear the loss. *Johnson v. Schultz*, 364 N.C. 90, 93, 691 S.E.2d 701, 704 (2010) (citations omitted). Even if common law principles do apply in this case, Discovery itself would be liable and bear the loss for the fraudulent activity of its employee, Steed.

The general rule is that a principal is responsible to third parties for injuries resulting from the fraud of his agent committed during the existence of the agency and within the scope of the agent's actual or apparent authority from the principal, even though the principal did not know or authorize the commission of the fraudulent acts

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Parsons v. Bailey, 30 N.C. App. 497, 501, 227 S.E.2d 166, 168 (1976) (citations and quotation marks omitted). “It makes no difference that the agent was acting in his own behalf and not in the interests of the principal when the fraudulent act was perpetrated unless the third parties had notice of that fact.” *Id.* at 501-02, 227 S.E.2d at 168 (citations omitted).

Based upon the Commissioner’s undisputed Finding of Fact 7, “Before 5 November 2011, neither the Facility nor any person at Discovery other than Steed was aware of Steed’s fraudulent conduct.” Therefore, Discovery did not have notice Steed was acting on his own behalf. *See id.* It is undisputed that Steed committed fraud in filing fraudulent claims under his authority to manage claims on behalf of Discovery. Even though Discovery “did not know or authorize” Steed’s fraud, as his employer it would still be responsible for Steed’s fraud under common law principles. *See id.* at 501, 227 S.E.2d at 168.

Based on Discovery’s unclean hands, attributable to its responsibility for Steed’s fraud under common law principles, the Commissioner did not abuse his discretion in determining “estoppel, ratification, and general equitable relief would not preclude the Facility from requiring repayment by Discovery of previously reimbursed fidelity losses.” Discovery’s arguments are overruled.

E. The Commissioner Did Not Err by Denying Pre-Hearing Discovery

[5] Discovery asserts the Commissioner erred in ordering that the parties had no right to formal discovery. Discovery argues it should have been allowed to conduct pre-hearing discovery prior to the appeal hearing before the Commissioner. We disagree.

Discovery cites N.C. Gen. Stat. § 58-2-50, governing hearings before the Commissioner, in support of its argument. This statute provides, in relevant part:

All hearings shall, *unless otherwise specially provided*, be held in accordance with this Article and Article 3A of Chapter 150B of the General Statutes and at a time and place designated in a written notice given by the Commissioner to the person cited to appear.

N.C. Gen. Stat. § 58-2-50 (emphasis supplied). N.C. Gen. Stat. § 150B-39 provides for the right of pre-hearing discovery.

Contrary to Discovery’s assertion that N.C. Gen. Stat. § 58-2-50 governs the hearing before the Commissioner, the proceedings before the Commissioner are specifically governed by N.C. Gen. Stat. § 58-37-65. N.C. Gen. Stat. § 58-37-65 states, in relevant part:

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(a) . . . any member of the Facility and any agent duly licensed to write motor vehicle insurance, may request a formal hearing and ruling by the Board of Governors of the Facility on any alleged violation of or failure to comply with the plan of operation or the provisions of this Article or any alleged improper act or ruling of the Facility directly affecting him as to coverage or premium or in the case of a member directly affecting its assessment

(b) Any formal ruling by the Board of Governors may be appealed to the Commissioner by filing notice of appeal with the Facility and Commissioner within 30 days after issuance of the ruling.

. . . .

(f) All rulings or orders of the Commissioner under this section shall be subject to judicial review as approved in G.S. 58-2-75.

N.C. Gen. Stat § 58-37-65 (2015).

Because N.C. Gen. Stat § 58-37-65 specifically covers appeals of formal rulings by the Facility Board to the Commissioner, it controls over N.C. Gen. Stat. § 58-2-50. *Trustees of Rowan Tech. v. J. Hyatt Hammond*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985) (citations omitted) (“Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability.”).

N.C. Gen. Stat. § 58-2-52 provides: “[t]he Commissioner may adopt rules for the hearing of appeals by the Commissioner or the Commissioner’s designated hearing officer under . . . § 58-37-65” and “these rules may provide for . . . discovery” N.C. Gen. Stat. § 58-2-52 (2015). The Commissioner has not adopted any rules providing for formal discovery in an appeal under N.C. Gen. Stat. § 58-37-65.

The only rules adopted by the Commissioner pertaining to the conduct of formal discovery in hearings before the Commissioner are those set forth at 11 N.C.A.C. 1.0401 *et seq.* Those rules apply solely to contested cases governed by N.C. Gen. Stat. § 150B-38 *et seq.* See 11 N.C.A.C. 01.0401 (granting party right to appeal in accordance with “Article 3A of G.S. 150B”); 11 N.C.A.C. 01.0414(4) (“Except as otherwise provided by statute, the rules contained in this Section govern the conduct of contested case hearings under Chapter 58 of the General Statutes.”)

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An appeal under N.C. Gen. Stat. § 58-37-65 is not a contested case within the meaning of N.C. Gen. Stat. § 150B. N.C. Gen. Stat. § 58-2-52(c) (specifying that appeals under N.C. Gen. Stat. §§ 58-36-35, 58-37-65, 58-45-50, 58-46-30, 58-48-40(c)(7), 58-48-42, and 58-62-51(c) are not contested cases within the meaning of N.C. Gen. Stat. § 150B (emphasis supplied)).

N.C. Gen. Stat. § 58-37-65 is the specific statute controlling over N.C. Gen. Stat. § 58-2-50. This statute does not provide for formal discovery for this hearing and the Commissioner has not promulgated any rules providing for formal discovery under N.C. Gen. Stat. § 58-2-52. The Hearing Officer did not err in concluding the parties were not entitled to conduct formal discovery. Discovery's argument is overruled.

F. The Decision of the Facility Board to Issue the Supplemental Account Activity Statement is Not Before this Court

[6] Defendant contends the Facility was without authority to issue the letter and attached Supplemental Account Activity Statement on 16 December 2013. However, Discovery did not appeal the 16 December 2013 decision of the Facility to issue the letter and Supplemental Account Activity Statement pursuant to N.C. Gen. Stat. § 58-37-65(b). Because Discovery never appealed the decision of the Facility to issue the letter and Supplemental Account Activity Statement, the Commissioner correctly concluded the 16 December 2013 action of the Facility was not properly before him. The 16 December 2013 action was not the subject of judicial review at the superior court and is not properly before this Court. This argument is dismissed.

VI. Conclusion

After review of the Commissioner's order and the superior court's review, we hold the order reflects a rational consideration of the evidence. The evidence in the record supports the Commissioner's findings of fact, which in turn support the ultimate conclusions of law.

This Court does not review the Commissioner's determinations concerning resolutions of conflicting evidence, credibility of the witnesses, or the weight to be given their testimony. Rather, we review whether competent evidence in the whole record supports those findings. The order of the superior court, which affirmed the Commissioner's decision, is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and STROUD concur.

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[255 N.C. App. 719 (2017)]

JENNIFER CLELAND GREEN, PLAINTIFF

v.

STANLEY BOYD GREEN, DEFENDANT

No. COA16-1102

Filed 3 October 2017

1. Divorce—equitable distribution—contingency fee—cannot be both divisible property and deferred compensation

For equitable distribution purposes, a contingent fee received by defendant's law firm in a case that began before separation and ended after separation could not be both divisible property and deferred compensation.

2. Divorce—equitable distribution—contingency fee received by defendant—not deferred compensation

A contingency fee received by defendant and his law firm was not deferred compensation where the contract was entered into during the marriage but the fee was not collected until after the date of separation. The General Assembly did not intend to include contingency fees in the term "deferred compensation" in N.C.G.S. § 50-20(b)(1). Even if the fee had been properly classified as deferred compensation, it would have been calculated as of the date of the separation and defendant was not entitled to any payment for his or his firm's work at that time because the case had not been settled.

3. Divorce—equitable distribution—defendant's contingency fee—separate property

The trial court erred in an equitable distribution case by determining that defendant's compensation from his law firm in a contingency fee case was divisible property. Defendant did not acquire any right to receive any income from the contingency fee case prior to the parties' separation. Moreover, the contingency fee contract was between the law firm and the client, not defendant and the client, and the compensation was appropriately labeled the separate property of defendant.

4. Divorce—equitable distribution—mortgage debt not distributed

The trial court did not abuse its discretion in an equitable distribution case when distributing mortgage debt by not ordering plaintiff to remove defendant's name from the promissory note and deed of trust for the marital residence. Defendant did not argue to

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the trial court that his name be removed for the note and deed of trust. Even assuming the issue was not waived, defendant cited no authority requiring a trial court to order a party receiving the marital home to refinance the debt to have the other party removed from the note and deed of trust. The trial court took all of the relevant factors into account and determined that defendant was to assume responsibility for paying the existing mortgage on the residence.

5. Divorce—equitable distribution—liquid assets—evidence sufficient

The trial court did not err in an equitable distribution action by ordering an unequal distribution of marital property where there was plenary evidence in the record that defendant had sufficient liquid assets to pay the distributive award. The trial court's statement that the presumption of an in-kind distribution was not rebutted was harmless error because the trial court proceeded to find that an in-kind distribution was impractical and thus rebuttable.

6. Divorce—alimony—amount—current income—findings

An alimony order was reversed and remanded where it contained findings of defendant's gross monthly income for prior years and the average gross monthly income defendant listed in his affidavit, but contained no ultimate finding establishing defendant's income at the time the award was made.

Judge TYSON concurring.

Appeal by Defendant from judgment and order entered 22 February 2016 and 2 March 2016 by Judge Lillian B. Jordan in District Court, Forsyth County. Heard in the Court of Appeals 15 May 2017.

Bell, Davis & Pitt P.A., by Robin J. Stinson, for Plaintiff-Appellee.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for Defendant-Appellant.

McGEE, Chief Judge.

Stanley Boyd Green ("Defendant") appeals from an equitable distribution order and judgment that, *inter alia*, classifies compensation he received as a part owner of a law firm as "deferred compensation," and thus divisible property pursuant to N.C. Gen. Stat. § 50-20. Defendant also appeals from an alimony order and judgment requiring him to pay

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\$6,000.00 per month in alimony to his former wife, Jennifer Cleland Green (“Plaintiff”). We reverse the alimony order and portions of the equitable distribution order, and remand for further proceedings.

I. Background

Plaintiff and Defendant married on 22 October 1994 and had four children together. Plaintiff and Defendant separated on 25 June 2013. Plaintiff graduated from law school in 1992 and worked as a law clerk at the North Carolina Court of Appeals for two to three years. Defendant graduated from law school after the parties were married, clerked for one year at the North Carolina Court of Appeals, and was then hired by the Womble Carlyle Sandridge & Rice law firm in Winston-Salem in 1999. Prior to the parties’ separation, Plaintiff had not worked outside the home since the birth of their first child in 1995, except for a few weeks writing subrogation letters early in the couple’s marriage. The parties agreed in 2000 that Plaintiff’s law license would become inactive, and Plaintiff has spent the last twenty years caring for their children. After the parties separated in 2013, Plaintiff was employed part-time and earned a net income of \$1,505.98 per month.

Defendant joined the firm of Strauch, Fitzgerald and Green (“the firm”) as a founding partner in 2009 where Defendant was initially a twenty-five percent shareholder. By the date of separation, Defendant was a 26.32 percent shareholder and, after the date of separation, he became a forty percent shareholder when one of the partners left the firm.¹ The firm is a Subchapter C corporation and, as such, shareholders are paid only when there are profits from which to pay them.

In 2009, Jack Strauch (“Strauch”) brought to the firm a contingency fee case, that arose out of a contract dispute from the 2010 Vancouver Winter Olympics. The firm represented Cruise Connections, a U.S. corporation based in Winston-Salem, against the Royal Canadian Mounted Police (the “*Cruise* case”). Though the *Cruise* case had already been dismissed by the federal district court at the time the case was brought to the firm, Defendant assisted Strauch with developing arguments on appeal, and the firm obtained a reversal in the *Cruise* case in April 2010. *See generally Cruise Connections Charter Mgmt. 1, LP v. Attorney General of Canada*, 600 F.3d 661 (D.C. Cir. 2010).

1. The firm was subsequently renamed Strauch, Green and Mistretta.

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After Plaintiff and Defendant separated, the firm obtained summary judgment on liability in the *Cruise* case. Defendant, Strauch, and others in the firm worked with experts, drafted pre-trial memoranda, developed motions in *limine*, and participated in the damages trial. The firm obtained a \$19.1 million verdict for its client at trial. While the matter was on cross-appeal, the *Cruise* case settled in mediation for \$16.9 million in December 2014. The settlement yielded the firm a fee of \$5,492,500.00.

Although the *Cruise* case was a contingency case, the firm kept detailed billing records that showed members of the firm had worked 6,608 total billable hours on the case. The hours logged prior to the separation of Plaintiff and Defendant totaled 5,159, being seventy-eight percent of the total billed hours. On 13 March 2015, under the firm's compensation structure in existence in 2015, Defendant received a payment of \$1,909,277.00 from the *Cruise* case. After accounting for taxes, Defendant received \$992,844.00 of the *Cruise* case fee.

Plaintiff filed a complaint against Defendant for child custody, child support, divorce from bed and board and injunctive relief on 14 June 2013. Plaintiff filed a second complaint on 2 July 2013 for equitable distribution, alimony, post-separation support, and attorney's fees. Defendant filed an answer and counterclaim in both actions on 21 August 2013. The two actions were consolidated, and the issues of equitable distribution and alimony were tried in January 2016. The trial court entered an equitable distribution judgment and order (the "equitable distribution order") on 22 February 2016, and entered an alimony judgment and order (the "alimony order") on 2 March 2016.

In determining the value of the firm on the date of separation and the current value, the trial court relied on the testimony of Defendant's expert, Betsy Fonvielle ("Fonvielle"), who testified that the most appropriate valuation method was the "capitalized returns" method. Fonvielle testified that the capitalized returns method over-emphasized the impact of the *Cruise* case, so Fonvielle determined Defendant's interest in the current value of the firm by averaging the capitalized return figure with the "direct market data calculation," and determined the current value of the firm to be \$409,000.00 (the value the trial court found). The trial court also found that Defendant's interest in the firm on the date of separation was \$314,476.00. It further determined that the \$94,524.00 difference between the current value of Defendant's interest and the value of Defendant's interest on the date of separation was a "passive" increase and therefore divisible property subject to equitable distribution. The trial court also found as fact that \$636,575.00 of the income Defendant received from the *Cruise* case was "divisible property" and constituted

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“deferred compensation.”² The trial court ordered half of that amount (\$318,287.50) to be paid to Plaintiff.

The total marital estate was valued at \$1,464,407.38. Pursuant to the equitable distribution order, Plaintiff was ultimately awarded fifty-three percent of the total marital estate, being \$776,135.91, which included the payment from the *Cruise* case compensation and a \$154,076.57 distributive award. The marital home, with a net value of \$41,867.26 after accounting for appreciation in the home and subtracting the mortgage still due on the home, was also distributed to Plaintiff as sole owner. The mortgage balance on the marital residence was \$368,448.74 and was distributed to Plaintiff. Pursuant to the alimony order, Defendant was ordered to pay permanent alimony of \$6,000.00 per month. Defendant appeals.

II. Analysis

Defendant argues the trial court erred by: (1) classifying the *Cruise* case compensation as deferred compensation, a type of marital property pursuant to N.C.G.S. § 50-20(b)(1); (2) classifying the *Cruise* case compensation as divisible property pursuant to N.C.G.S. § 50-20(b)(4)(b); (3) incorrectly valuing Defendant’s interest in the firm and distributing the post-separation increase in the value of the firm; (4) concluding as a matter of law that the entire increase in value of the firm from the date of separation to the date of distribution was a passive increase, and thus divisible property; (5) failing to order Plaintiff to remove Defendant from the note and deed of trust on the marital home; (6) ordering an unequal distribution funded by a distributive award where there was no evidence Defendant had the liquid funds and ability to pay the distributive award or that the presumption of an in-kind distribution was rebutted; and (7) determining the amount of alimony to be awarded to Plaintiff, and Defendant’s ability to pay that amount.

A. *Classification of the Cruise Case Compensation*

[1] Defendant argues the trial court erred by classifying the income he received from the firm as a result of the *Cruise* case settlement as both divisible property and deferred compensation.

2. This amount was calculated by multiplying the net payment to Defendant of \$992,844.00 by the percent of work done by the entire firm on the case prior to the separation (78%), being \$774,418.00. Defendant’s pre-separation ownership interest in the firm (26.32%) was then multiplied by the expected *Cruise* case fee used to determine the date of separation value of the firm using the capitalized returns method (\$523,723.00). This number, \$137,844.00, was subtracted from \$774,418.00, thus calculating “the divisible property portion” of the *Cruise* case fee to be \$636,575.00.

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It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Lee v. Lee, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (internal quotations omitted). It is also well settled that “[q]uestions of statutory interpretation are ultimately questions of law for the courts and are reviewed *de novo*.” *In re Summons of Ernst & Young*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted).

Pursuant to N.C. Gen. Stat. § 50-20, the trial court in an equitable distribution case “shall . . . provide for an equitable distribution of the marital property and divisible property between the parties[.]” N.C. Gen. Stat. § 50-20(a) (2015). As relevant here, marital property includes “all vested and nonvested pension, retirement, and other deferred compensation rights[.]” N.C.G.S. § 50-20(b)(1) (2015). Divisible property, as relevant to the present case, is defined as:

all real and personal property [including] [a]ll property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

N.C. Gen. Stat. § 50-20(b)(4)(b) (2015).

In the equitable distribution order in the present case, the trial court found as fact that “a portion of the Cruise Case fee received by [Defendant] after the date of separation is *divisible property* separate from the value of [t]he [f]irm and is considered by the [c]ourt as *deferred compensation* for work performed during the marriage.” (emphasis added). We initially note that the trial court appears to have found the Cruise case compensation to be both divisible property, pursuant to N.C.G.S. § 50-20(b)(4)(b), and deferred compensation, a type of marital property pursuant to N.C.G.S. § 50-20(b)(1). The “classification of property in an equitable distribution proceeding requires the application of legal principles,” and we therefore review *de novo* the classification of property as marital, divisible, or separate. *Romulus v. Romulus*, 215

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N.C. App. 495, 500, 715 S.E.2d 312 (2011) (citation omitted). The *Cruise* case compensation cannot be both marital and divisible property and, as such, we inquire separately into whether the income is appropriately classified as deferred compensation or divisible property.

1. Deferred Compensation

[2] The present case represents the first occasion North Carolina Courts have had to consider whether a contingent fee, collected after the date of separation but where the contract under which the contingent fee was earned was entered into during a marriage, qualifies as “deferred compensation” for the purposes of equitable distribution under N.C.G.S. § 50-20(b)(1). We first consider the text of the statute, which provides that “[m]arital property includes all vested and nonvested pension, retirement, and other deferred compensation rights.” N.C.G.S. § 50-20(b)(1). The statute does not define the term “deferred compensation,” and we therefore must employ methods of statutory construction in order to discern the intent of the General Assembly in drafting the statute. *See Stevenson v. Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972) (“The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute.”).

One canon of statutory construction employed by our Courts is *ejusdem generis*, which states that “where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.” *State v. Fenner*, 263 N.C. 694, 697-98, 140 S.E.2d 349, 352 (1965); *see also Knight v. Town of Knightdale*, 164 N.C. App. 766, 769, 596 S.E.2d 881, 884 (2004). Applying the canon to the present case, we discern that the General Assembly meant for “deferred compensation,” a general phrase, to include only items “of the same kind” as those words which come before it in N.C.G.S. § 50-20(b)(1). We do not believe a spouse’s share of a contingent fee earned by virtue of the spouse’s ownership interest in a law firm is “of the same type” as vested and nonvested pensions and retirement accounts, which suggests the General Assembly did not mean to include contingency fees to be included in the term “deferred compensation” in N.C.G.S. § 50-20(b)(1).

Also considering dictionary definitions leads to the same result. A contingent fee is defined as “[a] fee charged for a lawyer’s services *only if* the lawsuit is successful or is favorably settled out of court.” BLACK’S LAW DICTIONARY 338 (8th ed. 2004) (emphasis added). Deferred

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compensation, on the other hand, “generally refers to money which, *by prior arrangement*, is paid to the employee in tax years *subsequent* to that in which it is earned.” Michael J. Canan, *Qualified Retirement and Other Employee Benefit Plans* § 1.6 (West 1994) (emphasis added); *see also* BLACK’S LAW DICTIONARY 421 (6th ed. 1990) (defining “deferred compensation” as “compensation that will be taxed when received and not when earned”). Defendant received the *Cruise* case fee only after the lawsuit was favorably settled out of court, and Defendant received the income in the year in which it was earned and after the date of the parties’ separation.

“[A]s a general matter, retained earnings of a corporation are not marital property until distributed to the shareholders.” *Allen v. Allen*, 168 N.C. App. 368, 375, 607 S.E.2d 331, 336 (2005). “[F]unds received after the separation may appropriately be considered as marital property when the right to receive those funds was acquired during the marriage and before the separation[.]” *Hill v. Hill*, __ N.C. App. __, __, 781 S.E.2d 29, 40 (2015) (quotation omitted). Because the *Cruise* case had not been settled at the time of the parties’ separation, Defendant had no right to any income from the *Cruise* case at that time.

Even if the *Cruise* case compensation was properly classified as deferred compensation, under N.C.G.S. § 50-20.1(d), an award of deferred compensation is based on the accrued benefit calculated as of the date of separation. In the present case, Defendant had no accrued benefit at the date of the parties’ separation – Defendant was not entitled to any payment from his or the firm’s work on the *Cruise* case that had not yet been settled and would not be settled until months after the parties separated.

In *Musser v. Musser*, 909 P.2d 37 (Okla. 1995), the Oklahoma Supreme Court confronted the precise question we confront in this case: whether a husband’s interest in a contingency fee case was marital property. In holding it was not, that court stated:

[A]n attorney is not entitled to receive payment for services rendered unless the client succeeds in recovering money damages. For this reason, we conclude that because [the h]usband in the case at bar is not certain to receive anything under the contingency fee contracts, those contingency fee cases should not be considered marital property. At most, [the h]usband has a potential for earning income in the future. He is not assured of earning anything for his efforts nor does he acquire a vested interest in the income

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from those cases unless his client recovers, an event impossible to accurately predict. Therefore, we deem pending contingency fee cases of a law firm to be future income and not a part of the marital assets.

Id. at 40 (emphasis omitted). We agree with the reasoning of the Oklahoma Supreme Court. At the time Plaintiff and Defendant separated, Defendant and the firm were not certain to recover anything from the *Cruise* case. At most, Defendant had the potential to earn income from the case in the future. Therefore, the *Cruise* case compensation was not deferred compensation.

2. Divisible Property

[3] In addition to classifying the *Cruise* case compensation as deferred compensation, the trial court also classified it as divisible property. As noted, divisible property

means all real and personal property [including] [a]ll property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

N.C.G.S. § 50-20(b)(4)(b). Plaintiff argues the *Cruise* case compensation received by Defendant after the date of separation is divisible property because, pursuant to N.C.G.S. § 50-20(b)(4)(b), divisible property includes contractual rights. Plaintiff argues that the rights under the *Cruise* contingent fee contract “are divisible property to the extent of pre-separation labor pursuant to the contract.” As explained above, however, Defendant did not acquire any right to receive income from the *Cruise* case prior to the date of the parties’ separation. In addition, the contingency fee contract was between the firm and its client, not between Defendant and the client. Plaintiff provides no case law, and we have found none, holding that legal fees earned on a contingency basis should be considered under the contractual rights clause of N.C.G.S. § 50-20(b)(4)(b).

On appeal, Plaintiff raises a new argument not considered by the trial court as to why the *Cruise* case compensation was properly classified as divisible property. Plaintiff argues the *Cruise* case compensation is appropriately considered a bonus, making it a type of divisible property pursuant to N.C.G.S. § 50-20. “A bonus is something given in addition to

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what is ordinarily received by, or strictly due to, the recipient.” *Pugh v. Scarboro*, 200 N.C. 59, 62, 156 S.E.2d 149, 150 (1930); see also BLACK’S LAW DICTIONARY 194 (8th ed. 2004) (defining “bonus” as “[a] premium paid in addition to what is due or expected”). The income Defendant received from the *Cruise* case was not a premium paid to the firm in addition to the money that was due to it; rather, the *Cruise* case compensation was the compensation Defendant received by virtue of his ownership interest in the firm. The trial court erred in determining that the *Cruise* case compensation was divisible property, and that compensation is thus appropriately labeled as separate property of Defendant.

Given our determination that the *Cruise* case compensation is separate property, we decline to address Defendant’s remaining arguments regarding the *Cruise* case compensation, including whether the trial court appropriately found that the increase in the firm’s value was “passive” and therefore divisible pursuant to N.C.G.S. § 50-20(b)(4)(a). In viewing the *Cruise* case compensation as separate property, on remand the trial court will consider anew whether there was an increase in the firm’s value and, if so, again consider whether that increase was “passive” or “active.” We express no opinion on the matter, and leave it to the trial court’s determination.

B. Distribution of the Mortgage Debt

[4] Defendant argues that the trial court erred by failing to distribute the mortgage debt to Plaintiff by not ordering Plaintiff to remove Defendant’s name from the promissory note and deed of trust for the marital residence. We first note that Defendant never requested that the trial court order Plaintiff to refinance the existing mortgage, and offered no evidence that Plaintiff had the ability to refinance the existing mortgage in her name alone. Because Defendant failed to argue to the trial court that his name must be removed from the note and deed of trust, he has waived appellate review of the issue. See, e.g., *Bowles Auto., Inc. v. NC DMV*, 203 N.C. App. 19, 29, 690 S.E.2d 728, 734 (2010) (holding that an appellant “waived appellate review” of an issue due to its failure to raise that issue at trial).

Even assuming the issue was not waived, we hold that the trial court did not fail to distribute the mortgage debt.

Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result

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of competent inquiry, or a finding that the trial judge failed to comply with the statute will establish an abuse of discretion.

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

Defendant cites *Khajanchi v. Khajanchi*, 140 N.C. App. 552, 537 S.E.2d 845 (2000), which states that “the [trial] court must distribute the marital property and debts.” *Id.* at 557, 537 S.E.2d at 849. Since Defendant’s name remains on the note and deed of trust, Defendant argues, he would be liable should Plaintiff fail to pay the mortgage. We hold that the trial court did not abuse its discretion in ordering Plaintiff to pay the note and deed of trust, but not ordering Plaintiff to have Defendant’s name removed from those documents and secure a new loan in her name only. We find no merit in Defendant’s argument that the trial court failed to distribute the mortgage debt as part of the equitable distribution judgment. The trial court clearly distributed the debt owed on the marital home to Plaintiff. Finding of fact 34 of the trial court’s order states that “[t]he . . . mortgage on the marital residence . . . had a balance of \$364,448.74 on the date of separation. This debt is distributed to [Plaintiff].”

While Defendant argues that the trial court erred by failing to distribute the mortgage debt at all, he actually takes issue with the method in which the mortgage debt was distributed. But Defendant has failed to make that argument in his brief to this Court. In his brief, Defendant only argues that the trial court “in actuality . . . failed to” distribute the mortgage to Plaintiff, although it “found it was distributing the mortgage to Plaintiff.” Therefore, any argument that the trial court erred in the *method* in which it distributed the mortgage debt was abandoned by Defendant’s failure to raise it in his brief. N.C.R. App. P. 28(a) (“Issues not presented and discussed in a party’s brief are deemed abandoned.”).

Even if the issue were not abandoned, Defendant cites no authority requiring that a trial court order a party receiving the marital home in an equitable distribution action to refinance the mortgage debt to have the other party removed from the note and deed of trust. In the present case, the trial court heard testimony about the valuation of the marital residence at the time it was purchased in 2006, as well as the valuation of the residence at the time of separation. The trial court also heard testimony regarding the remaining balance on the mortgage at the time of trial, and the monthly mortgage payment for principal, interest, taxes, and insurance.

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The trial court's order clearly shows that it took these factors into account in distributing the marital property and debts. The equitable distribution order includes a lengthy discussion of the marital property, including the differing valuations of the property, each parties' contentions about the valuations, and the balance of the mortgage. The trial court then specifically ordered that "[t]he marital residence [is] distributed to [] Plaintiff," and that Plaintiff was "distributed a net value of \$41,867.26," which took into account the remaining balance on the mortgage.

The order also mandated that Plaintiff "shall assume and pay in full according to the terms of the *present mortgage* at Wells Fargo Mortgage that is a lien on [the marital residence] until such time as she sells the residence or refinances it." (emphasis added). This portion of the order demonstrates that the trial court took all of the relevant factors into account and determined that Plaintiff was to assume the responsibility to pay the already existing mortgage on the residence, rather than obtain a new mortgage. The record, transcript, and order combine to show that: (1) Defendant never requested the trial court order Plaintiff to refinance the mortgage; (2) Defendant did not offer any evidence that Plaintiff had the financial resources to do so; (3) the trial court's order included a notation that Plaintiff had made all payments on the existing mortgage as of the date of the order; and (4) the trial court carefully considered the evidence regarding the marital home and the mortgage; thus, we decline to hold that the trial court's decision "could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985). "[E]quitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion." *Adams*, 331 N.C. at 691, 417 S.E.2d at 451 (citations omitted). We hold the trial court did not abuse its discretion in distributing the mortgage debt.

C. *Available Liquid Funds for the Distributive Award*

[5] Defendant next argues the trial court erred by ordering an unequal distribution of marital property because there was no evidence that he had the liquid funds and ability to pay the distributive award. We disagree. When a distributive award is ordered, the court must "make the required findings that defendant had sufficient liquid assets from which to pay the distributive award." *Squires v. Squires*, 178 N.C. App. 251, 267, 631 S.E.2d 156, 165 (2006). "If a party's ability to pay an award with liquid assets can be ascertained from the record, then the distributive award must be affirmed." *Peltzer v. Peltzer*, 222 N.C. App. 784, 791, 732

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S.E.2d 357, 362 (2012). In the present case, there is plenary evidence in the record that Defendant had sufficient liquid assets to pay the distributive award. The trial court found that Defendant had separate assets³ which were valued at over \$276,500.00, in addition to a whole life insurance policy with a face value of \$1,275,000.00, and an investment portfolio with Northwestern Mutual with a balance of \$1,275,268.80.

Defendant further argues that there was no evidence that the presumption of an in-kind distribution was rebutted.

It shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, *or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind*. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

N.C. Gen. Stat. § 50-20(e) (emphasis added). In the present case, the presumption is rebuttable because Defendant's interest in the firm is a closely-held business interest, and the trial court found that, due to the nature of some of the marital property, it was impractical for an in-kind distribution. While the trial court specifically referred to the presumption as "not rebutted," we find the trial court's statement is harmless error because the court proceeded to find that an in-kind distribution was impractical and thus rebuttable under the statute. We affirm the trial court's determination that the distribution was not susceptible to division in-kind, and that Defendant had sufficient liquid assets to pay the distributive award.

D. Defendant's Ability to Pay Alimony

[6] Defendant argues that the trial court's findings of fact are insufficient for this Court to review his ability to pay alimony. Whether a spouse is entitled to an award of alimony is a question of law, which we review

3. These assets include a new home in which he invested \$40,000.00, a boat worth \$60,000.00 with \$10,000.00 equity, 27 guns, 100 knives, and a separate retirement plan worth over \$107,000.00.

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de novo. *Collins v. Collins*, ___ N.C. App. ___, ___, 778 S.E.2d 854, 856 (2015). “The amount of alimony is determined by the trial judge in the exercise of his sound discretion and is not reviewable on appeal in the absence of an abuse of discretion.” *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982). Defendant contends the trial court failed to make a finding of fact regarding his current actual income – a required finding before using prior years’ income to determine whether he had the ability to pay the alimony award.

“Alimony is ordinarily determined by a party’s actual income, from all sources, at the time of the order.” *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (citation and emphasis omitted). As this Court has previously held:

Unless the [trial] court finds that a supporting spouse is deliberately depressing his income in disregard of his marital obligation to provide reasonable support, and applies the “capacity to earn” rule, a supporting spouse’s ability to pay alimony is ordinarily determined by his income at the time the award is made.

Whedon v. Whedon, 58 N.C. App. 524, 527, 294 S.E.2d 29, 32 (1982) (emphasis omitted); *see also Megremis v. Megremis*, 179 N.C. App. 174, 182, 633 S.E.2d 117, 123 (2006) (“Ordinarily, alimony is determined by a party’s actual income at the time of the alimony order. It is well-established that a trial court may consider a party’s earning capacity only if the trial court finds the party acted in bad faith.” (citations omitted)).

In the present case, the trial court made the following findings of fact regarding Defendant’s income and ability to pay:

24. [Defendant] is one of two owners of his law firm and his gross monthly income in 2014 averaged \$24,333.00. In 2015 his monthly income averaged \$42,458.00 (excluding a contingency fee payment he received in the Spring of 2015.) His affidavit lists his average gross monthly income as \$23,280.00. Using the averages on his end of year income statements for 2014 and 2015 for mandatory deductions, the [c]ourt finds that his average gross monthly income for 2014 and 2015 was \$33,395.00 His average monthly mandatory deductions were \$14,012.00 and his net wages were \$19,383.00.
25. [Defendant] has an investment account at Northwestern Mutual that had an investment total as

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of December 16, 2015 of \$1,275,268.80. The parties stipulated that \$916,433.00 is owed in federal and state taxes on the very large contingency fee [Defendant] received after the date of separation which the [c]ourt ruled was part divisible property in the [e]quitable [d]istribution case.

. . . .

35. The [c]ourt finds that an appropriate gross amount for [Defendant] to pay [Plaintiff] as alimony is the sum of \$6,000.00 per month. This sum is reasonable and necessary to provide [Plaintiff] with the funds needed to meet her reasonable needs according to her accustomed standard of living. Defendant has the means and ability to pay alimony of \$6,000.00 per month to Plaintiff.
36. Defendant offered evidence showing, if he earns \$330,146.00 annually (as opposed to \$400,000.00 annually) if he pays \$5300.00 in taxable alimony per month, and he pays \$3184.00 per month in child support, he will have \$9,304.00 per month to meet his own living expenses.

. . . .

39. Based upon the factors set forth in [N.C. Gen. Stat. §] 50-16.3A and the [c]ourt's discretion, the award of alimony as ordered herein is equitable under the circumstances of this case.
40. [Defendant] has the ability to pay the support ordered herein.

While the alimony order contained findings of fact on Defendant's 2014 and 2015 gross monthly income, and found as fact that Defendant's "affidavit lists his average gross monthly income as \$23,280.00," the order contained no ultimate finding of fact establishing Defendant's income "at the time the award [was] made."

Plaintiff cites *Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014) and *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006), contending that the trial court may "use an average of [the supporting spouse's] prior years' income" when "the trial court does not have sufficient information to determine actual income." While the Court in both *Zurosky* and *Diehl* did use a supporting spouse's prior years' income to

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determine whether he had the ability to pay alimony, both of those cases are distinguishable from the present case.

In *Zurosky*, the trial court noted that the supporting spouse reported in his financial affidavits a \$16,000.00 monthly deficit between his income and expenses, but “expressed concerns about the credibility of the evidence presented by [the supporting spouse] concerning his income.” *Zurosky*, 236 N.C. App. at 230, 763 S.E.2d at 762. Therefore, the trial court “relied on prior years’ incomes rather than [the supporting spouse’s] testimony concerning” his current actual income. *Id.* In determining the trial court did not err in relying on previous years’ incomes, this Court noted several findings of fact in the trial court’s order in which the court explained why it “did not find [the supporting spouse’s] reported income to be credible[.]” *Id.* at 243, 763 S.E.2d at 769-770.

Similarly, in *Diehl*, the trial court used the supporting spouse’s prior years’ income because the trial court was not presented with “adequate information as to [the supporting spouse’s] actual . . . income” at the time of the order. *Diehl*, 177 N.C. App. at 650, 630 S.E.2d at 31. The trial court found the supporting spouse’s representation of his actual income to be “highly unreliable,” which forced the trial court to rely on previous years’ income. *Id.* at 650, 630 S.E.2d at 30.

In the present case, unlike in *Zurosky* and *Diehl*, the trial court did not make any findings of fact regarding Defendant’s current income at the time of the order, but only found as fact that Defendant had submitted an affidavit listing his income as \$23,280.00 per month. Even if such findings had been made, the trial court did not base its decision on whether Defendant had the ability to pay alimony with Defendant’s current income. Instead, the trial court based that decision on an average of Defendant’s two prior years’ income. But the trial court did not make findings of fact as to whether Defendant’s professed actual income at the time of the order was reliable or unreliable before basing its decision regarding Defendant’s ability to pay alimony on an average of prior years’ income. Averaging the prior years’ income to determine Defendant’s ability to pay alimony resulted in a monthly gross income that was \$10,115.00 higher than Defendant’s reported monthly gross income.⁴

Consistent with this Court’s precedents, we hold the trial court abused its discretion in basing its decision regarding Defendant’s ability

4. Defendant’s average gross monthly income for 2014 and 2015, as found by the trial court, was \$33,395.00, while his reported monthly gross income for those years was \$23,280.00, for a difference of \$10,115.00.

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to pay alimony on an average of Defendant's monthly gross income from prior years without first determining Defendant's current monthly income, and whether that reported current income was credible. Accordingly, the alimony order must be reversed. On remand, the trial court must make findings of fact regarding Defendant's "actual income, from all sources, at the time of the order," *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675, and may only use prior years' incomes if the trial court finds as fact that Defendant's actual income is not credible, or is otherwise suspect. *Zurosky*, 236 N.C. App. at 230, 763 S.E.2d at 762; *Diehl*, 177 N.C. App. at 650, 630 S.E.2d at 31.

III. Conclusion

We reverse the trial court's order classifying the *Cruise* case compensation as deferred compensation and divisible property. The *Cruise* case compensation is separate property of Defendant under the circumstances present in this case. This case is remanded for further proceedings regarding equitable distribution. We decline to address Defendant's additional arguments regarding the valuation and distribution of the property related to the firm. Correctly viewing the *Cruise* case compensation as separate property, the trial court should determine anew whether there was an increase in the value of the firm, and whether any such increase was passive or active.

The alimony order is also reversed and remanded for further proceedings, as the trial court must determine Defendant's current actual income before deciding his ability to pay alimony on an average of his income from prior years.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge INMAN concurs.

Judge TYSON concurs with separate opinion.

TYSON, Judge, concurring.

I fully concur to reverse and to remand to the trial court. I agree the contingency compensation proceeds from the *Cruise* case, distributed to Defendant, were not deferred compensation. I also agree the compensation from the *Cruise* case is separate property of Defendant under the circumstances presented here. On remand, the trial court should determine whether there was any increase in value of Defendant's law firm, and whether such increase, if any, was passive or active. I

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agree this case should be remanded for further proceedings regarding equitable distribution.

I also concur with the majority's holding and opinion that the alimony order should be reversed and remanded for further proceedings in order for the trial court to determine the amount of Defendant's current actual income. The trial court should do this before deciding his ability to pay alimony based upon the average of his income from previous years.

I write separately to further address Defendant's argument that the trial court's order failed to distribute the mortgage debt on the marital residence to Plaintiff.

A. Distribution of Marital Residence

Defendant argues the trial court failed to distribute the mortgage debt on the marital home to Plaintiff. Defendant argues in his brief: "while the [c]ourt ordered Defendant to deed over his interest in the property to Plaintiff, the trial court did not order Plaintiff to remove Defendant from the note and deed of trust, instead merely allowing her to assume the payments on the mortgage, and thus Defendant remains liable on the marital debt." I also disagree with Defendant's characterization of the trial court's order.

In contrast to Defendant's reading of the order, the decretal portion of the order states, in relevant part:

4. Defendant shall execute a special warranty deed transferring all of his right, title and interest in the property located at 2733 Spring Garden Road, Winston Salem, NC to Plaintiff. Plaintiff's attorney shall prepare and deliver to Defendant's attorney said deed conveying Defendant's interest in said property to Plaintiff and Defendant shall execute said deed within fifteen (15) days of receiving the deed from Plaintiff's attorney. The divisible property value of \$4,667.00 is also distributed to the Plaintiff. The *Plaintiff shall assume and pay in full* according to the terms of the present mortgage at Wells Fargo Mortgage that is a lien on said residence until such time as she sells the residence or refinances it. (Emphasis supplied.)

....

13. At the request of the other party, each party shall execute and deliver any and all written instruments or documents reasonably necessary or desirable to effectuate the

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purposes and provisions of this Judgment and Order.

....

15. The terms of this Judgment and Order are enforceable through the contempt powers of this court. Each party has the ability to seek enforcement of this Judgment at his or her respective election.

These provisions grant Defendant the authority and an enforcement mechanism to seek his release from liability for the note. That is the only logical reading to comport with the trial court's intent that Plaintiff "shall *assume and pay in full the debt*" on the residence. If Defendant's name remains on the note, then the trial court's intent to distribute the asset and debt in full to Plaintiff and for Plaintiff to "assume and pay in full" the mortgage would be a nullity, because the lender could assert Defendant's joint and several liability to pay the debt in full, if Plaintiff fails to "assume and pay in full." "Court judgments and orders 'must be interpreted like other written documents, not by focusing on isolated parts, but as a whole.'" *Cleveland Const., Inc. v. Ellis-Don Const. Inc.*, 210 N.C. App. 522, 535, 709 S.E.2d 512, 522 (2011) (citing *Reavis v. Reavis*, 82 N.C. App. 77, 80, 345 S.E.2d 460, 462 (1986)).

The majority's opinion states and correctly interprets the trial court's order as clearly distributing the debt owed on the marital residence to Plaintiff. Finding of Fact 34 of the order states: "The . . . mortgage on the marital residence . . . had a balance of \$364,448.74 on the date of separation. *This debt is distributed to [Plaintiff].*" (Emphasis supplied.) The court's order does not just state Plaintiff shall make payments on the mortgage, while Defendant remains fully liable, but that the ownership of the asset and mortgage debt itself "is distributed to Plaintiff" and expressly requires that Plaintiff "shall assume and pay in full."

" 'To assume' is defined by the lexicographers as 'to take upon one's self,' 'to undertake,' 'to adopt.'" *Lenz v. Chicago & N.W. Ry. Co.*, 111 Wis. 198, 86 N.W. 607, 609 (1901); *see also Proctor Tr. Co. v. Neihart*, 130 Kan. 698, 288 P. 574, 577 (1930) (" 'Assume' means 'to take upon one's self (to do or perform); to undertake.'" (citation omitted)). "To pay, is . . . to discharge a debt, to deliver a creditor the value of a debt, either in money or in goods, to his acceptance, by which the debt is discharged." *Bears v. Home Ins. Co.*, 36 N.Y. 522, 527 (1867) (citations omitted).

Here, the language of the trial court's order expressly distributes the marital residence equity and debt to Plaintiff, and requires Plaintiff "shall assume *and* pay in full" the mortgage and debt on the marital

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residence. Construing “assume” and “pay in full” together indicates Defendant has the power under the trial court’s order to demand Plaintiff to have Defendant’s name removed from the note or otherwise release Defendant from liability on the note. Otherwise, Plaintiff would assume the mortgage, but not be responsible to “pay in full.” See *Cleveland Const.*, 210 N.C. App. at 535, 709 S.E.2d at 522 (stating court orders and judgments must be interpreted as a whole).

If any ambiguity exists in the trial court’s order, then upon remand, the trial court should make the decretal section more definitive. “Whether ambiguity exists in a court order is a question of law. . . .” *Emory v. Pendergraph*, 154 N.C. App. 181, 185, 571 S.E.2d 845, 848 (2002). This Court reviews questions of law *de novo*. *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004).

Upon execution and recordation of the ordered special warranty deed, conveying the marital residence to Plaintiff, all of Defendant’s right, title, and interest in that collateral, including his equity of redemption of that property is terminated. As long as Defendant’s name remains on the note, he is fully liable for the entire debt. He must disclose that liability on his financial statements and credit reports, with no continuing or offsetting interest in the underlying real property asset, which serves as partial collateral to secure repayment of the debt. Plaintiff and Defendant’s joint and several promise to pay remains part of the collateral for repayment.

No cases allow a trial court to purportedly grant one spouse sole ownership of the marital residence, and to distribute responsibility to “assume and pay in full” the mortgage debt, while requiring the other spouse to remain jointly and severally liable for the balance on the note. Our Supreme Court in *Beall v. Beall*, 290 N.C. 669, 677 228 S.E.2d 407, 412 (1976), dealt with a divorce judgment that granted the wife *possession* of the marital residence and required the husband to pay the mortgage and taxes on the home. The Supreme Court found that portion of the divorce order reasonable. *Id.* The Court in *Beall* did not require the husband to *convey his entire property interest* in the marital residence to the wife, yet remain liable for the entire debt.

B. Conclusion

The majority’s opinion does not vacate or overturn the portions of the equitable distribution order distributing the marital residence asset and debt to Plaintiff. The order grants Plaintiff exclusive ownership of the marital residence and distributes concurrent responsibility to “assume and pay in full” the debt thereon.

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On this marital residence distribution issue, the trial court's decretal portion of its order is supported by its findings of fact and conclusions of law, which allows for Defendant's liability under the note to be terminated or released by the lender upon his execution and delivery of the special warranty deed. The trial court upon remand should enforce the express language of the equitable distribution order to require such release from the marital residence debt liability as a *quid pro quo* for the conveyance of Defendant's entire interest in the marital residence to Plaintiff.

CURTIS R. HOLMES, PLAINTIFF

v.

DAVID G. SHEPPARD AND FARM BUREAU INSURANCE OF
NORTH CAROLINA, INC., DEFENDANTS

No. COA17-125

Filed 3 October 2017

1. Insurance—agent—negligence—duty of care—summary judgment

Summary judgment for defendant was not appropriate on a negligence claim against an insurance agent for not obtaining insurance on property without a vacancy exclusion. If a trier of fact were to believe the evidence that plaintiff requested a vacancy exclusion and that defendant sought to obtain a policy based on that request, then defendant undertook a duty to procure such a policy.

2. Insurance—action against agent—policy exclusion—failure to read policy—contributory negligence

In a negligence action against an insurance agent for failure to obtain a property insurance policy without a vacancy exclusion, the admitted failure of plaintiff to read the policy did not necessitate summary judgment on contributory negligence because there were facts which suggested that plaintiff may have been misled or put off his guard by the agent.

3. Insurance—agent—policy—negligent misrepresentation

The trial court did not err by granting summary judgment for an insurance agent on a negligent misrepresentation claim arising from a vacancy exclusion in a property insurance policy. Although there was a dispute about whether the agent provided false information,

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plaintiff could have discovered the truth about the policy by reading it. Plaintiff did not allege that he was denied the opportunity to investigate or that he could not have learned the true facts by reasonable diligence.

4. Insurance—action against agent—vacancy exclusion included policy—merger and acceptance

Summary judgment for defendant was not appropriate in an action against an insurance agent for not obtaining a property insurance policy without a vacancy exclusion. Although defendant argued that summary judgment was appropriate because plaintiff received, retained, and thus accepted the policy, this was not an action in which plaintiff sought to hold the insurance company liable for an obligation not in the policy.

5. Appeal and Error—preservation of issues—no objection at trial

A cross-appeal contending that a motion to dismiss provided an alternate basis for relief was not properly before the Court of Appeals where the trial court determined that the issue was moot and defendant did not object.

Appeal by Plaintiff from an order granting summary judgment in favor of Defendants entered 13 September 2016 by Judge Stanley L. Allen in Guilford County Superior Court. Heard in the Court of Appeals 23 August 2017.

The Law Offices of Wade Byrd, P.A., by Wade E. Byrd, for Plaintiff-Appellant.

Teague Rotenstreich Stanaland Fox & Holt, P.L.L.C., by Stephen G. Teague, for Defendants-Appellees.

MURPHY, Judge.

Curtis R. Holmes appeals from the trial court's order granting David G. Sheppard and Farm Bureau Insurance of North Carolina, Inc.'s ("Farm Bureau") (collectively "Defendants") motion for summary judgment as to Holmes's causes of action for: (1) negligence and (2) negligent misrepresentation.¹ On appeal, Holmes argues that the grounds argued

1. The trial court also granted summary judgment in favor of Defendants on Holmes's constructive fraud claim. However, Holmes raises no arguments appealing summary

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for granting the motion are either precluded by precedent, disputed by issues of material fact, or both. Specifically, he maintains: (1) the record shows Sheppard owed Holmes a duty of care, which he breached; (2) evidence of misstatements was not needed to establish negligence by an insurance agent, and, nonetheless, the record shows Sheppard misstated the policy's coverage; (3) Holmes's failure to read the policy was not contributory negligence as a matter of law; and (4) Defendants' theory that Holmes accepted the policy by not reading it cannot support summary judgment in this case. Defendants raise an alternative basis in law through North Carolina Rule of Appellate Procedure 10(c), arguing that the claims herein appealed could have been appropriately dismissed on the alternative basis of failure to state claims upon which relief can be granted.

We hold the trial court did not err in granting summary judgment in favor of Defendants on the negligent misrepresentation claim. However, we agree with Holmes that the trial court erred in granting summary judgment on his negligence claim because there is a genuine issue of material fact as to whether Sheppard owed Holmes a duty of care to obtain coverage for the property at issue while it remained vacant. We reverse for Holmes to proceed with the negligence claim, and we reject Defendants' North Carolina Rule of Appellate Procedure 10(c) argument.

Background

Holmes owns various real estate holdings, including both residential and office buildings. Beginning in approximately 2010, Holmes purchased several insurance policies for his properties through Sheppard, an insurance broker and agent of Farm Bureau.

Holmes filed a claim under one of these Farm Bureau policies in November 2011, when eight heat pumps were stolen from an office building that Holmes owned. Farm Bureau denied the claim because there was a vacancy clause on the property ("the 2011 denial"). Nevertheless, Holmes continued to use Sheppard to purchase Farm Bureau insurance policies.

judgment on the constructive fraud claim in his opening brief. Nonetheless, Defendants address constructive fraud in their appellee brief, and Holmes then raises the issue in his reply brief. We do not allow Holmes to use his reply brief to raise an issue on appeal that was not raised in his principal brief. See *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 78, 772 S.E.2d 93, 96 (2015) ("[T]his Court has noted that [a] reply brief does not serve as a way to correct deficiencies in the principal brief.") (quotation omitted); see e.g. *State v. Dinan*, 233 N.C. App. 694, 698-99, 757 S.E.2d 481, 485 (2014) (holding that where a defendant did not ask the Court of Appeals to review an unreserved issue under the plain error standard in his principal brief, he could not cure the error by asking the Court to use the plain error standard in his reply brief).

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In August 2012, Holmes contacted Sheppard about a newly constructed home he owned on Thom Road in Mebane (“the Property”). Farm Bureau insured the Property until 19 August 2012, when it cancelled the policy due to the Property being vacant. Sheppard claimed that, although Holmes confirmed the Property was vacant, Holmes stated he would lease or rent the Property within thirty days. Holmes disputes that he told Sheppard he would lease the Property.

Sheppard told Holmes that Farm Bureau was unable to insure the Property, and that he would have to insure it through the North Carolina Joint Underwriters Association (“NCJUA”). Holmes testified that he did not know why he had to purchase the policy through NCJUA instead of through Farm Bureau, but thought “it was because the property was vacant.” Holmes further claims that he chose to purchase a policy through Sheppard because he felt Sheppard would “be the best man to -- to guide [him] in the right way” in purchasing a policy for the Property because Sheppard knew about the 2011 denial based on vacancy. Holmes testified that although he did not remember the application process for a NCJUA policy, he told Sheppard that he “didn’t want to ever have this vacancy problem again because of what [he] had been through.”

Following Holmes’s application for coverage, NCJUA issued a policy (“the Policy”) insuring the Property, which became effective on 24 August 2012. NCJUA mailed a copy of the Policy to Holmes, who received it, but admittedly did not read it. The Policy remained active in January 2015, when water damage occurred at the Property. Holmes contacted Sheppard to submit a claim for the damage, which Sheppard initially thought would be paid. Sheppard claims he thought the Policy covered the damage because he was “under the impression that [Holmes] had fulfilled his commitment to lease the property[.]” Holmes denies ever making a commitment to lease the Property. NCJUA denied the claim due to coverage exclusions and limitations for “‘Accidental Discharge or Overflow of Water or Steam’ of a dwelling that had been vacant for more than 60 consecutive days immediately prior to the loss.”

On 7 December 2015, Holmes filed a complaint seeking compensatory damages, alleging claims against Defendants for: (1) negligence; (2) negligent misrepresentation; and (3) constructive fraud in connection with the Policy. Defendants denied these allegations in their Answer, asserting various defenses, including a Rule 12(b)(6) motion to dismiss. On 16 August 2016, Defendants filed a motion for summary judgment, and served notice of a motions hearing for both the motion for summary judgment and the motion to dismiss. The hearing took place on 6-7 September 2016. The trial court granted Defendants’ motion for

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summary judgment as to all claims in open court. The trial court filed its written order on 13 September 2016. The trial court declined to reach the motion to dismiss because the grant of the summary judgment motion rendered the motion to dismiss moot. Plaintiff timely appealed.

Analysis

Holmes argues the trial court erred in granting summary judgment in favor of Defendants on his claims of negligence and negligent misrepresentation because none of the grounds asserted as a basis for summary judgment support the grant of the motion. Specifically, he maintains: (1) the record shows Sheppard owed Holmes a duty of care, which he breached; (2) evidence of misstatements was not needed to establish negligence by an insurance agent, and, nonetheless, the record shows Sheppard misstated the policy's coverage; (3) Holmes's failure to read the policy was not contributory negligence as a matter of law; and (4) Defendants' theory that Holmes accepted the policy by not reading it cannot support summary judgment in this case.

We reverse the trial court's grant of summary judgment on the negligence claim and affirm the trial court's grant of summary judgment as to negligent misrepresentation. We note Defendants invoke North Carolina Rule of Appellate Procedure 10(c) to raise an alternative basis in law supporting the dismissal of Holmes's claims. We find their argument deficient.

We review an order granting summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). Summary judgment is only appropriate when the record shows "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 523-24, 649 S.E.2d at 385 (quotation omitted).

I. Negligence by an Insurance Agent

Holmes argues the trial court erred in granting summary judgment on his negligence claim. We agree, because whether Defendants owed a duty of care to obtain insurance that would cover the Property while it remained vacant is a genuine issue of material fact to be decided by a jury.

A. Duty of Care

[1] To establish a prima facie case for an insurance agent's negligent failure to procure requested coverage, a plaintiff must "prove the existence of a legal duty owed to the plaintiff by the defendant, breach of

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that duty, and a causal relationship between the breach and plaintiff's injury or loss." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 301, 603 S.E.2d 147, 160 (2004) (citation omitted).

It is well established that a duty "to use reasonable skill, care and diligence to procure" contemplated insurance arises, and is breached, "if an insurance agent or broker undertakes to procure for another insurance against a designated risk[.]" *Kaperonis v. Underwriters at Lloyd's, London*, 25 N.C. App. 119, 128, 212 S.E.2d 532, 538 (1975). Thus, the agent or broker will be "liable to the proposed insured for loss proximately caused by" a "negligent failure to" procure such insurance. *Id.* at 128, 212 S.E.2d at 538. "Conversely, if the agent or broker . . . procured the contemplated insurance coverage from a competent, solvent insurer, so that it was in effect at the time of the casualty . . . he has performed his undertaking and is not liable . . . thereon." *Mayo v. Am. Fire & Cas. Co.*, 282 N.C. 346, 353, 192 S.E.2d 828, 832-33 (1972) (citations omitted). If a promise or some affirmative assurance that the broker or agent "will procure or renew a policy of insurance" is given "under circumstances which lull the insured into the belief that such insurance has been effected," then the broker or agent is obligated "to perform the duty which he has thus assumed." *Barnett v. Sec. Ins. Co. of Hartford*, 84 N.C. App. 376, 378, 352 S.E.2d 855, 857 (1987) (quotation omitted).

Here, Holmes claims he requested a policy without a vacancy exclusion. In support of this argument, he points to his deposition testimony, where he repeatedly claimed he told Sheppard he did not want to have another issue because of vacancy, as he did with the 2011 denial. Further, Holmes points to the following exchange that took place at deposition, which he argues demonstrates that he requested coverage without a vacancy exclusion, and that Sheppard undertook to procure such coverage:

Q. What did [Sheppard] say as to why he had to get insurance with a different company?

[Holmes]: I think it was because the property was vacant.

In contrast, Defendants argue that Holmes never requested a policy without a vacancy limitation. By affidavit, Sheppard testified that Holmes did not request a vacancy exclusion for the Property, but, rather, in August 2012, Holmes confirmed he planned to lease the Property within thirty days. Although, in his deposition, Holmes claimed that Sheppard's statement that Holmes planned to lease the Property was false, Holmes did indicate in his application for the Policy that the Property would be occupied. Sheppard claimed he initially thought

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the claim at issue would be paid when it was initially presented because he was under the impression that Holmes had fulfilled the commitment to lease the Property.

If a trier of fact were to believe the evidence that Holmes requested a vacancy exclusion and Sheppard sought to secure a policy based on the request, then Sheppard undertook a duty to procure such a policy. *See Kaperonis*, 25 N.C. App. at 128, 212 S.E.2d at 538 (explaining that the duty “to use reasonable skill, care and diligence to procure” contemplated insurance arises, and is breached, “if an insurance agent or broker undertakes to procure for another insurance against a designated risk”). Thus, as there is a genuine issue as to whether a legal duty arose for Sheppard to procure insurance without a vacancy exclusion, summary judgment was not appropriate on Holmes’s negligence claim.

B. Contributory Negligence

[2] Holmes next argues that Defendants’ argument in their motion for summary judgment that Holmes was contributorily negligent did not create sufficient grounds for the trial court to grant summary judgment on his negligence claim. We agree.

Generally, if “a person of mature years of sound mind who can read or write signs or accepts a deed or formal contract affecting his pecuniary interest, it is his duty to read it, and knowledge of the contents will be imputed to him in case he has negligently failed to” so read. *Elam v. Smithdeal Realty & Ins. Co.*, 182 N.C. 599, 603, 109 S.E. 632, 634 (1921). However, this duty “is subject to the qualification that nothing has been said or done to mislead him or to put a man of reasonable business prudence off his guard[.]” *Id.* at 603, 109 S.E. at 634. Thus, where an agent or broker says or does something to mislead an individual or to put a person of reasonable business prudence off guard, “the cause should be submitted to the jury on the question whether the failure to hold an adequate policy is due to plaintiff’s own negligence in not reading his policy and taking out one sufficient to protect him.” *Id.* at 603-04, 109 S.E. at 634.

Whether Holmes read the Policy is not at issue, as Holmes admits he did not read it. Further, he admits that he could have done so. He also testified that he would have done something about the Policy’s lack of vacancy exclusion, had he read the policy. Nonetheless, Holmes argues that the cause should be submitted to the jury on the question of whether this failure was contributorily negligent so as to bar his claim under the qualification described in *Elam* because Sheppard made representations regarding the coverage that misled him, or put him off his

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guard. Defendants argue that Sheppard made no such representations, and, therefore, Holmes was contributorily negligent, barring relief.

Contrary to Defendants' assertions, there are some facts in evidence, through Holmes's deposition testimony, that suggest Holmes may have been misled, or put off his guard, by Sheppard. Holmes denied he told Sheppard he was going to lease the residence, and repeatedly emphasized that he told Sheppard he did not want another issue to be caused by vacancy. From this testimony, a jury could determine that Sheppard misled Holmes, or put him off his guard, and, thus, Holmes's failure to read the policy does not necessitate as a matter of law that summary judgment be granted on his claim that Defendants were negligent.

Thus, we reverse the trial court's grant of summary judgment for Defendants on Holmes's negligence claim.

II. Negligent Misrepresentation

[3] Holmes argues the trial court erred in granting summary judgment on his negligent misrepresentation claim. We disagree.

"[N]egligent misrepresentation occurs when in the course of a business or other transaction in which an individual has a pecuniary interest, he or she *supplies false information* for the guidance of others in a business transaction, without exercising reasonable care in obtaining or communicating the information." *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 256, 552 S.E.2d 186, 191 (2001) (quotation omitted). However, "when a party relying on a misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Id.* at 256, 552 S.E.2d at 192 (quotation omitted).

Here, Holmes argues that Sheppard supplied false information by informing Holmes that the Policy would meet his needs. While whether this is "false information" is in dispute, Holmes could have discovered the truth that there was not a vacancy exclusion upon simple inquiry by reading the Policy. Holmes repeatedly testified that he never read the Policy insuring the Property, despite receiving it in the mail. Had he read the Policy, he would have learned that it did not include a vacancy exclusion. Thus, because he could have discovered the truth upon inquiry, the complaint had to allege Holmes was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence. It did not, so the trial court appropriately granted summary judgment as to Holmes's claim for negligent misrepresentation.

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III. Merger and Acceptance of the Policy

[4] Holmes argues summary judgment could not be granted based on Defendants' argument that summary judgment was appropriate because Holmes received, retained, and, thus, accepted as written the Policy. We agree.

Defendants support their argument with an insurance contract case, *State Distributing Corp. v. Travelers Indemnity Co.*, 224 N.C. 370, 30 S.E. 377 (1944). In *State Distributing Corp.*, the plaintiff requested both robbery and burglary insurance. *Id.* at 375-76, 30 S.E. at 380. The insurance agent sent the plaintiff a letter that constituted a temporary binder pending issuance of the formal policy, which stated that while the application was being processed, the insurer would put coverage into effect immediately. *Id.* at 376, 30 S.E. at 380. When the formal policy arrived, it only covered robbery. *Id.* at 376, 30 S.E. at 380. Our Supreme Court held that in the context of the continued efficacy of an insurance binder after delivery of an actual policy, the formal policy merged all prior or contemporaneous parole agreements, and upon accepting the policy, thereby assented to the terms. *Id.* at 376, 30 S.E. at 380-81. Thus, *State Distributing Corp.* did not concern whether the agent was subject to negligence for failure to procure requested coverage. Instead, here, as in *Elam*, "the action is not one . . . in which plaintiff is seeking to hold [the insurance company] liable for an obligation not contained in the written policy[;]" instead, the plaintiff is suing "the agent and broker for negligent failure to perform a duty he had undertaken and assumed as agent, by which plaintiff has suffered the loss complained of[.]" *Elam*, 182 N.C. at 602, 109 S.E. at 633. Therefore, summary judgment cannot be granted based on Defendants' argument that summary judgment was appropriate because, allegedly, Holmes received, retained, and accepted the Policy as written.

IV. Defendants' Cross-Assignment of Error

[5] Defendants contend their motion to dismiss Holmes's claims for failure to state a claim upon which relief can be granted provides an alternative basis in the law upon which relief can be granted. We disagree, because this cross-assignment of error is not properly before our Court.

North Carolina Rule of Appellate Procedure 10(c) provides, in pertinent part:

Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any

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action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief.

N.C.R. App. P. 10(c) (2017).

Our Supreme Court has explained that this rule is a mechanism to provide "protection for appellees who have been deprived in the trial court of an alternative basis in law on which their favorable judgment could be supported, and who face the possibility that on appeal prejudicial error will be found in the ground on which their judgment was actually based." *Carawan v. Tate*, 304 N.C. 696, 701, 286 S.E.2d 99, 102 (1982) (discussing the rule for cross-assignments of error).

In the present case, the trial court determined the granting of the motion for summary judgment rendered the motion to dismiss moot. During the hearing, Defendants agreed with the trial court that its ruling on summary judgment rendered the motion to dismiss moot:

[Trial court]: After careful consideration of the court file and everything handed up by counsel and arguments of counsel, Court is of the opinion that the motions for summary judgment as to each count of the complaint should be allowed. And does that make moot then the motion to dismiss?

[Defendants]: It does, Your Honor.

[Trial Court]: Okay. I'll ask you to draw that, [Defense counsel].

By not objecting, Defendants failed to properly preserve any action or omission of the trial court for appellate review as required by North Carolina Rule of Appellate Procedure 10(c). *See* N.C.R. App. P. 10(a)(1) (2017) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Conclusion

For the reasons stated above, we affirm the trial court granting summary judgment in favor of Defendants on the negligent misrepresentation

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and constructive fraud claims. However, the trial court erred in granting summary judgment on Holmes's negligence claim. We reverse for Holmes to proceed with the negligence claim.

REVERSED IN PART; AFFIRMED IN PART.

Judges CALABRIA and ZACHARY concur.

IN THE MATTER OF ANTHONY RAYSHON BETHEA

No. COA17-459

Filed 3 October 2017

1. Sexual Offenders—sex offender registry—substantive due process—current or potential threat to public safety

The trial court did not violate petitioner's due process rights by denying his request to be removed from the North Carolina Sex Offender Registry where although the trial court found he was not otherwise a current or potential threat to public safety, N.C.G.S. § 14-208.12A identified and classified petitioner as a continuing threat to public safety under federal sex offender standards.

2. Constitutional Law—ex post facto law—retroactive application of law—Adam Walsh Act—Sex Offender Registration and Notification Act—minimum sex offender registration period

Petitioner's contention that the retroactive application of the Adam Walsh Act (also known as the Sex Offender Registration and Notification Act) for minimum sex offender registration periods through N.C.G.S. § 14-208.12A(a1)(2) constituted an ex post facto law was overruled where it was already addressed by in *In re Hall* and *State v. Sakobie*.

Appeal by petitioner from order entered 31 October 2016 by Judge Carl R. Fox in Chatham County Superior Court. Heard in the Court of Appeals 20 September 2017.

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

Attorney General Joshua H. Stein, by Assistant Attorney General William P. Hart, Jr. for the State.

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TYSON, Judge.

Anthony Rayshon Bethea (“Petitioner”) appeals from the trial court’s denial of his petition to be removed from the North Carolina Sex Offender Registry. We affirm the trial court’s order.

I. Background

On 13 September 2004, Petitioner pled guilty to six counts of felony sexual activity with a student in violation of N.C. Gen. Stat. § 14-27.7(b), upon which the court sentenced Petitioner. This sexual activity with a student offense to which Petitioner pled guilty is now codified under N.C. Gen. Stat. § 14-27.32 (2015).

Following his convictions, Petitioner registered as a sex offender on 14 October 2004 under the North Carolina Sex Offender and Public Protection Registration Program (“the Registry Program”). *See* N.C. Gen. Stat. § 14-208.7, *et. seq* (2015) (establishing the North Carolina Sex Offender and Public Protection Registration Program).

Under the version of the Registry Program in effect at the time of his 2004 convictions, Petitioner’s requirement to be registered as a sex offender was to automatically terminate after ten years had elapsed, if he did not commit any further offenses requiring registration. N.C. Gen. Stat. § 14-208.12A (2004).

Statutory amendments in 2006 to the Registry Program affected Petitioner’s registration status. First, section 14-208.7 was amended to provide that registration of convicted sex offenders could continue beyond ten years, even when the registrant had not re-offended. N.C. Gen. Stat. § 14-208.7(5a) (2007) (providing that the registration requirement “shall be maintained for a period of at least ten years following the date of initial county registration”).

Second, the provision of section 14-208.7, which provided for automatic termination of registration, was removed. Section 14-208.12A was added to the Registry Program. The current version of section 14-208.12A provides that persons wishing to terminate their registration requirement must petition the superior court for relief.

- (a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.

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...

(a1) The court may grant the relief if:

(1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,

(2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and

(3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A (2015), *amended by* N.C. Sess. Laws 2017-158, § 22 (adding a provision to section 14-208.12A(a) irrelevant to this appeal).

In 2006, Congress enacted the Adam Walsh Act, also known as the Sex Offender Registration and Notification Act (“SORNA”). *See* 42 U.S.C. § 16901, *et seq.* The Adam Walsh Act replaced the Jacob Wetterling Act, the prior federal law addressing sex offender registration. This Court has held “[t]he Adam Walsh Act now provides the ‘federal standards applicable to the termination of a registration requirement [under N.C. Gen. Stat. § 14-208.12A(a1)(2)]’ and covers substantially the same subject matter as the Jacob Wetterling Act.” *In re Hamilton*, 220 N.C. App. 350, 356, 725 S.E.2d 393, 398 (2012).

SORNA establishes rules governing sex offender registration and conditions state receipt of certain federal funds on a state’s implementation of those rules. *See* 42 U.S.C. §§ 16915, 16925. SORNA utilizes a three-tiered system for classifying sex offenders:

Under SORNA, a tier I sex offender must register for fifteen years, a tier II sex offender must register for twenty-five years, and a tier III sex offender must register for life. However, a tier I sex offender may reduce his or her registration period to ten years by keeping a clean record; likewise, a tier II sex offender may reduce his or her registration period to twenty years. Only a tier III sex offender who is “adjudicated delinquent [as a juvenile] for the offense” may reduce his or her registration period to twenty-five years; otherwise, a tier III sex offender is subject to lifetime registration. *See* 42 U.S.C.S. § 16915(a), (b) (2013).

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In re Hall, 238 N.C. App. 322, 326, 768 S.E.2d 39, 42-43 (2014), *appeal dismissed and disc. review denied*, ___ N.C. ___, 771 S.E.2d 285, *cert. denied sub nom Hall v. North Carolina*, ___ U.S. ___, 193 L.Ed.2d 519 (2015).

In September 2014, Petitioner petitioned the Superior Court of Chatham County to be removed from the sex offender registry. At the hearing on 31 October 2016, Petitioner did not contest his prior offenses qualified him as a tier II offender under SORNA.

The trial court checked off the following findings of fact on the pre-printed form entitled Petition and Order for Termination of Sex Offender Registration, AOC-CR-263, Rev. 12/11:

1. The petitioner was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes for the offense(s) set out above.
2. The petitioner has been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least ten (10) years beginning with the Date of Initial NC Registration above.
3. Since the Date of Conviction above, the petitioner has not been convicted of any subsequent offense requiring registration under Article 27A of Chapter 14.
4. Since the completion of his/her sentence for the offense(s) set out above, the petitioner has not been arrested for any offense that would require registration under Article 27A of Chapter 14.
5. The petitioner served this petition on the Office of the District Attorney at least three (3) weeks prior to the hearing held on this matter.
6. The petitioner is not a current or potential threat to public safety.
7. The relief requested by the petitioner [does not] comp[ly] with the provisions of the federal Jacob Wetterling Act, 42 U.S.C § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State.

The court denied Petitioner's petition for relief from registration and removal from the registry. The court concluded Petitioner's requested

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relief and termination of his duty to register would not comply with “federal standards applicable to the termination of registration requirement required to be met as a condition for receipt of federal funds by the State, based upon . . . SORNA[,]” and entered an order thereon.

Petitioner timely appealed from the trial court’s denial of his petition.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issues

Petitioner argues: (1) the trial court violated his substantive due process rights by denying his petition for termination of sex offender registration after finding that he “is not a current or potential threat to public safety”; and, (2) the retroactive activation of federal sex offender registration standards violates the *ex post facto* clauses of the federal and state constitutions.

IV. Standard of Review

This Court “reviews conclusions of law pertaining to constitutional matters *de novo*.” *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citations omitted). Under *de novo* review, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

V. Analysis**A. Substantive Due Process**

Petitioner argues the trial court’s denial of his petition for termination of sex offender registration violates his substantive due process rights. He asserts that after the trial court found Petitioner “is not a current or potential threat to public safety[,]” it was arbitrary for the trial court to deny his petition and to require him to continue to register because of the SORNA standards incorporated into state law under section 14-208.12A(a1)(2). We disagree.

Petitioner argues “[t]he State can establish no justification for the arbitrary extension of [his] registration requirement now that he has been judicially determined to be no threat to the public.” Petitioner failed to challenge the trial court’s findings of fact detailed above. When “the trial court’s findings of fact are not challenged on appeal, they

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are deemed to be supported by competent evidence and are binding on appeal.” *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004).

1. XIV Amendment and Article I § 19

[1] Pursuant to the Constitution of the United States, “[n]o State shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of law. . . .” U.S. Const., amend. XIV, § 1. The North Carolina Constitution provides that “[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land.” N.C. Const. art. I, § 19. Our Supreme Court has held that “[t]he term ‘law of the land’ as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with ‘due process of law’ as used in the Fourteenth Amendment to the Federal Constitution.” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (citation and quotations omitted).

The Due Process Clause provides two types of protection: substantive and procedural due process. *See State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998).

“‘Substantive due process’ protection prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty.” *Id.*

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest.

Washington v. Glucksberg, 521 U.S. 702, 720-21, 138 L.Ed.2d 772, 787-88 (1997) (citations and quotations omitted).

Although the trial court did check or select the box on the pre-printed AOC form finding Petitioner “is not a current or potential threat to public safety[,]” section 14-208.12A(a1) allows a trial court to grant a petition for relief to register and removal from the Registry Program only if:

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(1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,

(2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and

(3) The court is *otherwise satisfied* that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A(a1) (emphasis supplied).

The statute clearly states that upon a finding that a petitioner does not have a dis-qualifying arrest and is not ineligible for relief under federal law, a trial court is required to find a petitioner is not *otherwise* a “current or potential threat to public safety” before it can exercise its discretion to grant relief. Here, the trial court determined Petitioner did not have a disqualifying arrest and that he is ineligible for relief under federal law.

Reading the pre-printed “[t]he petitioner is not a current or potential threat to public safety[,]” finding of fact on the AOC form in light of the language of section 14-208.12A, clarifies this finding of fact. The trial court did not find Petitioner is not a current or potential threat to public safety without qualification, rather Petitioner is not *otherwise* a current or potential threat to public safety beyond his ineligibility for removal from the registry under federal law. The required findings are cumulative and the court’s finding in Petitioner’s favor on one, some, or even most of the requirements does not reduce Petitioner’s burden to show compliance with all requirements.

The incorporation of federal sex offender registration standards into section 14-208.12A(a1)(2) is rationally related to the government purpose of protecting public safety, especially the protection and safety of minors and other victims, from sexual offenders. Even though the trial court found Petitioner “is not otherwise a current or potential threat to public safety,” section 14-208.12A identifies and classifies Petitioner as a continuing threat to public safety under federal sex offender standards. See N.C. Gen. Stat. § 14-208.12A(a1)(2). The Congress of the United States enacted SORNA: “In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators” 42 U.S.C. § 16901.

IN RE BETHEA

[255 N.C. App. 749 (2017)]

Petitioner's assertion that he has "been judicially determined to be no threat to the public" is a threshold finding that is required in the seven listed required findings, in addition to compliance with section 14-208.12A, which limits what the trial court can conclude before it grants his requested relief. *See* N.C. Gen. Stat. § 14-208.12A.

B. *Ex Post Facto*

[2] Petitioner next contends the retroactive application of SORNA to section 14-208.12A constitutes an *ex post facto* violation. We disagree.

The enactment of *ex post facto* laws is prohibited by both the Constitution of the United States and the North Carolina Constitution. See U.S. Const. art. I, § 10 ("No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts"); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted."). This prohibition against *ex post facto* laws applies to:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

State v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (citations and quotation omitted), *cert. denied*, 537 U.S. 1117, 154 L.E. 2d. 795 (2003). "Because both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition, we analyze defendant's state and federal constitutional contentions jointly." *Id.* (citation omitted).

Petitioner's contention that the retroactive application of SORNA minimum registration periods through section § 14-208.12A(a1)(2) constitutes an *ex post facto* law was recently addressed by this Court in *In re Hall*, 238 N.C. App. at 329-33, 768 S.E.2d at 44-46. In *Hall*, the Court stated:

IN RE BETHEA

[255 N.C. App. 749 (2017)]

This Court has held that Article 27A of Chapter 14 [N.C. Gen. Stat. § 14-208.5 *et seq.*] of our North Carolina General Statutes sets forth civil, rather than punitive, remedies and, therefore, does not constitute a violation of ex post facto laws. *See* [State v. Williams, 207 N.C. App. 499, 505, 700 S.E.2d 774, 777-78 (2010)]. Therefore, in light of this Court's prior decisions rejecting the argument that our sex offender registration statutes constitute an ex post facto law, we are bound to say that petitioner's argument lacks merit.

Id. at 332, 768 S.E.2d at 46.

In *State v. Sakobie*, 165 N.C. App. 447, 598 S.E.2d 615 (2004), this Court held "the legislature did not intend that the provisions of Article 27A [to] be punitive [and] . . . the effects of North Carolina's registration law do not negate the General Assembly's expressed civil intent and that retroactive application of Article 27A does not violate the prohibitions against *ex post facto* laws." 165 N.C. App. at 452, 598 S.E.2d at 618 (citations omitted).

We are bound by the precedents in *Hall* and *Sakobie*. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Petitioner's argument that the extension of his registration period as a sex offender through the incorporation of SORNA federal standards into N.C. Gen. Stat. § 14-208.12A(a1)(2) is overruled.

VI. Conclusion

Petitioner has failed to show any reversible errors in the trial court's order. The order of the trial court is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and STROUD concur.

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[255 N.C. App. 758 (2017)]

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF

v.

BEVERLY LEE PHILLIPS, VICTORIA PHILLIPS, AND JOHN DOE 236, DEFENDANTS

No. COA16-620

Filed 3 October 2017

Insurance—duty to defend—liability policy—sexual assault on defendant’s daughter—declaratory judgment

There was no duty to defend by an insurance company where the policy holders were sued for negligence arising from a sexual assault upon defendant John Doe’s daughter. The policy provided coverage for suits arising from bodily injury or property damage, and John Doe’s claims for loss of his daughter’s services and their damaged relationship did not arise from bodily injury as defined by the policy.

Appeal by plaintiff from judgment entered 12 April 2016 by Judge G. Bryan Collins, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 16 November 2016.

Young Moore and Henderson P.A., by Walter E. Brock, Jr. and Andrew P. Flynt, for plaintiff-appellant.

Batch, Poore & Williams, PC, by J. Patrick Williams, for defendant-appellee Beverly Lee Phillips and Victoria Phillips.

Jeff Anderson & Associates, P.A., by Gregg Meyers, pro hac vice, and Copeley Johnson & Groninger PLLC, by Leto Copeley, for defendant-appellee John Doe 236.

STROUD, Judge.

Plaintiff North Carolina Farm Bureau Mutual Insurance Company, Inc. appeals a judgment ordering it to defend and indemnify defendants Beverly Lee Phillips and Victoria Phillips under the insurance policy plaintiff issued to them. We reverse and remand.

I. Background

The background of this case is provided by the trial court’s judgment and is not at issue on appeal:

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1. Farm Bureau issued policy FO 1051463 to Beverly Lee Phillips and Vicki O. Phillips as named insureds effective January 11, 2008. The policy has been renewed annually and amended from time to time through January 11, 2016.

....

5. Beverly Lee Phillips was charged with various sexual offenses which occurred over a period of time against the minor child of John Doe 236, referred to in this order as KGK.

6. From those various charges, Beverly Lee Phillips agreed to plead guilty to two counts of taking indecent liberties with KGK (a violation of N.C.G.S. 14-202.1) and two counts of sexual activity by a substitute parent (a violation of N.C.G.S. 14-27.7[a]).

7. The date of the offenses pertinent to the plea were within the 2008 policy year: May 1, 2008 and August 7, 2008. The date on which the cause of action for John Doe 236 arose was in the 2012 policy year, when he learned of the abuse of KGK.

8. John Doe 236 is a pseudonym for the father of KGK. John Doe 236 filed a civil action in Chatham County Superior Court against Beverly Lee Phillips and Victoria Phillips: John Doe 236 v. Beverly Lee Phillips and Victoria Phillips, 14 CVS 885, Chatham County Superior Court (the Chatham County Action). That complaint alleges one cause of action for negligence and one cause of action for loss of services.

9. The Chatham County Action alleges in its statement of the “Nature of the Wrongdoing” that “Beverly Phillips was convicted of indecent liberty with [John Doe 236’s] minor child;” that “Beverly Lee Phillips was charged and convicted for the sexual battery of the [John Doe 236’s] minor child;” and that “[t]his case is about sexual battery made against [John Doe 236’s] child by Beverly Lee Phillips, and the negligence of Victoria Phillips to entrust that minor with Beverly Lee Phillips.”

10. The First Cause of Action of the Chatham County Action alleges in pertinent part that “Defendant Victoria

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Phillips was negligent in failing to properly supervise Beverly Lee Phillips, or warn [John Doe 236] about the assailant;” that “as a result of the conduct of the Defendants, [John Doe 236’s] child suffered damage, and that damage also impeded the relationship between [John Doe 236] and his child and caused independent injury to [John Doe 236].”

11. The Second Cause of Action of the Chatham County Action alleges in pertinent part that “[a]s a direct and proximate result of the assault and battery by Beverly Lee Phillips, and the negligence of Victoria Phillips, [John Doe 236’s] child was affected” and that “Defendants’ actions and inactions which resulted in the damage to [John Doe 236’s] child created difficulty between, parent and child, and loss of services of the child to the father.”

12. The First Cause of Action and Second Cause of Action conclude that “Defendants’ conduct was willful, wanton, and committed with knowledge that it was likely to cause damage to [John Doe 236] and his minor child. Therefore, [John Doe 236] is entitled to an award of punitive damages.” As noted above, the parties agree that punitive damages is not at issue under the policy, and in oral argument counsel for Farm Bureau agreed that viewing the pleading as a whole, that Victoria Phillips is entitled to this allegation being read as a recklessness standard.

13. Beverly Lee Phillips admits that the Transcript of Plea is a true and accurate copy of that plea entered in State v. Beverly Lee Phillips, 09 CRS 315, Chatham County Superior Court; that he initialed the plea arrangement in the Transcript of Plea; and that he signed the Transcript of Plea. By way of explanation, Beverly Lee Phillips asserts in his answers to interrogatories that “I entered a plea in this matter because I was facing significant time if convicted and the plea was in my best interest. However, I maintain now as I did at the time of the plea that I did not sexually assault or harm in any way KGK.”

14. Victoria Phillips admits the Transcript of Plea, her husband’s initials on the plea arrangement and her husband’s signature on the Transcript of Plea. By way of explanation, Victoria Phillips asserts in her answers to

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interrogatories that “we do not believe a sexual assault occurred and my husband entered into plea because it was in his best interests at the time.”

15. Due to his ex-wife abducting his child at age one, and she and her family separating her from him, John Doe 236 learned only in 2012 that his child had been sexually assaulted.

In April of 2015, plaintiff North Carolina Farm Bureau Mutual Insurance Company, Inc. (“Farm Bureau”) filed a complaint for declaratory relief “declaring that the Farm Bureau policies do not apply to any claims in the Chatham County Action, and that Farm Bureau does not have a duty to defend or indemnify Beverly Lee Phillips or Victoria Phillips in the Chatham County Action[.]” The defendants answered and requested that the complaint be dismissed. On 12 April 2016, the trial court entered judgment and ordered that plaintiff “Farm Bureau has a duty to defend and an obligation to indemnify each of Beverly Lee Phillips or Victoria O. Phillips in the Chatham County Action.” Plaintiff Farm Bureau appeals.

II. Policy Coverage

Plaintiff Farm Bureau’s brief argues several reasons why it should not have an obligation to defend in the Chatham County lawsuit, all based upon the policy language. The parties have presented arguments regarding the meanings of several defined terms and phrases under the policy and exclusions. But we will begin with plaintiff Farm Bureau’s last argument first, since it addresses the first relevant definition in the policy and is dispositive. Plaintiff Farm Bureau argues that “the Chatham County claims do not seek damages for ‘bodily injury’ as defined by the policies.” (Original in all caps.) We agree.

A. Standard of Review

Generally,

[t]he standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court’s findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court’s findings of fact are conclusive on appeal. Findings of fact not challenged on appeal are binding on this Court. However, the trial court’s conclusions of law are reviewable *de novo*.

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Basmas v. Wells Fargo Bank Nat.'l Ass'n, 236 N.C. App. 508, 511, 763 S.E.2d 536, 538–39 (2014) (citations and quotation marks omitted). Because no issues are raised as to the findings of fact in the judgment on appeal, the only question before this Court is the legal issue of whether plaintiff Farm Bureau has a contractual obligation to defend defendants Beverly and Victoria Phillips for the claims in the Chatham County lawsuit.¹

B. Comparison Test

In our Supreme Court's most recent decision on the duty to defend, the Court explained that in order to answer the question whether an insurer has a duty to defend, we apply the comparison test, reading the policies and the complaint side-by-side to determine whether the events as alleged are covered or excluded. In performing this test, the facts as alleged in the complaint are to be taken as true and compared to the language of the insurance policy. If the insurance policy provides coverage for the facts as alleged, then the insurer has a duty to defend.

Kubit v. MAG Mut. Ins. Co., 210 N.C. App. 273, 278, 708 S.E.2d 138, 144 (2011) (citations, quotation marks, and ellipses omitted). Our Supreme Court has also noted that the duty to defend exists unless the facts as alleged in the complaint “are not even arguably covered by the policy.” *Id.* at 278, 708 S.E.2d at 144 (citation and quotation marks omitted).

Our Supreme Court has observed that the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. This duty to defend is ordinarily measured by the facts as alleged in the pleadings. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable. An insurer is excused from its duty to defend only if the facts are not even arguably covered by the policy.

...

In addressing the duty to defend, the question is not whether some interpretation of the facts as

1. We take no position on the merits, if any, of the underlying Chatham County lawsuit, which is not at issue in this case.

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alleged could possibly bring the injury within the coverage provided by the insurance policy; the question is, assuming the facts as alleged to be true, whether the insurance policy covers that injury. The manner in which the duty to defend is broader than the duty to indemnify is that the statements of fact upon which the duty to defend is based may not, in reality, be true. As we observed in *Waste Management*, when the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable.

Under *Harleysville*, the duty to defend is broader than the duty to indemnify only in the sense that an unsubstantiated allegation requires an insurer to defend against it so long as the allegation is of a covered injury; however, even a meritorious allegation cannot obligate an insurer to defend if the alleged injury is not within, or is excluded from, the coverage provided by the insurance policy.

Harleysville does not specifically address and nothing in its language appears to revisit the following caveat to the comparison test set out in *Waste Management* imposing a duty on the insurance carrier to investigate:

Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.

Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage. In this event, the insurer's refusal to defend is at his own peril: if the evidence subsequently presented at trial reveals that the events are covered, the insurer will be responsible for the cost of the defense. This is not to free the carrier from its covenant to defend, but rather to translate its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant

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to pay. In addition, many jurisdictions have recognized that the modern acceptance of notice pleading and of the plasticity of pleadings in general imposes upon the insurer a duty to investigate and evaluate facts expressed or implied in the third-party complaint as well as facts learned from the insured and from other sources. Even though the insurer is bound by the policy to defend groundless, false or fraudulent lawsuits filed against the insured, if the facts are not even arguably covered by the policy, then the insurer has no duty to defend.

Id. at 277–79, 708 S.E.2d at 144–45 (emphasis added) (citations, quotation marks, and brackets omitted). We now turn to the comparison of the complaint to the insurance policy. *See id.* Because the duty to defend may be broader than the duty to indemnify we address the duty to defend because if it fails, so too does the duty to indemnify. *See id.* at 277–79, 708 S.E.2d at 144–45.

C. Analysis

The insurance policy contains coverage both for property and liability coverage, but no property claims are at issue here. The liability coverage includes personal liability coverage labeled as “Coverage L” and medical payments to others labeled as “Coverage M[.]” Defendant John Doe’s complaint does not seek to recover for any medical expenses incurred by KGK or himself, so the issue here arises under Coverage L, regarding personal liability:

Coverage L – Personal Liability – We pay up to our limit, all sums for which an insured is liable by law because of **bodily injury**² or property damage caused by an occurrence to which this coverage applies. **We will defend a suit seeking damages if the suit resulted from bodily injury or property damage not excluded under this coverage.** We may make investigations and settle claims or suits that we decide are appropriate. We do not have to provide a defense after we have paid an amount equal to our limit as a result of a judgment or written settlement.

2. All emphasis in bold to the policy language has been added by this Court throughout this opinion.

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Bodily injury is defined by the policy as

bodily harm to a person and includes sickness, disease or death. This also **includes required care and loss of services.**

Bodily injury does not mean bodily harm, sickness, disease or death that **arises out of:**

- a. a communicable disease; or
- b. the actual, alleged or **threatened sexual molestation of a person.**

Defendant John Doe set forth two claims in his complaint. In both claims, the negligence and loss of services, defendant John Doe is not suing for injuries to KGK but for alleged injuries he sustained as a result of the crimes committed against KGK. The negligence claim alleges defendant Victoria Phillips was negligent in caring for KGK because she knew or should have known of defendant Beverly Phillips's "sexual interest" in KGK and her lack of supervision allowed him to sexually abuse her. Defendant John Doe's negligence claim implicates no property damage but rather addresses the damage to "the relationship" with his daughter, and taking the allegations in his complaint as true, *id.* at 278, 708 S.E.2d at 144, it could potentially fall within the definition of a "bodily injury" claim under Coverage L within the policy.

The second claim is entitled "Loss of Services[;]" here, defendant John Doe alleges damages from "loss of services of the child to the father[.]" Defendant John Doe explains in his brief that "loss of services is an ancient Common Law cause of action . . . [u]nder [which] the overt fiction of . . . the injured child's lost 'service' is presumed." *See generally Tillotson v. Currin*, 176 N.C. 479, 480-81, 97 S.E. 395, 396 (1918) ("This is an action brought by the father to recover damages for the seduction of his daughter. . . . The right of the father to recover for debauching his daughter is based upon the loss of services growing out of the relation of master and servant, which, as said by Nash, J., in *Briggs v. Evans*, 27 N.C. 20, is a figment of the law, to open to him the door for the redress of his injury, but is, however, the substratum on which the action is built. If the daughter is under twenty-one years of age, the loss of service is presumed, and no evidence of the fact need be offered; and, if over twenty-one, the slightest service, such as handling a cup of tea, milking a cow, is sufficient at common law to support the action; but, while the father comes into court as a master, he goes before the jury as a father, and may recover damages for his humiliation, loss of the society of his daughter and mental suffering and anguish, destruction

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of his household, sense of dishonor, as well as expenses incurred and for loss of services, and the jury may also award exemplary damages as a punishment.” (citations and quotation marks omitted)). The claim of seduction can be maintained only by a father, since at common law, the father was master, and the daughter was the servant; it required that the father show that the defendant had sexual intercourse with his daughter, either with or without the daughter’s consent. *See generally id.* We will generously assume that the claim for “loss of services” stemming from the claim of “seduction” – which is based upon a master-servant relationship of father to daughter – still exists, *see id.*, and “loss of services” is thus also potentially a “bodily injury” under the policy definitions.

But we must continue with the remainder of the definition of “bodily injury.” Defendant John Doe’s claims also “arise[] out of” “the actual . . . sexual molestation of a person.” No prior North Carolina case has directly addressed the meaning of the words “arising out of” in this context, perhaps because the meaning is apparent, though courts in other states have addressed similar provisions. *See, e.g., Supreme Servs. & Specialty Co. v. Sonny Greer, Inc.*, 958 So. 2d 634, 645 (La. 2007) (“The key words in this provision are ‘arising out of,’ which could mean ‘but for’ the damaged property the resulting incident would not have occurred.”). Defendant John Doe’s claims are entirely based upon the sexual molestation of his daughter and would not exist “but for” the “molestation of a person[,]” his daughter. *Id.* Whatever name, title, or label defendant John Doe seeks to assign to his claims, they arise out of the sexual molestation of his daughter and are not included under the definition of a “bodily injury” as defined under the policy.

The policy provides that plaintiff Farm Bureau “will defend a suit seeking damages if the suit resulted from bodily injury or property damage not excluded under this coverage.” The Chatham County suit did not result from a “bodily injury” as defined by the policy, so we need not consider potential exclusions. The claims raised by defendant John Doe did not result from “bodily injury” as defined by the policy because that definition explicitly does not include bodily harm that “arises out of” “sexual molestation[.]” Because defendant John Doe’s entire action hinges on the sexual molestation of his daughter, it is not “a suit seeking damages” resulting “from bodily injury[.]” Therefore, plaintiff Farm Bureau has no duty to defend or indemnify defendants.

III. Conclusion

We reverse the judgment of the trial court concluding there was coverage under the policy and remand for entry of a declaratory judgment

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[255 N.C. App. 767 (2017)]

that plaintiff Farm Bureau has no duty to defend or indemnify defendants Beverly and Victoria Phillips in John Doe's Chatham County lawsuit.

REVERSED and REMANDED.

Judges BRYANT and HUNTER concur.

STATE OF NORTH CAROLINA
v.
ROBERT LEWIS BISHOP

No. COA17-55

Filed 3 October 2017

Appeal and Error—writ of certiorari denied—unpreserved argument—failure to make constitutional argument at trial—untimely appeal

The Court of Appeals in its discretion declined to issue a writ of certiorari to review defendant's unpreserved argument regarding enrollment in satellite-based monitoring where defendant conceded that he did not make a constitutional argument to the trial court and also did not timely appeal the trial court's satellite-based monitoring orders. Further, defendant did not show that his argument had merit or that error was probably committed below.

Appeal by defendant from orders entered 29 June 2016 by Judge Robert F. Floyd in Richmond County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennifer T. Harrod, for the State.

Mark Montgomery for defendant.

DIETZ, Judge.

Defendant Robert Lewis Bishop appeals from the trial court's orders requiring him to enroll in satellite-based monitoring. Bishop did not timely appeal these orders. As explained below, because the arguments Bishop seeks to raise in this appeal are either procedurally barred or

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meritless, in our discretion we decline to issue a writ of certiorari and dismiss this untimely appeal for lack of appellate jurisdiction.

Facts and Procedural History

A jury convicted Defendant Robert Lewis Bishop of three counts of taking indecent liberties with a child. The offenses occurred in 2015 and the victim was Bishop's five-year-old daughter. The trial court sentenced Bishop to three consecutive terms of 16 to 29 months in prison and ordered him to enroll in satellite-based monitoring for thirty years. Bishop did not challenge the trial court's imposition of satellite-based monitoring on constitutional grounds at the hearing.

Immediately after the trial court imposed its sentence and satellite-based monitoring order, the court stated, "We have another matter to take care of, I believe?" Bishop then entered an *Alford* plea to two additional counts of indecent liberties with a child. These two additional offenses occurred more than a decade before Bishop's criminal acts against his daughter. The basis of these new offenses was information, apparently obtained while investigating Bishop's crimes against his daughter, that Bishop also had sexually molested his younger brothers. One of Bishop's brothers told the trial court that Bishop "spent his entire life molesting children and getting away with it."

The trial court sentenced Bishop to suspended sentences of 19 to 23 months in prison for these offenses, found that Bishop qualified as a recidivist, and therefore ordered Bishop to enroll in satellite-based monitoring for life. As before, Bishop did not challenge the imposition of this new satellite-based monitoring order on constitutional grounds. Bishop also did not timely appeal either of the trial court's orders imposing satellite-based monitoring. Bishop later filed a petition for writ of certiorari, asking this Court to review the trial court's satellite-based monitoring orders.

Analysis**I. Imposition of Satellite-Based Monitoring**

Bishop argues that the trial court erred by ordering him to enroll in satellite-based monitoring without conducting a *Grady* hearing to determine whether that monitoring was reasonable under the Fourth Amendment. Bishop concedes that his argument suffers from two separate error preservation issues. First, Bishop did not make this constitutional argument to the trial court, as the law requires. Second, Bishop did not timely appeal the trial court's satellite-based monitoring orders. Bishop therefore asks this Court to take *two* extraordinary steps to

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reach the merits, first by issuing a writ of certiorari to hear this appeal, and then by invoking Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument. In our discretion, we decline to do so.

This Court has discretion to allow a petition for a writ of certiorari “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). A writ of certiorari is not intended as a substitute for a notice of appeal. If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals. Instead, as our Supreme Court has explained, “[a] petition for the writ must show merit or that error was probably committed below.” *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959).

Here, Bishop has not shown that his argument (on direct appeal, at least) is meritorious or that the trial court probably committed error. Indeed, Bishop concedes that the argument he seeks to raise is procedurally barred because he failed to raise it in the trial court. We recognize that this Court previously has invoked Rule 2 to permit a defendant to raise an unpreserved argument concerning the reasonableness of satellite-based monitoring. *State v. Modlin*, __ N.C. App. __, 796 S.E.2d 405, 2017 WL 676957, at *2–3 (2017) (unpublished). But the Court did so in *Modlin* because, at the time of the hearing in that case, “[n]either party had the benefit of this Court’s analysis in *Blue* and *Morris*.” *Id.* at *2. In *Blue* and *Morris*, this Court outlined the procedure defendants must follow to preserve a Fourth Amendment challenge to satellite-based monitoring in the trial court. *State v. Blue*, __ N.C. App. __, __, 783 S.E.2d 524, 525–26 (2016); *State v. Morris*, __ N.C. App. __, __, 783 S.E.2d 528, 528–29 (2016).

This case is different from *Modlin* because Bishop’s satellite-based monitoring hearing occurred several months *after* this Court issued the opinions in *Blue* and *Morris*. Thus, the law governing preservation of this issue was settled at the time Bishop appeared before the trial court. As a result, the underlying reason for invoking Rule 2 in *Modlin* is inapplicable here and we must ask whether Bishop has shown any other basis for invoking Rule 2.

He has not. Bishop’s argument for invoking Rule 2 relies entirely on citation to previous cases such as *Modlin*, where the Court invoked Rule 2 because of circumstances unique to those cases. In the absence of any argument specific to the facts of *this* case, Bishop is no different

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from countless other defendants whose constitutional arguments were barred on direct appeal because they were not preserved for appellate review. *See, e.g., State v. Garcia*, 358 N.C. 382, 410–11, 597 S.E.2d 724, 745 (2004); *State v. Roache*, 358 N.C. 243, 274, 595 S.E.2d 381, 402 (2004); *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003).

As our Supreme Court has instructed, we must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because “inconsistent application” of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not. *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007). Because Bishop is no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step. As Bishop concedes, he cannot prevail on this issue without the use of Rule 2 because his constitutional argument is waived on appeal. In our discretion, we decline to issue a writ of certiorari to review this unpreserved argument on direct appeal.

II. Determination of Recidivism

Bishop next argues that the trial court erred in finding that he was a recidivist, thereby qualifying him for lifetime satellite-based monitoring. As with his first argument, Bishop failed to timely appeal on this ground and this Court can address the merits only if it issues a writ of certiorari.

In our discretion, we again decline to issue the writ because Bishop has not shown that his argument has “merit or that error was probably committed below.” *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9. Under N.C. Gen. Stat. § 14-208.6, a “recidivist” is defined as “a person who has a *prior conviction* for an offense” that is a “reportable conviction” under section 14-208.6(4). N.C. Gen. Stat. § 14-208.6(2b) (emphasis added). A “reportable conviction” under section 14-208.6(4) includes Bishop’s conviction for taking indecent liberties with his five-year-old daughter. *Id.* § 14-208.6(4)(a). The statute does not define “prior conviction.” Bishop argues that his convictions for three counts of indecent liberties against his daughter cannot count as a “prior conviction” because they occurred on the same day as his guilty plea to the two additional counts of indecent liberties against his brothers.

Bishop relies on this Court’s decision in *State v. Springle*, where we found that the defendant’s two convictions for indecent exposure “cannot function as ‘prior convictions’ for purposes of categorizing defendant

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[255 N.C. App. 767 (2017)]

as a recidivist because defendant was *simultaneously* convicted of both counts of indecent exposure.” __ N.C. App. __, __, 781 S.E.2d 518, 523 n.3 (2016). *Springle* is readily distinguishable from this case because Bishop was not *simultaneously* convicted of the two separate sets of offenses that rendered him a recidivist. After being convicted and sentenced for offenses committed against his five-year-old daughter in 2015, Bishop chose to plead guilty to separate offenses he committed against his younger brothers more than a decade earlier. At the time Bishop pleaded guilty to these separate offenses, he already had been convicted and sentenced for the 2015 offenses. Thus, he had a prior conviction for a reportable offense at the time the trial court sentenced him on the new convictions. That his prior conviction occurred earlier the same day rather than the day before, or many years before, is irrelevant; Bishop was convicted and sentenced at different times for two separate sets of qualifying offenses. Accordingly, Bishop satisfied the statutory definition for a recidivist and the trial court properly applied the statute’s plain language in this case.

Because we find that Bishop’s argument is meritless, in our discretion we decline to issue a writ of certiorari and therefore dismiss Bishop’s untimely appeal for lack of appellate jurisdiction.

Conclusion

In our discretion, we deny Bishop’s petition for a writ of certiorari and dismiss this appeal for lack of jurisdiction.

DISMISSED.

Judges ELMORE and ARROWOOD concur.

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[255 N.C. App. 772 (2017)]

STATE OF NORTH CAROLINA

v.

MICHAEL ANTOINE CHESTNUT, DEFENDANT, AND MELISSA HINES, BAIL AGENT, AND
AGENT ASSOCIATES INSURANCE, L.L.C., SURETY

No. COA16-1310

Filed 3 October 2017

Penalties, Fines, and Forfeitures—bond forfeiture—motion to set aside—failure to identify statutory basis

The trial court lacked authority to allow a surety's motion to set aside a bond forfeiture where the surety did not identify the specific statutory basis under N.C.G.S. § 15A-544.5 of its motion on the written form it filed.

Appeal by Wilson County Board of Education from order entered 3 October 2016 by Judge John J. Covolo in District Court, Wilson County. Heard in the Court of Appeals 7 August 2017.

Schwartz & Shaw, P.L.L.C., by Kristopher L. Caudle and Rebecca M. Williams, for Wilson County Board of Education, Plaintiff-Appellant.

No brief for Michael Antoine Chestnut, Defendant-Appellee.

No brief for Melissa Hines, Bail Agent.

No brief for Agent Associates Insurance, L.L.C., Defendant-Appellee Surety.

McGEE, Chief Judge.

The Wilson County Board of Education (“the Board of Education”)¹ appeals from the trial court’s order granting a motion to set aside a bond forfeiture filed by Agent Associates Insurance, L.L.C. (“Surety”). For the reasons discussed below, we vacate the trial court’s order.

1. “The Board’s status as appellant in the instant case is due to its status as the ultimate recipient of the ‘clear proceeds’ of the forfeited appearance bond at issue herein, pursuant to Article IX, § 7 of the North Carolina Constitution.” *State v. Dunn*, 200 N.C. App. 606, 607 n.1, 685 S.E.2d 526, 527 n.1 (2009) (citation omitted).

STATE v. CHESTNUT

[255 N.C. App. 772 (2017)]

I. Background

Michael Antoine Chestnut (“Defendant”) failed to appear in Wilson County District Court on an underlying criminal charge on 8 April 2016. On that same day, the trial court issued a bond forfeiture notice for the forfeiture of an appearance bond in the amount of \$1,500.00 posted by Melissa Hines (“Bail Agent”) on Surety’s behalf. The notice set a final judgment date of 8 September 2016, and notice of the bond forfeiture was given to Bail Agent and Surety on 11 April 2016.²

Bail Agent filed a motion to set aside the forfeiture (“the motion to set aside”) on 6 September 2016. A pre-printed form, Form AOC-CR-213, is used for motions to set aside a bond forfeiture. This form lists seven exclusive reasons, pursuant to N.C. Gen. Stat. § 15A-544.5, for which a bond forfeiture may be set aside, along with corresponding boxes for a movant to mark the specific reason(s) alleged for setting aside the forfeiture. Bail Agent did not check any of these boxes in this case. In addition to the motion to set aside, however, Bail Agent submitted a letter stating that Bail Agent “ha[d] been putting forth efforts to locate [Defendant] and ha[d] been unsuccessful in doing so[,]” despite “spen[ding] \$150.00 checking leads as to where and how [Bail Agent could] locate [Defendant].” The Board of Education filed a Form AOC-CR-213 objecting to the motion to set aside on 12 September 2016.

The trial court held a hearing on Surety’s motion to set aside on 3 October 2016. At the conclusion of the hearing, the trial court allowed the motion, based on its finding that Surety “ha[d] established one or more of the reasons specified in [N.C.G.S.] 15A-544.5 for setting aside [the] forfeiture.” The Board of Education appeals.

II. Discussion**A. *Standard of Review***

In an appeal from an order setting aside a bond forfeiture, “the standard of review for this Court 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. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citation omitted); *see also* N.C.

2. Notice of a bond forfeiture is effective when the notice is mailed. N.C. Gen. Stat. § 15A-544.4(d) (2015). “A forfeiture becomes a final judgment of forfeiture on the 150th day after notice of forfeiture is given, unless a motion to set aside the forfeiture is either entered on or before or is pending on that date.” *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 48-49, 612 S.E.2d 148, 151 (2005) (citing N.C. Gen. Stat. § 15A-544.6).

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Gen. Stat. § 15A-544.5(h) (2015) (providing in part that “[a]n 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.”). Questions of law, including matters of statutory construction, are reviewed *de novo*. See *In re Hall*, 238 N.C. App. 322, 324, 768 S.E.2d 39, 41 (2014) (citation omitted) (“Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court’s conclusions of law *de novo*[.]”).

B. *Analysis*

1. Statutory Framework

In North Carolina, bail bond forfeiture is governed by N.C. Gen. Stat. §§ 15A-544.1 – 544.8.

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.

N.C. Gen. Stat. § 15A-544.3 (2015). A forfeiture entered under N.C.G.S. § 15A-544.3 becomes a final judgment of forfeiture “on the one hundred fiftieth day after notice is given under [N.C.G.S.] 15A-544.4 if (1) [n]o order setting aside the forfeiture under G.S. 15A-544.4 is entered on or before that date; and (2) [n]o motion to set aside the forfeiture is pending on that date.” N.C. Gen. Stat. § 15A-544.6 (2015).

“The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in [N.C. Gen. Stat. § 15A-544.5.” *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012) (citation and quotation marks omitted). Pursuant to N.C. Gen. Stat. § 15A-544.5(a), “there shall be no relief from a forfeiture except as provided in this section. The reasons for relief are those specified in subsection (b) of this section.” In turn, N.C. Gen. Stat. 15A-544.5(b) states that

[e]xcept as provided by subsection (f) of this section, 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

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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.³

3. After the present appeal was filed, the General Assembly amended N.C. Gen. Stat. § 15A-544.5(b)(6) to read as follows:

The defendant was incarcerated in a unit of the Division of Adult Correction and Juvenile Justice 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 and Juvenile Justice of the Department of Public Safety or Federal Bureau of Prisons, including an electronic record.

See North Carolina Sess. Law 2017-186 (eff. 25 July 2017) (emphases added).

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- (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. Gen. Stat. § 15A-544.5(b)(1)-(7) (2015) (emphasis added); *see also State v. Rodrigo*, 190 N.C. App. 661, 664, 660 S.E.2d 615, 617 (2008) ("Relief from a forfeiture, before the forfeiture becomes a final judgment, is exclusive and limited to the reasons provided in N.C. Gen. Stat. § 15A-544.5."). A party seeking to set aside a forfeiture must make a timely written motion "stat[ing] the reason for the motion and attach[ing] to the motion the evidence specified in subsection (b) of this section." N.C. Gen. Stat. § 15A-544.5(d) (2015). This Court has held that a trial court lacks the authority to allow a motion to set aside that is "not premised on any ground set forth in [N.C.]G.S. § 15A-544.5." *State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005).

2. Surety's Motion to Set Aside

In the present case, the Board of Education argues the trial court erred in allowing Surety's motion to set aside because Surety failed to demonstrate a legally sufficient reason to set aside a bond forfeiture pursuant to N.C.G.S. § 15A-544.5. We agree.

The record filed in this matter does not show that Surety established any of the reasons enumerated in N.C.G.S. § 15A-544.5(b) in support of its motion to set aside the forfeiture. Surety did not identify the specific statutory basis of its motion on the written form it filed, in that no box was checked on the AOC-CR-213 form. A letter attached to the written motion stated that Bail Agent "ha[d] been putting forth efforts to locate [Defendant] and ha[d] been unsuccessful in doing so." However, such documentation does not fall within any of the seven exclusive reasons for setting aside a forfeiture pursuant to N.C.G.S. § 15A-544.5(b).

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See, e.g., State v. Lazaro, 190 N.C. App. 670, 673, 660 S.E.2d 618, 620 (2008) (holding trial court erroneously granted motion to set aside based on evidence that defendant was deported, because “deportation is not listed as one of the . . . exclusive grounds that allowed the court to set aside a bond forfeiture.”). Accordingly, we conclude the trial court’s finding that Surety “established one or more of the reasons specified in G.S. 15A-544.5” was not supported by competent evidence.

Our holding in the present case follows *State v. Cobb*, ___ N.C. App. ___, ___ S.E.2d ___, 2017 WL 2945860 (2017), a recently published opinion of this Court, that involved similar facts. In *Cobb*, a bail agent filed a motion to set aside a bond forfeiture using Form AOC-CR-213, and checked a pre-set box stating that the defendant “ha[d] been surrendered by a surety on the bail bond as provided by [N.C.]G.S. 15A-540, as evidenced by the attached ‘Surrender of Defendant By Surety’ ([Form] AOC-CR-214),” *i.e.*, ground (b)(3) under N.C.G.S. § 15A-544.5. *Id.*, 2017 WL 2945860 at *2 (quotation marks omitted). However, instead of attaching Form AOC-CR-214, the bail agent attached a printout from the Automated Criminal/Infractions System (“ACIS”). The ACIS printout indicated the defendant had been charged with an unrelated traffic offense, to which he pled guilty, “and that, as part of the disposition [of the traffic offense charge], [the] defendant agreed to plead guilty in [another unrelated case].” *Id.*

This Court observed that “[t]he ACIS printout included no reference to [the] case number . . . [for] the case in which the bond was forfeited.” *Id.* The majority found that the ACIS printout, the only documentary evidence in the record offered to show that the defendant had been surrendered by a surety on the bail bond, “did not meet the requirement of a sheriff’s receipt contemplated by [N.C.G.S. § 15A-544.5(b)(3)]; *i.e.*, [the specific] evidence [required to prove that the] defendant was surrendered by a surety on the bail bond.” *Id.* at *3. According to the majority, “where the facts of record do not support the asserted ground for the motion [to set aside] or any other ground set forth in [N.C.G.S. § 15A-544.5] subsection (b), [there is] no basis on [such] record for the trial court to exercise statutory authority to set aside the bond forfeiture.” *Id.*

The dissenting opinion deemed it “impossible . . . to reach a conclusion on the validity of the trial court’s order without a record of what transpired at the hearing.” *Id.* at *8 (Zachary, J., dissenting). According to the dissent, “the only pertinent question [for this Court] . . . [was] the [sufficiency of the] evidence provided by the surety *at the hearing before the trial court.*” *Id.* at *8 (emphasis in original). In the dissent’s view,

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[t]he propriety of the trial court's order cannot be determined merely by review of the documentation that the surety attached to its motion [to set aside], 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.

Id. at *7. The dissent noted that if a transcript is unavailable, an appellant may create a record of the trial court hearing by preparation of a narration of the proceedings pursuant to N.C. R. App. P. 9(c)(1). *Id.* This Court, the *Cobb* dissent concluded, was required to presume the trial court acted properly because “the appellate record [did] 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.” *Id.*

The majority acknowledged 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.” *Id.* at *3.

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. 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.

Id. (internal citation omitted) (emphasis in original).

The *Cobb* majority controls in the present case. As in *Cobb*, the record on appeal in the present case was compiled and proposed by the Board of Education. Surety took no action within the time allowed for responding, and the record was therefore settled by operation of N.C. R. App. P. 11(b).⁴ The only documentary evidence in the record before

4. “If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall . . . serve upon all other parties a proposed record on appeal . . . Within thirty days . . . after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with

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us – the letter attached to Surety’s motion to set aside – does not support any of the grounds for setting aside a forfeiture enumerated in N.C.G.S. § 15A-544.5(b). Accordingly, under *Cobb*, the record in the present case “supports a conclusion, not a presumption, that the trial court erred, as there is not [a] sufficient basis in the record to warrant the exercise of statutory authority to set aside a bond forfeiture.” *Id.*

We note that the four companion cases filed contemporaneously with this appeal are factually distinguishable from both *Cobb* and the present case in that, in those cases, the records on appeal contained no documentary evidence to support the sureties’ motions to set aside.⁵ In each of the companion cases, a bail agent or surety filed a motion to set aside a bond forfeiture, using Form AOC-CR-213, without checking any of the preprinted boxes to identify the alleged statutory basis for the motion. The records on appeal did not indicate whether any evidence was attached to the motions to set aside, and transcripts of the hearings were not provided to this Court.⁶ *See supra* n.5. However, in light of *Cobb*, which was decided after the Board of Education filed the records on appeal and appellate briefs in the present case and the companion cases, the Board of Education filed motions to amend each record on appeal to add narrations of the trial court hearings. *See* N.C.R. App. P. 9(b)(5), 9(c)(1). No objections were filed to the Board of Education’s motions to amend the records on appeal in the present case or the companion cases, and this Court allowed the motions on 7 August 2017. The narrations submitted by the Board of Education assert that, during each hearing, (1) the bail agent or surety “did not argue that any of the statutory bases for set aside had been met,” and (2) “[n]either the Board [of Education] nor [the bail agent or surety] submitted any sworn

Rule 11(c). If all appellees within the times allowed them . . . fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant’s proposed record on appeal thereupon constitutes the record on appeal.” N.C.R. App. P. 11(b).

5. The companion cases are *State v. Reaves* (COA16-1311); *State v. Bowens* (COA16-1312); *State v. Owens* (COA16-1313); and *State v. Mercer* (COA16-1314). These cases, in addition to the present case, were heard the same day, in the same trial court, and the Board of Education was the objecting party in each case. According to the Board of Education, in both the present case and the four companion cases, written transcripts of the hearings are unavailable because no audio recordings were made and no court reporter was present during the hearings.

6. As in the present case, the records on appeal in all four companion cases were settled by operation of the Rules of Appellate Procedure after no action was taken by the respective bail agent or surety, and, thereafter, the Board of Education was the only party to file a brief.

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[255 N.C. App. 780 (2017)]

testimony, affidavits, or additional documents to the [trial] court during the hearing.” The amended records on appeal thus allay the concerns expressed in the *Cobb* dissent and permit a conclusion that, in all five cases, there was insufficient evidence before the trial court to support any of the statutory grounds for setting aside a bond forfeiture pursuant to N.C.G.S. § 15A-544.5(b). As a result, the trial court erred by setting aside the forfeitures.

III. Conclusion

The trial court lacked authority to allow Surety’s motion to set aside the bond forfeiture absent evidence required under N.C.G.S. § 15A-544.5. The order allowing the motion to set aside the bond forfeiture is vacated.

VACATED.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
LINWOOD EARL GREENE, DEFENDANT

No. COA17-311

Filed 3 October 2017

**Satellite-Based Monitoring—motion to dismiss application—
sufficiency of evidence—enrollment—reasonable Fourth
Amendment search**

The trial court erred by denying defendant’s motion to dismiss the State’s application for satellite-based monitoring where the State’s evidence was insufficient to establish that the enrollment constituted a reasonable Fourth Amendment search under *Grady v. North Carolina*, *State v. Blue*, and *State v. Morris*.

Appeal by defendant from order entered 14 November 2016 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

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

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[255 N.C. App. 780 (2017)]

ZACHARY, Judge.

Defendant appeals the Satellite-Based Monitoring Order entered after his *Alford* plea to two counts of taking indecent liberties with a child. Defendant argues on appeal that the trial court erred in ordering lifetime satellite-based monitoring in the absence of evidence from the State that this was a reasonable search of defendant. We agree, and conclude that this matter must be reversed.

Background

Defendant Linwood Earl Greene (defendant) was indicted on 27 October 2014 and on 14 July 2015 for sex offense with a 13, 14, or 15-year old child. On 15 August 2016, defendant entered an *Alford* plea before the Honorable Walter H. Godwin, Jr. to two counts of taking indecent liberties with a child. Judge Godwin then entered an order sentencing defendant to an active term of twenty-six to forty-one months' imprisonment and requiring that defendant register as a sex offender for the remainder of his natural life. No order regarding satellite-based monitoring was entered on that day.

On 14 November 2016, a satellite-based monitoring determination hearing was held upon the State's application before the Honorable Jeffery B. Foster. Defendant filed a Motion to Dismiss the State's Application for Satellite-Based Monitoring prior to the hearing. At the satellite-based monitoring hearing, the State put forth evidence establishing that defendant had a prior conviction of misdemeanor sexual battery, in addition to his conviction on 15 August 2016 of two counts of taking indecent liberties with a child. The State offered no further evidence beyond defendant's criminal record.

The trial court heard arguments from both parties. Referencing his motion to dismiss, defendant challenged the constitutionality of the lifetime satellite-based monitoring enrollment by citing *Grady v. North Carolina*, *State v. Blue*, and *State v. Morris*, positing that the State had not met its burden of establishing, under a totality of the circumstances, the reasonableness of the satellite-based monitoring program in light of both the State's interests and defendant's privacy interests. The trial court denied defendant's motion to dismiss, reasoning "that based on the fact that this is the second conviction that . . . defendant has accumulated of a sexual nature, . . . his privacy interests are outweighed by the State's interest in protecting future victims." Judge Foster then ordered that defendant be enrolled in the satellite-based monitoring program for the remainder of his natural life.

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On appeal, defendant argues that the trial court erred in ordering lifetime satellite-based monitoring because the State's evidence was insufficient to establish that the enrollment constituted a reasonable Fourth Amendment search under *Grady v. North Carolina*, *State v. Blue*, and *State v. Morris*. The State has conceded this point. However, the State contends that it should have a chance to supplement its evidence, upon remand from this Court, in order to support the finding that enrolling defendant in lifetime satellite-based monitoring is a reasonable Fourth Amendment search. Defendant argues that this Court should reverse without remand. Accordingly, the only issue before us involves the appropriate remedy.

Discussion

The United States Supreme Court has held that North Carolina's satellite-based monitoring program constitutes a search for purposes of the Fourth Amendment. *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462, (2015). As such, North Carolina courts must first "examine whether the State's monitoring program is reasonable—when properly viewed as a search"—before subjecting a defendant to its enrollment. *Id.* at ___, 191 L. Ed. 2d at 463. This reasonableness inquiry requires the court to analyze the "totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* at ___, 191 L. Ed. 2d at 462. These satellite-based monitoring proceedings, while seemingly criminal in nature, are instead characterized as "civil regulatory" proceedings. *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010).

Notwithstanding the fact that satellite-based monitoring proceedings are civil proceedings, the State argues that the civil bench proceeding standard, pursuant to which "[a] dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief[.]"—is inapplicable here. *Hill v. Lassiter*, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999). In so arguing, the State reasons that in satellite-based monitoring proceedings, the State is not specifically referred to as "the plaintiff." This reasoning is far too technical and detracts from the true substance of satellite-based monitoring proceedings. Viewed in the civil context, the State is undoubtedly the party seeking relief in a satellite-based monitoring proceeding. *See* N.C. Gen. Stat. § 14-208.40A(a).

Next, the State argues that remand is proper under *State v. Blue* and *State v. Morris*.

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After *Grady* was decided, there was some uncertainty concerning the scope of the State's burden at satellite-based monitoring proceedings, and several cases came up to this Court in the midst of that uncertainty. See *State v. Blue*, ___ N.C. App. ___, 783 S.E.2d 524 (2016); *State v. Morris*, ___ N.C. App. ___, 783 S.E.2d 528 (2016). *Blue* and *Morris* resolved those uncertainties, however, as this Court made it abundantly clear that "the State shall bear the burden of proving that the [satellite-based monitoring] program is reasonable." *Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527; *Morris*, ___ N.C. App. at ___, 783 S.E.2d at 530. But, having just resolved the uncertainty, it was necessary for this Court to remand *Blue* and *Morris* so that the State would have an appropriate opportunity to establish its burden. See *Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527; *State v. Morris*, ___ N.C. App. at ___, 783 S.E.2d at 529 (remand appropriate where "the trial court simply considered the case of *Grady v. North Carolina*, and summarily concluded that registration and lifetime satellite-based monitoring constitutes a reasonable search or seizure of the person and is required by statute[.]") (internal citations and quotation marks omitted). However, this case is entirely distinguishable, as the nature of the State's burden was no longer uncertain at the time of defendant's satellite-based monitoring hearing. *Blue* and *Morris* made clear that a case for satellite-based monitoring is the State's to make. The State concedes it has not done so.

Even accepting its burden, the State contends that, "[a]s with any appellate reversal of a trial court's determination that plaintiff's evidence is legally sufficient, nothing . . . precludes the Appellate Division from determining in a proper case that plaintiff[-]appellee is nevertheless entitled to a new trial." *Harrell v. W.B. Lloyd Constr. Co.*, 300 N.C. 353, 358, 266 S.E.2d 626, 630 (1980) (citations omitted) (emphasis in the original). In *Harrell*, however, remand was appropriate because "incompetent evidence ha[d] been erroneously considered by the trial judge in his ruling on the sufficiency of plaintiff's evidence." *Id.* at 358, 266 S.E.2d at 630 (citations omitted). The evidence was insufficient *in light of* the improperly considered evidence. *Id.* Therefore, it was necessary to remand the case in order for the trial court to consider the matter anew absent the erroneously admitted evidence. In contrast, there has been no contention in this case that the State's evidence was improperly considered by the trial court. The conceded error instead involves the State's evidence having been too scant to satisfy its burden under the requirements of *Grady*.

Because "dismissal under Rule 41(b) is to be granted if the plaintiff has shown no right to relief[.]" having conceded the trial court's

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error, the State must likewise concede that the proper outcome below would have been for the trial court to grant defendant's motion and dismiss the satellite-based monitoring proceeding against him.¹ *See Jones v. Nationwide Mut. Ins. Co.*, 42 N.C. App. 43, 46-47, 255 S.E.2d 617, 619 (1979). And if, as the State's concession requires, the trial court had properly dismissed the satellite-based monitoring application, the matter would have ended there. The State cites no authority suggesting that it would have been permitted to "try again" by applying for yet another satellite-based monitoring hearing against defendant, in the hopes of this time having gathered enough evidence. Instead, the result of the trial court's dismissal would have been just that—a dismissal, and it is the duty of this Court to effectuate that result.

Conclusion

We reverse the trial court's order denying defendant's motion to dismiss the State's application for satellite-based monitoring.

REVERSED.

Judges CALABRIA and MURPHY concur.

1. Both parties correctly note that defendant's motion for a "directed verdict" should have been more properly characterized as a "motion for involuntary dismissal" pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017). *See Hill*, 135 N.C. App. at 517, 520 S.E.2d at 800 ("When a motion to dismiss under Rule 41(b) is incorrectly designated as one for a directed verdict, it may be treated as a motion for involuntary dismissal.") (citation omitted).

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[255 N.C. App. 785 (2017)]

STATE OF NORTH CAROLINA

v.

RICKY LEE HINNANT, DEFENDANT

AND

TERRENCE C. RUSHING, BAIL AGENT

AND

AGENT ASSOCIATES INSURANCE, L.L.C., SURETY

No. COA16-1293

Filed 3 October 2017

Penalties, Fines, and Forfeitures—bond forfeiture—actual notice before executing bail bond—failure to appear on two or more prior occasions

The trial court was statutorily barred under N.C.G.S. § 15A-544.5 from setting aside a bond forfeiture where a bail agent had actual notice from a properly marked release order, before executing a bail bond, that defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed.

Judge TYSON dissenting.

Appeal by Wilson County Board of Education from order entered 12 September 2016 by Judge John J. Covolo in District Court, Wilson County. Heard in the Court of Appeals 7 August 2017.

Schwartz & Shaw, P.L.L.C., by Kristopher L. Caudle and Rebecca M. Williams, for Wilson County Board of Education, Plaintiff-Appellant.

No brief for Ricky Lee Hinnant, Defendant-Appellee.

No brief for Terrence C. Rushing, Bail Agent.

No brief for Agent Associates Insurance, L.L.C., Defendant-Appellee Surety.

McGEE, Chief Judge.

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The Wilson County Board of Education (“the Board of Education”)¹ appeals from an order allowing a motion to set aside a bond forfeiture filed by Terrence C. Rushing (“Bail Agent”) on behalf of Agent Associates Insurance, L.L.C. (“Surety”). Because the record on appeal indicates that, at the time Surety posted the bond, it had actual notice that defendant Ricky Lee Hinnant (“Defendant”) had failed to appear in the same matter on at least two prior occasions, the trial court was prohibited by statute from setting aside the bond forfeiture. Accordingly, we reverse.

I. Background

Defendant failed to appear in Wilson County Criminal District Court on 23 October 2015 on charges of driving while impaired. As a result of Defendant’s failure to appear, an order was issued for his arrest on 26 October 2015. On the order for arrest, a box was checked indicating “[t]his [was] [] [D]efendant’s second or subsequent failure to appear on these charges.” Defendant was served with the order for arrest on 6 January 2016 and released the same day on a secured bond posted by Bail Agent in the amount of \$16,000.00. Defendant’s 6 January 2016 release order also explicitly indicated “[t]his was [] [D]efendant’s second or subsequent failure to appear in this case.”

When Defendant again failed to appear in the same case on 15 April 2016, the trial court ordered the bond forfeited, with a final judgment date of 15 September 2016. Notice of the forfeiture was given to Bail Agent and Surety on 18 April 2016.²

Bail Agent filed a motion to set aside the forfeiture (“the motion to set aside”) on 15 August 2016, on the basis that “[D]efendant ha[d] been surrendered by a surety on the bail bond as provided by [N.C. Gen. Stat. §] 15A-540[.]” At a 12 September 2016 hearing on the motion to set aside, Bail Agent presented a letter from Deputy J.D. McLaughlin (“Deputy McLaughlin”) of the Wilson County Sheriff’s Office, in which Deputy McLaughlin stated:

1. “The Board’s status as appellant in the instant case is due to its status as the ultimate recipient of the ‘clear proceeds’ of the forfeited appearance bond at issue herein, pursuant to Article IX, § 7 of the North Carolina Constitution.” *State v. Dunn*, 200 N.C. App. 606, 607 n.1, 685 S.E.2d 526, 527 n.1 (2009) (citation omitted).

2. Notice of a bond forfeiture is effective when the notice is mailed. N.C. Gen. Stat. § 15A-544.4(d) (2015). “A forfeiture becomes a final judgment of forfeiture on the 150th day after notice of forfeiture is given, unless a motion to set aside the forfeiture is either entered on or before or is pending on that date.” *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 48-49, 612 S.E.2d 148, 151 (2005) (citing N.C. Gen. Stat. § 15A-544.6).

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On [26 April 2016] Terrance [sic] Rushing[,] a Bondsmen [sic] for Wilson County brought [Defendant] to [the] magistrate's office on case 14cr054745 to surrender. As I took [Defendant] to the jail I saw [Bail Agent] taking the surrender form to the Wilson County Jail Control Room to drop off.

The trial court found “that the moving party ha[d] established one or more of the reasons specified in [N.C. Gen. Stat. §] 15A-544.5 for setting aside that forfeiture” and allowed the motion to set aside. The Board of Education appeals.

II. Motion to Set Aside Bond Forfeiture

The Board of Education contends the trial court was statutorily barred from setting aside the bond forfeiture in the present case and that no competent evidence supported the trial court's decision to set aside the bond forfeiture. We agree.

A. *Standard of Review*

In an appeal from an order setting aside a bond forfeiture, “the standard of review for this Court 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. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citation omitted); *see also* N.C. Gen. Stat. § 15A-544.5(h) (2017) (providing in part that “[a]n 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.”). Questions of law, including matters of statutory construction, are reviewed *de novo*. *See In re Hall*, 238 N.C. App. 322, 324, 768 S.E.2d 39, 41 (2014) (citation omitted) (“Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*[.]”).

B. *Analysis*

“The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in [N.C. Gen. Stat.] § 15A-544.5.” *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 15A-544.5(a) (2017) (stating in part that “[t]here shall be no relief from a forfeiture except as provided in this section.”). In addition to enumerating the circumstances in which a

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bond forfeiture must be set aside, including where “[t]he defendant has been surrendered by a surety on the bail bond as provided by [N.C.G.S. §] 15A-540,” *see* N.C. Gen. Stat. § 15A-544.5(b)(3) (2017), the statute explicitly prohibits a court from setting aside a bond forfeiture “*for any reason in any case* in which the surety or the bail agent had actual notice before executing a bail bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed.” N.C. Gen. Stat. § 15A-544.5(f) (2017) (emphasis added). N.C.G.S. § 15A-544.5(f) further provides:

Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated *on the defendant's release order* by a judicial official. The judicial official shall indicate on the release order when it is the defendant's second or subsequent failure to appear in the case for which the bond was executed.

Id. (emphasis added).

In *State v. Adams*, 220 N.C. App. 406, 725 S.E.2d 94 (2012), a surety challenged the trial court's finding that, pursuant to N.C.G.S. § 15A-544.5(f), the surety had actual notice that the defendant had failed to appear on two or more prior occasions before executing a bail bond. In that case, the surety “[did] not dispute that [the] defendant's release order contain[ed] an explicit finding that [the] ‘defendant was arrested or surrendered after failing to appear in a prior release order . . . two or more times in this case.’ ” *Id.* at 410, 725 S.E.2d at 96. The surety instead contended that it had conducted its own independent investigation and “determined that [the] defendant had only forfeited a bond once previously[.]” *Id.* The surety argued that because the court system's computerized database did not contain information about one of the defendant's prior failures to appear, “its agent should have been free to disregard the finding on the [defendant's] release order.” *Id.*

This Court held that the “surety's reasoning [was] inconsistent with the plain language of N.C. Gen. Stat. § 15A-544.5(f)[,]” because under the statute, “it is only a defendant's failure to appear in court that is relevant to the judicial official who is entering a release order[,]” not the number of bond forfeitures or orders for arrest. *Id.* We concluded that, “[s]ince [the] defendant's release order included a finding . . . which reflected that he had previously failed to appear on two or more occasions, the trial court properly found that [the] surety had actual notice as defined by N.C. Gen. Stat. § 15A-544.5(f).” *Id.* at 410, 725 S.E.2d at 97.

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Similarly, in the present case, both the 26 October 2015 order for Defendant's arrest and the 6 January 2016 release order explicitly indicated that "[t]his [was] [] [D]efendant's second or subsequent failure to appear" on these charges. Thus, applying the plain language found in N.C.G.S. § 15A-544.5(f), Bail Agent "had actual notice before executing [the] bail bond that [] [D]efendant had already failed to appear on two or more prior occasions in the case for which the bond was executed." Accordingly, the trial court lacked authority to set aside the forfeiture "for any reason." The evidence presented by Bail Agent at the hearing on the motion to set aside – Deputy McLaughlin's letter stating that Bail Agent had surrendered Defendant – was immaterial, because the language found in N.C.G.S. § 15A-544.5(f) is unequivocal. *See, e.g., State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) ("Courts must give an unambiguous statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." (citation, quotation marks, and brackets omitted)).

According to the dissenting opinion, *Adams* is distinguishable from the present case because, in *Adams*, "no issue was asserted [before the trial court as to] whether the surety had seen, read, or had 'actual notice' of the [defendant's] release order[,] because the surety "acknowledged that [it] had conducted an independent investigation to determine the veracity of the notation on the [defendant's] release order [indicating two or more prior failures to appear][.]" However, in *Adams*, this Court explicitly held that the efforts undertaken by the surety were inapposite with respect to the "actual notice" requirement in N.C.G.S. § 15A-544.5(f). The singular fact that "[the] defendant's prior failures to appear were noted on his release order . . . supported the trial court's finding that [the] surety had actual notice as defined by N.C. Gen. Stat. § 15A-544.5(f)."³ *Adams*, 220 N.C. App. at 411, 725 S.E.2d at 97.

3. This Court recently reached a similar conclusion in an unpublished decision, *State v. Daniel*, ___ N.C. App. ___, 784 S.E.2d 237, 2016 WL 968457 (2016). In *Daniel*, a surety "attached to its motion to set aside [documentation showing that the defendant] had been served with an order of arrest for failure to appear, thus establishing a basis for set aside under [N.C.G.S. § 15A-544.5(b)(4)]." *Id.*, 2016 WL 968457 at *2.

However, also before the district court at the hearing [on the motion to set aside] was the [defendant's] second release order, indicating that [the defendant's] 22 October 2014 failure to appear was "a second or subsequent failure to appear" in the same matter. Under the plain language of subsection (f), this notation on the second release order constituted actual notice to the [s]urety that [the defendant] had previously failed to appear

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The dissenting opinion also submits that the Board of Education did not meet its burden of showing that Surety or Bail Agent had *actually seen* Defendant's release order such that they were aware that a box was checked indicating Defendant's prior failures to appear. However, that is not what the statute requires and is unsupported by its legislative history. The version of N.C.G.S. § 15A-544.5(f) in effect prior to 1 January 2010 provided:

In any case in which *the State proves* that the surety or the bail agent had *notice or actual knowledge*, before executing the bail bond, that the defendant had already failed to appear on two or more prior occasions, no forfeiture of that bond may be set aside for any reason.

See N.C. Session Law 2009-437 (eff. 1 January 2010) (emphases added); see also *State v. Poteat*, 163 N.C. App. 741, 746-47, 594 S.E.2d 253, 256 (2004) (construing the term "notice," in version of N.C.G.S. § 15A-544.5(f) then in effect, "to include constructive, as well as actual notice[,] and concluding professional bondsman "through the exercise of proper diligence could have readily discovered the earlier bond forfeiture notices, arrest warrants, and orders for [the defendant's] arrest, any of which would have indicated that [the defendant] had a second prior failure to appear.").

During the 2009-2010 legislative session, our General Assembly amended N.C.G.S. § 15A-544.5(f) in several ways that inform our holding in the present case. Significantly, the General Assembly eliminated the "burden of proof" previously imposed upon the State to show notice by a surety or bail agent. It also replaced the phrase "notice or actual knowledge" with the current requirement of "actual notice," and *expressly defined* "actual notice" for purposes of the statute. See *Pelham Realty Corp. v. Bd. of Transportation*, 303 N.C. 424, 434, 279 S.E.2d 826, 832 (1981) ("It is within the power of the [L]egislature to define a word used in a statute, and that statutory definition controls the interpretation of that statute." (citations omitted)). We do not, as the dissenting opinion contends, read the requirement of "actual notice" in N.C.G.S. § 15A-544.5(f) as encompassing "constructive" or "record" notice. We instead follow the exact wording of the statute as amended, under which a properly

at least twice in the same matter, and, accordingly, deprived the district court of authority to set aside the bond forfeiture "for any reason[.]"

Id. (quoting N.C.G.S. § 15A-544.5(f)) (emphasis in original). While *Daniel* is not controlling precedent, we find its reasoning persuasive. See, e.g., *State v. Foster*, 222 N.C. App. 199, 204, 729 S.E.2d 116, 120 (2012).

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marked release order is *per se* sufficient evidence of “actual notice.” The State is not required to produce any additional evidence – including evidence that the surety or bail agent actually saw the release order before executing the bail bond. We stress that the question of whether a trial court, in applying N.C.G.S. § 15A-544.5(f), may consider evidence that, *notwithstanding a properly marked release order*, a surety or bail agent was prevented in some way from discovering a defendant’s prior failures to appear is not presently before us.

We disagree with the dissenting opinion that “[n]othing in the record indicates whether the parties presented evidence at the hearing . . . of whether Surety or Bail Agent had ‘actual notice’ of the notation on the release order indicating Defendant’s prior failures to appear.” As discussed above, the Board of Education was not required to present any evidence of “actual notice” beyond the properly marked release order itself, which was contained in Defendant’s case file. *See Adams*, 220 N.C. App. at 411, 725 S.E.2d at 97 (“The trial court’s finding . . . that [the] defendant had failed to appear on two prior occasions was supported by competent evidence, because [the] defendant’s shuck demonstrated that he had failed to appear [on two prior dates].” (emphasis added)). Moreover, the narration of the trial court proceedings submitted by the Board of Education – which Surety did not challenge – indicates that, during the hearing on the motion to set aside the forfeiture, Surety did not argue Bail Agent lacked notice of Defendant’s prior failures to appear before executing the bond, and “[n]either the Board [of Education] nor Surety submitted any sworn testimony, affidavits or additional documents to the court[.]”⁴ Thus, the record on appeal shows that the *only* evidence before the trial court related to the issue of notice was the *exact* evidence required to show “actual notice” under N.C.G.S. § 15A-544.5(f).⁵

4. No transcript of the trial court hearing on Surety’s motion to set aside the forfeiture appears in the record before us. However, after filing the record on appeal and its appellate brief, the Board of Education filed a motion to amend the record on appeal to add a narration of the hearing, which is permitted by our Appellate Rules and encouraged when, as in the present case, an electronic transcript of the trial court proceedings is unavailable. *See In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003) (“Where a verbatim transcript of the [trial court] proceedings is unavailable, there are means . . . available for [a party] to compile a narration of the evidence, i.e., reconstructing the testimony with the assistance of those persons present at the hearing.” (citation and internal quotation marks omitted)); *see also* N.C. R. App. P. 9(c)(1) (providing for narration of the evidence in record on appeal and, if necessary, settlement of record by the trial court on form of narration of the testimony). No objection was filed to the Board’s motion to amend the record on appeal, and this Court allowed the motion on 7 August 2017.

5. In *Daniel*, *see supra* n.3, the appellant school board asserted on appeal that, at the hearing on the motion to set aside, the surety “[had] argued that the bail agent had not

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While not dispositive, we note that Surety has taken no action at any stage of this appeal. The record on appeal was settled by operation of the Rules of Appellate Procedure after Surety took no action within the time allowed for responding to the proposed record compiled by the Board of Education. *See* N.C. R. App. P. 11(b); *see also In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003) (noting that “[i]f an opposing party contended the record on appeal was inaccurate in any respect, the matter could be resolved by the trial judge in settling the record on appeal.” (citation and internal quotation marks omitted)). Thereafter, only the Board of Education filed an appellate brief. Surety also did not object to the motion filed by the Board of Education to amend the record on appeal by adding a narration of the trial court hearing. *See supra* n.4-5; *see also State v. Cobb*, 2017 WL 2945860 at *3 (2017).

III. Conclusion

The record as submitted by the Board of Education “contains documentary evidence which, on its face, does not support the ruling of the trial court.” *Cobb*, 2017 WL 2945860 at *3. Accordingly, we vacate the trial court’s order allowing the motion to set aside the forfeiture.

VACATED.

Judge INMAN concurs.

Judge TYSON dissents with separate opinion.

actually seen the second release order in [the defendant’s] file when [the bail agent] posted the bond and thus lacked actual notice that [the defendant] had twice previously failed to appear in the same matter.” *Daniel*, 2016 WL 968457 at *3. However, the record did not include a transcript of the hearing, and the trial court’s order did not include any finding of fact on that issue. “Thus, the *only* competent evidence at the motion hearing conclusively established that, pursuant to N.C. Gen. Stat. § 15A-544.5(f), the district court was barred from setting aside the bond forfeiture.” *Id.* (emphasis in original). The dissenting opinion reads *Daniel* as suggesting this Court *would have considered* evidence, if included in the record on appeal, that a bail agent did not actually see a defendant’s release order in determining whether there was “actual notice” under N.C.G.S. § 15A-544.5(f). However, as the dissenting opinion concedes, we emphasized in *Daniel* that the record on appeal contained no evidence regarding whether the bail agent had in fact seen the relevant release order before posting the bond. The same is true in the present case. No evidence in the record before us reveals any argument by Surety that it lacked “actual notice” because Bail Agent never saw Defendant’s release order. Furthermore, the narration of the hearing submitted by the Board of Education – and *unopposed by Surety* – affirmatively indicates that, at the hearing, Surety (1) did not make such an argument and (2) did not offer any evidence to the trial court other than the letter signed by Deputy McLaughlin stating Bail Agent had surrendered Defendant on 26 April 2016.

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Judge TYSON, dissenting.

The majority's opinion correctly states the controlling statute to set aside a forfeiture, but erroneously concludes the substantial evidence presented by the Bail Agent to support his motion to set aside the forfeiture of an appearance bond, and the trial court's findings of fact thereon, "[were] immaterial because the language found in N.C.G.S. § 15A-544.5(f) is unequivocal." As a result, the majority's opinion concludes 'the trial court lacked authority to set aside the forfeiture 'for any reason.' " The Board of Education failed to present any evidence to support its opposition to the Bail Agent's motion. I disagree with the majority opinion and respectfully dissent.

The record establishes Defendant was charged with driving while impaired in Wilson County File No. 14 CRS 54745, and that a secured appearance bond was set at \$16,000, for which Bail Agent posted bond. Defendant failed to appear in court on the scheduled trial date of 15 April 2016. The trial court ordered forfeiture of the bond, and Bail Agent and Surety received notice of the forfeiture.

On 15 August 2016, Bail Agent timely moved to have the bond forfeiture set aside on the basis that "[D]efendant ha[d] been surrendered by a surety on the bail bond as provided by [N.C. Gen. Stat. §] 15A-540[.]" The Bail Agent's motion and evidence of his surrender of Defendant to Deputy McLaughlin established a *prima facie* showing under the statute that Defendant had been surrendered and the Surety and Bail Agent were entitled to relief from forfeiture. N.C. Gen. Stat. § 15A-540 (2015).

The Board of Education objected to Bail Agent's motion to set aside the forfeiture of the bond. The Board of Education has appealed from the trial court's order of relief from forfeiture, which was based on the trial court's finding of fact that Bail Agent had established the existence of one or more statutorily-permissible reasons for setting aside the bond forfeiture. The proper issue before this Court, and not addressed by the majority's opinion, is whether the findings of fact and conclusions of law in the trial court's order were supported by evidence adduced at the hearing conducted by the trial court.

I. Standard of Review

"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, 671, 660 S.E.2d

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618, 619 (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.”

The Board of Education is the appellant and “it 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. App. 442, 445-46, 552 S.E.2d 262, 265 (2001) (internal quotation omitted) (emphasis supplied).

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.” N.C. Gen. Stat. § 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)(1-6)], and none other.’” *State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005).

II. N.C. Gen. Stat. § 15A-544

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. . . a bail agent acting on behalf of an insurance company. 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.

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(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. . . .

N.C. Gen. Stat. § 15A-544.5 prohibits a court from setting aside a bond forfeiture “for any reason in any case in which the surety or the *bail agent had actual notice before executing a bail bond* that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed.” N.C. Gen. Stat. § 15A-544.5(f) (emphasis supplied). N.C. Gen. Stat. § 15A-544.5(f) further provides:

Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated on the defendant’s release order by a judicial official. The judicial official shall indicate on the release order when it

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is the defendant's second or subsequent failure to appear in the case for which the bond was executed.

The Board of Education, as appellant, failed to include any audio recordings or transcripts of testimony presented at the hearing in the record on appeal. The Board of Education tendered a *post hoc* narrative summarizing the events of the bond forfeiture hearing. Addressing whether the trial court was statutorily prohibited by N.C. Gen. Stat. § 15A-544.5(f) from granting the motion to set aside the forfeiture, the narrative asserts:

[Board's attorney] further stated that the bond at issue was a Bond C and that Surety had actual notice that the criminal defendant had failed to appear on two or more previous occasions in the case. [Board's attorney] stated that, based on these facts, notwithstanding any grounds to set aside under § 15A-544.5(b)(3), the court was statutorily prohibited from granting the motion to set aside for any reason pursuant to N.C. Gen. Stat. § 15A-544.5(f).

Statements of counsel to the court are not competent evidence to support or reverse the trial court's order. *See State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985) (holding "counsel's statements were not competent evidence[.]"). The majority opinion characterizes N.C. Gen. Stat. § 15A-544.5(f) as being "unambiguous" regarding when a surety or bail agent has actual notice of the release order. I disagree.

When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). 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. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.").

Diaz v. Div. of Soc. Servs. & Div. of Med. Assistance, N.C. Dep't of Health & Human Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006).

"[T]he language of a statute will be interpreted so as to avoid an absurd consequence. A statute is never to be construed so as to require

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an impossibility if that result can be avoided by another fair and reasonable construction of its terms.” *Hobbs v. County of Moore*, 267 N.C. 665, 671, 149 S.E.2d 1, 5 (1966) (citations and quotation marks omitted).

The majority opinion interprets the statutory language of “[a]ctual notice . . . shall only occur if two or more failures to appear are indicated on the defendant’s release order by a judicial official” in the statute to conclude a bail agent has received “actual notice” a defendant has failed to appear on two or more prior occasions, if the box checked on the release order so indicates, regardless of whether the bail agent actually saw the release order. Interpreting “actual notice,” as the majority opinion does, would change “actual notice” to mean “constructive” or “record” notice. N.C. Gen. Stat. § 15A-544.5(f). “Actual” is defined as “existing in fact or reality[.]” *The American Heritage College Dictionary* 77 (2d ed. 1982). The phrase “actual notice” has been defined as “the actual awareness or direct notification of a specific fact or proceeding to a person.” USLegal, *Definitions*, “Actual Notice Law and Legal Definition,” <http://definitions.uslegal.com/a/actual-notice/> (last visited Sept. 11, 2017).

“[T]o charge one with notice, the activating information known to the party sought to be charged must ordinarily be such as may reasonably be said to excite inquiry respecting the particular fact or facts necessary to be disclosed in order to fix the party charged with notice.” *Perkins v. Langdon*, 237 N.C. 159, 168, 74 S.E.2d 634, 642 (1953) (citations omitted). “[I]mplicit in the principles that underlie the doctrine of constructive notice is the concept that before one is affected with notice of whatever reasonable inquiry would disclose, the circumstances must be such as to impose on the person sought to be charged a duty to make inquiry.” *Id.* at 168, 74 S.E.2d at 642 (citations omitted).

The General Assembly’s specific choice of “actual notice,” and not “constructive” or “record” notice, in N.C. Gen. Stat. § 15A-544.5(f) is evident from the legislative history. Before 1 January 2010, N.C. Gen. Stat. § 15A-544.5(f) read as follows:

(f) No More Than Two Forfeitures May Be Set Aside Per Case. – In any case in which the State proves that the surety or the bail agent had *notice or actual knowledge*, before executing a bail bond, that the defendant had already failed to appear on two or more prior occasions, no forfeiture of that bond may be set aside for any reason.

N.C. Gen. Stat. § 15A-544.5(f) (2009) (emphasis added), *amended by* 2009 N.C. Sess. Laws 2009-437.

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This Court had interpreted “notice” in the prior statute to encompass “constructive,” as well as “actual,” notice to comply with the former version of N.C. Gen. Stat. § 15A-544.5(f). *See State v. Poteat*, 163 N.C. App. 741, 746, 594 S.E.2d 253, 256 (2004) (“We conclude that construing the term ‘notice’ in N.C. Gen. Stat. § 15A-544.5(f) to include constructive, as well as actual, notice is in harmony with this statute’s purpose.”)

To construe “actual notice” in the current version of N.C. Gen. Stat. § 15A-544.5(f) to encompass “constructive” or “record” notice would create an “absurd consequence” in light of the plain language of the statute and the legislative history showing the statute was amended to specifically require the bail agent to have received “actual notice” versus the more general “notice or actual knowledge.” *See* 2009 N.C. Sess. Laws 2009-437 (amending “notice” in § 15A-544.5(f) to “actual notice”); *Hobbs*, 267 N.C. at 671, 149 S.E.2d at 5 (“[T]he language of a statute will be interpreted so as to avoid an absurd consequence.”).

The majority opinion cites two cases to support its interpretation of N.C. Gen. Stat. § 15A-544.5(f), *State v. Adams* and *State v. Daniel*, an unpublished case. Neither case controls the issues before us.

This Court held in *State v. Adams*, 220 N.C. App. 406, 410-11, 725 S.E.2d 94, 97 (2012), competent evidence was presented and supported the trial court’s finding that the surety had received “actual notice,” as defined by N.C. Gen. Stat. § 15A-544.5(f), because the defendant’s prior failures to appear were noted on his release order. However, the majority opinion’s use of *Adams* to read “actual notice” as encompassing “constructive” or “implied” notice in N.C. Gen. Stat. § 15A-544.5(f) to vacate the trial court’s order before us is inapposite.

In *Adams*, no issue was asserted whether the surety had seen, read, or had “actual notice” of the release order. *See Adams* at 410, 725 S.E.2d at 96. The surety acknowledged that its bail agent had conducted an independent investigation to determine the veracity of the notation on the release order that “defendant had already failed to appear on two or more occasions” before the surety executed the defendant’s surety bond. *Id.* at 409, 725 S.E.2d at 96. *Adams* does not support the conclusion to vacate here.

This Court in *State v. Daniel*, ___ N.C. App. ___, 784 S.E.2d 237, 2016 WL 968457 (2016) (unpublished) held the district court was deprived of authority to set aside a bond forfeiture, where the defendant’s release order indicated the defendant had failed to appear on two or more occasions. *Daniel*, 2016 WL 968457 at *2. However, in *Daniel*, this Court implied it would have considered evidence that the surety’s bail agent

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did not see the defendant's release order before the bail agent posted bond as pertinent to the issue of whether the surety had "actual notice". *Id.* This Court in *Daniel* noted that competent evidence indicating the bail agent had not seen the release order was not included in the record and declined to address whether the surety had received actual notice on that basis. *Id.* *3. *Daniel* is also an unpublished case and does not constitute binding precedent upon this Court. N.C. R. App. P. 30(e)(3).

The Board of Education has not met its statutory burden to produce evidence to show Surety or Bail Agent had received "actual notice" of the release order so that they were apprised that one of the boxes on it was checked to indicate, this was "defendant's second or subsequent failure to appear in this case." See N.C. Gen. Stat. § 15A-544.5(f) ("Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated on the defendant's release order by a judicial official").

Given the total absence of anything in the record, other than counsel's statements, of the evidence presented to the trial court showing whether the Surety or Bail Agent had received "actual notice" of the release order, any conclusion reached by this Court regarding the merits of the trial court's order will, of necessity, be based upon implication, assumption, or speculation. The majority opinion's holding is based upon the presumption that the trial court erred by not finding Bail Agent had actual notice in the absence of any evidence of proof. This is an intolerable burden for an appellee to meet and is wholly inconsistent with our standard of review.

The long-standing rule of our appellate courts demands we not presume error upon a silent record. "[W]here 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) (citations omitted).

On 17 August 2016, the Board of Education filed its objection to the Bail Agent's motion, and a hearing was scheduled for 12 September 2016. Following the hearing, Judge Covolo entered an order allowing Surety's motion and setting aside the bond forfeiture, based upon a finding of fact and conclusion of law that:

Upon due notice, a hearing was held on the above Objection to the Motion To Set Aside Forfeiture. The Court finds that 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

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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.

“[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*, 146 N.C. App. at 445-46, 552 S.E.2d at 265 (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); see also *Phelps v. McCotter*, 252 N.C. 66, 67, 112 S.E.2d 736, 737 (1960) (noting “the well established [sic] principle that there is a presumption in favor of the regularity and validity of the proceedings in the lower court”). “The rulings, orders and judgments of the trial judge are presumed to be correct, and the burden is on the appealing party to rebut the presumption of verity on appeal.” *Hocke v. Hanyane*, 118 N.C. App. 630, 635, 456 S.E.2d 858, 861 (1995) (citation, alteration, and quotation marks omitted).

The only relevant issue on appeal before this Court is whether the trial court’s findings of fact and conclusions of law in the order were properly entered in light of the competent evidence adduced at the hearing. The Board of Education produced no evidence, to contradict the Bail Agent’s competent and substantive evidence at the hearing, only statements of counsel.

The Board’s *post hoc* narrative summarizing the events of the hearing contains nothing to show the Board of Education presented any evidence of the Bail Agent or Surety having received “actual notice” or seeing the release order before executing the bail bond. In the course of settling the record on appeal, pursuant to N.C. R. App. P. 11, the Board of Education could have submitted an affidavit from the appellant’s trial counsel regarding the evidence the Board and 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 could have filed

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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[.]”

Nothing in the record indicates whether Surety or Bail Agent had received “actual notice” of the notation on the release order indicating Defendant’s prior failures to appear. “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)). It was the Board’s duty as the appellant,

and not the duty of this Court, to challenge findings and conclusions, and make corresponding arguments on appeal. It is not the job of this Court to “create an appeal for” [Appellant]. . . . “It is not the duty of this Court to supplement an appellant’s brief with legal authority or arguments not contained therein. Th[ese] [arguments are] deemed abandoned by virtue of N.C. R. App. P. 28(b)(6).”

Sanchez v. Cobblestone Homeowners Ass’n., __ N.C. App. __, __, 791 S.E.2d 238, 245-46 (2016) (citations omitted).

We should not reach a contrary conclusion on the validity of the trial court’s order, and vacate that order, without a record of what evidence the parties presented at the hearing regarding the Bail Agent or Surety’s “actual notice.”

III. Conclusion

In the absence of any record of the proceedings before the trial court showing what evidence was, or was not, presented, the Board has failed to meet its burden to show error in the trial court’s order. This Court has, until now, consistently followed the well-established rule and has not presumed that the trial court has erred and vacated its order in the absence of a showing of any error by the appellant. *Granville*, 160 N.C. App. at 488-89, 586 S.E.2d at 795.

The Board of Education has failed to meet its burden on appeal to show error, or to rebut the Bail Agent’s *prima facie* showing of entitlement to relief under the statute based upon competent evidence. The record contains no evidence upon which we can undermine the validity

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of the trial court's ruling. The majority's opinion avoids any analysis of the Board's burden on appeal.

Our consistent precedents require us to presume the trial court's findings of fact and conclusions of law are properly supported and correct, and to affirm the trial court's order. *See id.*; *see also In re A.R.H.B.*, 186 N.C. App. at 219, 651 S.E.2d at 253; *King*, 146 N.C. App. at 445-46, 552 S.E.2d at 265; *Hocke*, 118 N.C. App. at 635, 456 S.E.2d at 861. For these reasons, I vote to affirm the trial court's order and respectfully dissent.

STATE OF NORTH CAROLINA

v.

ANTONIO JERMAINE KNIGHT, JR., DEFENDANT AND ONTARRIS T. ARMSTRONG, BAIL
AGENT, AND FINANCIAL CASUALTY & SURETY, SURETY

No. COA17-19

Filed 3 October 2017

**Penalties, Fines, and Forfeitures—reduction of bond forfeiture—
denial of motion to set aside—no statutory authority**

The trial court lacked statutory authority under N.C.G.S. § 15A-544.5 to reduce a bond forfeiture amount after denying a surety's motion to set aside the bond forfeiture. The only relief it could grant was the setting aside of the forfeiture based on the enumerated statutory reasons.

Appeal by Wilson County Board of Education from order entered 3 October 2016 by Judge William C. Farris in District Court, Wilson County, following a hearing the same date before Judge John J. Covolo. Heard in the Court of Appeals 7 August 2017.

Schwartz & Shaw, P.L.L.C., by Kristopher L. Caudle and Rebecca M. Williams, for Wilson County Board of Education, Plaintiff-Appellant.

No brief for Antonio Jermaine Knight, Jr., Defendant.

No brief for Ontarris T. Armstrong, Bail Agent.

Harris & Associates, P.L.L.C., by Robert J. Harris, for Financial Casualty & Surety, Defendant-Appellee Surety.

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McGEE, Chief Judge.

The Wilson County Board of Education (“the Board of Education”)¹ appeals from the trial court’s order reducing a bond forfeiture amount after denying a surety’s motion to set aside the bond forfeiture. Because we conclude the trial court lacked statutory authority to reduce the bond forfeiture amount, we vacate the trial court’s order and remand for further proceedings consistent with this opinion.

I. Background

Antonio Jermaine Knight (“Defendant”) failed to appear in Wilson County District Court in an underlying criminal matter on 11 March 2016. The Wilson County Clerk of Court issued a bond forfeiture notice in the amount of \$2,000.00 to Defendant, Financial Casualty & Insurance (“Surety”), and Surety’s bail agent, Ontarris T. Armstrong (“Bail Agent”), on 14 March 2016. Notice was mailed to all parties on 17 March 2016.

Clarence Fuller, another bail agent of Surety, filed a motion to set aside the bond forfeiture (“the motion to set aside”) on 15 August 2016. Form AOC-CR-213, the preprinted form used for motions to set aside a forfeiture, lists the seven reasons, pursuant to N.C. Gen. Stat. § 15A-544.5, for which a bond forfeiture may be set aside, with corresponding boxes for a movant to mark the alleged basis for setting aside the forfeiture. In the present case, the motion to set aside filed by Surety’s bail agent did not indicate Surety’s reason for setting aside the forfeiture. A document attached to the motion, entitled “General Court of Justice (*Surety Notice of Defendant’s Incarceration*),” indicated that Defendant was incarcerated on 2 August 2016 with a projected release date of 5 October 2016. The Board of Education objected to the motion to set aside the forfeiture on 17 August 2016.

Following a hearing on 3 October 2016, the trial court denied Surety’s motion to set aside the bond forfeiture, based on its finding that Surety “ha[d] [not] established one or more of the reasons specified in [N.C.G.S. §] 15A-544.5 for setting aside [the] forfeiture.” In accordance with N.C.G.S. § 15A-544.5(d)(7) (2017), the trial court’s order provided that “the forfeiture shall become a final judgment of forfeiture on the later of this date or one hundred and fifty (150) days after the ‘Date

1. “The Board’s status as appellant in the instant case is due to its status as the ultimate recipient of the ‘clear proceeds’ of the forfeited appearance bond at issue herein, pursuant to Article IX, § 7 of the North Carolina Constitution.” *State v. Dunn*, 200 N.C. App. 606, 607 n.1, 685 S.E.2d 526, 527 n.1 (2009) (citation omitted).

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Notice Given[.]’” Despite denying the motion, the trial court verbally reduced the amount of the bond forfeiture from \$2,000.00 to \$300.00.² A handwritten notation stating “Surety to pay \$300” appears on the trial court’s order, also filed on 3 October 2016. Surety paid \$300.00 to the clerk of court that same day. The Board of Education appeals.

II. Analysis

The Board of Education contends the trial court lacked statutory authority to reduce the amount of the bond forfeiture after denying Surety’s motion to set aside the bond forfeiture. We agree.

A. *Standard of Review*

In an appeal from an order setting aside a bond forfeiture, “the standard of review for this Court 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. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citation omitted); *see also* N.C. Gen. Stat. § 15A-544.5(h) (2015) (providing in part that “[a]n 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.”). Questions of law, including matters of statutory construction, are reviewed *de novo*. *See In re Hall*, 238 N.C. App. 322, 324, 768 S.E.2d 39, 41 (2014) (citation omitted) (“Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court’s conclusions of law *de novo*[.]”).

B. *Surety’s Motion to Set Aside*

In North Carolina, bail bond forfeiture is governed by Chapter 15A, Article 26, Part 2 of our General Statutes. *See* N.C. Gen. Stat. § 15A-544.1

2. No transcript of the hearing appears in the record on appeal, which was settled by operation of N.C. R. App. P. 11(b) after Surety took no action within the time allowed for responding to the proposed record on appeal. The Board of Education subsequently filed a motion to amend the record on appeal to add a narration of the trial court hearing. *See* N.C.R. App. P. 9(b)(5), 9(c)(1). No objection was filed, and this Court allowed the motion on 7 August 2017. According to the narration submitted by the Board of Education, at the hearing on the motion to set aside, an attorney for Surety “did not argue that any of the statutory bases for set aside had been met, however, [Surety’s attorney] requested that [the trial court] award some relief on the amount of the bond forfeiture to be paid.” After hearing arguments from both parties, the trial court “found that Surety had not established the grounds for set aside under N.C. Gen. Stat. § 15A-544.5 and denied Surety’s motion. However, Judge Covolo then ordered [] Surety to pay a reduced bond forfeiture amount of \$300.00.”

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(2017) (“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[.]”). “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.” N.C. Gen. Stat. § 15A-544.3(a) (2017) (emphasis added).

N.C. Gen. Stat. § 15A-544.5 (2017) provides that “[t]here shall be no relief from a forfeiture except as provided in this section.” *See State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012) (“The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in [N.C.]G.S. § 15A-544.5.” (citation and quotation marks omitted) (internal parentheses in original)). The statute’s language is unequivocal: “a forfeiture *shall* be set aside for any one of the following [seven] reasons, *and none other*.”³ N.C. Gen. Stat. § 15A-544.5(b) (2017) (emphases added); *see also State v. Rodrigo*, 190 N.C. App. 661, 664, 660 S.E.2d 615, 617 (2008) (“Relief from a forfeiture, before the forfeiture becomes a final judgment, is exclusive and limited to the reasons provided in N.C. Gen. Stat. 15A-544.5.”).

3. Although not directly at issue in the present case, the exclusive reasons for which a bond forfeiture may be set aside are as follows:

- (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 and *Juvenile Justice* of the Department of Public Safety and

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In the present case, it is undisputed that Surety's motion was a motion to set aside a bond forfeiture filed pursuant to N.C.G.S. § 15A-544.5. Surety filed a Form AOC-CR-213, the form used for motions to set aside a bond forfeiture under N.C. Gen. Stat. § 15A-544.5(d)(1) (2017), and did so before a final judgment of forfeiture was entered. The trial court's order explicitly stated that the motion was denied based on the court's finding that Surety "[failed to establish] one or more of the reasons specified in [N.C.G.S. §] 15A-544.5 for setting aside that forfeiture." Accordingly, we agree with the Board of Education that N.C. Gen. Stat. § 15A-544.5 is the controlling statute in this appeal.

On appeal, the Board of Education does not challenge the trial court's denial of Surety's motion to set aside, since, the Board contends, Surety failed to establish any of the seven exclusive statutory reasons for which a bond forfeiture may be set aside. *See supra* n.3. In response, Surety does not argue that its motion to set aside *should have been allowed* because it *did* satisfy one or more of the reasons set forth in N.C.G.S. § 15A-544.5. Surety instead asserts the trial court "in its discretion reduced the bond forfeiture [amount] from \$2000 to \$300; thus, *granting* the [m]otion to [s]et [a]side the bond forfeiture *in part*." (emphases added). In making this argument, Surety improperly relies upon N.C. Gen. Stat. § 15A-544.8, the statute that sets forth a distinct procedure for seeking relief from *final judgments* of forfeiture.⁴ Because

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 and Juvenile Justice 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)(1)-(7) (2017) (emphases added to indicate 2017 amendments).

4. Surety's reliance on N.C.G.S. § 15A-544.8 is misplaced because Surety filed the motion to set aside before entry of a final judgment of forfeiture occurred. "A forfeiture becomes a final judgment of forfeiture on the 150th day after notice of forfeiture is given,

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the Board of Education does not challenge the trial court's conclusion that Surety failed to establish a reason for setting aside the forfeiture pursuant to N.C.G.S. § 15A-544.5, and Surety offers no argument under the relevant statute, we proceed on the presumption that the trial court properly denied the motion to set aside. *See, e.g., Hocke v. Hanyane*, 118 N.C. App. 630, 635, 456 S.E.2d 858, 861 (1995) (observing that "the rulings, orders and judgments of the trial judge are presumed to be correct, and the burden is on the appealing party to rebut the presumption of verity on appeal." (citation, alteration, and quotation marks omitted)).

C. Reduction of Bond Amount

The sole question before us is whether the trial court had authority, pursuant to N.C.G.S. § 15A-544.5, to reduce the amount owed by Surety on the executed bond. We conclude it did not.

In construing a statute, we must first ascertain the legislative intent to ensure that the purpose and intent of the legislation are satisfied. In making this determination, we look first to the language of the statute itself. If the language used is clear and unambiguous, this Court must not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.

Bryant v. Adams, 116 N.C. App. 448, 457, 448 S.E.2d 832, 836 (1994) (citation omitted). Our Supreme Court has instructed that "[reviewing c]ourts should give effect to the words actually used in a statute and should neither delete words used nor insert words not used in the relevant statutory language during the statutory construction process." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (citation and internal quotation marks omitted).

As discussed above, by its plain language, N.C.G.S. § 15A-544.5 provides the "exclusive" relief for setting aside a bond forfeiture that has not yet become a final judgment. *See* N.C. Gen. Stat. § 15A-544.5(a) (2017). The reasons enumerated therein for which a forfeiture may be set aside

unless a motion to set aside the forfeiture is either entered on or before *or is pending on that date.*" *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 48-49, 612 S.E.2d 148, 151 (2005) (citing N.C. Gen. Stat. § 15A-544.6) (emphasis added). Notice of forfeiture is effective when the notice is mailed. N.C. Gen. Stat. § 15A-544.4 (2017). In the present case, notice of forfeiture was mailed on 17 March 2016. Surety's bail agent filed the motion to set aside on 15 August 2016, the day the forfeiture would have become a final judgment. Thus, there was a motion to set aside "pending on that date," and the forfeiture did not become a final judgment by operation of the statute.

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are both mandatory and exhaustive. *See, e.g., State v. Lazaro*, 190 N.C. App. 670, 673, 660 S.E.2d 618, 620 (2008) (holding trial court erred in granting surety's motion to set aside bond forfeiture because "deportation is not listed as one of the . . . exclusive grounds that allowed the court to set aside a bond forfeiture.").

The only "relief" authorized under N.C.G.S. § 15A-544.5 is the setting aside of the bond forfeiture. The statute provides that, "[i]f at the hearing the [trial] court allows the motion, the court *shall enter an order setting aside the forfeiture.*" N.C.G.S. § 15A-544.5(d)(6) (emphasis added). Conversely, if a movant fails to establish any of the reasons enumerated in N.C.G.S. § 15A-544.5, the court must deny the motion to set aside. Once a motion to set aside is denied, a final judgment date is prescribed by statute:

If at the hearing [on the motion to set aside] the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture on the later of:

- a. The date of the hearing.
- b. The date of final judgment specified in G.S. 15A-544.6.

N.C.G.S. § 15A-544.5(d)(7). There is no "partial" relief provided under the plain language of the statute.

In addition to the statutory language itself, "[o]ther *indicia* considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption[.]" *Taylor v. City of Lenoir*, 129 N.C. App. 174, 177, 497 S.E.2d 715, 718 (1998) (citation and quotation marks omitted) (second alteration in original); *but see Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 295 (1991) (advising that reviewing courts need only examine legislative history if, "after analyzing the text, structure, and policy of the statute, we are still in doubt as to legislative intent[.]" (citation omitted)).

As the Board of Education notes, our General Assembly enacted S.L. 2000-133, entitled "An Act to Modernize Bail Bond Forfeiture Proceedings[.]" during the 1999-2000 legislative session. S.L. 2000-133 repealed N.C. Gen. Stat. § 15A-544, the statute formerly governing bail bond forfeiture, and replaced it with the statutory provisions now codified at N.C.G.S. §§ 15A-544.1 through 544.8. Under former N.C.G.S. § 15A-544, trial courts had discretion to "remit" part or all of a bond forfeiture, and could do so before or after entry of a final judgment of forfeiture.

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See N.C. Gen. Stat. §§ 15A-544(c), (e), (h) (repealed by S.L. 2000-133, eff. 1 January 2001). Among other things, S.L. 2000-133 created a new procedure for “setting aside” a bond forfeiture prior to the entry of a final judgment. The newly-enacted N.C.G.S. § 15A-544.5 established the “exclusive” relief from a bond forfeiture prior to the entry of final judgment, and enumerated the specific reasons for which a forfeiture “shall” be set aside, “and none other.” See N.C.G.S. §§ 15A-544.5(a)-(b). Importantly, N.C.G.S. § 15A-544.5 omitted any reference to language found in former N.C.G.S. § 15A-544(e) that authorized a trial court to “remit” a bond forfeiture “in whole or in part, upon such conditions as the court may impose, if it appears [to the trial court] that justice requires the remission of part or all of the judgment.”

By contrast, S.L. 2000-133 retained some of the discretionary language found in former N.C.G.S. § 15A-544 in establishing a separate procedure for seeking relief from *final* judgments of forfeiture. Under current N.C.G.S. § 15A-544.8, a trial court “may” grant relief from a final judgment of forfeiture if, *inter alia*, “extraordinary circumstances exist that the [trial] court, in its discretion, determines should entitle [the movant] to relief.” See N.C.G.S. § 15A-544.8(b)(2). Additionally, N.C.G.S. § 15A-544.8 provides that, “[a]t the hearing [on a motion for relief from final judgment of forfeiture][,] the court may grant the [moving] party *any relief* from the judgment that the court considers appropriate, *including the refund of all or a part of any money paid to satisfy the judgment.*” See N.C.G.S. § 15A-544.8(c)(4) (emphases added). These provisions echo language found in former N.C.G.S. § 15A-544(h), which provided that, “[f]or extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate.” See *State v. Lopez*, 169 N.C. App. 816, 820, 611 S.E.2d 197, 199 (2005) (observing that language in N.C.G.S. § 15A-544.8, granting trial courts broader discretion in providing relief from final judgments of forfeiture, “also appeared in the predecessor statute (N.C. Gen. Stat. § 15A-544(e) and (h)), [and] requires that we review such decisions [only] for an abuse of discretion.” (citation omitted) (internal parentheses in original)).

We agree with the Board of Education that the General Assembly’s decision to omit discretionary language with respect to motions to set aside, and retain such language with respect to final judgments of forfeiture, “suggests the [L]egislature made a conscious choice in this regard.” See *State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005); see also *Long v. Hammond*, 164 N.C. App. 486, 497, 596 S.E.2d 839, 846

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(2004) (finding construction of one statutory section as not requiring the element of intent was bolstered by the fact that another section, within the same article and amended at the same time, “[*did*] possess an element of intent. We credit the [L]egislature with deliberate composition of its statutes unless there is some construction and policy concern sufficient to raise an ambiguity.” (emphasis added)). We are persuaded that, considered together, the plain language used in N.C.G.S. § 15A-544.5 and the statute’s legislative history demonstrate that the General Assembly intended to limit a trial court’s authority in setting aside a bond forfeiture before the entry of a final judgment.

Under N.C.G.S. § 15A-544.5, a trial court may only grant relief from a forfeiture for the reasons listed in the statute, and the only relief it may grant is the setting aside of the forfeiture. *Cf. Lopez*, 169 N.C. App. at 819, 611 S.E.2d at 199 (noting that whether to grant relief under N.C.G.S. § 15A-544.8 is “entirely within the discretion of the [trial] court[.]”). The trial court must either allow the motion and set aside the bond forfeiture in its entirety, or deny the motion to set aside, in which case the original forfeiture will become a final judgment in accordance with the relevant statutory provisions. *See* N.C.G.S. §§ 15A-544.5(d)(6)-(7), 15A-544.6. Once the forfeiture becomes a final judgment, a party may initiate a new proceeding seeking relief pursuant to N.C.G.S. § 15A-544.8.

In *State v. Cortez*, 215 N.C. App. 576, 715 S.E.2d 881 (2011), this Court held that a trial court lacked jurisdiction “to enter and affirm [] second orders of forfeiture[,]” because

the Sureties would currently be liable for two separate failures to appear and, therefore, liable for two times the actual amount of the bonds executed in [the] [d]efendant’s case . . . [and] the Sureties *may not be held liable for more than the amount agreed upon pursuant to the bonds they actually executed*[.]

Id. at 580, 715 S.E.2d at 884 (emphasis added). We now hold that, when a motion to set aside a forfeiture is denied under N.C.G.S. § 15A-544.5, an obligor also may not be held liable for *less than* the amount agreed upon pursuant to the bond it actually executed. A conclusion to the contrary would contravene the Legislature’s demonstrated intent to divest the trial courts of *discretionary* authority to modify bond forfeitures before entry of final judgment occurs, and “result[] in unnecessary inefficiencies and confusion.” *Id.*; *see also State v. Evans*, 166 N.C. App. 432, 434, 601 S.E.2d 877, 878 (2004) (observing that, unlike a trial court’s grant of relief from a final judgment of forfeiture under N.C.G.S. § 15A-544.8, “the

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setting aside of a forfeiture that has not become final *imposes no burden on any party[.]*” (emphasis added)).

We also note that allowing a trial court to deny a motion to set aside a bond forfeiture, but reduce the amount owed on the bond, would undermine the purpose of bail, “which is to secure the appearance of the principal in court as required.” *State v. Hollars*, 176 N.C. App. 571, 574, 626 S.E.2d 850, 853 (2006) (citation and internal quotation marks omitted). The prospect of a bond reduction, notwithstanding forfeiture, could create a disincentive for sureties and their agents to “diligently pursue defendants.” See *State v. Coronel*, 145 N.C. App. 237, 247, 550 S.E.2d 561, 568 (2001).

In the present case, the trial court denied Surety’s motion to set aside based on its finding that no reason existed pursuant to N.C.G.S. § 15A-544.5 to set aside the forfeiture. Having denied the motion to set aside, the trial court had no authority to grant “partial relief” by reducing the amount owed on the bond.

III. Conclusion

Because we find no statutory basis upon which a trial court may deny a motion to set aside a bond forfeiture pursuant to N.C.G.S. § 15A-544.5, but reduce the amount owed on the executed bond, the trial court’s order is vacated. On remand, the trial court shall enter an order directing Surety to pay the amount of the bond as executed, less any amounts already paid.

VACATED AND REMANDED.

Judges TYSON and INMAN concur.

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[255 N.C. App. 812 (2017)]

STATE OF NORTH CAROLINA

v.

ANTHONY EDWARD MESSER

No. COA16-1174

Filed 3 October 2017

1. Robbery—dangerous weapon—motion to dismiss—sufficiency of evidence—corpus delicti—trustworthiness

The trial court did not err by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon where the State provided substantial independent evidence establishing the trustworthiness of the essential facts to which defendant confessed. Defendant's admission he stole \$104.00 from the victim was credible, and the corpus delicti for robbery with a dangerous weapon was established.

2. Confessions and Incriminating Statements—in-custody statement—evidence from seized clothing—DNA test—sufficiency of findings of fact—criminal activity—probable cause for arrest

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's motions to suppress his in-custody statement and evidence from his seized clothing and DNA test where the contested findings of fact were supported by competent evidence, were inconsequential to the holding, or did not amount to prejudicial error. The findings suggested the probability or substantial chance that defendant engaged in criminal activity and thus supported the conclusion that the detectives had probable cause to arrest defendant.

Appeal by Defendant from judgment entered 6 November 2015 and 10 November 2015 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Peter A. Regulski, for the State.

Paul F. Herzog, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

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Anthony Edward Messer (“Defendant”) appeals a jury verdict convicting him of first degree murder and robbery with a dangerous weapon. On appeal, Defendant argues the following: (1) the trial court erred by denying his motion to dismiss because the State failed to establish the *corpus delicti* of the charge of robbery with a dangerous weapon; and (2) the trial court erred by denying his motions to suppress his in-custody interview by law enforcement officers, his clothing, and the results of his DNA testing. We find no error.

I. Factual and Procedural Background

On 16 December 2013, the Johnston County Sheriff’s Department arrested Defendant on warrants for first degree murder and robbery with a dangerous weapon. Upon taking Defendant into custody and transporting him to the Johnston County Sheriff’s Office, Detective Rodney Byrd interviewed Defendant for an official statement. During the interview, Defendant admitted the following:

I told him to take me to Benson and uh, before we got to Benson, I told him I needed to get out and pee and when I got out, I acted like I peed, pulled a gun out of my pants, opened my door back up and shot him in the head.

In the same statement, Defendant claimed he took the gun used to kill Billy from Billy’s home. Defendant then stole \$104.00 from Billy’s wallet, dragged Billy out of the car, and left. Defendant said he then went to “the crackman’s house.”

After the interview, Detectives seized the shirt Defendant wore during his arrest, because it “appeared to have mud and blood on it.” Detectives then placed him into custody at the Johnston County Detention Center. On 22 January 2014, Detective Byrd obtained a warrant to seize a DNA sample from Defendant with a saliva sample.

On 15 May 2015, Defendant moved to suppress the results of his DNA test. He argued the probable cause affidavit in support of the search warrant “[w]as insufficient.” Defendant also moved to suppress the statement he made to Detective Byrd on the night of his arrest because he “was too impaired after a day of drug use and drinking to understand his Miranda rights and to knowingly and intelligently waive [the] same.”

On 12 October 2015, the trial court held a suppression hearing for Defendant’s motion to suppress his in-custody statement. At that time, defense counsel announced he did not plan to present evidence on his *Miranda* rights argument. Defendant shifted his argument and claimed detectives arrested him without probable cause, and, therefore, his

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statement, DNA test, and clothing should be suppressed as fruits of the poisonous tree. The court allowed the amendment, and the State did not object to the lack of notice. The court denied all the motions to suppress.¹

The Johnston County Superior Court called Defendant's case for trial on 26 October 2015. The State called eighteen witnesses in total, and the evidence tended to show the following.

The State first called Keith Burakowski, a Deputy Sheriff with the Johnston County Sheriff's Office. In response to a call on 16 December 2013, emergency communications dispatched Deputy Burakowski to the intersection of Hannah Creek Road and Strickland's Crossroads Road. Deputy Burakowski arrived at the scene at 11:49 a.m. He saw Billy lying on the side of the road, with a towel over his midsection. About eight to ten feet from Billy, he noticed a "black in color revolver with a brown handle[.]" which he later identified as a ".38 revolver." He immediately called for EMS because Billy "was . . . gasping for breath[.]" After contacting EMS, Deputy Burakowski "secured the gun[.]" by removing one discharged and five unfired rounds of ammunition from the barrel. He placed the gun and ammunition in the trunk of his patrol car. Deputy Burakowski then "secured the area" and called the dispatch center and asked them to "run" the gun's serial number.

The State next called Ricky Messer, who is not related to Defendant. Around 11:30 a.m. on 16 December 2013, Ricky drove home from a nearby rock quarry on Strickland's Crossroads Road. As he passed the intersection at Hannah Creek Road, he noticed Billy's body lying on the side of the road, with his pants around his knees. Ricky knew Billy "virtually all [his] life[.]" However, Ricky did not immediately recognize Billy, because he was lying on his side and blood covered his face and hair. Ricky also saw a denture plate and pair of glasses lying nearby.

The State then called James Dwayne Dorman.² On 16 December 2013 at around 11:30 a.m., James and his wife, Kim, returned home from shopping at Food Lion in Benson. James and Kim came upon Billy at the same time as Ricky. James's description of the appearance and location

1. Defendant filed other pretrial motions, such as a motion *in limine* and a motion for mistrial. However, the only relevant motions on appeal are the motion to dismiss and the three above-mentioned motions to suppress.

2. The State actually called emergency dispatcher, Travis Johnson, who received the 911 call, before James Dorman. His testimony is not dispositive to the issues on appeal in this case.

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of Billy's body on the side of Hannah Creek Road largely matched Ricky's account. He only added that his wife³ covered Billy's midsection with a towel.

Christopher Shambaugh next testified for the State. He works for the Johnston County EMS and responded to Deputy Burakowski's call. He arrived at the scene at 11:50 a.m. He did not detect a pulse or heart beat anywhere on Billy's body and declared Billy dead around 11:57 a.m.

The State called Billy's youngest son, Robert Dale Strickland.⁴ Dale lived with his father for "all [his] life[.]" Dale and Defendant were "friends," and grew up in the same neighborhood.

On the evening of 15 December 2013, Dale visited his cousin. At approximately 9:00 p.m., Defendant called Dale and asked to stay the night at his home. Defendant explained he and his father argued earlier in the evening. Dale told Defendant he was not home, but Defendant could go to his home because Billy was there. Around 9:30 p.m., Billy and Defendant picked Dale up, and they all returned to Billy's home.

Later in the evening, Defendant repeatedly asked Dale if he knew where they could find drugs. Defendant gave him some "empty bags and straws and stuff, paraphernalia, whatnot . . ." Defendant told Dale he knew "two elder[ly] people that . . . he could get some money from . . . , but he would have to kill them to get it[.]" by "put[ting] two bullets in their head[s]." Hoping to move away from this subject, Dale discussed guns because they are his "go-to" hobby. Defendant persisted, and Dale eventually told Defendant he would try to get some drugs in the morning. The two went to sleep between 4:00 a.m. and 5:00 a.m. in the morning.

On the morning of 16 December 2013, Dale awoke around 11:00 a.m. and found the home empty. Dale looked behind the recliner in the living room, where Billy normally kept one of his guns, a black, .38 special revolver with a wooden handle. However, Dale could not find it. Dale noticed Billy's medicine bottles appeared "gone through and turned over . . . just like somebody searching for something." Dale also noticed an empty spot in Billy's used car lot adjacent to the house, where a gold Chevrolet Malibu usually sat. Dale called Billy's cellphone several times,

3. James's wife, Kimberly Dorman, also testified on behalf of the State. Her testimony matched her husband's.

4. The State called two witnesses before Dale, Billy's elder son, Chris Strickland, and Detective Jamie Snipes, who transported Defendant to the Johnston County Sheriff's Office on the evening of 16 December 2013. Their testimony is not dispositive to the issues on appeal.

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but Billy did not answer. Dale never called the police because “it was Monday and on Mondays my dad goes to the car sale every Monday, and you know, I assumed, you know, I didn’t assume the worst.”

Between 12:30 p.m. and 1:30 p.m., officers came to Billy’s home. When Dale saw them turn into his driveway, he thought they wanted to arrest him because he “was involved in drugs[.]” He ran into the woods and called his boss, James, and asked for a ride. James picked Dale up and took Dale to his cousin’s home. At some point during this interaction, Dale asked James to create a false alibi for Dale if law enforcement contacted him. During Dale’s visit at his cousin’s home, his uncle stopped by and told Dale Billy died that morning.

Dale returned home around 6:00 p.m., where Detective Byrd waited for him. Though he first lied to Detective Byrd regarding his whereabouts that day, he eventually conveyed to Detective Byrd the above testimony.

The State then called Detective Byrd. He works as a detective for the Johnston County Sheriff’s Office and investigated Defendant’s case. On 16 December 2013, he received instructions to go to the intersection of Hannah Creek Road and Strickland’s Crossroads Road. He arrived at 12:48 p.m. His description of the crime scene and Billy’s appearance matches that of Ricky Messer and both the Dormans. Detective Byrd noticed a wallet in Billy’s back pocket, which contained Billy’s I.D. and a few cards, but no cash.

That afternoon, Detective Byrd went to Billy’s home with Detectives Don Pate and Kevin Massengill. They found the door ajar and did not find anyone in the home or on the property. Finding no one, Detective Byrd went to give a “death notification,” to Chris Strickland and other family members. Around 6:15 p.m., Detective Byrd interviewed Dale when Dale returned home from his cousin’s home.

When asked why he and other detectives “went looking for Andy Messer,” Detective Byrd replied:

Based on the phone call from Mr. Messer to Mr. Danny Stanley, in [the] interview with Mr. Strickland, the fact of the defendant Mr. Andy Messer stayed the night before, and when Mr. Strickland woke up, both Andy Messer and his father were missing, along with [sic] .38 Special, I began looking a little harder for the defendant Mr. Andy Messer.

After interviewing Dale, Detective Byrd went to Defendant’s home, hoping to locate him. While there, detectives received a phone call

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and drove to I-95 in Cumberland County near mile marker sixty-one. There, Detective Byrd saw another detective place Defendant in handcuffs. Detective Snipes transported Defendant to the Johnston County Sheriff's Office.

Back at the Johnston County Sheriff's Office, Detective Byrd interviewed Defendant around 8:10 p.m. At this point in the trial, the State moved to introduce a video recording of Defendant's in-custody interview into evidence. Defendant objected, preserving his motion to suppress for appeal. The trial court overruled Defendant's objection and the State played the recording for the jury.

In the recording, prior to questioning Defendant, Detective Byrd gave Defendant *Miranda* warnings, which Defendant waived. Defendant confessed to killing Billy and stealing \$104.00 from Billy. At the conclusion of the interview, Detective Byrd arrested Defendant.

The State then called Dr. Lauren Scott. As the Associate Chief Medical Examiner, she performed the autopsy on Billy. She determined Billy died from "[a] gunshot wound to the head." She found two gunshot wounds, an entry wound on his right temple and an exit wound on his left temple. Billy's head also showed signs of "bleeding in between the brain and the membranes that surrounds the brain . . . bruises or contusions to the brain itself . . . [and] many fractures at the base of the skull."

The State called Detective Massengill of the Johnston County Sheriff's Office. Detective Massengill assisted the investigation for Billy's case. He helped locate the missing gold Chevy Malibu, based upon Defendant's interview with Detective Byrd. Officers found the car down a path in a wooded area in Cumberland County.⁵

The State then called Jennifer Whitley of the Johnston County Clerk's Office.⁶ On 17 December 2013, Jennifer saw "a name that [she] recognized,]" on the court's initial appearance list. Once she saw Defendant, Jennifer told a co-worker she knew Defendant's father. Defendant overheard Jennifer and spoke with her. Defendant told Jennifer "[his father]

5. The State then called Captain Caldwell of the Johnston County Sheriff's Office. Captain Caldwell also helped locate the missing Malibu and his testimony regarding how and where detectives found the car matches Detective Massengill's. Further, after finding the vehicle, he waited until a local towing company came to transport the car back to Johnston County.

6. Ron Mazur, a Johnston County crime scene investigator testified just before Jennifer. However, his testimony consisted of generally proper evidence tagging and transporting procedures and is not dispositive to this appeal.

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got [Defendant] hooked on drugs and that [his father] was able to get off and that [Defendant] wasn't, and that's why [Defendant] blew that m---f---'s head off yesterday." Jennifer told Detective Byrd.

The State called Detective Liza Langdon, a crime scene investigator for the Johnston County Sheriff's Office. She arrived at the intersection of Hannah Creek Road and Strickland's Crossroads Road at 12:48 p.m. Detective Langdon worked closely with Detective Mazur in gathering and securing evidence at the scene of the crime. She took photographs of the scene, the .38 Smith and Wesson revolver and ammunition Detective Burakowski secured, the wallet in Billy's back pocket, the glass fragments in the road, the dentures, and the eyeglasses.

Later that evening, Detective Langdon drove to Wade, North Carolina, where other detectives found the missing Malibu. She secured the car and searched it, after receiving a search warrant. Pursuant to the search warrant, Detective Langdon collected suspected blood, a pink lighter, a cigarette butt, pieces of glass, and clothing.

On 22 January 2014, Detective Langdon took swabs of Defendant's cheek. Detective Langdon sent these cheek swabs, along with items from the autopsy, the vehicle, and from Defendant himself, to the State Crime Lab on 7 February 2014.⁷

The State called Agent Martha Traugott, a serologist at the North Carolina State Crime Laboratory. As a serologist, she "identif[ies] body fluids on cases in any sort of criminal case[,] such as "blood, semen, or saliva." Agent Traugott analyzed the body fluids present on the evidence for Defendant's case and determined Defendant's shirt contained a blood stain.

The State next called Agent Michelle Hannon, a DNA analyst at the State Crime Laboratory. She tested the evidence against the DNA from Defendant's cheek swab. In her expert opinion, the blood on Defendant's shirt matched the DNA profile of Billy Strickland. She tested the cuttings from Billy's coat and determined those DNA profiles "[were] consistent with mixtures of at least two contributors." She could not further identify the DNA profiles due to "insufficient quality and/or quantity." Agent Hannon also tested the gun but did not obtain "a profile that was interpretable."

7. At trial, Defendant questioned Langdon extensively regarding how she obtained, boxed, transported, and stored each item of evidence. However, that testimony is not dispositive to this appeal, as Defendant did not challenge the status of any evidence against him.

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The State rested. Defendant moved to dismiss all charges. The court denied both motions. Defendant did not present any evidence and renewed his motions to dismiss. The Court denied the motions.

On 6 November 2015, the jury found Defendant guilty of robbery with a dangerous weapon and first degree murder premised upon felony murder, but not premeditation and deliberation. The court arrested judgment on the robbery with a dangerous weapon charge and sentenced Defendant to life imprisonment, without parole. Defendant gave oral notice of appeal in open court.

II. Standard of Review

Regarding the motion to dismiss, “[t]his Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations and quotations omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

Second, our review of an order deciding a motion to suppress is “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). “The trial court’s conclusions of law . . . are fully reviewable on appeal.” *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Analysis

We review Defendant’s arguments in two parts: (A) his motion to dismiss; and (B) his motions to suppress.

A. Motion to Dismiss

[1] Defendant first argues the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon because the State failed to establish the *corpus delicti* of that crime. Specifically, Defendant contends the State relied solely on his uncorroborated

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confession to law enforcement officers, which is insufficient to establish guilt. We disagree.

Corpus delicti means “the body of the crime,” and typically describes “the material substance on which a crime has been committed.” *Black’s Law Dictionary* 419-20 (10th ed. 2014). As a modern doctrine, the *corpus delicti* rule states “no criminal conviction can be based upon defendant’s extrajudicial confession or admission, although otherwise admissible, unless there is other evidence tending to establish the corpus delicti.” *State v. Smith*, 362 N.C. 583, 590, 669 S.E.2d 299, 304 (2008) (citation and quotation omitted).

Various cultures adopted iterations of the *corpus delicti* doctrine for centuries to guard against the wrongful convictions of innocent defendants. *Id.* at 589, 669 S.E.2d at 303-04; Brian C. Reeve, *State v. Parker: North Carolina Adopts the Trustworthiness Doctrine*, 64 N.C. L. Rev. 1285, 1290 (1986). As early as 2250 B.C., *Hammurabi’s Code of Laws* “required one accusing another of a capital offense to prove his case or else be put to death.” *Smith*, 362 N.C. at 589, 669 S.E.2d at 303-04 (citing Robert Francis Harper, *The Code of Hammurabi King of Babylon about 2250 B.C.* § 1 (2d ed. 1904)).

However, the modern doctrine regarding the need to corroborate a defendant’s testimony took root in the common law of England with *Perry’s Case*. *Id.* at 590, 669 S.E.2d at 304. *Perry’s Case* involved a defendant who confessed to a murder of a missing man and incriminated his mother and brother in the confession. *State v. Dern*, 303 Kan. 400, 401, 362 P.3d 566, 577 (2015). Although the mother and brother repeatedly denied all wrongdoing, the court convicted all three and sentenced them to death. *Id.* at 400, 362 P.3d at 577. The supposed victim turned up alive years later. *Id.* at 400, 362 P.3d at 577.

Thereafter, *corpus delicti* cemented itself into the English common law. *See Smith*, 362 N.C. at 590, 669 S.E.2d at 304-05. However, “no definitive rule emanated from the English courts,” and, therefore, American jurisdictions adopted different versions of the rule. *Id.* at 590, 669 S.E.2d at 305. Almost all American states adopted some form of *corpus delicti* into their common law, and a few have codified it. *See Reeve, supra* at 1290-91, n. 53 (citation omitted). Only Massachusetts allows “a criminal conviction based solely on a defendant’s confession without extrinsic corroboration.” *Id.* at 1290, n. 49 (citations omitted).

Corpus delicti has existed in North Carolina case law since the eighteenth century. *Smith*, 362 N.C. at 592, 669 S.E.2d at 305 (citation

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omitted). For almost two hundred years the rule stood, “a conviction cannot be sustained upon a naked extrajudicial confession. There must be independent proof, either direct or circumstantial, of the *corpus delicti* in order for the conviction to be sustained.” *State v. Green*, 295 N.C. 244, 248, 244 S.E.2d 369, 371 (1978).

This evidentiary requirement applied to all confessions and admissions until 1985, when the North Carolina Supreme Court decided *State v. Parker*, 315 N.C. 222, 337 S.E.2d. 487 (1985). In *Parker*, our State’s highest court loosened the “quantum and quality” of corroborative evidence needed to satisfy *corpus delicti*. *Smith*, 362 N.C. at 592, 669 S.E.2d at 306. The North Carolina Supreme Court adopted a version of *corpus delicti* known as “the ‘trustworthiness’ doctrine, which focuses on the reliability of a defendant’s confession rather than independent evidence of the *corpus delicti*.” Reeve, *supra*, at 1290-91; *Parker*, 315 N.C. at 236, 337 S.E.2d at 495.

Writing for a unanimous court, Justice Billings cited three reasons for loosening the traditional *corpus delicti* doctrine. First, because the doctrine imposes a strict burden of proof on the State for all crimes, “the results obtained through application of a rule requiring independent proof of the *corpus delicti* will not be consistent or comparable[.]” *Parker*, 315 N.C. at 232, 337 S.E.2d at 493. The traditional doctrine tended to place an unwarranted burden on the State in certain instances such as attempt crimes, which do not have a “tangible *corpus*[.]” *Id.* at 232, 337 S.E.2d at 493 (citation omitted). The second reason pertains to the development of “modern procedural safeguards[.]” Reeve, *supra* at 1296, that render *corpus delicti* unnecessary to alleviate “the concern that the defendant’s confession might have been coerced or induced by abusive police tactics[.]” *Parker*, 315 N.C. at 234, 337 S.E.2d at 494. Concerns surrounding the validity of an extra-judicial confession “have been undercut by the principles enunciated in *Miranda v. Arizona* . . . and the development of similar doctrines relating to the voluntariness of confessions which limit the opportunity for overzealous law enforcement.” *Id.* at 234, 337 S.E.2d at 494. Finally, Justice Billings opined the trustworthiness doctrine operates as a more realistic and “flexible” standard for the State when interviewing a defendant and gathering evidence against him. *Id.* at 235, 337 S.E.2d at 494 (citation omitted).

Relying on these justifications, the *Parker* Court held:

We adopt a rule in non-capital cases that when the State relies upon the defendant’s confession to obtain a conviction, it is no longer necessary that there be independent

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proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.

Id. at 236, 337 S.E.2d at 495. The Supreme Court emphasized, however, “when independent proof of loss is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice.” *Id.* at 236, 337 S.E.2d at 495.

Parker did not wholly demolish the traditional *corpus delicti* rule, however. In 2013, the North Carolina Supreme Court clarified, “we did not abandon the traditional rule when we adopted the rule in *Parker*. Rather, the State may now satisfy the *corpus delicti* rule under the traditional formulation or under the *Parker* formulation.” *State v. Cox*, 367 N.C. 147, 153, 749 S.E.2d 271, 276 (2013) (citations omitted).

In Defendant's brief, his primary argument is because he was convicted of felony murder based on the underlying felony of robbery with a dangerous weapon (rather than based on premeditation and deliberation), under the *corpus delicti* doctrine, the State was required—but failed—to introduce other evidence corroborating the assertion that he stole \$104 from the victim. Defendant's argument is his motion to dismiss should be granted because there is not a scintilla of evidence that Defendant took \$104 from the victim and therefore a jury would lack the substantial evidence required to support a reasonable inference of Defendant's guilt. Defendant's argument, if adopted, would require non-confessional evidence of every element of a crime to be submitted to the jury. We are not persuaded by this argument.

Under the trustworthiness doctrine, the State does not need independent evidence of each element of the crime to show Defendant's confession to robbery with a dangerous weapon was trustworthy. Our Supreme Court in *Parker*, rejected a similar argument. The State need only show “corroborative evidence tending to establish the reliability of the confession”—not the reliability of each part of the confession which incriminates the defendant.

In *Parker*, the defendant admitted he murdered the victims and then took \$10.00 from one of their pockets. *Parker*, 315 N.C. at 237, 337 S.E.2d at 495-96. The Supreme Court held this confession sufficiently trustworthy because: (1) the bodies were found by police in the condition

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described by the defendant; (2) the blood found in the victim's car was consistent with both of the victims' blood; and (3) the evidence was consistent with defendant's statement as to how he disposed of the bodies. *Id.* at 237, 337 S.E.2d at 496.

Defendant's confession closely parallels that in *Parker*:

I told him to take me to Benson and uh, before we got to Benson, I told him I needed to get out and pee and when I got out, I acted like I peed, pulled a gun out of my pants, opened my door back up and shot him in the head.

....

Yeah, I did rob him. I got \$104.00 off him.

To corroborate Defendant's testimony, the State presented the same "quantum and quantity," of evidence as it did in *Parker*. *Smith*, 362 N.C. at 592, 669 S.E.2d at 306. The following evidence aligns with Defendant's confession: (1) the medical examiner's determination Billy died from a single gunshot wound to the head; (2) the recovery of a revolver with a single expended cartridge at the scene; (3) the DNA test confirming Billy's blood was inside the 2005 Chevy Malibu; and (4) the DNA test establishing Billy's blood was on the jacket Defendant wore at the time of arrest.

Moreover, the State presented evidence to corroborate other facts. For example, Defendant confessed that he threw Billy's gun out of the car window and tossed the gun behind Billy, which aligns with Dale discovering Billy's revolver missing, and Deputy Burakowski seeing a revolver ten feet from Billy's body. Similarly, Dale reported a 2005 gold Chevy Malibu missing from Billy's used car lot, and detectives found it at a remote location matching Defendant's description of where he abandoned the gold 2005 Chevy Malibu he took from Billy's house.⁸ All of Defendant's statements regarding Billy's murder, the murder weapon, and the stolen vehicle are essential facts to Billy's confession. Thus, the State provided substantial "independent evidence tending to establish" the trustworthiness of these essential facts, "including [evidence] that tend[s] to show the defendant had the opportunity to commit the crime[s,]" to which he confessed. *Parker*, 315 N.C. at 236, 337 S.E.2d at 495. Thus, we conclude Defendant's admission he stole \$104.00 from

8. The State's brief contained even more evidence corroborating various facts from Defendant's confession in several ways. However, review of additional corroboration is not necessary to our holding.

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Billy is credible, and the *corpus delicti* for robbery with a dangerous weapon is established.

We hold the trial court did not err in denying Defendant's motion to dismiss the charge of robbery with a dangerous weapon and overrule his assignment of error.

B. Motions to Suppress

[2] Defendant next contends the trial court erred by denying his motions to suppress his in-custody statement and evidence from his seized clothing and DNA test. Here, and at the 12 October 2015 suppression hearing, Defendant does not address his original argument regarding his inability to “knowingly and intelligently” waive his *Miranda* rights. Rather, on appeal, Defendant's argument is two-fold: (1) Findings of Fact Numbers 2, 10, and 11 are not supported by substantial evidence; and (2) detectives arrested him without probable cause, and, therefore, his statement and the evidence gathered from it are “fruits of the poisonous tree.” We disagree and address Defendant's arguments in turn.

i. Finding of Fact Number 2

Defendant contends the last sentence in Finding of Fact Number 2 is not supported by substantial evidence and should be stricken from the record. We disagree.

The particular sentence to which Defendant objects states, “The patrol deputy had located a Smith and Wesson revolver *near the decedent.*” (emphasis added) Defendant takes issue with the finding's description of where Deputy Burakowski found the gun at the scene. The trial court sustained Defendant's numerous objections to Detective Byrd's testimony regarding what Deputy Burakowski told him about the location of the gun at the scene. However, at one point the trial court directly questioned Deputy Burakowski about the location of the gun at the scene:

THE COURT: Where and when was the revolver recovered and by whom?

THE WITNESS: It was on the same day, 12/16/2013. It should have been a short time. Recovered by Deputy Burakowski who located the revolver on the scene of the deceased, Mr. Strickland, at which time he secured it in his vehicle. And that was -- he arrived on the scene at approximately at 11:49. Due to the EMS workers and fire personnel who arrived on the scene, he secured it in his vehicle for safety reasons.

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We note Defendant did not object to this portion of testimony. From this portion of Deputy Burakowski's testimony, we conclude Finding of Fact 2 is by supported by substantial evidence. Moreover, we note even if Detective Byrd's statement does not support Finding of Fact Number 2, the portion contested by Defendant is inconsequential to our holding.

ii. Findings of Fact Numbers 10 and 11

Defendant argues Findings of Fact Numbers 10 and 11 are not supported by substantial evidence.

These Findings state:

10. Dale Strickland told Detective Byrd that the defendant had spent the previous night at the residence. He stated that Defendant had slept on the couch. He further stated that when he woke up, both the defendant and the victim were gone. He stated that his father's Smith and Wesson revolver also was missing and that a Malibu Chevrolet automobile was gone from his father's used car lot at the residence.

11. At about 6:30 p.m., Johnston Sheriff's Detective Kevin Massengill interviewed Carl Dean Temple, an associate of the defendant, at Temple's residence located at 736 Temple Road in Four Oaks. Temple stated that defendant had come to this residence earlier that day driving a tan colored Chevrolet Malibu automobile.

Specifically, Defendant takes issue with the portion of Finding of Fact Number 10: "Dale Strickland . . . stated that his father's Smith and Wesson revolver also was missing" Defendant points out Dale Strickland never told Detective Byrd the manufacturer of his father's firearm. We agree with Defendant.

This portion of the finding is not supported by substantial evidence. Accordingly, we strike this portion of the finding. However, we conclude this error is not prejudicial in light of the following facts: (1) Dale specified to Detective Byrd his father's ".38 revolver was missing[;]" (2) Dale specified to Detective Byrd "[h]is dad's38 special gun was gone[;]" and (3) Dale's description of his father's missing gun matched that of the gun found at the scene of Billy's body. The record shows a connection between Billy's missing gun and the gun found at the scene exists. Therefore, whether or not Dale identified the manufacturer of his father's missing gun to Detective Byrd is irrelevant to our holding.

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Regarding Finding of Fact Number 11, Defendant objects to the last sentence, which states, “Temple stated that defendant had come to this residence earlier that day driving a tan colored Chevrolet Malibu automobile.” Defendant notes Detective Massengill actually testified Temple did not convey the make or model of the car he saw Defendant driving. We agree the portion of the finding Defendant contests is not supported by substantial evidence.

However, we conclude the error did not prejudice Defendant because: (1) detectives knew Defendant stayed the night at Billy’s house where the used cars were stored; (2) detectives knew someone removed a 2005 gold Chevy Malibu from Billy’s yard; and (3) detectives knew Temple saw Defendant in a car matching the general description of the car missing from Billy’s lot. Regardless of whether Temple relayed the make and model of the car Defendant drove that day, our holding remains the same. Therefore, we strike the portion of Finding of Fact Number 11, which states the make and model of the car Temple saw, but hold it is irrelevant to the trial court’s conclusions of law.

iii. Conclusion of Law

We must now determine whether the remaining portions of Findings of Fact Numbers 2, 10, and 11 and the other findings support the trial court’s Conclusion of Law Number 1.

The Fourth Amendment protects “against unreasonable searches and seizures” U.S. Const. amend. IV; N.C. Const. art. I, § 20. Under North Carolina law, “[a]n officer may arrest without a warrant any person who the officer has probable cause to believe . . . [h]as committed a felony” N.C. Gen. Stat. § 15A-401(b)(2)a (2016). “The existence of probable cause depends upon ‘whether at that moment the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.’” *State v. Milien*, 144 N.C. App. 335, 341, 548 S.E.2d 768, 772 (2001) (quoting *State v. Bright*, 301 N.C. 243, 255, 271 S.E.2d 368, 376 (1980) (alterations in original). “[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *State v. Teate*, 180 N.C. App. 601, 606-07, 638 S.E.2d 29, 33 (2006) (citation and quotation marks omitted).

The conclusion states:

Under the totality of circumstances believed to exist by the Johnston County Sheriff’s Detectives — including the

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fact that Defendant placed a telephone call using the victim's cell phone about 20 minutes before the victim's death was reported to the Johnston County Sheriff's Office, the fact that Defendant had spent the previous night at the victim's residence, the fact that the victim's son had last seen his father with the defendant, the fact that the victim's Smith and Wesson revolver was missing that morning and a Smith and Wesson revolver was found near the victim's body, the fact that the Defendant was seen on the day of the victim's death driving an automobile matching the description of an automobile missing from the victim's used car lot, and the fact that Defendant had called Danny Stanley the day of the victim's death looking for a place to stay — probable cause existed for the detectives to seize Defendant's person and take him into custody for the murder of Billy Strickland.

The remaining findings of fact reveal Defendant spent the evening prior to Billy's death at Billy's home, and when Dale awoke the next morning, both Defendant and Billy were gone. Dale noticed Billy's revolver missing from its usual hiding place, and a Chevy Malibu was missing from Billy's used car lot. The trial court found Detectives recovered a revolver matching the description of Billy's gun at the scene.

The trial court further found Temple told detectives Defendant placed a call from Billy's cell phone about twenty minutes before law enforcement received word of Billy's body on the side of Hannah Creek Road. Temple also told detectives he saw Defendant driving a vehicle the color of the Malibu missing from Billy's lot.

These findings suggest the "probability or substantial chance" Defendant engaged in criminal activity. *Teate*, 180 N.C. App. at 606-07, 638 S.E.2d at 33 (citation omitted). Therefore, we hold the court did not err in concluding detectives had probable cause to arrest Defendant. Thus, detectives did not unconstitutionally interview Defendant, or seize his clothing and DNA, and the trial court did not err in denying his motions to suppress.

IV. Conclusion

For the reasons stated above, we find no error.

NO ERROR.

Judges DAVIS and MURPHY concur.

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STATE OF NORTH CAROLINA
v.
LESTER ALAN WALKER, DEFENDANT

No. COA17-58

Filed 3 October 2017

1. Appeal and Error—notice of appeal given prior to order date—delay entering findings of fact and conclusions of law—no prejudicial error

The trial court did not err in a driving while intoxicated and reckless and careless driving case by entering an order on 31 October 2016 where the State gave its notice of appeal prior to that date. A delay in the entry of findings of fact and conclusions of law does not amount to prejudicial error.

2. Search and Seizure—motion to suppress—vehicle stop—sufficiency of findings of fact—conclusion of law—totality of circumstances—reasonable suspicion

The trial court did not err in a driving while intoxicated and reckless and careless driving case by granting defendant's motion to suppress where the pertinent findings were supported by competent evidence and supported the conclusion of law that, given the totality of circumstances, an informant's tip did not have enough indicia of credibility to create reasonable suspicion for a trooper to stop defendant's vehicle.

Appeal by the State from an order granting Defendant's Motion to Suppress, entered 31 October 2016 by Judge John E. Nobles, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Jeffrey S. Miller, for Defendant-Appellee.

MURPHY, Judge.

The State appeals from the trial court's grant of Lester Alan Walker's ("Defendant") motion to suppress. On appeal, the State contends the trial court erred by: (1) entering the 31 October 2016 order after the

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State gave its notice of appeal; and (2) granting Defendant's motion to suppress. After careful review, we hold the trial court did not err by entering the 31 October 2016 order and granting the motion to suppress.

Background

On 5 July 2015, State Trooper Jonathan Cody (the "Trooper") of the North Carolina Highway Patrol was on routine patrol on U.S. 258. At approximately 5:00 p.m., dispatch notified him that a driver ("the informant") reported another driver ("the driver") for driving while intoxicated. The informant reported the driver was driving from the Hubert area towards Jacksonville, traveling at speeds of approximately 80 to 100 miles per hour, while drinking a beer. He also claimed the driver drove "very erratically," and almost ran him off the road "a few times."

While the Trooper traveled towards Jacksonville in response to the notification from dispatch, the informant flagged him down. The informant told the Trooper that the vehicle in question, although no longer visible, had just passed through the intersection on U.S. 258 heading towards Richlands. The Trooper proceeded through the intersection on U.S. 258 towards Richlands, stopping Defendant's vehicle within approximately one-tenth of a mile from the intersection. At some point, the vehicle in question was described as a "gray Ford passenger vehicle[,]"¹ however it is unclear whether the Trooper was given this description before or after he stopped Defendant. Defendant was arrested and charged with driving while impaired, and careless and reckless driving.

Prior to trial, Defendant filed a motion to suppress the evidence seized as a result of Defendant being stopped by the Trooper. On 9 June 2016, Onslow County District Court held a hearing on this motion, which claimed the evidence obtained by the stop should be suppressed because the Trooper lacked the requisite reasonable articulable suspicion to stop Defendant. The District Court denied the motion to suppress. Subsequently, Defendant was convicted of driving while intoxicated, and reckless and careless driving.

Defendant appealed to Superior Court, which held a hearing on Defendant's motion to suppress on 15 September 2016. After taking evidence and hearing arguments, the Superior Court determined the Trooper lacked the reasonable articulable suspicion required to make

1. The spelling of gray is a grey area. *See generally* Merriam-Webster's Collegiate Dictionary (11th ed. 2004) (listing grey as a variant of gray). We note the trial court's transcript uses "gray" and order uses "grey" to describe the same color, causing some inconsistency in the spelling of "grey" in this opinion.

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the stop, and granted the motion to suppress in open court. That same day, the trial court entered a written order stating the motion was allowed, and directing Defendant's counsel to prepare an order. The State gave oral notice of appeal after the trial court announced its decision, and then gave written notice of appeal on 22 September 2016, once the trial court filed its 15 September 2016 written order. The trial court entered the written order prepared by Defendant's counsel, as directed in the 15 September 2016 order, on 31 October 2016.

Analysis

The State argues that the trial court erred: (1) by entering an order on 31 October 2016; and (2) by granting Defendant's motion to suppress. We disagree.

I. Authority to Enter the 31 October 2016 Order

[1] The State maintains that our Court should base our review solely on the 15 September 2016 order, arguing the trial court lacked jurisdiction to enter the 31 October 2016 written order because the State gave its notice of appeal prior to that date. We disagree and review the 31 October 2016 order because "our appellate courts have repeatedly held that a delay in the entry of findings of fact and conclusions of law does not amount to prejudicial error." *State v. Lippard*, 152 N.C. App. 564, 571, 568 S.E.2d 657, 662 (2002) (citing *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984)).

The State relies on *State v. Grundler*, 251 N.C. 177, 11 S.E.2d 1 (1959) to support its argument that the trial court did not have jurisdiction to enter the 31 October 2016 order, contending that once the oral and written notices of appeal are given, the trial court is without further authority to make orders *affecting the merits* of the case effective immediately. *See id.* at 185, 11 S.E.2d at 7 (explaining that "when appeal entries are noted, the appeal becomes" instantly effective, and the Superior Court no longer has the authority "to make orders affecting the merits of the case"). However, *Grundler* does not control this case because the 31 October 2016 order was not a new order *affecting the merits*, but, rather, is a chronicle of the findings and conclusions decided at the hearing. The 15 September 2016 order, which reads: "J. Miller to prepare order[,] " specifically contemplates this later entry of the 31 October 2016 order, which was intended to record the findings and conclusions decided at the 15 September 2016 hearing, not to affect the merits. As such, we reject the contentions of the State and review the 31 October 2016 order.

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II. Motion to Suppress

[2] The State argues that the trial court erred in granting Defendant's motion to suppress because: (1) several of the findings of fact are not supported by competent evidence; and (2) the findings of fact do not support the conclusions of law. We disagree. The findings of fact are based on competent evidence and support the conclusions of law.

A. Standard of Review

When reviewing an order granting a motion to suppress, this Court "is strictly limited to determining whether the trial judge's underlying findings of facts are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

B. Findings of Fact

The State challenges whether there was competent evidence to support the findings of fact as follows.

i) Findings of Fact 1 and 3, Conclusion of Law 6

The State contests: (1) the part of finding of fact 1 that states "[a]t what point the radio dispatcher forwarded the information about the description of the vehicle and the license plate number is unclear from the testimony[;]" (2) the part of finding of fact 3 that states "the State offered no evidence that [the Trooper] received any information as to the tag number of the vehicle in question until after [the Trooper] stopped [Defendant's] vehicle[;]" and (3) the part of conclusion of law 6² that states "the State has failed to produce evidence that [the Trooper] had the license plate of [D]efendant's vehicle before making a stop in this case[.]" The State argues these findings of fact are unsupported by competent evidence because the Trooper testified he received the license plate number from dispatch before making the stop and the trial court found the Trooper credible. We disagree.

The Trooper gave conflicting testimony as to whether or not he had the license plate number at the time of the stop. According to finding of

2. We review the portion of this conclusion of law quoted here while reviewing the findings of fact both: (1) to address the State's argument; and (2) because it describes a finding of fact, not a conclusion of law. *See Rolan v. N.C. Dep't of Agric. & Consumer Servs.*, 233 N.C. App. 371, 380, 756 S.E.2d 788, 794 (2014) ("As with separate findings of fact and conclusions of law, the factual elements of a mixed finding must be supported by competent evidence, and the legal elements must, in turn, be supported by the facts.") (citation omitted).

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fact 6, which is unchallenged, the Trooper testified in District Court that he did not remember whether he had the license plate number, and then called communications the day before his 15 September 2016 Superior Court testimony to check and confirm whether “that information was relayed out.” During his testimony in Superior Court, the Trooper again testified that he did not recall if he “remembered the full tag or not, at the time” of the stop, and further stated that he only recorded the tag number “on the citation, after the fact.” The fact that the trial court observed in open court that the witness was credible does not bind its findings of fact as it relates to the witness’s recollection of past events. This testimony provides competent evidence to support the findings related to when the radio dispatcher forwarded the information about Defendant’s license plate number.

ii) Findings of Fact 4 and 7

The State next contests: the part of finding of fact 4 that states “[a]t some point the vehicle was described as a grey Ford passenger vehicle, but the State offered no evidence as to when the vehicle was so described[;]” and the part of finding of fact 7 that states “the only mention of the color of the vehicle was in the witness statements, . . . written after [Defendant’s] vehicle was stopped.” The State argues these findings of fact are unsupported by competent evidence because the Trooper testified that the informant told him the vehicle was a grey Ford passenger vehicle when she flagged him down, and he may have had the information that the car was grey before he stopped Defendant. We disagree.

During his testimony, the Trooper admitted that he only knew the color of the vehicle from the witness statements. Further, the Trooper admitted that the witness statements were written after the stop, and he “may or may not” have had the information prior to the stop. Overall, the Trooper was unclear as to what description of the vehicle he had at the time of the stop. At first, during direct examination, he claimed to have been looking for a Ford Taurus. When opposing counsel took issue with this description, the Trooper changed his testimony to say he only had information that the vehicle was a “gray Ford passenger vehicle.” This conflicting testimony presents competent evidence that the State failed to show when and to what extent the Trooper was aware of the description of the vehicle.

iii) Finding of Fact 13

The State next challenges whether there was competent evidence to support finding of fact 13 that, at the time of the stop, the Trooper had no particular information as to what vehicle he was looking for except

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that it was a grey Ford. The State argues the Trooper did have particular information as to what vehicle he was looking for, claiming he knew the model and the license plate number of the vehicle. As discussed above, the Trooper gave conflicting testimony both as to whether or not he had the license plate number at the time of the stop, and as to whether he knew the model of the car. As there was competent evidence supporting the trial court's findings of fact 1, 3, 4, and 7, there is also competent evidence to support finding of fact 13 that there was no particular information about the vehicle except that it was a grey Ford.

C. Conclusions of Law

The State argues that the findings of fact do not support the conclusions of law. We disagree.³

The State challenges the following conclusions of law:

1. At the time that [the Trooper] stopped [Defendant's] vehicle he lacked any reasonable, articulable suspicion that [Defendant] was engaged in any unlawful activity, since he lacked any information that particularized [Defendant's] vehicle as the one that had been complained about in Hubert earlier that day or complained about by the roadside witnesses.
2. The State has advanced *State v. Maready*, 362 N.C. 614 (2008), as authority for its position that [the Trooper's] stop of [Defendant] was lawful. Upon the court's review of *State v. Maready*, it is obvious that prior to the stop the deputies saw the defendant staggering, obviously intoxicated, across the roadway, and a driver behind Maready's vehicle told them that Maready had been driving erratically, running stop signs and stop lights. Furthermore, he specifically pointed out the vehicle as being the suspected vehicle.
3. In this case noone [sic] specifically pointed out [Defendant's] vehicle as being the one that was reported as having been observed or reported driving unlawfully. Furthermore, unlike the case in *Maready*, the State

3. We note that in reviewing these conclusions of law for whether the order's findings of fact support the conclusions, we are bound by the order's findings of fact because, as discussed above, they are supported by competent evidence. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619 (explaining that when "the trial judge's underlying findings of facts are supported by competent evidence, . . . they are conclusively binding on appeal").

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Trooper here did not observe the driver do anything, nor did he observe the vehicle being driven in any erratic or any other suspicious way.

4. The State further relied upon *State v. Nelson*, No. COA13-1355 (unpublished 2014), but that case is distinguishable from this one because the tipster in question “flagged [the officer] down and directed his attention to the pickup truck, which was exciting [sic] the parking lot.” In that case then the suspected vehicle was specifically identified. Here the evidence was that [Defendant’s] vehicle was never specifically pointed out to the Trooper prior to him making the stop.

5. In *State v. Hudgins*, 195 N.C. App. 430 (2009) there again was no question at the time of the stop that the vehicle stopped was the vehicle that had been complained about. The officer in question had advised the dispatch to direct the caller to drive to Market Street so he could intercept them. Officer Pamerteri proceeded to Market Street where he observed vehicles matching the description given by the caller stopped at a red light. There was in that case no question as to the particular vehicle or person to be seized.

6. In *Navarette v. California*, 134 S.Ct. 1683 (2014), the officer making the stop had the license plate number of the pickup truck before he made the stop of the vehicle. Here the State has failed to produce evidence that [the Trooper] had the license plate of [D]efendant’s vehicle before making a stop in this case, and the court further notes and finds as a fact that [the Trooper], while he testified that he found a vehicle that matched that tag number, admitted that in the trial in District Court he did not remember that dispatch had given out a tag or a description of the vehicle “from our communications” and that he had called his communications the day before the hearing and learned that that information was relayed out. “It was just from my memory from District Court that I didn’t remember that that happened.”

7. Based upon the totality of the circumstances the court concludes that the State failed to carry its burden of demonstrating that [the Trooper] was looking for any

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vehicle that was “particularly described” as the Fourth Amendment and the cases thereunder require, and that the stop of [D]efendant’s vehicle and the fruits thereof must be suppressed.

The State contends the trial court’s conclusions of law are in error because of the conclusion that the Trooper lacked reasonable suspicion to stop Defendant. Specifically, the State argues the conclusions cannot be supported on the ground that the informant’s tip was not sufficiently reliable. We disagree, because the tip did not have sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop of the vehicle driven by Defendant.

“[T]o conduct an investigatory warrantless stop and detention of an individual, a police officer must have reasonable suspicion, grounded in articulable and objective facts, that the individual is engaged in criminal activity.” *State v. Hudgins*, 195 N.C. App. 430, 433, 672 S.E.2d 717, 719 (2009) (citation omitted). “[I]n determining whether a reasonable suspicion exists[,]” we consider the totality of these circumstances, *id.* at 720, 672 S.E.2d at 720 (quotation omitted), including “the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (quotation and citations omitted). We do not consider information that he later learns; “reasonable suspicion must arise from the officer’s knowledge prior to the time of the stop.” *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

“When police act on the basis of an informant’s tip, the indicia of the tip’s reliability are certainly among the circumstances that must be considered in determining whether reasonable suspicion exists.” *State v. Maready*, 362 N.C. 614, 619, 669 S.E.2d 564, 567 (2008). Potential indicia include “all the facts known to the officers from personal observation[.]” *Id.* at 619, 669 S.E.2d at 567 (quotation omitted). In *Maready*, the officers observed an intoxicated man enter a vehicle. A nearby second vehicle’s driver, who had also been in a position to see the intoxicated man enter the first vehicle, then approached the officers and, while able to point out the first vehicle, told the officers that the first vehicle had been driving erratically, running stop signs and stop lights. *Id.* at 620, 669 S.E.2d at 568.

Here, the informant’s tip has less indicia of credibility than the tip in *Maready*. While the informant was not anonymous, he was unable to specifically point out Defendant’s vehicle as being the one driving unlawfully, as it was out of sight, and the Trooper did not observe Defendant’s

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vehicle being driven in a suspicious or erratic fashion. Moreover, as addressed in the findings of fact, it is unknown whether the Trooper had the license plate number before or after the stop, and, further, we do not know whether he had any vehicle description besides a “gray Ford passenger vehicle” to specify his search.

The State also challenges the conclusions of law that distinguish *State v. Hudgins*, 195 N.C. App. 430, 672 S.E.2d 717 (2009) and *State v. Nelson*, No. COA13-1355, 235 N.C. App. 219, 763 S.E.2d 339, 2014 WL 3510586 (N.C. Ct. App. July 15, 2014) (unpublished) from the instant case. Similar to *Maready*, in both *Hudgins* and *Nelson*, the officers had reasonable suspicion to stop an individual where an informant’s tip had sufficient indicia of reliability to, in light of the totality of the circumstances, create reasonable suspicion. In *Hudgins* and *Nelson*, the tip provided enough information that there was no doubt as to which particular vehicle each informant reported. *Hudgins*, 195 N.C. App. at 431, 672 S.E.2d at 718; *Nelson*, 2014 WL 3510586 *7. In contrast, here, the informant’s ambiguous description did not specify a particular vehicle. There were no other circumstances that enabled the Trooper to further corroborate the tip; the Trooper did not testify that he witnessed Defendant’s vehicle exhibit any behavior similar to the erratic driving described by the informant. Thus, given the totality of the circumstances, this informant’s tip did not have enough indicia of credibility to create reasonable suspicion for the Trooper to stop Defendant’s vehicle.

Conclusion

For the foregoing reasons, we hold that the trial court had jurisdiction to enter the 31 October 2016 order. The findings of fact in that order were based on competent evidence, and support the conclusions of law.

AFFIRMED

Judges HUNTER, JR. and DAVIS concur.

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[255 N.C. App. 837 (2017)]

SWAN BEACH COROLLA, L.L.C., OCEAN ASSOCIATES, LP, LITTLE NECK TOWERS,
L.L.C., GERALD FRIEDMAN, NANCY FRIEDMAN, CHARLES S. FRIEDMAN, 'TIL
MORNING, LLC, AND SECOND STAR, LLC, PLAINTIFFS

v.

COUNTY OF CURRITUCK; THE CURRITUCK COUNTY BOARD OF COMMISSIONERS;
AND JOHN D. RORER, MARION GILBERT, O. VANCE AYDLETT, JR., H.M. PETREY,
J. OWEN ETHERIDGE, PAUL MARTIN, AND S. PAUL O'NEAL AS MEMBERS OF THE
CURRITUCK COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA16-804

Filed 3 October 2017

1. Judgments—default—remand from appeal—time for answer—motion to set aside—good cause

The trial court abused its discretion by not applying the proper standard (good cause) in denying a motion to set aside an entry of default, which came after the case had been remanded by an appellate court. The trial court identified no reason for the denial of the motion other than uncertainty as to whether the time for filing an answer had run. Any doubt should be resolved in favor of setting aside an entry of default.

2. Judgments—default—remand after appeal—motion to set aside entry of default—denied—grave injustice

In a case decided on other grounds, the trial court would have abused its discretion by denying defendants' motion to set aside an entry of default following remand where defendants would have suffered a grave injustice were they denied the ability to defend against plaintiffs' claims. The case was delayed in the trial court for reasons inherent in the appellate process; defendants promptly resumed discussions with plaintiff regarding discovery, settlement, and other related matters following the appellate decision; the entry of default came as a surprise to defendants; nothing in the record indicated that plaintiffs asserted that they had asserted any harm; and, given the size and nature of the claims, defendants would suffer a grave harm if they were denied the ability to defend against plaintiffs' claims.

Judge BERGER dissenting.

Appeal by Defendants from a default judgment entered 9 May 2016 by Judge Milton F. Fitch, Jr., in Currituck County Superior Court. Heard in the Court of Appeals 19 April 2017.

SWAN BEACH COROLLA, L.L.C. v. CTY. OF CURRITUCK

[255 N.C. App. 837 (2017)]

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster and Lacy H. Reaves, for Plaintiffs-Appellees.

The Brough Law Firm, PLLC, by G. Nicholas Herman and Currituck County Attorney Donald I. McRee, Jr., for Defendants-Appellants.

Conner Gwyn Schenck PLLC, by James S. Schenck, IV, and Amy Bason, for Amicus Curiae, the North Carolina Association of County Commissioners.

Simonsen Law Firm, P.C., by Lars P. Simonsen, for Amicus Curiae, the Northern Currituck Outer Banks Association.

Roger W. Knight, P.A., by Roger W. Knight, for Amicus Curiae, the Fruitville Beach Civic Association.

INMAN, Judge.

The County of Currituck, the Currituck County Board of Commissioners, and members of that Board (collectively, “Defendants”) appeal from the trial court’s denial of their motion to set aside entry of default and the trial court’s grant of default judgment in favor of Swan Beach Corolla, L.L.C., Ocean Associates, LP, Little Neck Towers, L.L.C., Gerald Friedman, Nancy Friedman, Charles S. Friedman, ‘til Morning, LLC, and Second Star, LLC (collectively, “Plaintiffs”). Defendants argue that the trial court erred because the time in which they had to file an answer never commenced, thereby making the clerk’s entry of default premature and void. Defendants also argue that even if they did not timely file an answer, the trial court abused its discretion by failing to apply the good cause standard when considering Defendants’ motion to set aside the entry of default.

After careful review, we reverse the trial court’s denial of Defendants’ motion to set aside the entry of default.

Factual and Procedural History

This is the third appeal to this Court in this case. Facts relevant to this appeal follow, but additional procedural and factual history of the litigation are included in our decisions resulting from the first two appeals. *See Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, 234 N.C. App. 617, 619-21, 760 S.E.2d 302, 305-07 (2014) (*Swan Beach I*); and *Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, No. COA15-293,

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2015 WL 8747777 *1, *1-3 (N.C. Ct. App. Dec. 15, 2015) (unpublished) (*Swan Beach II*).

Plaintiffs, a group of owners of real property in Currituck County, filed suit after Defendants refused to allow Plaintiffs to develop their land. Plaintiffs alleged in their complaint that: (1) Plaintiffs have common law vested rights to develop their property (the “Vested Rights Claim”); (2) Defendants were violating Plaintiffs’ rights to due process and equal protection under the federal Constitution (the “Equal Protection Claim”); and (3) Defendants were violating Plaintiffs’ right to taxation by uniform rules as guaranteed by Article V, Section 2 of the North Carolina Constitution (the “Uniform Tax Claim”).

Defendants moved to dismiss all three claims pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure without filing an answer. The trial court entered an order granting the motion in July 2013. Plaintiffs appealed, which resulted in the first appeal to this Court and our opinion in *Swan Beach I*.

Swan Beach I was decided by this Court on 1 July 2014. In *Swan Beach I*, we affirmed the trial court’s dismissal of the Uniform Tax Claim, but reversed the dismissal of the Vested Rights Claim and the Equal Protection Claim. 234 N.C. App. at 622-31, 760 S.E.2d at 307-13. We remanded the matter to the trial court for further proceedings on the two remaining claims. *Id.* at 631, 760 S.E.2d at 313.

Less than a week after our decision, counsel for Defendants contacted counsel for Plaintiffs via email to disclose documents that could be subject to discovery and to forecast a forthcoming analysis by the county planning director to address Plaintiffs’ long frustrated development plans.

On 21 July 2014, the mandate on *Swan Beach I* issued.

On 18 August 2014, counsel for Plaintiffs proposed via email to counsel for Defendants a meeting on 25 August 2014 to discuss settlement of the litigation. Defendants’ counsel responded the following day, agreed to the meeting, and indicated that a location had been secured for depositions related to the litigation.

On 21 August 2014, thirty days after the issuance of the mandate and four days before the scheduled meeting to discuss settlement, Plaintiffs’ counsel filed with the clerk of court a motion for entry of default based on Defendants’ failure to file a timely responsive pleading as to their Vested Rights and Equal Protection claims. The clerk entered default. Plaintiffs’ counsel served Defendants’ counsel with notice via regular mail.

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Six days after the clerk entered default, on 27 August 2014, Defendants filed a motion to set aside the entry of default and submitted to the court, but were not allowed to file, a proposed answer. Defendants' motion asserted that there was "no clearly established rule under the North Carolina Rules of Appellate Procedure or North Carolina Rules of Civil Procedure setting forth the time in which responsive pleadings are to be filed following issuance of an opinion by the North Carolina Court of Appeals." Before the trial court, Defendants argued that N.C. Gen. Stat. § 1-298 (2015)—which states that "at the first session of the superior or district court after a certificate of the determination of an appeal is received, . . . if the judgment is modified, shall direct its modification and performance"—applied to the mandate from our decision in *Swan Beach I* and that Defendants' answer was not late because the trial court never entered an order directing the modification and performance, *i.e.*, the reinstatement of the Vested Rights and Equal Protection claims. The trial court denied Defendants' motion and Defendants timely appealed, leading to this Court's decision in *Swan Beach II*.

In *Swan Beach II*, we held that Defendants' appeal from the denial of their motion to set aside the entry of default was interlocutory because no default judgment had been entered. *Swan Beach II*, 2015 WL 8747777, at *2. We limited our review to Defendants' arguments regarding the defenses of governmental immunity and collateral estoppel, which affected substantial rights. *Id.* at *2. We affirmed the trial court's order only on the merits of these arguments, and otherwise "dismiss[ed] Defendants' appeal without prejudice to any right Defendants may have to make [additional] arguments at some later stage." *Id.* at *5.

Plaintiffs filed an amended motion for default judgment, and Defendants responded with a second motion to set aside the entry of default and a motion to deny Plaintiffs' motion for default judgment. The motions were heard before the trial court, which entered a default judgment awarding Plaintiffs their common law vested rights and \$39,137,805 in damages for their Equal Protection claim. Defendants appealed the default judgment—the case now before us, *Swan Beach III*—and filed a motion under Rule 60(b) of the North Carolina Rules of Civil Procedure to set aside the default judgment.

This Court stayed Defendants' appeal in *Swan Beach III* until the trial court ruled on the Rule 60(b) motion. The trial court has since denied the motion and Defendants subsequently filed an appeal from that denial resulting in yet a fourth appeal, *Swan Beach IV*, which has been placed on a future docket of this Court.

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In this decision, we address only Defendants' appeal from the denial of their motion to set aside the entry of default and the trial court's entry of default judgment in favor of Plaintiffs.

Analysis

Defendants' primary argument is that the time period in which they could file a responsive pleading never commenced because the complaint revived by this Court's decision in *Swan Beach I* was governed by N.C. Gen. Stat. § 1-298, which requires the trial court to enter an order effectuating the modification of its prior order following a decision by our Court. Defendants also argue that regardless of the applicability of § 1-298, the trial court abused its discretion by: (1) failing to apply the proper standard—good cause—to its determination of Defendants' motion to set aside; and (2) assuming *arguendo* that the trial court had applied the good cause standard, it abused its discretion because Defendants' actions were not dilatory, Plaintiffs were not harmed by the delay, and a failure to set aside the entry of default will result in a grave injustice to Defendants.

We hold that the trial court abused its discretion by failing to apply the proper standard in considering Defendants' motion to set aside the entry of default, and that even if the trial court had applied the proper standard, denial of Defendants' motion to set aside the entry of default would amount to an abuse of discretion. Because we hold the trial court abused its discretion in denying the motion to set aside the entry of default, the default judgment is rendered void and we do not reach Defendants' other arguments.

I. Standard of Review

The decision of whether to set aside an entry of default for good cause under Rule 55(d) of the North Carolina Rules of Civil Procedure is “within the sound discretion of the trial court[.]” *Auto. Equip. Distribs., Inc. v. Petroleum Equip. & Serv., Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896 (1987) (citation omitted). Such a decision therefore will “not be disturbed on appeal absent a showing of abuse of that discretion.” *Id.* at 608, 361 S.E.2d at 896 (internal quotation marks and citation omitted).

II. Motion to Set Aside the Entry of Default

[1] In determining whether a party has made a showing of good cause to set aside the entry of default, as well as when reviewing a trial court's decision regarding such a motion, our Court considers: “(1) was [the moving party] diligent in pursuit of [the] matter; (2) did [the non-moving party] suffer any harm by virtue of the delay; and (3) would

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[the moving party] suffer a grave injustice by being unable to defend the action.” *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009) (quoting *Auto. Equip. Distribs.*, 87 N.C. App. at 608, 361 S.E.2d at 896-97); see also *Brown v. Lifford*, 136 N.C. App. 379, 382, 524 S.E.2d 587, 589 (2000). Importantly, our Court has explained that a “[d]efault judgment is a drastic remedy which should be reserved for those cases . . . in which one party refuses or fails to attend to his or her legal business.” *Beard v. Pembaur*, 68 N.C. App. 52, 58, 313 S.E.2d 853, 856 (1984).

A trial court abuses its discretion when the party appealing the denial of its motion to set aside the entry of default demonstrates that the trial court did not apply the proper “good cause” standard in its determination. *Decker v. Homes, Inc./Constr. Mgmt. & Fin. Grp.*, 187 N.C. App. 658, 661-62, 654 S.E.2d 495, 498-99 (2007). In such instances, our Court has vacated and remanded the trial court’s decision with instruction to the trial court to engage in a proper examination under the correct standard. *Id.* at 662, 654 S.E.2d at 499 (“The order denying the motion to set aside the entry of default must be vacated, and this matter remanded for reconsideration by the trial court as to whether [the] defendants have shown good cause to set aside default.”).

However, a trial court’s failure to apply the “good cause” standard is not the only circumstance in which our Court has found an abuse of discretion in denying a motion to set aside the entry of default. In *Peebles v. Moore*, 48 N.C. App. 497, 504, 269 S.E.2d 694, 698 (1980), *modified and aff’d* by 302 N.C. 351, 275 S.E.2d 833 (1981), this Court held that the trial court abused its discretion in finding that the defendant had not established good cause to set aside the entry of default. This Court explained that “[w]hile setting aside a default judgment under [N.C. Gen. Stat. §] 1A-1, Rule 60(b) generally involves a showing of excusable neglect and a meritorious defense, to set aside an entry of default, all that need be shown is good cause.” *Id.* at 504, 269 S.E.2d at 698 (internal citations omitted). We noted that “[w]hat constitutes ‘good cause’ depends on the circumstances in a particular case, and within the limits of discretion, an inadvertence which is not strictly excusable may constitute good cause, particularly ‘where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant.’” *Id.* at 504, 269 S.E.2d at 698 (quoting *Whaley v. Rhodes*, 10 N.C. App. 109, 112, 177 S.E.2d 735, 737 (1970)). “This standard is less stringent than the showing of ‘mistake, inadvertence, or excusable neglect’ necessary to set aside a default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b).” *Brown*, 136 N.C. App. at 382, 524 S.E.2d at 589 (citation omitted).

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In modifying and affirming our Court's decision in *Peebles*, the Supreme Court held that "the better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise." *Peebles*, 302 N.C. at 356, 275 S.E.2d at 836. This principle is in line with the strong public policy that "[t]he law generally disfavors default and 'any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits.'" *Auto. Equip. Distribs.*, 87 N.C. App. at 608, 361 S.E.2d at 896 (quoting *Peebles*, 302 N.C. App. at 504-05, 269 S.E.2d at 698).

In this case, the trial court provided the following reasoning when it denied Defendants' motion to set aside the entry of default:

THE COURT: I will readily admit that I do not fully understand the—and know the appellate rules. But would you not have an opportunity if I were to deny your Motion to Set Aside the Default to appeal that ruling?

...

THE COURT: Well, I'm going to do that. *For one reason, it will give us on the trial bench some clarity as to how we are to proceed in this particular situation where it never happens again.* So I'm going to deny your Motion to Set Aside the default. And you can appeal my ruling and then the Court of Appeals can give us some clarity on how we are to proceed on that.

(emphasis added). Plaintiffs assert that the trial court's use of the language "[f]or one reason" indicates that the trial court's uncertainty regarding § 1-298 was not the sole reason for its determination and that we must presume the court found on proper evidence facts to support its judgment—specifically, a finding of no good cause. We are unpersuaded.

A full review of the hearing and the trial court's written order reveals that the trial court identified no reason for its denial of Defendants' motion other than uncertainty as to whether the time for which Defendants had to file an answer had run. Following the governing principle that "any doubt should be resolved in favor of setting aside an entry of default," *Peebles*, 302 N.C. App. at 504-05, 269 S.E.2d at 698, we conclude that the trial court failed to apply the proper standard in its determination and abused its discretion through this failure.

[2] In addition to abusing its discretion by failing to apply the proper standard, we are persuaded that had the trial court applied the good

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cause standard, it would have nonetheless abused its discretion by denying Defendants' motion given the circumstances in this case. *See Beard*, 68 N.C. App. at 56, 313 S.E.2d at 855 ("Even if the trial court used as its standard, 'good cause,' as set forth in Rule 55(d), the trial court abused its discretion in this case.").

To demonstrate good cause, Defendants must show: (1) they were diligent in pursuit of the matter; (2) Plaintiffs did not suffer harm by virtue of the delay; and (3) they would suffer a grave injustice by being unable to defend the action. *See Luke*, 194 N.C. App. at 748, 670 S.E.2d at 589.

To this end, Defendants assert on appeal that: (1) there had been extensive discovery and litigation before the trial court and our Court and Defendants' reliance on § 1-298 was neither unreasonable nor dilatory; (2) Plaintiffs have not suffered any harm by Defendants' delay in filing an answer; and (3) Defendants will suffer a grave injustice by being unable to defend against claims of religious discrimination and claims impairing Defendants' ability to govern and regulate the development of property within the County. We agree.

In *Beard*, the evidence on record indicated that "discovery was being pursued vigorously by the parties; that [the] plaintiff's counsel thought, albeit erroneously, that service was not perfected on [the] defendant until . . . four days before the entry of default; and that all matters in [the] defendant's Counterclaim related to the . . . subject of all material allegations in the plaintiff's Complaint." 68 N.C. App. at 56, 313 S.E.2d at 855-56. Based on those facts as considered in light of the principle that default judgments should be reserved for instances in which "one party refuse or fails to attend to his or her legal business[.]" this Court held that the trial court abused its discretion by denying the a motion to set aside the entry of default. *Id.* at 58, 313 S.E.2d at 856.

Plaintiffs seek to distinguish the facts of this case from those in *Beard*. Plaintiffs rely on our Court's decision in *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 487, 586 S.E.2d 791, 794 (2003), which upheld the denial of a motion to set aside the entry of default by a defendant who failed to respond for seven months after service of a summons. The defendant sought to be excused for the delay because he was not a lawyer. *Id.* at 487, 586 S.E.2d at 794. His argument was unsuccessful because "the evidence show[ed the] defendant simply neglected the matter at issue." *Id.* at 488, 586 S.E.2d at 795. *Granville* is inapposite to the present case, in which Defendants submitted an answer for filing within days of learning of the entry of default.

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By the time of the hearing on the initial motion to set aside the entry of default, this case had been pending for over two years, largely for reasons inherent in any case from which an appeal is taken. Defendants had obtained a judgment of dismissal in July 2013 and followed the appeal of that judgment by Plaintiffs through litigation before this Court. The appeal was not resolved until a year later, in July 2014, when this Court reversed the dismissal of Plaintiffs' Vested Rights and Equal Protection claims.

Within a week of this Court's decision, counsel for Defendants promptly resumed discussions with Plaintiffs' counsel regarding discovery scheduling and other tasks related to continuing the litigation in the trial court. Two days before Plaintiffs' counsel sought entry of default, counsel had scheduled a meeting to discuss settlement. It is undisputed that the entry of default came as a surprise to Defendants.

Six days after the clerk's entry of default and before the entry of a default judgment, Defendants submitted a proposed answer and filed the motion to set aside the entry of default. The motion included the colorable argument that N.C. Gen. Stat. § 1-298 applied to the decision from our Court reinstating two of Plaintiffs' claims. Regardless of whether N.C. Gen. Stat. § 1-298 applied, these actions demonstrate that Defendants' delay in filing an answer was not dilatory.

Our dissenting colleague asserts that Plaintiffs were harmed by Defendants' delayed response to the complaint, advancing an argument not raised by Plaintiffs before the trial court or before this Court. Nothing in the record indicates that Plaintiffs asserted that they had suffered any harm by the delay of sixteen days between 11 August 2014, which Plaintiffs contend was the last day Defendants were allowed to file an answer, and 27 August 2014, when Defendants submitted their proposed answer. Nor have Plaintiffs in their briefs filed with this Court asserted any harm by that delay.

Finally, we are persuaded that given the size of the judgment and the nature of the claims, Defendants would suffer a grave injustice if they were denied the ability to defend against Plaintiffs' claims.

Accordingly, we hold that the trial court abused its discretion in denying Defendants' motion to set aside the entry of default.

Conclusion

For the foregoing reasons, we hold the trial court abused its discretion by failing to apply the good cause standard when it denied Defendants' motion to set aside the entry of default. Because we also hold that even if the trial court had applied the proper standard it would

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have abused its discretion in denying Defendants' motion, we reverse the trial court's order.

We are not blind to the principle that "rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity." *Howell v. Haliburton*, 22 N.C. App. 40, 42, 205 S.E.2d 617, 619 (1974). But in the circumstances of this case, justice is best served by reversing the trial court's denial of Defendants' motion to set aside the clerk's entry of default.

REVERSED.

Judge ELMORE concurs.

Judge BERGER dissents with separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent from the majority opinion for two reasons: (1) it would be more prudent to remand this matter to the trial court for additional findings, and (2) the majority is sanctioning what is essentially a "mistake of law" defense by Defendants.

There is no dispute that the trial court's order is lacking. However, remanding for additional findings is appropriate in this matter. *See Coastal Fed. Credit Union v. Falls*, 217 N.C. App 100, 718 S.E.2d 192 (2011).

In addition, we should not allow mistake of law on the part of a defaulting party to constitute good cause. To demonstrate good cause, Defendants have the burden of showing: (1) Defendants were diligent in pursuit of the matter; (2) Plaintiffs did not suffer harm by virtue of the delay; and (3) Defendants would suffer "grave injustice by being unable to defend the action." *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009) (citations and quotation marks omitted).

However, our courts have held that failure to understand the law is not good cause to set aside entry of default. *See Lewis v. Hope*, 224 N.C. App. 322, 324-25, 736 S.E.2d 214, 216-17 (2012) (finding good cause was not shown where the "[d]efendant's claims amount[ed] to nothing more than alleging that he was unaware of the need to file an answer because of his unfamiliarity with the law"). *See also First Citizens Bank & Tr. Co. v. Cannon*, 138 N.C. App. 153, 158, 530 S.E.2d 581, 584

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(2000) (affirming entry of default where *pro se* party claimed she “was unaware that she was required to file an Answer”); *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 487, 586 S.E.2d 791, 794 (2003) (finding no good cause was shown by the defendant who argued he was “unfamiliar with the procedural and substantive rules of law”).

While the law may disfavor default, courts have stressed the importance of filing timely responsive pleadings. Inattention and disregard for the rules should not be rewarded. Defendants admit they failed to file a responsive pleading. Further, they acknowledge that they were aware of this Court’s determination that further proceedings were to occur, but argue that because of their interpretation of North Carolina General Statute Section 1-298, no responsive pleading was due and entry of default was improper. If mistake of law is not a valid excuse for *pro se* defendants, it should not be allowed here.

North Carolina General Statute Section 1-298 states in relevant part that “[i]n civil cases, at the first session of the superior or district court after a certificate of the determination of an appeal is received, . . . if the judgment is modified, [the court below] shall direct its modification and performance.” N.C.G.S. § 1-298 (2015). Under the rules of civil procedure, parties have twenty days to file a response after receiving “notice of the court’s action in ruling on [a] motion.” N.C. R. Civ. P. 12(a)(1) (emphasis added). Rather than following the rules of procedure, Defendants argue that Section 1-298 requires the lower court to enter its own order to establish the efficacy of this Court’s decision in *Swan Beach I* in order to continue with these proceedings. I disagree.

As noted in *D & W, Inc., v. City of Charlotte*, 268 N.C. 720, 724, 152 S.E.2d 199, 203 (1966), the Supreme Court explicitly stated “the efficacy of our mandate does not depend upon the entry of an order by the court below.” The Supreme Court also highlighted that “[n]o judgment other than that directed or permitted by the appellate court may be entered. Otherwise, litigation would never be ended[.]” *Id.* at 722, 152 S.E.2d at 202 (citation and quotation marks omitted). A mandate from the appellate court is automatically issued twenty days after the filing of an appellate opinion. N.C.R. App. P. 32.

Defendants would have us believe that the trial court must take some affirmative act before they had the responsibility to file an answer to a complaint which they knew existed. In reality, they had twenty days in which to file a response because no action by the trial court was necessary.

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Simply, the Defendants unjustifiably relied on Section 1-298 to their detriment. While the majority indicates that “Defendants submitted an answer for filing within days of learning of the entry of default,” this does not make them diligent. To the contrary, Defendants had fifty days after this Court’s published *Swan I* opinion to prepare and file an answer. They failed to do so, and have failed to show good cause.

Also, it is somewhat misleading to indicate that Plaintiffs have asserted no harm from the delay caused by failure to file a responsive pleading. Defendants argue *inter alia* that Plaintiffs have not raised the issue of harm, thus they are unconcerned with the delay caused by Defendants. Plaintiffs have been harmed, however, and absent the entry of default, Plaintiffs may still be waiting on Defendants to file their answer.

This litigation began in 2012. For the past five years Plaintiffs have been unable to exercise fundamental property rights due to the actions of Defendants. Plaintiffs provided affidavits from two experts attesting to the damages incurred by Plaintiffs since the beginning of this litigation. While these reports are not specific to the fifty days in which Defendants failed to respond, they are indicative of damages Plaintiffs have suffered. However, Defendants failed to address either affidavit included in the record regarding damages. Defendants have not adequately shown that Plaintiffs suffered no harm sufficient to set aside the entry of default.

I believe this matter should be remanded to the trial court for entry of additional findings. Failing there, however, Defendants were not diligent in pursuing this matter. Further, Defendants have not shown Plaintiffs have suffered no harm. Accordingly, I would affirm the entry of default.

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[255 N.C. App. 849 (2017)]

WATAUGA COUNTY, PLAINTIFF

v.

TERESA BEAL, DEFENDANT

No. COA16-1226

Filed 3 October 2017

Process and Service—service by publication—personal delivery and certified mail not effective—prior experience

The trial court did not abuse its discretion by denying defendant's motion to set aside an entry of default and a subsequent foreclosure for failure to pay taxes where defendant contended that service by publication was made before a diligent effort to locate and serve defendant personally. Plaintiff knew from extensive prior experience that it could not make service on defendant by personal delivery or by personal or certified mail.

Appeal by defendant from order entered 26 July 2016 by Judge Hal G. Harrison in Watauga County District Court. Heard in the Court of Appeals 8 August 2017.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Chelsea Bell Garrett, for plaintiff-appellee.

Deal, Moseley & Smith, LLP, by Bryan P. Martin, for defendant-appellant.

BRYANT, Judge.

Where the unique facts of this case show that plaintiff was aware based on extensive prior experience with defendant that it could not effect service of process on defendant by personal delivery or by registered or certified mail, plaintiff's actions satisfied the "due diligence" requirement necessary to justify the use of service of process by publication, and the trial court did not err or abuse its discretion in denying defendant's motion to set aside entry of default, default judgment, foreclosure sale, and commissioner's deed. We affirm.

In November 2001, defendant Theresa Beal acquired title to real property as shown in Book 677, Page 205 of the Watauga County Register of Deeds. Thereafter, defendant became delinquent on her tax obligation and plaintiff Watauga County initiated collections for taxes

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owed. Defendant's address on record was listed as Post Office Box 1202, Conover, NC 28613.

On or about 6 May 2013, the Watauga County Tax Collections Supervisor (the "Supervisor") attempted to find a valid address for defendant. Plaintiff attempted to contact various individuals, including defendant's mother by phone. On 9 May 2013, defendant contacted the Supervisor, wherein defendant agreed to enter into a payment agreement with plaintiff. During that conversation, defendant provided a facsimile number, but she did not provide any other contact information.

Thereafter, the Supervisor sent a three-page fax to defendant at the fax number provided by defendant. The fax included a cover sheet, an "Agreement of Payment Schedule," and a "Watauga County Tax Certification." On 17 May 2013, defendant sent a return fax, which included a cover sheet and a copy of the Agreement of Payment Schedule with defendant's signature. No contact information for defendant was added to either page of her return fax.

In 2013, defendant made two payments on her payment plan. The first was made shortly after execution of the payment agreement, and the second was made on 26 June 2013. On 12 May 2014, plaintiff sent defendant a fax including a cover page and a 2013 tax bill. The cover page included a note asking defendant to please call regarding her 2013 tax bill and payment plan and notifying her that failure to do so could result in foreclosure. On 22 May 2014, plaintiff received a third payment from defendant. After the third payment, plaintiff received no further payments or communications from defendant.

As a result, plaintiff sent collection notices to defendant's address of record—Post Office Box 1202, Conover, NC 28613. Thereafter, on 4 September 2015, plaintiff filed a verified complaint in Watauga County District Court to collect the past due taxes from defendant and request a commissioner be appointed to sell the property in order to satisfy plaintiff's tax lien. Defendant's address was listed on the complaint as follows: "Teresa Beal Post Office Box 1202 Conover, NC 28613." The same day the complaint was filed—4 September 2015—plaintiff filed a Notice of Service by Publication, indicating that plaintiff would publish notice in the *Watauga Democrat*, a newspaper in circulation in the county where the property is located, on 14, 21, and 28 September 2015. Less than a week later, plaintiff filed another Notice of Service by Publication on 10 September 2015, indicating that it intended to publish notice on three additional dates—13, 20, and 27 September 2015.

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Thereafter, plaintiff attempted service on 19 October 2015 by certified mail to the same address listed for defendant on the complaint—P.O. Box 1202, Conover, NC, 28613. On 21 October 2015, this was returned as “undeliverable as addressed; unable to forward.” On 16 December 2015, plaintiff filed an affidavit of attempted service, based on plaintiff’s attempt to serve defendant on 20 October 2015 by certified mail at the Conover post office box address. The affidavit was filed along with a motion for entry of default which was granted by the Watauga County Clerk of Superior Court on the same day.

On 4 January 2016, default judgment was entered. On 9 February 2016, a sale of the property was held, which sale was confirmed on 2 May 2016. On 6 May 2016, a Commissioner’s Deed was recorded.

On 20 May 2016, plaintiff’s attorney, Stacy C. Eggers, IV,

received a call from a lady who identified herself as Teresa Roten and stated she was calling about a foreclosure sale [Eggers] had conducted against her. She stated she did not have notice of the sale. [Eggers] told her [he] did not have a foreclosure action against anyone with the last name of Roten pending at that time. She then stated to [Eggers] that the address of the property as 186 Chestnut Knob. [Eggers] asked if this was her residence, and she stated it was a rental property. [Eggers] stated that address did not ring a bell with [him], and she then stated that [Eggers] had the action under the name of Beal, and that she was Teresa Beal Roten. Ms. Roten asked why she had not been served with the Foreclosure Complaint. [Eggers] told her the address that [he] had for her was a post office box in Conover, and she advised that was not her mailing address and that she had moved to another county. [Eggers] asked her if she had changed her mailing address with the County Tax Listing Office, and she stated she had not but that it was common knowledge where she could be found. [Eggers] advised Ms. Roten that [he] was unable to locate anything in the record that indicated a name change to Roten and had been unable to locate her.

On 3 June 2016, defendant filed a motion to set aside and a motion for sanctions, alleging improper service of process. Following a hearing, defendant’s motion to set aside was denied by order entered 26 July 2016. Defendant appeals.

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On appeal, defendant contends the trial court erred in denying defendant's motion to set aside entry of default, default judgment, foreclosure sale, and commissioner's deed, where service by publication was effectuated before a diligent effort was made to locate and serve defendant personally. We disagree.

A trial court's denial of a motion to set aside and a motion for sanctions is reviewed for abuse of discretion. *Jones v. Wallis*, 211 N.C. App. 353, 356, 712 S.E.2d 180, 183 (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." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

In its order denying defendant's motion to set aside, the trial court entered eighteen findings of fact in support of its decision. Where "findings have not been assigned as error," they are "deemed binding on appeal." *Lowery v. Campbell*, 185 N.C. App. 659, 664, 649 S.E.2d 453, 456 (2007) (citing *In re S.N.H. & L.J.H.*, 177 N.C. App. 82, 83, 627 S.E.2d 510, 512 (2006)) (concluding that the trial court's denial of the defendant's motion to set aside the entry of default was not manifestly unsupported by reason based on the unchallenged findings as set out in its order). As stated *infra*, defendant's challenge to the trial court's findings of fact is vague at best; however, we (generously) consider defendant's argument regarding due diligence as challenging the trial court's relevant findings of fact.

Rule 4(j1) and Rule 4(k) of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 1-75.8 collectively provide, in relevant part, that if, after due diligence, a plaintiff in a foreclosure action cannot serve the defendant by personal delivery, registered or certified mail, or designated delivery service, the defendant may be served by publication in the county where the action is pending. N.C. Gen. Stat. § 1A-1, Rule 4(j1), (k) (2015); N.C.G.S. § 1-75.8 (2015).

"Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Jones*, 211 N.C. App. at 357, 712 S.E.2d at 183 (quoting *Fountain v. Patrick*, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980)). "This Court has held that there is no 'restrictive mandatory checklist for what constitutes due diligence' for purposes of service of

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process by publication; ‘[r]ather, a case by case analysis is more appropriate.’ ” *Id.* at 358, 712 S.E.2d at 184 (alteration in original) (quoting *Emanuel v. Fellows*, 47 N.C. App. 340, 347, 267 S.E.2d 368, 372 (1980)). “However, the ‘due diligence’ test of Rule 4(j1) requires a party to use all reasonably available resources to accomplish service.” *Barclays Am./Mortg. Corp. v. BECA Enters.*, 116 N.C. App. 100, 103, 446 S.E.2d 883, 886 (1994) (citing *Williamson v. Savage*, 104 N.C. App. 188, 192, 408 S.E.2d 754, 756 (1991)).

In *Barclays*, upon which defendant relies, the plaintiff’s “sole attempt at personal service . . . consisted of a certified letter mailed to the business address of [the defendant, a partnership], a postal box number,” *id.* at 103, 446 S.E.2d at 886, before resorting to “notice by posting,” *id.* at 104, 446 S.E.2d at 887. Because the evidence revealed that “the public record and other sources . . . were easily accessible to [the] plaintiff, but not utilized[,]” *id.* at 104, 446 S.E.2d at 886, this Court concluded that “this solitary venture”—the plaintiff’s sole attempt at service by certified letter to a post office box—“constituted neither application of ‘due diligence’ as required by Rule 4(j1) nor a ‘reasonable and diligent effort’” *Id.* at 103, 446 S.E.2d at 886.

In the instant case, defendant challenges the trial court’s denial of her motion to set aside because, she argues, plaintiff failed to exercise its due diligence in trying to contact her before resorting to notice by publication. From what we can discern from defendant’s vague argument in brief on appeal, defendant appears to challenge the trial court’s findings that plaintiff made diligent and reasonable efforts to locate her before having default entered against her. Those findings of fact which relate to this issue are as follows:

4. Prior to the filing of the Complaint, on or about May 6, 2013, Tax Collection Supervisor . . . ran a Lexis-Nexis Accurant search in an attempt to locate . . . [d]efendant. The address listed in this search did not produce a confirmed address for . . . [d]efendant. On or about May 9, 2013, [the] Tax Collection Supervisor . . . had a telephone conversation with . . . [d]efendant, where [the Supervisor] advised . . . [d]efendant of the need to “catch up” her delinquent taxes in order to avoid a tax foreclosure against her. . . . [D]efendant provided only a fax number for contact with her, at (704) 660-4442.
5. . . . Defendant returned a May 9, 2013 fax from the Tax Collector to [plaintiff] on May 17, 2013, consisting of a fax

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cover sheet and an “Agreement of Payment Schedule.” This facsimile consisted of two pages as shown on Exhibit 3 of the Affidavit of [the Supervisor], as confirmed by the date, time, and page stamp placed by the facsimile machine on these pages. . . . [D]efendant did not fax a change of address form back to . . . [p]laintiff, nor did . . . [d]efendant attach a copy of the tax certificate with a new address as alleged in her affidavit.

. . . .

7. The Watauga County Tax Collection Supervisor was unable to reach . . . [d]efendant at the above listed fax number by her facsimile of May 12, 2014.

8. Watauga County sends out delinquent tax notices to taxpayers at least three times a year, *which were returned as undeliverable*.

9. The Watauga County Attorney made a diligent search of the public records of Watauga County in an attempt to locate an address for [defendant] in order to serve the Verified Complaint, including a search of the tax records of Watauga County and the records of the Watauga County Clerk of Superior Court.

10. Additionally, the Watauga County Attorney attempted to contact . . . [d]efendant prior to filing suit on September 18, 2014 and June 17, 2015 regarding payment of the delinquent taxes. These letters were returned as “Return to Sender; Not Deliverable as Addressed; Unable to Forward.”

11. On September 4, 2015, [plaintiff] filed its Verified Complaint for unpaid *ad valorem* real property taxes.

12. On October 19, 2015, [plaintiff] attempted to serve its Complaint upon . . . [d]efendant at the last known address for . . . [d]efendant, Post Office Box 1202; Conover, North Carolina 28613. This letter was returned as “Return to Sender; Not Deliverable as Addressed; Unable to Forward.”

13. . . . Defendant, Teresa Beal, has failed to attend to the matter of her unpaid *ad valorem* property taxes with the attention which would be accorded by a reasonable and prudent person.

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14. [Plaintiff] made diligent and reasonable efforts to locate a valid service address for service of the Verified Complaint upon . . . [d]efendant, Teresa Beal.

15. The Court finds the Verified Motion of . . . [d]efendant, Teresa Beal, not fully credible.

16. The inattention of . . . [d]efendant to her unpaid and delinquent *ad valorem* real property taxes constitutes inexcusable neglect.

17. . . . [D]efendant has failed to present the Court with sufficient evidence of a meritorious defense to the allegations contained in the Verified Complaint.

18. Based on the totality of the credible evidence presented in this matter, the Motion to Set Aside and Motion for Sanctions is without merit.

(Emphasis added).

The facts of this case are unique in that plaintiff essentially accomplished or satisfied much of the due diligence requirement before the complaint was ever filed. While normally the filing of the complaint is the event which triggers the period in which a party must do its due diligence in attempting service of process by means other than publication—i.e., service by certified mail—it is clear from the evidence in the record and the trial court’s findings of fact that long before plaintiff filed its complaint, plaintiff had been unable to reach defendant at the address she provided to the Watauga County Tax Administrator—Post Office Box 1202, Conover, North Carolina, 28613. Therefore, plaintiff knew from experience that service to defendant at the Conover Post Office box would not be fruitful. As such, the record belies any contention that service by anything other than publication at this point would have been fruitful. *See Jones*, 211 N.C. App. at 359, 712 S.E.2d at 185. As stated previously, plaintiff attempted to contact defendant prior to filing suit at the Conover Post Office box address on two previous occasions—18 September 2014 and 17 June 2015—and both letters were returned as “Return to Sender; Not Deliverable as Addressed; Unable to Forward.” Indeed, defendant admitted during her 20 May 2016 phone call to plaintiff’s attorney regarding the foreclosure sale that the Conover Post Office box was no longer her mailing address, she had moved to another county, and changed her name, all without notifying the County Tax Listing Office. Defendant’s contention that “it was common knowledge where she could be found” will not suffice where the

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record suggests that since at least 2013, defendant appears to have made every effort to purposefully conceal exactly that fact, i.e., the fact of her whereabouts, at least for the purposes of plaintiff's collecting duly owed property taxes. In other words, defendant will not now be heard to complain on appeal about lack of notice where she failed in the first place to provide notice to the County Tax Listing Office that she had changed her name and moved to another county.

“[A] plaintiff is not required to jump through every hoop later suggested by a defendant in order to meet the requirement of ‘due diligence.’ This is particularly true when there is no indication in the record that any of the steps suggested by a defendant would have been fruitful.” *Id.* “Rule 4(j1) requires ‘due diligence,’ not that a party explore every possible means of ascertaining the location of a defendant.” *Id.* at 358–59, 712 S.E.2d at 184.

Based on the circumstances of this case, we conclude that where plaintiff already knew from extensive prior experience with defendant that it could not with due diligence effect service of process on defendant by personal delivery or by registered or certified mail, *see* N.C.G.S. § 1A-1, Rule 4(j1), plaintiff's actions satisfied the “due diligence” necessary to justify the use of service of process by publication. Thus, the trial court did not err or abuse its discretion in denying defendant's motion to set aside entry of default, default judgment, foreclosure sale, and commissioner's deed, and defendant's argument is overruled.

AFFIRMED.

Judges CALABRIA and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 OCTOBER 2017)

BARTLETT v. BARTLETT No. 17-248	New Hanover (16CVD107)	Affirmed
BRADY v. BEST BUY CO., INC. No. 17-315	N.C. Industrial Commission (14-708059) (15-720823)	Affirmed
GYEDU-SAFFO v. DUNCAN No. 17-86	Mecklenburg (14CVD3610)	Affirmed
IN RE M.D.H. No. 17-326	Columbus (15JT58-59)	Affirmed
IN RE T.R.K. No. 17-303	Catawba (16SPC50903)	Vacated and Remanded
KEDAR v. PATEL No. 16-781	Mecklenburg (13CVS9860)	Affirmed
McKINNON v. McKINNON No. 17-152	Robeson (12CVD2697)	Affirmed
MOORE v. MCKENZIE No. 17-53	Harnett (16CVD669)	Affirmed
PERRY v. W. MARINE, INC. No. 17-243	Wake (16CVS5407)	Affirmed
STATE v. BARNES No. 17-14	Wilson (15CR703890)	Vacated and Remanded
STATE v. BARNES No. 17-15	Wilson (15CR703311)	Vacated and Remanded
STATE v. BOWENS No. 16-1312	Wilson (15CR54322)	Vacated
STATE v. BUTLER No. 17-144	Edgecome (14CRS51551-52)	JUDGMENT ARRESTED IN PART; NO ERROR IN PART
STATE v. BYNUM No. 17-4	Wilson (15CR51982)	Vacated and Remanded
STATE v. BYNUM No. 17-5	Wilson (15CR52515)	Vacated and Remanded

STATE v. CANNON No. 17-17	Wilson (14CR055000)	Vacated and Remanded
STATE v. CLYBURN No. 17-258	Union (14CRS1605) (14CRS1606)	No Error
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STATE v. EAVES No. 17-159	Mecklenburg (13CRS236146)	Affirmed
STATE v. ELLIOTT No. 17-338	Cumberland (15CRS55180) (15CRS55672) (15CRS55673)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART; DISMISSED WITH PREJUDICE IN PART.
STATE v. GARDNER No. 16-1089	Pitt (05CRS57020) (06CRS54112)	Affirmed
STATE v. GOMEZ No. 16-1327	Wilson (15CR52188)	Vacated and Remanded
STATE v. HARRISON No. 17-16	Wilson (15CR701814)	Vacated and Remanded
STATE v. HOLLOMAN No. 16-658	Buncombe (15CRS708839) (15CRS87822)	No plain error
STATE v. ISOM No. 17-24	Cabarrus (15CRS50858) (15CRS50860)	No Error
STATE v. JACKSON No. 17-250	Rowan (16CRS50550)	No Error
STATE v. McDONALD No. 17-246	Mecklenburg (13CRS243916-19)	No Error
STATE v. MERCER No. 16-1314	Wilson (15CR117)	Vacated
STATE v. MITCHELL No. 16-1323	Wilson (14CR54833)	Vacated and Remanded

STATE v. MITCHELL No. 17-534	Wilson (15CRS053920)	Vacated and Remanded
STATE v. OWENS No. 16-1313	Wilson (15CR53062)	Vacated
STATE v. PAIGE No. 17-102	Pitt (12CRS53795) (13CRS3949)	Affirmed
STATE v. RAMSEY No. 17-175	Mecklenburg (15CRS213363) (15CRS25213)	DISMISSED WITHOUT PREJUDICE
STATE v. REAVES No. 16-1311	Wilson (15CR702523)	Vacated
STATE v. ROBERTSON No. 17-199	Buncombe (14CRS80428)	No Error
STATE v. ROUSE No. 17-176	Forsyth (15CRS59002)	No Error
STATE v. SAULS No. 17-6	Wilson (15CR52185)	Vacated and Remanded
STATE v. SURRATT No. 17-65	Cleveland (15CRS50222-23)	No Error
STATE v. TAYLOE No. 16-1032	Forsyth (15CRS50070)	No Error
STATE v. THOMAS No. 17-120	Watauga (16CRS50168-69) (16CRS575)	Affirmed
STATE v. THOMAS No. 17-162	Richmond (15CRS50942)	No Error
STATE v. VILLA No. 16-1104	Johnston (15CRS52234)	No Error
STATE v. VILLALOBOS No. 17-269	Mecklenburg (14CRS237025) (14CRS237812)	No Error
STATE v. WIGGINS No. 17-18	Wilson (14CR002440)	Vacated and Remanded

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Criminal conversation—due process—not offended—North Carolina's common law causes of action for alienation of affections and criminal conversation do not violate the Fourteenth Amendment. Adult individuals have a constitutionally protected interest in engaging in intimate sexual activities free of governmental intrusion or regulation, but the State has a legitimate interest in protecting the institution of marriage and deterring conduct that would cause injury to one of the spouses. **Malecek v. Williams, 300.**

Criminal conversation—free speech—no violation—Defendant's rights to free speech and expression were not violated by claims for alienation of affections and criminal conversation where defendant and plaintiff's wife had an affair. An extra-marital relationship can implicate protected speech and expression, but these torts exist for the unrelated reason of remedying the harms that result from breaking the marriage vows. **Malecek v. Williams, 300.**

Criminal conversation—freedom of association—not violated—The First Amendment right to free association was not violated by the torts of alienation of affections and criminal conversation. Those torts did not prohibit all conceivable forms of association between a spouse and someone outside the marriage. **Malecek v. Williams, 300.**

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Appealability—writ of certiorari—defective notice of appeal—The Court of Appeals granted defendant's petition for writ of certiorari in a habitual misdemeanor larceny case and reached the merits of his arguments even though defendant gave defective notice of appeal. **State v. Glidewell, 110.**

APPEAL AND ERROR—Continued

Appealability—writ of certiorari—lack of subject matter jurisdiction—The Court of Appeals exercised its discretion under N.C. R. App. P. 2 to suspend N.C. R. App. P. 21 to allow defendant's petition and to issue a writ of certiorari solely to address the trial court's lack of subject matter jurisdiction to enter judgment following defendant's guilty plea. **State v. Culbertson, 635.**

Interlocutory appeals—Industrial Commission—statute of repose—An appeal from the Industrial Commission in a wrongful death claim was dismissed as interlocutory. The underlying issue concerned only a determination of the application of the statute of repose to plaintiff's tort claims arising under the Tort Claims Act. There was no issue of immunity that would create a substantial right justifying an immediate appeal. **Foushee v. Appalachian State Univ., 468.**

Interlocutory orders and appeals—arbitration order—no substantial right—Plaintiff company's appeal from an interlocutory order compelling arbitration in a claim for breach of a preliminary agreement for a construction project was dismissed. An order compelling arbitration does not affect a substantial right and does not fall within the enumerated grant of appellate review under N.C.G.S. § 1-569.28. **C. Terry Hunt Indus., Inc. v. Klausner Lumber Two, LLC, 8.**

Interlocutory orders and appeals—wastewater disposal—substantial right—governmental immunity inapplicable—Defendant town's appeal from an interlocutory order dismissing some, but not all, of plaintiff county's claims made in its dispute over the disposal of wastewater was dismissed where the town failed to show a substantial right was affected since its defense of governmental immunity was inapplicable. **Union Cty. v. Town of Marshville, 441.**

Interlocutory orders and appeals—wastewater disposal—substantial right—possibility of inconsistent verdicts—Defendant town's appeal from an interlocutory order dismissing its counterclaims in its dispute with plaintiff county over the disposal of wastewater was dismissed where the town failed to show a substantial right was affected since it never explained how its allegations of inconsistent verdicts could truly become realities. **Union Cty. v. Town of Marshville, 441.**

Mootness—claim for equitable accounting—An issue concerning an equitable accounting between a homeowners association and a developer was moot where the parties had agreed via a consent order that financial records would be disclosed. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

Notice of appeal given prior to order date—delay entering findings of fact and conclusions of law—no prejudicial error—The trial court did not err in a driving while intoxicated and reckless and careless driving case by entering an order on 31 October 2016 where the State gave its notice of appeal prior to that date. A delay in the entry of findings of fact and conclusions of law does not amount to prejudicial error. **State v. Walker, 828.**

Notice of appeal—untimely—The Court of Appeals treated a notice of appeal as a petition for certiorari, which it granted, where the filing date of the judgment was not clear. **Sarno v. Sarno, 543.**

Preservation of issues—abandonment of issue on appeal—failure to argue at trial—Although defendant contended that the trial court erred by denying his motion to suppress evidence seized during the search of a residence and the statements defendant made to officers during the search, defendant failed to preserve the

APPEAL AND ERROR—Continued

issue where he either abandoned the argument by failing to address it on appeal or did not argue it at trial. Even assuming this issue was preserved, defendant did not show that the trial court erred in its assessment of the weight and credibility of the evidence. **State v. Robinson, 397.**

Preservation of issues—claims not addressed in principal brief—Claims not addressed in the appellant's brief were abandoned. **Braswell v. Medina, 217.**

Preservation of issues—failure to cite legal authority—failure to argue—The trial court did not err in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, by denying defendant commercial landlord and construction company's counterclaims for breach of duty to maintain the leased premises and breach of contract where defendants failed to cite any legal authority or argue this issue. **Morrell v. Hardin Creek, Inc., 55.**

Preservation of issues—failure to declare mistrial sua sponte—failure to object—Although defendant contended the trial court abused its discretion in a child sex abuse case by failing to declare a mistrial sua sponte after the victim's father engaged in a "pattern of abusive and prejudicial behavior" during defendant's trial, defendant failed to preserve this issue where he did not request additional action by the trial court, did not move for a mistrial, and did not object to the trial court's method of handling the alleged misconduct in the courtroom. **State v. Shore, 420.**

Preservation of issues—failure to object at trial—Indian Child Welfare Act—The issue of whether the trial court erred by failing to address an issue under the Indian Child Welfare Act was not preserved for appeal where it was not raised in the trial court. **In re L.W.S., 296.**

Preservation of issues—failure to renew motion to dismiss after jury verdict—general motions at both close of State's evidence and all evidence—The State's argument in a delaying a public officer case that defendant failed to preserve review based on failure to renew a motion to dismiss after the jury rendered its verdict was without merit where defendant made general motions to dismiss at both the close of the State's evidence and at the close of all evidence. **State v. Peters, 382.**

Preservation of issues—no objection at trial—A cross-appeal contending that a motion to dismiss provided an alternate basis for relief was not properly before the Court of Appeals where the trial court determined that the issue was moot and defendant did not object. **Holmes v. Sheppard, 739.**

Record—transcript not provided—The trial court did not err in a prosecution for misdemeanor larceny and injury to personal property, arising from defendant's removal of appliances from a rental property from which she was being evicted, by concluding that defendant was not entitled to a new trial based on the State's inability to provide her with a transcript of the proceedings. An alternative was available that would fulfill the same functions as a transcript and provided the defendant with a meaningful appeal. **State v. Bradsher, 625.**

Two motions for summary judgment—second one vacated—appeal of first interlocutory—Where there were two motions for summary judgment on the same issues ruled on by different judges and the second was vacated on appeal, appeal of the first was interlocutory and was dismissed. **Gardner v. Rink, 279.**

Writ of certiorari denied—unpreserved argument—failure to make constitutional argument at trial—untimely appeal—The Court of Appeals in its discretion

APPEAL AND ERROR—Continued

declined to issue a writ of certiorari to review defendant's unpreserved argument regarding enrollment in satellite-based monitoring where defendant conceded that he did not make a constitutional argument to the trial court and also did not timely appeal the trial court's satellite-based monitoring orders. Further, defendant did not show that his argument had merit or that error was probably committed below. **State v. Bishop, 767.**

ATTORNEY FEES

Award—ability to pay—estates of the parties—An award of attorney fees does not require a comparison of the relative estates of the parties. **Sarno v. Sarno, 543.**

Child support action—A trial court order awarding attorney fees in a child support action met the requisite requirements where it found that defendant was an interested party acting in good faith and had insufficient funds to defray the cost of the suit. **Sarno v. Sarno, 543.**

Indigent defendant—taxing court costs and attorney fees—failure to discuss in open court—A civil judgment imposing fees for court costs and attorney fees against an indigent defendant was vacated without prejudice where neither defense counsel's total attorney fee amount nor the appointment fee were discussed in open court with defendant or in his presence. **State v. Harris, 653.**

Response to writ of mandamus—The trial court did not err by awarding defendant attorney fees for a response to plaintiff's writ of mandamus where plaintiff alleged that the response was unnecessary and moot. Notwithstanding any alleged errors in two findings, the remaining finding showed that the trial court did not abuse its discretion. Moreover, while the petition may have been moot, it could not be said that defendant's filing was wholly unnecessary. **Sarno v. Sarno, 543.**

Termination of tenured professor—special circumstances—The trial court did not abuse its discretion, in a case involving the termination of a tenured professor who was arrested in an airport in Argentina and ultimately convicted of smuggling cocaine found in his suitcase, by denying the professor's request for attorney fees under N.C.G.S. § 6-19.1(a) where it would be unjust to require the State to pay attorney fees under such special circumstances based on defendant university's responsibility to manage public funds and plaintiff professor's own choices that precipitated this dispute. **Frampton v. Univ. of N.C., 15.**

Termination of tenured professor—substantial justification—The trial court did not abuse its discretion, in a case involving the termination of a tenured professor who was arrested in an airport in Argentina and ultimately convicted of smuggling cocaine found in his suitcase, by denying the professor's request for attorney fees under N.C.G.S. § 6-19.1(a) where defendant university acted with substantial justification in managing an unusual set of circumstances. **Frampton v. Univ. of N.C., 15.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Felonious breaking and entering instruction—no plain error—The trial court did not commit plain error by its instructions on felonious breaking and entering where defendant raised no objection to either the oral instruction or the written instruction, and in fact, affirmatively agreed to the clarification included in the

BURGLARY AND UNLAWFUL BREAKING OR ENTERING—Continued

written instruction on the felonious breaking or entering charge. Further, the jury did not need a formal definition of the term “assault” to understand its meaning and to apply that meaning to the evidence. **State v. Voltz, 149.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Adjudication—serious neglect—The trial court erred in an abused juvenile proceeding by adjudicating a child as “seriously neglected” due to inappropriate discipline by the father and inaction by the mother. The trial court used the wrong definition of “serious neglect.” The definition the trial court used pertained to the responsible individuals list in N.C.G.S. § 7B-101(19a), rather than the definition pertaining to adjudication of neglect in N.C.G.S. § 7B-101(15). **In re J.M., 483.**

Findings—supported by evidence—Certain findings in an abused juvenile proceeding were supported by the evidence, and others, or portions thereof, that were not supported by the evidence were not binding on the Court of Appeals. The binding findings of fact established that the child sustained multiple non-accidental injuries and that the father was responsible for the injuries. **In re J.M., 483.**

Reunification efforts ceased—statutory requirements not met—The statutory requirements for the cessation of reunification efforts in an abused juvenile proceeding were not met where dispositional and permanency planning matters were combined in a single order at the initial dispositional hearing. There was no indication that a previous court had determined that one of the aggravating factors in N.C.G.S. § 7B-901(c)(1) was present, and the trial court’s order should have included written findings pertaining to those circumstances. **In re J.M., 483.**

CHILD CUSTODY AND SUPPORT

Child support—deviation from guidelines—findings—Although a trial court’s child support orders are afforded substantial deference, the trial court in this case failed to make the requisite findings to support deviation from the Child Support Guidelines. **Sarno v. Sarno, 543.**

Overpayment—findings not supported by evidence—The evidence did not support a credit for overpayment of child support where neither plaintiff nor defendant testified; counsel’s arguments are not evidence. **Sarno v. Sarno, 543.**

CIVIL RIGHTS

42 U.S.C. § 1983—malicious prosecution—In a claim under 42 U.S.C. § 1983 for malicious prosecution, the complaint adequately alleged lack of probable cause for the underlying arrest and prosecution on the charge of obtaining property by false pretenses. Plaintiff had borrowed money from family members to invest in the stock market, then lost the money in an economic crash, but the evidence possessed by the officers actually exculpated plaintiff. **Braswell v. Medina, 217.**

42 U.S.C. § 1983—malicious prosecution—causation—decision of prosecutors and grand jury—In a 42 U.S.C. § 1983 claim for malicious prosecution, the intervening decision of the prosecutor or the grand jury in the underlying criminal prosecution did not immunize the officers from liability. **Braswell v. Medina, 217.**

CONFESSIONS AND INCRIMINATING STATEMENTS

In-custody statement—evidence from seized clothing—DNA test—sufficiency of findings of fact—criminal activity—probable cause for arrest—The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's motions to suppress his in-custody statement and evidence from his seized clothing and DNA test where the contested findings of fact were supported by competent evidence, were inconsequential to the holding, or did not amount to prejudicial error. The findings suggested the probability or substantial chance that defendant engaged in criminal activity and thus supported the conclusion that the detectives had probable cause to arrest defendant. **State v. Messer, 812.**

CONSTITUTIONAL LAW

Effective assistance of counsel—failure to give notice of alibi defense—no trial court order requiring information—Defendant did not receive ineffective assistance of counsel by his counsel's failure to give timely notice of an alibi defense where the trial court never entered an order requiring defendant to disclose the information. Further, defendant was not prejudiced since the jury heard the alibi evidence and the trial court's charge afforded defendant the same benefits as a formal charge on alibi. **State v. Harris, 653.**

Effective assistance of counsel—failure to object—Defendant did not receive ineffective assistance of counsel in a child abuse case where defense counsel's "failure" to object to alleged improper vouching testimony was not objectionable and could not serve as the basis for a viable ineffective assistance of counsel claim. **State v. Prince, 389.**

Effective assistance of counsel—failure to object—lay opinion testimony—crack cocaine—Defendant did not receive ineffective assistance of counsel in a drug case based on trial counsel's failure to object to an agent's lay opinion testimony visually identifying a substance that fell from defendant as crack cocaine. There was a chemical analysis and related expert opinion that the substance had unique chemical properties consistent with the presence of cocaine and defendant failed to establish a reasonable probability that there would have been a different result absent the alleged error. **State v. Carter, 104.**

Effective assistance of counsel—premature claim—Defendant's ineffective assistance of counsel claim in a child sex abuse case, based on his attorney eliciting evidence of guilt that the State had not introduced, was premature and dismissed without prejudice to his right to assert it during a subsequent motion for appropriate relief proceeding. **State v. Shore, 420.**

Ex post facto law—retroactive application of law—Adam Walsh Act—Sex Offender Registration and Notification Act—minimum sex offender registration period—Petitioner's contention that the retroactive application of the Adam Walsh Act (also known as the Sex Offender Registration and Notification Act) for minimum sex offender registration periods through N.C.G.S. § 14-208.12A(a1)(2) constituted an ex post facto law was overruled where it was already addressed by in *In re Hall* and *State v. Sakobie*. **In re Bethea, 749.**

North Carolina—Rules Commission—authority to review rules of Board of Education—Separation of powers was not violated where the review and approval of rules made by the State Board of Education was appropriately delegated by the

CONSTITUTIONAL LAW—Continued

General Assembly to the North Carolina Rules Commission. The General Assembly adequately directed and limited the Commission's review of the Board's proposed rules. **N.C. State Bd. of Educ. v. State of N.C.**, 514.

State constitutional claim—adequate remedy—action against city—immunity claim not resolved—The dismissal of defendant's state constitutional claim against the City of Rocky Mount was premature where the City had raised immunity claims that had not been adjudicated, so that it was not clear whether plaintiff would have an adequate state remedy. **Braswell v. Medina**, 217.

CONTRACTS

Breach of contract—landscaping—uncertain and indefinite arrangement—no meeting of minds—summary judgment—The trial court did not err by granting summary judgment in favor of defendant landscaper on a breach of contract claim for landscaping services where no contract was ever formed between the parties based on an uncertain and indefinite arrangement as to the price or scope of work to be completed on plaintiffs' property, and no meeting of the minds occurred. Further, plaintiff husband's affidavit contradicting his sworn deposition testimony was not considered. **Rider v. Hodges**, 82.

COSTS

Not requested in pleadings—supporting evidence not challenged—The trial court did not err by awarding defendant costs in a child support action where defendant did not plead a request for costs. Defendant was entitled to the relief justified by the allegations in the pleadings, and plaintiff challenged only the findings for being without a legal basis and not for lack of supporting competent evidence. **Sarno v. Sarno**, 543.

CRIMINAL LAW

Joinder of charges—assault inflicting serious injury—second—degree sexual offense—assault by strangulation—felonious breaking or entering—intimidating a witness—exclusion of voir dire testimony—relevancy of evidence—The trial court did not err in an assault inflicting serious injury, second-degree sexual offense, assault by strangulation, felonious breaking or entering, and intimidating a witness case by joining charges from 15 May 2015 and 2 January 2016 for a single trial even though defendant contended portions of a witness's voir dire testimony was improperly excluded and would have raised doubt as to whether defendant was the perpetrator of the crimes of breaking or entering and intimidating a witness. The testimony was not relevant to the 2 January 2016 charges and would have been inadmissible to suggest that another person committed them. **State v. Voltz**, 149.

Trial court expression of opinion—denial of motion to dismiss in presence of jury—child sex abuse—The trial court did not impermissibly express an opinion on the evidence in a child sex abuse case by denying defendant's motion to dismiss in the presence of the jury in violation of N.C.G.S. § 15A-1222 where defendant did not seek to have the ruling made outside the presence of the jury, did not object, and did not move for a mistrial on this issue. **State v. Shore**, 420.

DAMAGES AND REMEDIES

Compensatory—deterrence—The trial court did not abuse its discretion in the compensatory phase of a bifurcated wrongful death trial by allowing plaintiff to argue that not awarding full and fair compensation would mean not creating the deterrent of making people pay for the harm they caused, and “not one penny more.” A general deterrence argument is appropriate during the compensatory phase of a bifurcated trial so long as it does not refer to any of the aggravating factors in N.C.G.S. § 1D-15(a) or urge the trier of fact to punish the defendant. **Haarhuis v. Cheek, 471.**

Loss of society and companionship—There was no error in an auto accident case in the admission of evidence about loss of society and companionship damages from the victim’s cousin and one of her co-workers. The challenged evidence was relevant to the jury’s determination of the value of the victim’s society, companionship, comfort, kindly offices, and advice pursuant to N.C.G.S. § 28A-18-2(b)(4)(c). Additionally, defendant made no argument as to how she was prejudiced. **Haarhuis v. Cheek, 471.**

Motion for a new trial—compensatory damages allegedly excessive—The trial court did not abuse its discretion in the bifurcated trial of an automobile accident case by determining that the compensatory damage award was appropriate and denying defendant’s motion for a new trial. Although defendant argued that the small punitive damages award indicated that the jury included a measure of punishment in the compensatory damage award, there was evidence that defendant made very little and it was not an abuse of discretion to determine that the amount was an adequate punishment for this defendant. **Haarhuis v. Cheek, 471.**

Pain and suffering—instructions—conscious pain and suffering—The trial court did not err in an automobile accident case by instructing the jury on pain and suffering damages where defendant contended that there was not evidence of conscious pain and suffering. There was, in fact, evidence that the victim was trying to breathe and was moaning after being struck by defendant’s vehicle, and the treating physician testified that the victim’s injuries would be severely painful and that she responded to pain stimuli. **Haarhuis v. Cheek, 471.**

DECLARATORY JUDGMENTS

Foreclosure by power of sale—collateral attack—North Carolina Uniform Declaratory Judgments Act—equitable action—The trial court erred in a declaratory judgment action for a foreclosure by power of sale under N.C.G.S. § 45-21.16(d) by determining that the entirety of plaintiffs’ complaint was a collateral attack on a valid judgment. While plaintiffs’ claims under the North Carolina Uniform Declaratory Judgments Act in N.C.G.S. § 1-253 et seq. were an impermissible collateral attack, plaintiffs’ complaint was sufficient to invoke equitable jurisdiction pursuant to N.C.G.S. § 45-21.36 to argue equitable grounds to enjoin the foreclosure sale. On remand, the trial court was instructed to ensure that the rights of the parties have not become fixed before proceeding with an equitable action pursuant to N.C.G.S. § 45-21.34. **Howse v. Bank of Am., N.A., 22.**

Foreclosure by power of sale—denial of motion to compel discovery—abuse of discretion—equitable claims—The trial court abused its discretion in a declaratory judgment action for a foreclosure by power of sale under N.C.G.S. § 45-21.16(d) by denying plaintiffs’ motion to compel discovery. **Howse v. Bank of Am., N.A., 22.**

DECLARATORY JUDGMENTS—Continued

General warranty deed—life estate—contingent remainder interest—The trial court did not err in a declaratory judgment action, involving a dispute over a general warranty deed conveying a life estate to the grantors' children and a future interest to certain of the grantors' grandchildren, by concluding that the grantor's two living grandchildren each held a contingent remainder interest in the subject property where they had to outlive the last of the living children in order for their title to the property to vest. **Rutledge v. Feher, 356.**

General warranty deed—life estate—future interest—class of grandchildren—The trial court did not err in a declaratory judgment action, involving a dispute over a general warranty deed conveying a life estate to the grantors' children and a future interest to certain of the grantors' grandchildren, by concluding that the class of grandchildren would not close and could not be determined until the death of the grantor's last living child (Price), and the individuals in which the remainder interest vested could not be established until the death of Price. **Rutledge v. Feher, 356.**

Summary judgment—right to receive annual earnout payments—stock purchase agreement—The trial court did not err in a declaratory judgment action by granting summary judgment in favor of plaintiff company and determining that it had not violated defendants' rights to receive annual earnout payments under a stock purchase agreement. Defendant stockholders failed to provide evidence of affirmative acts taken by the pertinent hospital sites to "subscribe to" or "license" SafetySurveillor (a software program generating automated alerts to notify users of health-related problems that require attention). **Premier, Inc. v. Peterson, 347.**

DISCOVERY

New discovery schedule—ambiguity in commercial lease—On remand in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, the trial court should consider setting a new discovery schedule pursuant to N.C.G.S. § 1A-1, Rule 26 to allow the parties to complete discovery based on an ambiguity in the parties' commercial lease. **Morrell v. Hardin Creek, Inc., 55.**

DIVORCE

Alimony—amount—current income—findings—An alimony order was reversed and remanded where it contained findings of defendant's gross monthly income for prior years and the average gross monthly income defendant listed in his affidavit, but contained no ultimate finding establishing defendant's income at the time the award was made. **Green v. Green, 719.**

Equitable distribution—contingency fee received by defendant—not deferred compensation—A contingency fee received by defendant and his law firm was not deferred compensation where the contract was entered into during the marriage but the fee was not collected until after the date of separation. The General Assembly did not intend to include contingency fees in the term "deferred compensation" in N.C.G.S. § 50-20(b)(1). Even if the fee had been properly classified as deferred compensation, it would have been calculated as of the date of the separation and defendant was not entitled to any payment for his or his firm's work at that time because the case had not been settled. **Green v. Green, 719.**

Equitable distribution—contingency fee—cannot be both divisible property and deferred compensation—For equitable distribution purposes, a contingent

DIVORCE—Continued

fee received by defendant's law firm in a case that began before separation and ended after separation could not be both divisible property and deferred compensation. **Green v. Green, 719.**

Equitable distribution—defendant's contingency fee—separate property—The trial court erred in an equitable distribution case by determining that defendant's compensation from his law firm in a contingency fee case was divisible property. Defendant did not acquire any right to receive any income from the contingency fee case prior to the parties' separation. Moreover, the contingency fee contract was between the law firm and the client, not defendant and the client, and the compensation was appropriately labeled the separate property of defendant. **Green v. Green, 719.**

Equitable distribution—liquid assets—evidence sufficient—The trial court did not err in an equitable distribution action by ordering an unequal distribution of marital property where there was plenary evidence in the record that defendant had sufficient liquid assets to pay the distributive award. The trial court's statement that the presumption of an in-kind distribution was not rebutted was harmless error because the trial court proceeded to find that an in-kind distribution was impractical and thus rebuttable. **Green v. Green, 719.**

Equitable distribution—mortgage debt not distributed—The trial court did not abuse its discretion in an equitable distribution case when distributing mortgage debt by not ordering plaintiff to remove defendant's name from the promissory note and deed of trust for the marital residence. Defendant did not argue to the trial court that his name be removed for the note and deed of trust. Even assuming the issue was not waived, defendant cited no authority requiring a trial court to order a party receiving the marital home to refinance the debt to have the other party removed from the note and deed of trust. The trial court took all of the relevant factors into account and determined that defendant was to assume responsibility for paying the existing mortgage on the residence. **Green v. Green, 719.**

DRUGS

Possession with intent to sell and distribute—marijuana—heroin—near a park—lack of subject matter jurisdiction—failure to allege over age of 21—The trial court lacked jurisdiction to accept defendant's guilty plea or to impose judgments for possession with intent to sell and distribute (PWISD) marijuana near a park or PWISD heroin near a park where the State conceded that neither indictment set forth an allegation that defendant was over the age of 21 and nothing in the record showed any stipulation or admission concerning defendant's age at the time of his arrest. **State v. Culbertson, 635.**

Possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—large quantity of un sourced cash—The trial court did not err in a drugs case by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana where the uncontroverted evidence showed that defendant, twenty years old, was carrying a large amount of cash (\$1,504.00) on his person and was on the grounds of a high school while possessing illegal drugs. Large amounts of cash on defendant's person supported an inference that he had the intent to sell or deliver. **State v. Yisrael, 184.**

Possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—packaging of illegal drugs—The trial court did not err in a drugs case by denying defendant's motion to dismiss the charge of

DRUGS—Continued

possession with intent to sell or deliver marijuana where an officer testified regarding the packaging of the three bags of 10.88 grams of marijuana into two larger plastic bags of remnant marijuana and one dime size bag of marijuana. The packaging and possession of both “sellable” and “unsellable” marijuana was evidence raising an inference that the jury could determine defendant had the intent to sell marijuana. **State v. Yisrael, 184.**

Possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—quantity of drugs—admitted possession—surrounding circumstances—evidence recovered—The trial court did not err by denying defendant’s motion to dismiss the charge of possession with intent to sell or deliver marijuana based on only 10.88 grams of marijuana being recovered. Although the amount found on defendant’s person and inside the vehicle’s console might not be sufficient, standing alone, to support an inference that defendant intended to sell or deliver marijuana, defendant’s admitted possession, together with other surrounding circumstances and evidence recovered, were sufficient. **State v. Yisrael, 184.**

Possession with intent to sell or deliver marijuana—motion to dismiss—sufficiency of evidence—intent—stolen and loaded handgun in vehicle—The trial court did not err in a drugs case by denying defendant’s motion to dismiss the charge of possession with intent to sell or deliver marijuana where a stolen and loaded handgun was also recovered from inside the glove compartment of a vehicle in addition to 10.88 grams of marijuana in the car. The Court of Appeals has previously recognized, as a practical matter, that firearms are frequently involved for protection in illegal drug trade. Further, neither our Supreme Court or Court of Appeals has ever recognized the *Wilkins* factors regarding packaging of the marijuana and cash recovered from defendant as exclusive for determining intent. **State v. Yisrael, 184.**

EMPLOYER AND EMPLOYEE

Retaliation against police officer—city manager—summary judgment—Summary judgment was properly granted against a police officer on a retaliation claim against a city manager arising from the police officer being passed over for promotion. The allegations and forecasted evidence did not support a claim against the city manager for the police chief’s promotion decision that was made months before the conversation with the city manager. **Forbes v. City of Durham, 255.**

Retaliation claim—42 U.S.C. § 1981—A retaliation claim for reporting acts of discrimination can be brought under 42 U.S.C. § 1981. Even though section 1981 does not explicitly include retaliation, precedent state that it is an integral part of preventing racial discrimination. **Forbes v. City of Durham, 255.**

Retaliation—42 U.S.C. § 1981 and § 1983 claims—The trial court properly granted summary judgment for Durham a police officer’s claim under 42 U.S.C. § 1983 that rose from his being passed over for promotion, allegedly in retaliation for mentioning the perception of racial discrimination by African-American officers to the police chief. Plaintiff did not direct the appellate courts to any policy or regulation that caused or encouraged the retaliation. **Forbes v. City of Durham, 255.**

Retaliation—being passed over for promotion—Summary judgment was properly granted for a police chief, a city manager, and the City of Durham on a claim under the North Carolina Constitution arising from plaintiff being passed over for promotion, allegedly in retaliation for reporting racial concerns. Plaintiff did not

EMPLOYER AND EMPLOYEE—Continued

provide support for his argument that there was a claim available under Article I, Section 19 of the State Constitution. **Forbes v. City of Durham, 255.**

Retaliation—police chief—promotion decision—Summary judgment was properly granted for a police chief on claims under 42 U.S.C. § 1981 and 1983 by one of his officers who was passed over for promotion. Plaintiff lacked sufficient evidence of a connection between his protected actions and the decision to pass him over for promotion. **Forbes v. City of Durham, 255.**

Wrongful retaliation—summary judgment—The trial court properly granted summary judgment for the City of Durham in a claim for employment retaliation under Title VII by a police officer passed over for promotion. While the officer contended that his comments to the police chief about perceived racial discrimination by African American officers were protected activities that caused the adverse action of changing the hiring process and passing him over for promotion, there must be a direct link connecting the comments to the promotion decision that is more than speculation. Moreover, a non-retaliatory reason for the promotion decision could be demonstrated. **Forbes v. City of Durham, 255.**

EQUITY

Clean hands—reimbursement of Reinsurance Facility—fraud by executive—unclean hands—The Insurance Commissioner did not abuse his discretion by determining that estoppel, ratification, and general equitable relief would not preclude the Reinsurance Facility from requiring repayment by an insurance company of previously reimbursed claims that were fraudulent. Even though the insurance company argued that the Facility's audit process did not discover the fraud, the insurance company itself was in violation of its duty. **Discovery Ins. Co. v. N.C. Dep't of Ins., 696.**

EVIDENCE

Expert witness testimony—sexual abuse—children delay disclosure of sexual abuse—reasons for delay—reliability test—Rule 702(a)—The trial court did not abuse its discretion in a child sex abuse case by allowing an expert witness in clinical social work specializing in child sexual abuse cases to testify that it was not uncommon for children to delay the disclosure of sexual abuse and by allowing the witness to provide possible reasons for delayed disclosures where the testimony satisfied the three-prong reliability test under N.C.G.S. § 8C-1, Rule 702(a). Defendant failed to demonstrate that his arguments attacking the principles and methods of the testimony were pertinent in assessing its reliability. **State v. Shore, 420.**

Felony child abuse—nurse practitioner testimony—vouching for victim's credibility—The trial court did not commit plain error in a child abuse case by concluding a nurse practitioner's testimony relating the victim's disclosure about how his injuries occurred and who caused the injuries was not improper vouching. The nurse was describing her process of gathering necessary information to make a medical diagnosis, and further, there was no prejudice based on the overwhelming evidence of defendant's guilt, including the testimony of three eyewitnesses. **State v. Prince, 389.**

Hearsay—admissions by party opponent—Evidence in an abused juvenile proceeding was hearsay but admissible as admissions of a party opponent where the

EVIDENCE—Continued

mother testified about the father's actions. His actions had occurred in her presence and she was a party to the action filed by the Department of Social Services alleging abuse and neglect. **In re J.M., 483.**

Hearsay—medical exception—Statements by a mother during a well baby checkup about the father's actions were hearsay but admissible in an abused juvenile proceeding. The two-month-old baby had marks on the neck and bloodshot eyes that were observed by the pediatrician, and the child was immediately sent to the emergency department of a hospital, where the mother disclosed the same information. The child was too young to talk and the declarant was not required to be the patient. **In re J.M., 483.**

Lay opinion—visual identification—crack cocaine—chemical analysis—The trial court did not commit plain or prejudicial error in a drug case by allowing an agent's lay opinion testimony visually identifying a substance (crack cocaine) as a controlled substance where the State presented expert testimony, based on a scientifically valid chemical analysis, that the substance was a controlled substance. **State v. Carter, 104.**

Motion to suppress all evidence—officer stop—summary dismissal of motion—testimony not required—affidavit—reasonable suspicion—The trial court did not err in resisting a law enforcement officer and assault inflicting serious bodily injury on a law enforcement officer case by failing to hear sworn testimony before denying defendant's motion to suppress all evidence obtained pursuant to an officer's stop. Testimony is only required under N.C.G.S. § 15A-977(d) if the trial court first determines it cannot dispose of the motion summarily. Further, defendant's affidavit gave rise to a reasonable suspicion that she had been trespassing at a shelter, and that an officer detained her as the only means of ascertaining her identity for the purposes of "trespassing" her from the shelter. **State v. Williams, 168.**

Second-degree sexual offense—denial of cross-examination—prosecuting witness's sexual history—Rape Shield law—Rule 403—The trial court did not abuse its discretion in a second-degree sexual offense case by denying defendant's cross-examination of a prosecuting witness regarding his admission of sexually assaulting his sister when he was a child where it occurred more than a decade earlier and involved no factual elements similar to the underlying charge. The evidence of prior sexual behavior was protected by the Rape Shield law under N.C.G.S. § 8C-1, Rule 412 and the probative value of the evidence of the witness's sexual history was substantially outweighed by its potential for unfair prejudice under N.C.G.S. § 8C-1, Rule 403. **State v. West, 162.**

FRAUD

Particularity—summary judgment—invoice—alleged promises—The trial court did not err by granting summary judgment in favor of defendant landscaper on a fraud claim for landscaping services where plaintiffs failed to allege a proper fraud claim under North Carolina law with particularity regarding both an invoice and alleged promises as required by N.C.G.S. § 1A-1, Rule 9(b). **Rider v. Hodges, 82.**

GUARDIAN AND WARD

Appointment of guardian—financial resources—In a guardianship proceeding for a minor child, the trial court's finding that the finances of the child's aunt

GUARDIAN AND WARD—Continued

were sufficient to care for the child was supported by the testimony of the aunt, who worked as a school bus driver. Her testimony could have been more specific, but her sworn statement that she was willing to care for the child and possessed the financial resources to do so constituted competent evidence. The standard of review merely asks if there was competent evidence to support the findings. **In re N.H., 501.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—ambulatory surgical center—financial and operational projections—The Department of Health and Human Services did not err in a certificate of need (CON) proceeding involving an ambulatory surgical center in its consideration of the criteria involving financial and operational projections. Although the hospital objecting to the ambulatory surgical center contended that this criteria was not satisfied because the application for the CON contained no documentation of the builder's financing or funding source, the application was not required to show the builder's source of funding for the construction of the shell building. **Blue Ridge Healthcare Hosps., Inc. v. N.C. Dep't of Health & Human Servs., 451.**

Certificate of need—ambulatory surgical center—prejudice—The lack of prejudice to the objecting hospital provided an alternative basis for affirming a certificate of need for an ambulatory surgical center. Normal competition does not constitute a showing of substantial prejudice from a certificate of need. **Blue Ridge Healthcare Hosps., Inc. v. N.C. Dep't of Health & Human Servs., 451.**

Certificate of need—operating rooms—criteria—duplicate facts—In an action arising from a certificate of need (CON) proceeding for an ambulatory surgical center, the hospital did not show that the Department of Health and Human Services failed to perform an independent review and application of a criterion when it relied on facts used for other criteria. **Blue Ridge Healthcare Hosps., Inc. v. N.C. Dep't of Health & Human Servs., 451.**

Operating rooms—certificate of need—agency criteria—geographic scope—In case involving the opening of an ambulatory surgical center and the issue of geographic scope, the hospital challenging the new surgical center did not meet its burden of showing that the Department of Health and Human Services' (the Agency's) interpretation and application of N.C.G.S. § 131E-183(a) was unreasonable or based on an impermissible construction of the statute. The Agency used its articulated and established practice of applying the standards and definitions set forth in the Administrative Code for determining certificates of need. **Blue Ridge Healthcare Hosps., Inc. v. N.C. Dep't of Health & Human Servs., 451.**

INDICTMENT AND INFORMATION

Habitual misdemeanor larceny—acting in concert jury instruction—allegation beyond essential elements of crime—The trial court did not err in a habitual misdemeanor larceny case by giving an acting in concert instruction even though it was not listed in the indictment. The alleged errors in the indictment did not prevent defendant from preparing his defense, and defendant was not at risk for a subsequent prosecution for the same incident. Further, the numerical discrepancies for the stolen items did not amount to error. **State v. Glidewell, 110.**

INSURANCE

Action against agent—policy exclusion—failure to read policy—contributory negligence—In a negligence action against an insurance agent for failure to obtain a property insurance policy without a vacancy exclusion, the admitted failure of plaintiff to read the policy did not necessitate summary judgment on contributory negligence because there were facts which suggested that plaintiff may have been misled or put off his guard by the agent. **Holmes v. Sheppard, 739.**

Action against agent—vacancy exclusion included policy—merger and acceptance—Summary judgment for defendant was not appropriate in an action against an insurance agent for not obtaining a property insurance policy without a vacancy exclusion. Although defendant argued that summary judgment was appropriate because plaintiff received, retained, and thus accepted the policy, this was not an action in which plaintiff sought to hold the insurance company liable for an obligation not in the policy. **Holmes v. Sheppard, 739.**

Agent—negligence—duty of care—summary judgment—Summary judgment for defendant was not appropriate on a negligence claim against an insurance agent for not obtaining insurance on property without a vacancy exclusion. If a trier of fact were to believe the evidence that plaintiff requested a vacancy exclusion and that defendant sought to obtain a policy based on that request, then defendant undertook a duty to procure such a policy. **Holmes v. Sheppard, 739.**

Agent—policy—negligent misrepresentation—The trial court did not err by granting summary judgment for an insurance agent on a negligent misrepresentation claim arising from a vacancy exclusion in a property insurance policy. Although there was a dispute about whether the agent provided false information, plaintiff could have discovered the truth about the policy by reading it. Plaintiff did not allege that he was denied the opportunity to investigate or that he could not have learned the true facts by reasonable diligence. **Holmes v. Sheppard, 739.**

Duty to defend—liability policy—sexual assault on defendant's daughter—declaratory judgment—There was no duty to defend by an insurance company where the policy holders were sued for negligence arising from a sexual assault upon defendant John Doe's daughter. The policy provided coverage for suits arising from bodily injury or property damage, and John Doe's claims for loss of his daughter's services and their damaged relationship did not arise from bodily injury as defined by the policy. **N.C. Farm Bureau Mut. Ins. Co., Inc. v. Phillips, 758.**

Prehearing discovery—hearing before Insurance Commissioner—Defendant was correctly denied prehearing discovery prior to a hearing before the Insurance Commissioner in a case that rose from the Reinsurance Facility's demand that an insurance company repay reimbursements after fraud by a company executive was discovered. The specific statute controlling the case, N.C.G.S. § 58-2-50, did not provide for formal discovery for this hearing, and the Commissioner had not promulgated any rules for formal discovery. **Discovery Ins. Co. v. N.C. Dep't of Ins., 696.**

Reinsurance Facility—fraud by insurance executive—repayment to Facility—The Reinsurance Facility acted within its statutory authority when it ordered an insurance company to repay reimbursements to the insurance company by the Facility after fraud by an executive of the insurance company was discovered. Although the insurance company argued that there was no express authority that empowered the Facility to order the repayment, the Facility acted within its statutory authority to do what was necessary to accomplish the purpose of the Facility. N.C.G.S. § 58-37-35(g)(12). **Discovery Ins. Co. v. N.C. Dep't of Ins., 696.**

INSURANCE—Continued

Reinsurance Facility—fraudulent reimbursement losses—recovery—civil action not necessary—The Reinsurance Facility was not required to bring suit to recover reimbursements it had made to an insurance company where fraud by an executive of the company was discovered after the reimbursements were made. The Facility has the authority to order a member company to correct claims reimbursements erroneously paid by the Facility due to fidelity losses arising from claims handling. **Discovery Ins. Co. v. N.C. Dep't of Ins., 696.**

Reinsurance Facility—reimbursement of fraudulent claims—recovery—findings—Findings and conclusions by the Insurance Commissioner were supported by the whole record in a case arising from fraud by an insurance company executive that was discovered after the Facility reimbursed the company for claims and the Facility sought repayment of the reimbursement. **Discovery Ins. Co. v. N.C. Dep't of Ins., 696.**

JUDGES

One judge overruling another—second summary judgment motion—A subsequent order by a second judge on a second summary judgment motion in the same case (one by defendants and one by plaintiffs) was vacated, leaving the first summary judgment order operative. Both parties moved for summary judgment on the same legal issue and, although plaintiffs argued that the second trial judge could rule on their motion because they supported it with different arguments, a subsequent motion for summary judgment may be ruled upon only when the legal issues differ. **Gardner v. Rink, 279.**

JUDGMENTS

Default—remand after appeal—motion to set aside entry of default—denied—grave injustice—In a case decided on other grounds, the trial court would have abused its discretion by denying defendants' motion to set aside an entry of default following remand where defendants would have suffered a grave injustice were they denied the ability to defend against plaintiffs' claims. The case was delayed in the trial court for reasons inherent in the appellate process; defendants promptly resumed discussions with plaintiff regarding discovery, settlement, and other related matters following the appellate decision; the entry of default came as a surprise to defendants; nothing in the record indicated that plaintiffs asserted that they had asserted any harm; and, given the size and nature of the claims, defendants would suffer a grave harm if they were denied the ability to defend against plaintiffs' claims. **Swan Beach Corolla, L.L.C. v. Cty. of Currituck, 837.**

Default—remand from appeal—time for answer—motion to set aside—good cause—The trial court abused its discretion by not applying the proper standard (good cause) in denying a motion to set aside an entry of default, which came after the case had been remanded by an appellate court. The trial court identified no reason for the denial of the motion other than uncertainty as to whether the time for filing an answer had run. Any doubt should be resolved in favor of setting aside an entry of default. **Swan Beach Corolla, L.L.C. v. Cty. of Currituck, 837.**

JURY

Jury instruction—actual possession—constructive possession—drugs—The trial court did not commit plain error by its instructions to the jury on actual and

JURY—Continued

constructive possession where there was substantial evidence that defendant constructively possessed the items seized during the search, and defendant did not contest the sufficiency of that evidence. The possession distinction did not play a role in the outcome of the case where the question for the jury was whether to believe that defendant's sister-in-law planted the drugs and that his wife's brother was storing weapons in defendant's house. **State v. Robinson, 397.**

Questions on voir dire—not a stake-out question—juror's opinions of DUI laws—A question to prospective jurors about whether DUI laws were too harsh or too lax was not a stake-out question because it did not provide any facts of the case and did not ask the jurors to state what their verdict would be under a given state of facts. There was no prejudice to defendant. **Haarhuis v. Cheek, 471.**

Selection—hypothetical question—not a stake-out question—A question asked during voir dire of the jury was hypothetical but was not a stake-out question because the facts presented were not similar to the underlying facts of the case and did not ask jurors to state what kind of verdict they would render. It asked a question about a key criterion of juror competency—following the law. **Haarhuis v. Cheek, 471.**

Selection—questions—attitude toward damages—There was no prejudice from jury voir dire questions concerning damages in an automobile accident case, even assuming they were stake-out questions. **Haarhuis v. Cheek, 471.**

Selection—questions—loss of caregiver—not a stake-out question—A jury voir dire question in an automobile accident case concerning whether the potential jurors had lost a caregiver was not a stake-out question and was appropriate to allow both parties to evaluate the fitness of each juror. **Haarhuis v. Cheek, 471.**

Written jury instructions after oral instructions—felonious breaking or entering—no conflicting instructions—The trial court did not err in an assault inflicting serious injury, second-degree sexual offense, assault by strangulation, felonious breaking or entering, and intimidating a witness case by providing the jury with written instructions on the charge of felonious breaking or entering that were similar to the trial court's earlier oral instructions. The jury requested a written copy and clarification upon certain points of law, and the trial court recognized a need to clarify the instructions. **State v. Voltz, 149.**

LARCENY

Motion to dismiss—sufficiency of evidence—lawful possession of property—conceded error—The State conceded that the trial court erred by denying defendant's motion to dismiss a larceny charge, arising from defendant's removal of appliances from a rental property from which she was being evicted, where she was in lawful possession of the property at the time she carried it away. **State v. Bradsher, 625.**

Of a firearm—intent to permanently deprive—There was sufficient evidence to support the element of intent for the charge of larceny of a firearm where police found the stolen firearm in the spare tire well of defendant's vehicle and defendant feigned ignorance about the firearm. **State v. Rogers, 413.**

LIENS

Foreclosure—relief—The superior court erred in the relief granted to a homeowner who was foreclosed upon for failure to pay homeowners dues where the homeowners association had not exercised due diligence in providing notice of the sale but had provided constitutionally sufficient notice. The superior court ordered that the foreclosure sale be set aside and the title restored to the debtor; however, N.C.G.S. § 1-108 favors a good faith purchaser at a judicial sale, and the superior court cannot order relief which affects the title to property which has been sold to a good faith purchaser with constitutionally sufficient notice. The owner was entitled to seek restitution from the homeowners association. **In re Foreclosure of Ackah, 284.**

Homeowners dues—foreclosure—notice—The superior court did not err by holding that a homeowner who was foreclosed upon by her homeowners association while she was out of the country was entitled to relief. The homeowners association did not exercise due diligence in giving notice in that it had reason to know the owner was not residing at the residence and only posted a notice on the door of the residence when certified mail was returned. Due diligence required that the homeowners association at least attempt notification through the email address which the owner had left with them. **In re Foreclosure of Ackah, 284.**

MALICIOUS PROSECUTION

Prosecution for false pretenses—probable cause fabricated—The trial court erred by dismissing plaintiff's claims for malicious prosecution for false pretenses arising from loans from relatives and stock market investments. Plaintiff alleged that the prosecuting officers not only lacked probable cause but also concealed and fabricated evidence in order to cause him to be prosecuted. **Braswell v. Medina, 217.**

MENTAL ILLNESS

Involuntary commitment—initial examination—negligence—no special relationship to third parties—The trial court did not abuse its discretion in a negligence action by entering an order granting defendant hospital and health system company's motion to dismiss and denying plaintiff family's motion to amend as futile where defendant hospital owed no legal duty to plaintiff family during an initial examination of plaintiffs' relative (a dishonorably discharged Marine and drug abuser) prior to an involuntary commitment. Defendants did not assume custody or a legal right to control the relative under the mental health statutes of N.C.G.S. § 122C-261 et seq., and there was no special relationship creating a duty to third parties for harm resulting from an examiner's recommendation against involuntary commitment. **McArdle v. Mission Hosp., Inc., 39.**

MOTOR VEHICLES

Driving while impaired—trooper testimony—HGN test—tender as an expert witness unnecessary—The trial court did not commit plain error in a driving while impaired case by allowing a trooper to testify at trial about a horizontal gaze nystagmus (HGN) test he administered on defendant during a stop. It was unnecessary for the State to make a formal tender of the trooper as an expert on HGN testing. **State v. Sauls, 684.**

MOTOR VEHICLES—Continued

Operating motor vehicle with open container—subject matter jurisdiction—citation not required to state all elements of charge—The trial court had subject matter jurisdiction in an operating a motor vehicle with an open container of alcohol (while alcohol remained in system) case even though a citation issued to defendant failed to state facts establishing each of the elements under N.C.G.S. § 20-138.7(a). A citation simply needs to identify the crime charged to comply with N.C.G.S. § 15A-302(c), and any failure of an officer to include each element of the crime in a citation is not fatal to the court's jurisdiction. Further, defendant was apprised of the charge against him and would not be subject to double jeopardy. **State v. Jones, 364.**

NEGLIGENCE

Summary judgment—ambiguous commercial lease—burst water pipe—modified sprinkler system—The trial court erred in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, by granting summary judgment in favor of all defendants on plaintiff lessee's negligence claims where the language in a commercial lease was ambiguous. Further, the issue of the various defendants' degree of involvement in modifying a sprinkler system was an issue to be resolved by the trial court on a motion for directed verdict. **Morrell v. Hardin Creek, Inc., 55.**

OBSTRUCTION OF JUSTICE

Civil claim—actions in underlying criminal case—The trial court properly dismissed plaintiff's obstruction of justice claims that arose from a prosecution for false pretensions following loans from relatives and stock market losses. Plaintiff sought to hold the prosecuting officers civilly liable for obstruction of justice solely for their actions taken in the course of his criminal prosecution, not for obstruction of plaintiff's ability to obtain a legal remedy. **Braswell v. Medina, 217.**

PARTIES

Motion to amend complaint—add party—reconsideration—The trial court's denial of plaintiff lessee's motion to amend a complaint to add E. Greene as a party defendant in an action for monetary damages, arising from a burst water pipe after a remodeling of a commercially leased property, needed to be reconsidered based on the reversal of the trial court's order granting summary judgment in favor of all defendants. **Morrell v. Hardin Creek, Inc., 55.**

PENALTIES, FINES, AND FORFEITURES

Bond forfeiture—actual notice before executing bail bond—failure to appear on two or more prior occasions—The trial court was statutorily barred under N.C.G.S. § 15A-544.5 from setting aside a bond forfeiture where a bail agent had actual notice from a properly marked release order, before executing a bail bond, that defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed. **State v. Hinnant, 785.**

Bond forfeiture—motion to set aside—failure to identify statutory basis—The trial court lacked authority to allow a surety's motion to set aside a bond forfeiture where the surety did not identify the specific statutory basis under N.C.G.S. § 15A-544.5 of its motion on the written form it filed. **State v. Chestnut, 772.**

PENALTIES, FINES, AND FORFEITURES—Continued

Reduction of bond forfeiture—denial of motion to set aside—no statutory authority—The trial court lacked statutory authority under N.C.G.S. § 15A-544.5 to reduce a bond forfeiture amount after denying a surety's motion to set aside the bond forfeiture. The only relief it could grant was the setting aside of the forfeiture based on the enumerated statutory reasons. **State v. Knight, 802.**

PERSONAL PROPERTY

Injury to personal property—motion to dismiss—sufficiency of evidence—willful and wanton conduct—causation—The trial court erred by denying defendant's motion to dismiss the charge of injury to personal property where the State failed to meet its burden of sufficiently establishing that defendant intended to willfully and wantonly cause injury to the personal property, or that defendant actually caused the damage. **State v. Bradsher, 625.**

POLICE OFFICERS

Assault inflicting serious bodily injury on a law enforcement officer—motion to dismiss—sufficiency of evidence—bite on arm—permanent or protracted condition causing extreme pain—serious permanent injury—The trial court erred by denying defendant's motion to dismiss the charge of assault inflicting serious bodily injury on a law enforcement officer where the evidence was insufficient to support a finding that defendant's bite of an officer's arm resulted in a permanent or protracted condition that caused extreme pain, or caused serious permanent injury. **State v. Williams, 168.**

Delaying a public officer—motion to dismiss—sufficiency of evidence—intent—willfulness—The trial court did not err by denying defendant's motion to dismiss the charge of delaying a public officer in violation of N.C.G.S. § 14-223 in a shoplifting case based on alleged insufficient evidence of intent. An officer's testimony about his interactions with defendant at the time of her arrest gave rise to an inference that defendant willfully gave false information for the purpose of delaying the officer in the performance of his duties. **State v. Peters, 382.**

Delaying a public officer—motion to dismiss—sufficiency of evidence—wrongful deed—The trial court did not err by denying defendant's motion to dismiss the charge of delaying a public officer in a shoplifting case based on alleged insufficient evidence of a wrongful deed. Defendant produced an altered ID and knowingly stated that the erroneous number on the ID was accurate, thus causing an officer to spend more time locating records associated with defendant to continue the investigation. **State v. Peters, 382.**

Resisting an officer—motion to dismiss—sufficiency of evidence—reasonable articulable suspicion—ascertaining identity of trespasser at shelter—discharging duty as an officer—The trial court did not err by denying defendant's motions to dismiss the charges of resisting an officer where an officer had a reasonable articulable suspicion to stop and detain defendant for trespassing at a shelter. The officer was discharging or attempting to discharge his duty as an officer at the time defendant resisted him. **State v. Williams, 168.**

PROBATION AND PAROLE

Error in revocation of probation—mootness—willful violation—missed curfew—enhanced sentencing for subsequent offenses—Defendant's appeal from a judgment revoking his probation and activating his suspended sentence was dismissed as moot even though the trial court lacked jurisdiction to revoke probation under the Justice Reinvestment Act. The pertinent offenses occurred prior to 1 December 2011, but defendant had already served his time and would not suffer future collateral consequences from the trial court's error. N.C.G.S. § 15A-1340.16(d)(12a), providing for enhanced sentencing for subsequent offenses, was actually triggered by the trial court's finding that defendant was in willful violation of his probation for missing curfew. **State v. Posey, 132.**

PROCESS AND SERVICE

Service by publication—personal delivery and certified mail not effective—prior experience—The trial court did not abuse its discretion by denying defendant's motion to set aside an entry of default and a subsequent foreclosure for failure to pay taxes where defendant contended that service by publication was made before a diligent effort to locate and serve defendant personally. Plaintiff knew from extensive prior experience that it could not make service on defendant by personal delivery or by personal or certified mail. **Watauga Cty. v. Beal, 849.**

REAL PROPERTY

Condos—association and developer—clubhouse dues—breach of contract—breach of covenant of good faith—Summary judgment for a homeowners association was reversed in a dispute arising from the association's refusal to collect clubhouse dues from homeowners and pay them to the developer. The declaration clearly obligated the association and the evidence clearly created a genuine issue or material fact regarding the developer's breach of contract and good faith claims. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

Condos—clubhouse dues—In an action arising from the refusal of a homeowners association to collect and remit clubhouse dues to the developer after the homeowners association had gained control of the development, the argument that the association had no duty to collect the clubhouse dues was rejected. The Legislature did not intend N.C.G.S. § 47F-3-102 to limit the power of a planned community's association, but to provide additional powers if the declaration is silent on the point. Here, the 1999 Declaration specifically authorized the Association to assess clubhouse dues. Moreover, N.C.G.S. § 47F-3-102 authorized the imposition of charges for services provided to lot owners, such as providing access to and maintaining a clubhouse amenity. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

Condos—clubhouse—contractual obligation—The question of whether a homeowners association was obligated to pay clubhouse dues to the developer under a Declaration was contractual in nature and not a matter of real or personal covenants. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

Condos—dispute with homeowners association—clubhouse dues—The trial court's dismissal of claims by a homeowners association against the developer concerning clubhouse dues was affirmed. The trial court concluded that the claims were

REAL PROPERTY—Continued

time barred, but in fact the one-year limitation relied on by the trial court concerned amendments to an existing Declaration, not to a new declaration. Whether labelled an “amendment” or not, the declaration at issue here merged two former communities into a single planned community, which the Planned Community Act treats as terminating the former declarations and establishing a new declaration. **Conleys Creek Ltd. P’ship v. Smoky Mountain Country Club Prop. Owners Ass’n, Inc., 236.**

Condos—homeowners association and developer—breach of fiduciary duty—The trial court correctly dismissed a counterclaim by a homeowners association against the members of a family who constituted the developer (excepting two members of the family who were an officer and director of the association). The developer’s relationship with the homeowners association was contractual and parties to a contract do not become each other’s fiduciaries. However, the officers and directors of the association owed a fiduciary duty to the association. **Conleys Creek Ltd. P’ship v. Smoky Mountain Country Club Prop. Owners Ass’n, Inc., 236.**

Condos—homeowners association and developer—clubhouse dues—civil conspiracy—The trial court properly granted summary judgment for a homeowners association on the developer’s civil conspiracy claim arising from a dispute over clubhouse dues. There was no allegation that the association conspired with any third party regarding the dues. The association, as a corporation, cannot conspire with itself. **Conleys Creek Ltd. P’ship v. Smoky Mountain Country Club Prop. Owners Ass’n, Inc., 236.**

Condos—reformation of Declaration provisions—necessary parties—A homeowners association’s counterclaim seeking reformation of its Declaration provisions was properly dismissed. Any reformation order would necessarily affect the ownership interests of condo unit owners in certain common areas and they were necessary parties. Without all necessary parties, there was no authority to decide the reformation claim. **Conleys Creek Ltd. P’ship v. Smoky Mountain Country Club Prop. Owners Ass’n, Inc., 236.**

Condos—status of ownership—A homeowners association was entitled to an order declaring that a 1999 Declaration recorded by the developer established a form of property ownership not recognized in North Carolina, and an order dismissing the association’s counterclaim was reversed. While North Carolina’s Condominium Act requires that the common areas be owned by the unit owners in common, here the homeowners association owned the common areas. **Conleys Creek Ltd. P’ship v. Smoky Mountain Country Club Prop. Owners Ass’n, Inc., 236.**

Partition by sale—actual partition—substantial injury—specific findings of fact required—value—The trial court erred in a partition by sale of real property by determining that an actual partition of the pertinent property could not be made without causing substantial injury to one or more of the interested parties. The trial court failed to make specific findings of fact necessary to support an order for partition by sale of the parcels under N.C.G.S. § 46-22, including the value of each individual parcel and the value of each share of the parcels if they were to be physically partitioned. **Solesbee v. Brown, 603.**

Partition by sale—factors—personal value—difficulty of physical partition—highest and best use of parcels—substantial injury—owelty—The trial court erred in a partition by sale of real property by utilizing factors such as the personal value of the parcels to the parties, the difficulty of physical partition, and the “highest and best use” of the parcels in concluding that substantial injury would

REAL PROPERTY—Continued

result by physical partition. Until the trial court made the requisite findings regarding the fair market value of the parcels, it could not decide whether owelty (the ability of a court to order that a cotenant who receives a portion of the land with greater value than his proportionate share of the property's total value to pay his former cotenants money to equalize the value) was appropriate under N.C.G.S. § 46-22(b1). **Solesbee v. Brown, 603.**

ROBBERY

Dangerous weapon—motion to dismiss—sufficiency of evidence—corpus delicti—trustworthiness—The trial court did not err by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon where the State provided substantial independent evidence establishing the trustworthiness of the essential facts to which defendant confessed. Defendant's admission he stole \$104.00 from the victim was credible, and the corpus delicti for robbery with a dangerous weapon was established. **State v. Messer, 812.**

SATELLITE-BASED MONITORING

Motion to dismiss application—sufficiency of evidence—enrollment—reasonable Fourth Amendment search—The trial court erred by denying defendant's motion to dismiss the State's application for satellite-based monitoring where the State's evidence was insufficient to establish that the enrollment constituted a reasonable Fourth Amendment search under *Grady v. North Carolina*, *State v. Blue*, and *State v. Morris*. **State v. Greene, 780.**

SCHOOLS AND EDUCATION

Right to sound basic public education—local board of county commissioners not responsible—The trial court did not err by granting a local board of county commissioners' motion to dismiss under Rule 12(b)(6) of a claim by North Carolina schoolchildren asserting a violation of their right to a sound basic public education, guaranteed by the North Carolina Constitution, based on the board's alleged failure to adequately fund certain aspects of public schools. The board did not bear the constitutional duty to provide a sound basic education, and the correct avenue for addressing plaintiffs' concerns in the present case was through the ongoing litigation in *Leandro I* and *Leandro II*. **Silver v. Halifax Cty. Bd. of Comm'rs, 559.**

SEARCH AND SEIZURE

Denial of motion to suppress—traffic stop—prejudicial error—fruit of poisonous tree—The trial court's denial of defendant's motion to suppress evidence obtained by law enforcement officers following a traffic stop was prejudicial error where most of the evidence used to support defendant's conviction was derived from an officer's unconstitutional seizure and thus was fruit of the poisonous tree. **State v. Nicholson, 665.**

Motion to suppress—protective sweep—plain view doctrine—incriminating nature not immediately apparent—The trial court erred in a possession of a firearm by a felon case by denying defendant's motion to suppress a shotgun seized from defendant's apartment while officers executed arrest warrants issued for misdemeanor offenses. Although the officers had authority to conduct a protective sweep

SEARCH AND SEIZURE—Continued

of the apartment, the seizure of the shotgun could not be justified under the plain view doctrine where the incriminating nature of the shotgun was not immediately apparent. **State v. Smith, 138.**

Motion to suppress—traffic stop—lack of reasonable suspicion—The trial court erred in a common law robbery case by denying defendant's motion to suppress evidence obtained by law enforcement officers following an investigatory stop, based on lack of reasonable suspicion. The officers had no evidence of any criminal activity to which they could objectively point, and the series of activities did not provide reasonable suspicion. **State v. Nicholson, 665.**

Motion to suppress—vehicle stop—sufficiency of findings of fact—conclusion of law—totality of circumstances—reasonable suspicion—The trial court did not err in a driving while intoxicated and reckless and careless driving case by granting defendant's motion to suppress where the pertinent findings were supported by competent evidence and supported the conclusion of law that, given the totality of circumstances, an informant's tip did not have enough indicia of credibility to create reasonable suspicion for a trooper to stop defendant's vehicle. **State v. Walker, 828.**

Protective sweep—apartment rooms—immediately adjoining place of arrest—The trial court did not err in a possession of a firearm by a felon case by concluding officers had authority to conduct a protective sweep of all rooms in defendant's apartment where the sole purpose was to determine whether there were any other occupants in the apartment that could launch an attack on the officers. All of the rooms, including defendant's bedroom where a shotgun was found, were part of the space immediately adjoining the place of arrest. **State v. Smith, 138.**

Vehicle stop—objective justification for stop—motion to suppress evidence—reasonable suspicion—The trial court did not commit plain error in a driving while impaired case by denying defendant's motion to suppress evidence resulting from the stop of her vehicle, including various field sobriety tests, where the evidence together provided an "objective justification" for stopping defendant. The totality of circumstances showed defendant's vehicle was idling in front of a closed business late at night, the business and surrounding properties had experienced several break-ins, and defendant pulled away when the deputy approached her car. **State v. Sauls, 684.**

SENTENCING

First-degree murder—resentencing—lack of jurisdiction—Supreme Court mandate not issued—The trial court lacked jurisdiction to resentence a sixteen-year-old defendant in a first-degree murder case where the mandate from the N.C. Supreme Court had not been issued. The judgment was vacated and remanded for resentencing. **State v. Seam, 417.**

Juvenile—life in prison without the possibility of parole—failure to make statutorily required findings of fact—no jurisdiction after notice of appeal—The trial court erred in a first-degree murder case by failing to make statutorily required findings of fact on the presence of mitigating factors under N.C.G.S. § 15A-1340.19B before sentencing a juvenile to life in prison without the possibility of parole. Further, the trial court lacked jurisdiction to make findings after defendant gave notice of appeal. **State v. May, 119.**

SENTENCING—Continued

Prior record level—erroneous calculation—harmless error—sentencing within presumptive range—The trial court committed harmless error by its calculation of defendant's prior record level where the trial court's sentence was within the presumptive range at the correct record level. **State v. Harris, 653.**

Prior record level—South Carolina conviction—criminal sexual conduct in the third degree—substantially similar to North Carolina offenses—second—degree forcible rape—second—degree forcible sexual offense—The trial court did not err in a second-degree sexual offense and second-degree rape case by calculating defendant's prior record level at VI based on its conclusion that defendant's prior South Carolina offense of criminal sexual conduct in the third degree was substantially similar to North Carolina's offenses of second-degree forcible rape and second-degree forcible sexual offense. Any violation of S.C. Code Ann. § 16-3-654 would also be a violation of either N.C.G.S. § 14-27.22 or § 14-27.27, and vice versa. **State v. Bryant, 93.**

Prior record level—South Carolina conviction—criminal sexual conduct with minors in the first degree—not substantially similar to North Carolina offenses—statutory rape of child by adult—statutory sexual offense with child by adult—harmless error—The trial court committed harmless error in a second-degree sexual offense and second-degree rape case by calculating defendant's prior record level VI based on its conclusion that defendant's 1996 South Carolina conviction for criminal sexual conduct with minors in the first degree was substantially similar to North Carolina's offenses of statutory rape of a child by an adult under N.C.G.S. § 14-27.23 and statutory sexual offense with a child by an adult under N.C.G.S. § 14-27.28, where there were disparate age requirements. The error did not affect defendant's prior record level calculation. **State v. Bryant, 93.**

Suspended sentence—conditional discharge—burden of proof—eligibility—The trial court erred in a driving while impaired and drug possession case by entering a suspended sentence rather than a conditional discharge under N.C.G.S. § 90-96 where, notwithstanding the fact that the State had the burden at trial, the trial court did not afford either party the opportunity to establish defendant's eligibility or lack thereof. **State v. Dail, 645.**

SEXUAL OFFENDERS

Sex offender registry—substantive due process—current or potential threat to public safety—The trial court did not violate petitioner's due process rights by denying his request to be removed from the North Carolina Sex Offender Registry where although the trial court found he was not otherwise a current or potential threat to public safety, N.C.G.S. § 14-208.12A identified and classified petitioner as a continuing threat to public safety under federal sex offender standards. **In re Bethea, 749.**

UNFAIR TRADE PRACTICES

Condos—homeowners association and developer—clubhouse dues—The trial court erroneously dismissed a homeowners association's counterclaim for unfair and deceptive practices arising from a dispute with the developer. The purported misconduct took place while the developer controlled the association and was more properly classified as having taken place within a single entity rather than in commerce. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

UNFAIR TRADE PRACTICES—Continued

Unfair and deceptive trade practices—landscaping—no contract for aggravating circumstances—invoicing—no proximate injury—The trial court did not err by granting summary judgment in favor of defendant landscaper on an unfair and deceptive trade practices claim under N.C.G.S § 75-1.1(a) for landscaping services where there was no contract between the parties to back up plaintiffs' claim of aggravating circumstances and any alleged acts regarding the invoicing did not cause proximate injury. **Rider v. Hodges, 82.**

UTILITIES

Solar panels on church—electricity sold to church—public utility—Plaintiff was operating as a public utility and was subject to regulation by the Utilities Commission when it placed solar panels on the roof of a church, retained ownership of the panels, and sold the electricity to the church. Although plaintiff only sought to provide affordable solar electricity to non-profits, a subset of the population, approval of its activity would open the door for other organizations to offer similar arrangements to other classes of the public, upsetting the balance of the marketplace and jeopardizing regulation of the industry. Its activity was contrary to the North Carolina public policy intended to provide electricity to all at affordable rates. **State ex rel. Utils. Comm'n v. N.C. Waste Awareness & Reduction Network, 613.**

WORKERS' COMPENSATION

Average weekly wage—per diem payments—in lieu of wages—The Industrial Commission did not err in a worker's compensation case in its determination of plaintiff's average weekly wage—specifically, the determination that per diem payments were in lieu of wages. This was a question of fact which was supported by the evidence, and the Court of Appeals was not free to conduct a de novo review. **Myres v. Strom Aviation, Inc., 309.**

Expert opinions—competent evidence—injuries causally related to workplace accident—The Industrial Commission did not err in a workers' compensation case by concluding that the expert opinions supported competent evidence to prove plaintiff employee's neck, hand, and wrist injuries were causally related to her workplace accident. The Commission is the sole judge of the credibility of witnesses and the weight to be given to their testimony. **Pine v. Wal-Mart Assocs., Inc., 321.**

Parsons presumption erroneously applied—preponderance of evidence—additional medical conditions—causally related to workplace injury—Although the Industrial Commission erred in a workers' compensation case by applying the *Parsons* presumption to a medical condition not listed on an employer's admission of compensability form, the error did not require reversal where the Commission also found that plaintiff employee had proved by a preponderance of the evidence that her additional medical conditions were causally related to her workplace injury. **Pine v. Wal-Mart Assocs., Inc., 321.**

Symphony violinist—average weekly wage—Of the five methods of determining the average weekly wage of an injured symphony violinist, method five applied because none of the other statutory reasons were appropriate. The violinist was employed for 36 weeks in the year rather than 52 weeks; applying the methods intended for employment for less than 52 weeks would result in putting the violinist in a better position than before her injury or agreed by the parties to be inapplicable. **Frank v. Charlotte Symphony, 269.**

WORKERS' COMPENSATION—Continued

Temporary total disability benefits—average weekly wage—method of calculation—fair and just—The Industrial Commission erred in a workers' compensation case by utilizing Method 3 set out in N.C.G.S. § 97-2(5) to calculate plaintiff's average weekly wage for temporary total disability benefits. The method was not "fair and just" as required by the statute since it ignored an undisputed fact of the employee's employment and the case was remanded to the Commission to utilize Method 5 to appropriately consider plaintiff's post-injury work. **Ball v. Bayada Home Health Care, 1.**

ZONING

Zoning ordinance—dumpster screening requirement—nonconforming structures—land activity—The superior court and a City Board erred in a zoning case by concluding petitioner company's unscreened dumpsters on industrially zoned property were nonconforming structures subject to the nonconformance provisions of a zoning ordinance without determining whether petitioner's land activity triggered application of Section 12.303 of the ordinance's dumpster-screening requirement. **NCJS, LLC v. City of Charlotte, 72.**

Zoning ordinance—dumpster screening requirement—standards of review—appellate record—meaningful review—Although the superior court erred in a zoning case by failing to identify and apply the proper standards of review to each issue separately, the Court of Appeals elected not to remand the case where the appellate record permitted a meaningful review of the dispositive issue of whether the City Board's interpretation and application of a zoning ordinance, posing a dumpster screening requirement, warranted reversal of its ultimate decision. **NCJS, LLC v. City of Charlotte, 72.**