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CASES REPORTED

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CASES REPORTED WITHOUT PUBLISHED OPINIONS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CHRIS AZAR, PETITIONER
v.
TOWN OF INDIAN TRAIL BOARD OF ADJUSTMENT, RESPONDENT

No. COA17-704

Filed 19 December 2017

Civil Procedure—judicial review of board of adjustment's decision—failure to join town as respondent—amended petition too late

Where petitioner sought judicial review of a town board of adjustment's denial of a special use permit, his failure to join the town as respondent in his original petition as required by N.C.G.S. § 160A-393(e) was not cured by his amended petition filed outside the 30-day limitations window, since it was an attempt to add the town as a new party. The Court of Appeals affirmed the trial court's order granting the board of adjustment's motion to dismiss for failure to join a necessary party.

Judge DAVIS concurring in the result only.

Appeal by petitioner from order entered 4 April 2017 by Judge Kevin M. Bridges in Union County Superior Court. Heard in the Court of Appeals 29 November 2017.

Steven D. Starnes for petitioner-appellant.

Middlebrooks Law PLLC, by James G. Middlebrooks, for respondent-appellees.

TYSON, Judge.

Chris Azar ("Appellant") appeals from the superior court's order granting the Town of Indian Trail Board of Adjustment's motion to dismiss Appellant's petition for judicial review of the Town of Indian Trail's denial of a special use permit. We affirm.

I. Background

Appellant owns a parcel of real property located within the jurisdictional limits of the Town of Indian Trail (the "Town"). Appellant has long intended to build town homes upon this property. Around 2003, the Town advised Appellant to petition to rezone his property from Light Industrial to Multi-Family, which was allowed. Subsequently, Appellant applied to the Town for and was granted a special use permit for a multi-family housing project in 2004. The special use permit was renewed in 2006 and again in 2012.

In 2016, Appellant requested another renewal of the special use permit. The Town's Board of Adjustment conducted a hearing on 27 October 2016 to decide whether to grant Appellant's renewal request. The Town's Board of Adjustment denied Appellant's request to renew his special use permit. The Board of Adjustment voted on four factors specified in the town zoning ordinance to determine whether Appellant's special use permit request should be granted.

On the first factor of "Not Materially Endanger the Public Health or Safety[,]" "[t]he Board voted 5 to 0 that the proposed [special use permit] request would materially endanger the public health or safety." On the second factor of "Not Substantially Injure the Value of Adjoining or Abutting Property[,]" "[t]he Board voted 3 to 2 that the proposed [special use permit] request would substantially injure the value of adjoining or abutting property."

On the third factor of "Be in Harmony With The Area In Which It Is To Be Located[,]" "[t]he Board voted 5 to 0 that the proposed [special use permit] request would be in harmony with the area in which it is to be located." On the fourth factor of "Be in General Conformity With The Town of Indian Trail Comprehensive Plan or Other Adopted Plans[,]" "[t]he Board voted 5 to 0 that the proposed [special use permit] request would be in general conformity with the Town of Indian Trail Comprehensive Plan or other adopted [plan]."

Appellant received written notice of the Board of Adjustment's denial of his special use permit request on 15 December 2016. On

5 January 2017, Appellant filed a petition for judicial review under writ of certiorari of the decision to deny the special use permit. Appellant's petition named the Board of Adjustment, but not the Town, as the respondent to the action. Appellant's petition stated that he was seeking judicial review pursuant to "N.C. G.S. 150B-45[,]" which is the portion of the North Carolina Administrative Procedure Act statute providing for judicial review of administrative decisions of state agencies. *See* N.C. Gen. Stat. § 150B-1 *et seq.* (2015).

The Board of Adjustment moved to dismiss Appellant's petition pursuant to both Rules 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure, for the failure to state a claim upon which relief can be granted, and the failure to join a necessary party, respectively. N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 12(b)(7) (2015). The Board of Adjustment asserted the following bases in its motion to dismiss: (1) the superior court lacked jurisdiction to review Appellant's petition under N.C. Gen. Stat. § 150B-45, because that statute does not apply to local governmental units; (2) Appellant failed to name the Town as the respondent to the action pursuant to N.C. Gen. Stat. § 160A-393(e) (2015); and (3) Appellant failed to file a proper petition for writ of certiorari within 30 days of 15 December 2016 pursuant to N.C. Gen. Stat. §§ 160A-388(e2)(2) and -393 (2015).

Appellant filed an amended petition for judicial review under writ of certiorari pursuant to N.C. Gen. Stat. § 160A-393 naming the Town as the respondent on 29 March 2017. Respondent Town asserts this later filed amended petition does not relate back to Appellant's initial petition.

On 4 April 2017, the superior court granted the Town's motion to dismiss, and concluded that the "initial petition in this case failed to comply [with] N.C. Gen. Stat. § 160A-393, and his petition filed on March 29, 2017, was filed long after the 30-day limitation period for appealing such decisions." Appellant timely filed notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court from a final order of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Standard of Review

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

Quasi-judicial decisions by a city's Board of Adjustment are "subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2). N.C. Gen. Stat. § 160A-393(e) provides that "[t]he respondent named in the petition shall be the city whose decision-making board made the decision that is being appealed[.]"

A party is a "necessary party" to an action when he or she "is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party." *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365-66 (1978) (citations omitted). Dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(7) for failure to join a necessary party "is proper only when the defect cannot be cured[.]" *Howell v. Fisher*, 49 N.C. App. 488, 491, 272 S.E.2d 19, 22 (1980) (citations omitted), *disc. review denied*, 302 N.C. 218, 277 S.E.2d 69 (1981).

IV. Analysis

A. *Dismissal*

The trial court dismissed Appellant's amended petition for judicial review for his failure to state a claim for which relief can be granted under Rule 12(b)(6) and for Appellant's failure to join the Town, as opposed to the Town's Board of Adjustment, as a necessary party in his original petition under Rule 12(b)(7).

The statutes pertinent to Appellant's petition for review of the Board's decision in this case provide as follows:

> Every quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393. *A petition for review shall be filed with the clerk of superior court by the later of 30 days after the decision is effective or after a written copy thereof is given* in accordance with subdivision (1) of this subsection. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.

N.C. Gen. Stat. § 160A-388(e2)(2) (emphasis supplied).

> *The respondent named in the petition shall be the city whose decision-making board made the decision that is being appealed*, except that if the petitioner is a city that has filed a petition pursuant to subdivision (4) of

> subsection (d) of this section, then the respondent shall be the decision-making board. If the petitioner is not the applicant before the decision-making board whose decision is being appealed, the petitioner shall also name that applicant as a respondent. Any petitioner may name as a respondent any person with an ownership or leasehold interest in the property that is the subject of the decision being appealed who participated in the hearing, or was an applicant, before the decision-making board.

N.C. Gen. Stat. § 160A-393(e) (emphasis supplied).

B. *Failure to Name the Town in the Original Petition*

N.C. Gen. Stat. § 160A-393(e) plainly requires the Town, and not the Town's Board of Adjustment, to be named as the respondent in the petition for judicial review. *Id.* Appellant originally named "The Town of Indian Trail Board of Adjustment" as the respondent in his original petition. Defendant subsequently named "Town of Indian Trail" as the respondent in his amended petition.

It is undisputed Appellant filed his original petition on 5 January 2017, within 30 days of the Board's provision of written notice to him of its denial of his special-use permit on 15 December 2016. Appellant did not seek to amend his petition to name the Town as respondent, and not the Town's Board of Adjustment, until 29 March 2017, after the Board of Adjustment's motion to dismiss was filed, and nearly three and a half months after Appellant received written notice of the Board's decision.

Appellant cites *MYC Klepper/Brandon Knolls L.L.C. v. The Board of Adjust. for City of Asheville* and argues the Town has been properly joined as a party to the suit, in order to reverse the superior court's dismissal. 238 N.C. App. 432, 767 S.E.2d 668 (2014). In *MYC Klepper*, the petitioner was a billboard sign owner, who had filed a petition for writ of certiorari, seeking review of the Asheville Board of Adjustment's decision to uphold a notice of violation regarding a billboard sign the petitioner owned. *Id.* at 433-35, 767 S.E.2d at 669-71. The petitioner named the "Board of Adjustment for the City of Asheville," not the "City of Asheville," as is required by N.C. Gen. Stat. § 160A-393(e). *Id.* at 436, 767 S.E.2d at 671; *see* N.C. Gen. Stat. § 160A-393(e) ("The respondent named in the petition shall be the city whose decision-making board made the decision that is being appealed[.]").

On appeal, this Court stated that the "defect" to name the City amounted to a failure to join a necessary party. *Id.* "[T]he City was on

notice of this action and participated in the defense thereof[,]" and "the City's participation in the proceedings cured the defect in the petition[.]" *Id.* at 437, 767 S.E.2d at 671. The Court held, in part, "[b]ecause the City's participation in the proceedings cured the defect in the petition, we hold that the trial court did not err in denying the Board's motion to dismiss the petition." *Id.*

Unlike the City of Asheville in *MYC Klepper*, the Town has not participated in the hearings of this action to waive Appellant's failure to join them as a necessary party. *See Id.* There has not been a hearing in the superior court to review the Town's zoning decision, only a hearing on the Board of Adjustment's motion to dismiss, which the Town did not participate in. Although the Town filed a motion for an extension of time to respond to Appellant's initial petition, this action does not waive the defense of failure to join a necessary party. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b) ("Obtaining an extension of time within which to answer or otherwise plead shall not constitute a waiver of any defense herein set forth.")

C. *Relation Back*

Under the present facts, Appellant must show the amended petition naming the Town relates back to the filing of his initial petition, in order for his amended petition not to be barred under the 30-day period for filing petitions for judicial review of quasi-judicial zoning decisions. *See* N.C. Gen. Stat. § 160A-393(e). Appellant argues the amended petition should relate back to his original petition under Rule 15 of our Rules of Civil Procedure, and be deemed timely filed. We disagree. The relation back rule "does not apply to the naming of a new party-defendant to the action." *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995).

In this case, Appellant named the Board of Adjustment for the Town of Indian Trail as respondent instead of naming the Town, as is required by N.C. Gen. Stat. § 160A-393(e). The real party-in-interest in this case is the Town, not the Board of Adjustment. *See* N.C. Gen. Stat. § 160A-393(e). The question becomes whether the defect in the original petition of naming the Board as the respondent, instead of the Town, was sufficient to bar Appellant's petition and support the Town's motion to dismiss, or whether the defect was merely technical in nature and subject to remedy under the relation back rule.

Appellant filed his amended petition naming the Town as the respondent on 29 March 2017, two and a half months late, and well outside the

30-day limitations period for filing petitions for judicial review of zoning decisions of towns. N.C. Gen. Stat. § 160A-388(e2)(2). *Id.*

Here, the Board is a different party from the Town. According to our precedents, Appellant's amended petition does not relate back to his original filing. *Piland v. Hertford Cty. Bd. of Comm'rs.*, 141 N.C. App. 293, 301-02, 539 S.E.2d 669, 674 (2000). In *Piland*, a factually similar case to *MYC Klepper*, the Hertford County Board of Commissioners argued the trial court had erred in denying its motion to dismiss pursuant to N.C. Rules of Civil Procedure 12(b)(1), (2), (4), (6) and (7). *Id.* at 294-95, 539 S.E.2d at 670. The Commissioners contended that the plaintiffs had failed to join the proper defendant, Hertford County, and that plaintiffs attempt to amend their complaint to name Hertford County was barred by N.C. Gen. Stat. § 1-54.1 (1996), the two-month statute of limitations for challenging zoning decisions of a county. *Id.* at 295, 539 S.E.2d at 671.

This Court recognized "the plaintiffs' attempt to amend the summons and complaint in the instant case by changing the name of the party-defendant to Hertford County in place of the Board of Commissioners effectively seeks to add a new party-defendant rather than merely correct a misnomer, and the relation-back rule therefore cannot apply[.]" *Id.* at 301-02, 539 S.E.2d at 674. The Court held "the plaintiffs' suit against the county was time-barred under N.C. Gen. Stat. § 1-54.1, and the trial court should have granted the defendant's motion to dismiss. *Id.* at 302, 539 S.E.2d at 674; N.C. Gen. Stat. § 1A-1, Rule 15(c).

Appellant failed to join the Town as respondent in his initial petition, as is statutorily required by N.C. Gen. Stat. § 160A-393(e), and he filed the amended petition outside the 30-day limitations period provided by N.C. Gen. Stat. § 160A-388(e2)(2). Appellant's amended petition does not relate to his initial petition because it attempted to add the Town as a new party, outside the 30-day limitations period. *See id.*; *see also Crossman*, 341 N.C. at 187, 459 S.E.2d at 717 (holding that relation back rule "does not apply to the naming of a new party-defendant to the action").

The Town has not waived Defendant's failure to name them as the respondent in his initial petition by participating in the hearing on the Board of Adjustment's motion to dismiss. *See MYC Klepper*, 238 N.C. App. at 437, 767 S.E.2d at 671 (holding City of Asheville waived failure to be joined as a necessary party by participating in proceedings before superior court). As this defect in Appellant's initial petition was not and could not be cured by his amended petition under the relation back doctrine, the superior court properly granted the Board's motion to dismiss under Rule 12(b)(7). *See Howell*, 49 N.C. App. at 488, 491, 272 S.E.2d 19,

22 (holding dismissal for failure to join a necessary party is proper when the "defect cannot be cured.")

D. *Misnaming of Judicial Review Statute*

The Town also based its motion to dismiss upon Appellant's improperly seeking judicial review pursuant to N.C. Gen. Stat. § 150B-45, under the Administrative Procedure Act, and not under the proper statute, N.C. Gen. Stat. § 160A-393(e). Based upon our resolution of the issue that Appellant failed to correctly name or join the Town in his initial petition, it is unnecessary to, and we do not address the parties' remaining arguments concerning Appellant's original petition being brought under N.C. Gen. Stat. § 150B-45 instead of N.C. Gen. Stat. § 160A-393(e).

V. Conclusion

Appellant has failed to show any reversible error in the superior court's order. The superior court's grant of the Board's motion to dismiss for failure to join a necessary party is affirmed. *It is so ordered.*

AFFIRMED.

Judge CALABRIA concurs.

Judge DAVIS concurs in the result only.

ECOPLEXUS INC., FRESH AIR ENERGY II, LLC AND CURRITUCK SUNSHINE FARM, LLC, PETITIONERS

v.

COUNTY OF CURRITUCK, BOARD OF COMMISSIONERS, AND DAVID L. GRIGGS, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD OF COMMISSIONERS, AND O.VANCE AYDLETT, JR., S. PAUL O'NEAL, MIKE D. HALL, MIKE H. PAYMENT, PAUL M. BEAUMONT, AND MARION GILBERT, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF COMMISSIONERS OF THE COUNTY OF CURRITUCK, RESPONDENTS

AND

STEVEN P. FENTRESS, DONALD LEON PROFFITT, GAIL LYNN PROFFITT, JAMES J. WIERZBICKI, MARGARET GERALDINE NEWSOME, DAVID L. RICE, LINDA L. RICE, RANDY L. MILLS, ROY W. TATE, KATHY C. TATE, FIDEL C. ESCOBAR, LAURA DARDEN AND MICHELLE LYNN CUNNINGHAM, INTERVENOR-RESPONDENTS

No. COA17-656

Filed 19 December 2017

Zoning—use permit—solar energy farm—prima facie showing of entitlement

Where petitioners presented a prima facie showing of entitlement to their use permit to construct a solar energy farm and the county board of commissioners' denial of the application was based on lay opinion and speculation, the denial was unsupported by competent substantial evidence and was reversed.

Appeal by petitioners from order entered 23 March 2017 by Judge Jerry R. Tillett in Currituck County Superior Court. Heard in the Court of Appeals 15 November 2017.

Tuggle Duggins P.A., by Michael S. Fox, Benjamin P. Hintze and Jaye E. Bingham-Hinch, for petitioner-appellants.

Currituck County Attorney Donald I. McRee, Jr. for respondent-appellees.

TYSON, Judge.

Ecoplexus, Inc., Fresh Air Energy II, LLC, and Currituck Sunshine Farm, LLC ("Petitioners") appeal from an order affirming the decision of the Currituck County Board of Commissioners ("the Board") to deny Petitioners' application for a use permit to construct a solar energy array farm. We reverse and remand.

I. Background

Petitioners Currituck Sunshine Farm, LLC ("Currituck") and Ecoplexus, Inc. ("Ecoplexus") applied for a use permit on 11 December 2015, to construct a solar array farm on the vacant property that was previously used as Goose Creek Golf Course ("the property"), located at 6562 Caratoke Highway, Grandy, North Carolina. The golf course closed as a result of a foreclosure action in 2012 and has remained unused. Currituck owns the property, and Ecoplexus is a solar farm developer. Fresh Air Energy II, LLC ("Fresh Air") is the proposed tenant of the solar array farm to be developed.

The property is located in an Agricultural ("AG") Zoning District. The Currituck County Unified Development Ordinance ("UDO") provides that a "solar array" is allowed as a permitted use on AG zoned land, subject to a use permit.

The Currituck County Planning Staff and the Planning Board unanimously recommended the application for the permit to be approved, finding Petitioners' application fulfilled all the use permit review standards. On 4 April 2016, the Currituck County Board of Commissioners held a quasi-judicial hearing to consider Petitioners' use permit application.

A. Evidence Presented by Petitioners

Ecoplexus is a developer of solar energy farms, with projects located in five states, including ten projects within North Carolina. Nathan Rogers of Ecoplexus testified regarding the design of the proposed solar energy farm. He explained the solar panels would be arranged in rows and attached to metal racking, bringing the total height to 8 to 10 feet. To comply with the UDO's 300-foot setback requirements, the majority of the existing trees on the property would remain, with Ecoplexus filling in any gaps in the natural barrier with landscaping. Mr. Rogers opined that the solar farm would be harmonious with the surrounding properties. Concerning herbicide use, Mr. Rogers testified he preferred not to use herbicides, but did not rule out the possibility of future herbicide use.

Tommy Cleveland, a licensed engineer specializing in solar energy in North Carolina, testified regarding the materials to be used. Solar panels are constructed of "very non-toxic" silicone-based cells, and the other components consist of glass, aluminum, and plastic. He testified the safety of these materials has been tested over the course of 25 to 30 years. Mr. Cleveland asserted there would be no emissions, and the electromagnetic field produced by the panels would be below international

occupational hazard levels, and virtually non-existent at the perimeter of the property.

Mr. Cleveland also testified solar facilities can be built to withstand hurricane force winds, and the proposed facility will be engineered to withstand winds of up to 120 mph. Because of the overall safety of solar farms, Mr. Cleveland testified there would be no negative health or safety impacts to the neighboring properties or the community from the installation of this solar energy system.

Rich Kirkland, a certified and MAI designated appraiser, testified regarding the impact of the proposed solar farm on the valuation of the surrounding properties. Mr. Kirkland stated he has visited over 170 solar farms in North Carolina, and testified that over 90 percent of properties adjoining solar farms in North Carolina are located "where homes and fields meet," between agricultural and residential areas.

Regarding the aesthetics of the proposed site, Mr. Kirkland testified the 400 foot average buffer from the proposed location of the solar panels to nearby homes is greater than the 150 foot average commonly observed in other projects across North Carolina. With the large setback buffer from the homes in the area and the natural vegetative barrier, Mr. Kirkland opined the property is a harmonious location for a solar farm.

Mr. Kirkland also conducted a "matched pair" analysis of four other solar farm projects. In those properties, he opined no effects were shown on either the sale or value of surrounding properties. Mr. Kirkland predicted a similar outcome for the proposed facility, and opined the construction of the solar farm would not negatively impact surrounding property values.

Kim Hamby, a North Carolina licensed engineer with 20 years of experience in water management, testified regarding the surface water, impoundments, and drainage on the property. Several ponds from the golf course would be filled in to construct the solar farm. Ms. Hamby testified sufficient drainage would be provided to make up for filled ponds. The new drainage system would be installed before the ponds are filled in, and the larger existing ponds will remain along the perimeter of the property. Further, the proposed solar farm would reduce the impervious surfaces of the property and leave plenty of land to manage and absorb surface water effectively. Ms. Hamby testified the drainage plan would be submitted for review and approval by the county engineers and the North Carolina Department of Environmental Quality. Plaintiffs assert this evidence, taken together, establishes a *prima facie* case of entitlement to the use permit.

B. Evidence Presented by Respondents

Herb Eckerlin, a professor in mechanical and aerospace engineering at North Carolina State University, testified regarding the overall problems he sees with solar energy. Dr. Eckerlin expressed concern with the high cost of energy in places such as California and Germany, but stated his testimony was based upon internet research. He also took issue with the legislative decision to allow only twenty percent of the value of a solar farm to be taxed, and opined Currituck County would see very little economic or tax benefit from allowing a solar farm to be approved.

Dr. Eckerlin opined that the actual number of panels or type of panels installed in solar farms would be different from what was stated in the application, and there was no local or state oversight available to address such problems. He believes all solar farm construction should cease until these issues are addressed.

Ron Heiniger, a professor in the crop, soil, and environmental science department at North Carolina State University, testified regarding the holding ponds. Holding ponds are important to maintain and control nutrient runoff from the property, and protect the surrounding environment. Dr. Heiniger asserted these holding ponds were important for containing the pesticides and herbicides applied when the property was used as a golf course, and opined this same purpose would be necessary for the proposed solar farm. He testified the federal government does not allow solar farms to be located on property owned by the United States Department of Agriculture ("USDA") in North Carolina, though he conceded a solar farm would not be in harmony in a national forest or park, which is the use of the majority of USDA-owned land located in North Carolina.

Bruce Sauter, a certified appraiser, testified regarding the highest and best use for the property. He had appraised Goose Creek Golf Course in 2012, prior to the foreclosure action, and concluded the highest and best use of the property would be single family homes. Mr. Sauter opined the proposed solar farm would not be harmonious with the surrounding residential community, but asserted that harmonious use is the same as highest and best use. He questioned Mr. Kirkland's opinions on land value, as Mr. Kirkland's evaluation did not consider properties in the eastern part of the state. Mr. Sauter opined it was too early to tell how land and home values would be affected in Currituck County by solar farms.

Steve Fentress, a resident of Grandy Road, testified and expressed his concerns about the proposed project. He questioned whether the amount of on-site fill would be enough to fill in the ponds, and was

concerned about drainage on adjoining properties as a result of filling in the ponds. Mr. Fentress argued solar farms are an industry, and should be regulated under industrial use. He also testified as to the lack of inspections at other nearby, established solar farms, and communicated the need for such inspections, especially concerning the joining of metals from the panel to the frame.

Laura Darden, an adjoining property owner, testified regarding the current water drainage issues. One of the existing retention ponds from the defunct golf course is located near her property, and every time it rains, she states it overflows onto her property. She asserted that at least fifty percent of her property was underwater at the time of the hearing, and she was concerned that changes resulting from constructing the solar farm would only make flooding on her property worse.

C. Procedural Outcome

The Board denied Petitioners' application for a use permit for failure to comply with the Use Permit Review Standards in an order dated 2 May 2016. The Board found the proposed solar farm (1) would endanger the public health or safety, (2) would not be in harmony with the surrounding area, and (3) would not be in conformity with the 2006 Land Use Plan.

On 31 May 2016, Petitioners filed a petition for writ of certiorari, seeking review of the Board's decision in the superior court. The superior court upheld the Board's decision in an order dated 23 March 2017. Petitioners appeal.

II. Jurisdiction

Jurisdiction lies in this Court from a final order of the superior court pursuant to N.C. Gen Stat. § 7A-27(b) (2015).

III. Issues

Petitioners argue the superior court erred by affirming the Board's decision because: (1) their application for a use permit was supported by competent, substantial, and material evidence; (2) they made a *prima facie* showing entitling them to the use permit; and, (3) the Board's denial was not supported by competent, substantial, and material evidence, and its decision was arbitrary and capricious.

IV. Standard of Review

"A legislative body such as the Board, when granting or denying a conditional use permit, sits as a quasi-judicial body." *Sun Suites*

Holdings, LLC v. Bd. of Alderman of Town of Garner, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000).

"The Board's decisions 'shall be subject to review of the superior court in the nature of certiorari.' " *Dellinger v. Lincoln Cty.*, __ N.C. App. __, __, 789 S.E.2d 21, 26 (quoting N.C. Gen. Stat. § 160A-381(c) (2015)), *disc. review denied*, 369 N.C. 190, 794 S.E.2d 329 (2016). "In reviewing the Commissioners' decision, the superior court sits as an appellate court, and not as a trier of facts." *Innovative 55, LLC v. Robeson Cty.*, __ N.C. App. __, __, 801 S.E.2d 671, 675 (2017) (citation and quotation marks omitted). Under the scope of its review, a superior court may only determine whether:

> 1) the [b]oard committed any errors in law; 2) the [b]oard followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the [b]oard's decision was supported by competent evidence in the whole record; and 5) [whether] the [b]oard's decision was arbitrary and capricious.

Overton v. Camden Cty., 155 N.C. App. 391, 393, 574 S.E.2d 157, 159 (2002) (alterations in original) (quoting *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjustment*, 152 N.C. App. 474, 475, 567 S.E.2d 440, 441 (2002) (citation omitted)).

This Court's review of the superior court's order "is limited to determining whether the superior court applied the correct standard of review, and to determine whether the superior court correctly applied that standard." *Overton*, 155 N.C. App. at 393-94, 574 S.E.2d at 160.

"When a party alleges the Board of Commissioners' decision was based upon an error of law, both the superior court, sitting as an appellate court, and this Court reviews the matter *de novo*, considering the matter anew." *Dellinger*, ___ N.C. App. at ___,789 S.E.2d at 26 (citation omitted). When the petitioner argues the Board's decision is arbitrary and capricious, this Court applies the whole record test. *Id.* "The whole record test requires that the trial court examine all competent evidence to determine whether the decision was supported by substantial evidence." *Morris Commc'ns. Corp. v. Bd. of Adjustment of Gastonia*, 159 N.C. App. 598, 600, 583 S.E.2d 419, 421 (2003) (citation omitted).

V. Analysis

Petitioners argue the Board improperly denied their application for a use permit, as their application was supported by competent, substantial,

and material evidence. Petitioners assert this *prima facie* showing entitles them to a use permit under the standards in the UDO, and the opponents of the solar farm did not present competent or material evidence sufficient to overcome or rebut this *prima facie* showing. We agree.

A. Petitioners' *Prima Facie* Showing

"When an applicant for a conditional use permit produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made a *prima facie* showing of entitlement to a permit." *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002) (citation and quotation marks omitted). "Material evidence is '[e]vidence having some logical connection with the facts of consequence or the issues.' " *Dellinger*, __ N.C. App. at __, 789 S.E.2d at 27 (quoting Black's Law Dictionary 638 (9th ed. 2009). "Substantial evidence is evidence a reasonable mind might accept as adequate to support a conclusion." *Humane Soc'y of Moore County v. Town of S. Pines*, 161 N.C. App. 625, 629, 589 S.E.2d 162, 165 (2003) (citation and quotation marks omitted).

While the applicant must make an initial, or *prima facie*, showing of compliance, "[t]o hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not impossible, burden on an applicant for a conditional use permit. An applicant need not negate every possible objection to the proposed use." *Woodhouse v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 211, 219, 261 S.E.2d 882, 887-88 (1980) (citation and quotation marks omitted).

Solar energy arrays are expressly scheduled as a permitted use in property zoned AG under section 4.1.2 of the Currituck County UDO, subject to a use permit. Section 2.4.6 of the UDO, "Use Permit Review Standards" provides:

> A use permit *shall be approved* on a finding the applicant demonstrates the proposed use will:
>
> (1) Not endanger the public health or safety;
>
> (2) Not injure the value of adjoining or abutting lands and will be in harmony with the area in which it is located;
>
> (3) Be in conformity with the Land Use Plan or other officially adopted plan.
>
> (4) Not exceed the county's ability to provide adequate public facilities, including but not limited to, schools, fire

> and rescue, law enforcement, and other county facilities. Applicable state standards and guidelines shall be followed for determining when public facilities are adequate. (Emphasis supplied).

The Planning Board unanimously found Petitioners had met their burden under section 2.4.6 of the UDO as to the first three standards, and that standard (4) was not at issue in this case.

Petitioners then presented competent, material, and substantial lay and expert testimony to the Board to show: (1) solar panels are safe and generate no toxic emissions, and the proposed solar farm will be able to withstand winds up to 120 mph; (2) the proposed solar farm will not adversely affect surrounding property values, and, due to natural and supplemental vegetation buffers and setbacks, will be in harmony with the surrounding area; and, (3) the proposed project complies with the Land Use Plan as a full service sub-area.

B. Board's Denial of Petitioners' *Prima Facie* Showing

"Once an applicant makes [a *prima facie*] showing, the burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls upon those who oppose the issuance of the permit." *Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227. If after presentation of rebuttal evidence a board denies the application, the denial must be "based upon findings which are supported by competent, material, and substantial evidence appearing in the record." *Id.*

After presentation of Petitioners' and opponents' evidence, the Board concluded the proposed solar energy farm:

> 1) Will endanger the public health or safety because:
>
> a. The applicant . . . did not adequately address water drainage to ensure that the amount of water that needs to vacate the property will be able to do so safely without negative impact to adjoining properties. . . .
>
> b. There is significant disparity with the amount of material that is available on the site for backfilling the ponds and . . . [backfilling] will create an additional drainage issue . . . .
>
> c. Testimony . . . relative to the use of chemicals on the property, specifically herbicides is unspecified as to the use and amount. Without some limitation . . . it is going to be excessive and present a health

hazard to those around it.

2) Will not be in harmony with the area in which it is located because:

a. Expert testimony from Mr. Sauter indicates a solar farm is not the highest and best use of the property, is not in harmony with adjacent neighborhoods, and provides stark contrast to the adjacent subdivision.

3) Will not be in conformity with the 2006 Land Use Plan because:

a. It is a large facility being reverted or being used in a manner that would not be conducive in a full service district because this district is intended for community centers that include a diversity of housing types and clusters of businesses to serve the immediate area.

. . . .

d. The use is not consistent with POLICY ID9 which states the county shall not support the development of energy producing facilities within its jurisdiction.

e. The use is not consistent with POLICY CD6 which states that appropriate office and institutional developments . . . be encouraged to locate as a transitional land use between residential areas and commercial. A solar array is classified as an institutional use, but . . . is not an appropriate transitional use.

The Board's decision must include and be based upon all of the Petitioners' evidence, or lack thereof, to show a *prima facie* case. *See Innovative 55*, __ N.C. App. at __, 801 S.E.2d at 676. The denial cannot be based on evidence solely presented by the opponents to the solar farm, the Board's own personal opinions, or by no evidence at all. *See id.*

"Speculative and general lay opinions and bare or vague assertions do not constitute competent evidence" to overcome an applicant's *prima facie* showing. *Id.* at __, 801 S.E.2d at 678.

> Speculative assertions, mere expression of opinion, and generalized fears about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body. In other words, the denial of a conditional

> use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.

Howard, 148 N.C. App. at 246, 558 S.E.2d at 227 (citation and internal quotation marks omitted).

Regarding finding 1) a. and b., the Board wholly ignored Petitioners' expert testimony on water management, and solely considered lay witnesses' testimony of their speculative fears of worsening floods due to the present state of storm water drainage and management on adjacent properties. Even if true, this flooding is based upon current conditions from the defunct golf course and not due to conditions or uses proposed by Petitioners. Further, Petitioners asserted their desire not to use herbicides. Very little testimony addressed the use of chemicals on the property. It appears this finding is based on the generalized fear of the Board, as no competent evidence in the record supports the finding of hazardous levels of herbicide use. Finding 1) is not supported by competent, material, and substantial evidence to rebut Petitioners' *prima facie* showing, but is merely based on generalized and speculative fears and concerns. *See id.*

Similarly, the Board erred in regards to finding 2), by only considering testimony of opponents and ignoring the expert testimony offered by Petitioners. Mr. Sauter did not present any value impact evidence of properties surrounding solar farms, but merely stated his opinion on the impact on surrounding properties. Mr. Kirkland presented data relating to the value of properties around existing solar farms. Finding 2) erroneously equates "harmonious use" with "highest and best use" after Mr. Sauter conceded that the use need not be "the highest and best use" to be "harmonious." This finding is not based on competent, material, and substantial evidence to rebut Petitioners' *prima facie* case.

It does not appear the Board used any record evidence to support its finding 3) that a solar farm is an incompatible use. Mr. Fentress, a lay witness, asserted his belief that solar farms are an industrial use, in contradiction to the Currituck County UDO specifically designating solar arrays as an appropriate and permitted use in agricultural areas, subject to a use permit. General assertions criticizing solar farms by lay witnesses do not rise to the level of competent, material, and substantial evidence to overcome the prior legislative determination to allow solar arrays as a permitted use in agricultural areas, after meeting permit requirements. *Blair Invs., LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 325, 752 S.E.2d 524, 530 (2013). Further, no other

evidence in the record supports the Board's five findings that a solar energy farm is an incompatible land use.

The Planning Board unanimously found Full Service areas "are those parts of the county where a broad range of infrastructure and service investments have been provided." They found and recommended the proposed solar energy farm will be harmonious in a Full Service district, and supports two specific policies of the Land Use Plan as adopted by the County Commission:

> a. POLICY ED1: New and expanding industries and businesses should be especially encouraged that: 1) diversify the local economy, 2) train and utilize a more highly skilled labor force, and 3) are compatible with the environmental quality and natural amenity-based economy of Currituck County.
>
> b. POLICY ID1 Provide industrial development opportunities for cluster industries identified by Currituck Economic Development such as defense aero-aviation, port and maritime related industries, *alternative energy*, agriculture and food, and local existing business support. (Emphasis supplied).

In contrast, the Board found the proposed solar energy farm violated Policy ID9, which states, "Currituck County shall not support the exploration or development of ENERGY PRODUCING FACILITIES within its jurisdiction including, but not limited to, oil and natural gas wells, and associated staging, transportation, refinement, processing or on-shore service and support facilities." The Board points to Policy ID9 as evidence a solar farm, as an "energy producing facility," does not conform to the 2006 Land Use Plan.

While a solar farm could be considered an "energy producing facility," the examples listed in ID9: "oil and natural gas wells and associated staging, transportation, refinement, processing or on-shore service and support facilities," are distinctly different than a solar energy farm, which is clearly a form of "alternative energy." Further, the Land Use Plan clearly indicates prior legislative support for "cluster industries identified by Currituck Economic Development such as . . . alternative energy."

These prior legislative findings by the Board of Commissioners clearly refute the Board's findings at bar, which are not supported by competent, material, and substantial evidence, that the proposed use would not be in conformity with a Full Service area and would be an "energy producing facility." The Planning Board's recommendations also

reflect the current permitted developments in Currituck County, which contains two previously approved solar energy farms.

Without competent, material, and substantial evidence to overcome Petitioners' *prima facie* showing to support its findings, it appears the Board relied on generalized lay concerns, speculation, and "mere expression of opinion" and improperly denied Petitioners' use permit application after Petitioners had made a *prima facie* showing of entitlement to the use permit. *See Howard*, 148 N.C. App. at 246, 558 S.E.2d at 529.

VI. Conclusion

Based upon review of the whole record, Petitioners presented a *prima facie* showing of entitlement to their use permit to construct a solar energy farm in a zoning district where such facility is a permitted use. The Board's denial of the application was not based on competent, material, and substantial evidence to rebut the Petitioners' *prima facie* showing. "When a Board action is unsupported by competent substantial evidence, such action must be set aside for it is arbitrary." *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 811, 610 S.E.2d 794, 796, *disc. review denied*, 359 N.C. 634, 616 S.E.2d 540 (2005). The superior court's order affirming the Board's denial of Petitioners' application is reversed.

This matter is remanded with instructions to the superior court to further remand to the Board to approve Petitioners' application. Upon remand, the Board may hear and require reasonable terms for the Petitioners to comply with the development standards, including Petitioners securing any required approvals of other local, state, and federal authorities' and agencies' permits required to operate the solar array energy farm. *It is so ordered.*

REVERSED AND REMANDED.

Judges CALABRIA and DAVIS concur.

IN RE R.S.M.

[257 N.C. App. 21 (2017)]

IN THE MATTER OF R.S.M

No. COA17-499

Filed 19 December 2017

1. Juveniles—delinquency—subject matter jurisdiction—probation violations—second dispositional order—no new motion for review

The trial court lacked subject matter jurisdiction under N.C.G.S. § 7B-2510(d) in a juvenile delinquency case to enter a second dispositional order on probation violations when it had already entered a disposition order and no new motion for review was pending.

2. Criminal Law—correction of clerical error—date of probation order

A 17 October 2016 order in a juvenile delinquency case was remanded for correction of a clerical error regarding the date a probation order was entered.

Appeal by Defendant from orders entered 17 October 2016 and 2 November 2016 by Judge Regina Joe in Hoke County District Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, *by Special Deputy Attorney General Stephanie A. Brennan*, *for the State.*

Leslie Rawls, *for the D*efendant-Appellant.

MURPHY, Judge.

Ryan[1], appeals from a 2 November 2016 order[2] committing him to a youth development center for a minimum of six months up to his eighteenth birthday. On appeal, he contends that the trial court had already filed a written dispositional order on 17 October 2016 continuing him on probation, and therefore the trial court lacked subject matter jurisdiction to enter a second dispositional order on the probation violations when it had already entered a disposition order and no new motion for review was pending. We agree.

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1. A pseudonym is used to protect the identity of the juvenile.

2. Ryan also appeals a clerical error in the 17 October 2016 order, which we address below.

Background

In an Order entered 20 January 2016, Ryan was adjudicated delinquent upon pleading guilty to various charges of breaking and/or entering, common law robbery, felony larceny, breaking and/or entering [a] motor vehicle, and intimidating a witness. The order placed Ryan under probation for a period of twelve months.

On 1 August 2016, juvenile court counselor Damain Terry filed two Probation Violation-Motion[s] for Review in Hoke County District Court alleging that Ryan violated the terms and conditions of the probation imposed on him on 16 December 2015 in that:

1. [Ryan] left the home without parents' permission on the 17th day of July 2016 and not returning back [sic] to the home.
2. [Ryan] failed to comply with curfew by leaving the home on the 17th day of July 2016 and not returning home.
3. [Ryan] left the home without parents' permission on the 7th day of July 2016 and returning back [sic] to the home until the 8th day of July 2016.
4. [Ryan] failed to comply with curfew by leaving the home on the 7th day of July 2016 and not returning home until the 8th day of July 2016.

Ryan admitted to these violations on 12 September 2016. A dispositional hearing was conducted on 17 October 2016, and Judge Joe orally announced that she was ordering the active commitment of Ryan to a Youth Development Center ("YDC"). Later that day, the written disposition order was entered referencing the 12 September 2016 hearing date. This order continued Ryan on probation, and was signed by Judge Joe. No further probation violation motions were pending at the time. However, on 2 November 2016, Judge Joe entered a purported disposition order on the probation violations, committing Ryan to a YDC.

Ryan's trial attorney filed a notice of appeal on 31 October 2016, and an amended notice of appeal on 4 November 2016. Ryan's appellate counsel filed a petition for writ of certiorari due to defects in the notices of appeal, which we granted on 5 October 2017.

Analysis

I. Subject Matter Jurisdiction

[1] On appeal, Ryan argues that the trial court lacked subject matter jurisdiction to enter a second written dispositional order committing

him to a YDC when it had already filed a written dispositional order continuing him on probation. An issue of subject matter jurisdiction presents a question of law subject to de novo review on appeal. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

The trial court's written disposition order filed 17 October 2016 controls over its earlier oral judgment committing Ryan to the YDC. Any conflict between the announcement of judgment in open court and the written order is resolved in favor of the written order. *State v. Buchanan*, 108 N.C. App. 338, 340, 423 S.E.2d 819, 821 (1992).

Furthermore, because there were no motions for review filed, notice, or hearings conducted after the 17 October 2016 disposition order, the trial court lacked subject matter jurisdiction to create a new disposition order committing Ryan to YDC. N.C.G.S. § 7B-2510(d) (2015). *See also State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) ("Where jurisdiction is statutory and the Legislature requires the [c]ourt to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the [c]ourt to certain limitations, an act of the [c]ourt beyond these limits is in excess of its jurisdiction. If the [c]ourt was without authority, its judgment [. . .] is void and of no effect." (Citations and quotations omitted)).

N.C.G.S. § 7B-2510(d) has three requirements before a trial court may "review the progress of any juvenile on probation": (1) a motion by the court counselor, the juvenile, or the court; (2) notice; and (3) a hearing. N.C.G.S. § 7B-2510(d) (2015). None of these requirements were met after the 17 October 2016 order, and the trial court had no authority under our statutes or caselaw to enter a new dispositional order.

II. Clerical Error

[2] A clerical error is "[a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (citations and quotations omitted) (alterations in original). When a clerical error is found, the case may be remanded, "to the trial court for the limited purpose of correcting the clerical errors in the judgment and commitment forms." *Id.* at 95, 678 S.E.2d at 703.

The 17 October 2016 Order for Motion for Review (Probation Violation) states that Ryan's actions violated the prior dispositional order entered on 16 September 2015. The probation order was not entered until 20 January 2015. This order is thus remanded to the trial court for correction.

Conclusion

The trial court lacked subject matter jurisdiction to enter a subsequent order on 2 November 2016. The 17 October 2016 order is controlling, and the 2 November 2016 order is vacated. Additionally, the 17 October 2016 Order is remanded for correction of a clerical error.

VACATED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

KEVIN S. LASECKI, PLAINTIFF
v.
STACEY M. LASECKI, DEFENDANT

No. COA17-79

Filed 19 December 2017

1. Child Custody and Support—child support modification—failure to reduce amount—unincorporated separation agreement—specific performance

The trial court did not abuse its discretion by failing to reduce child support established in an unincorporated separation agreement where defendant wife did not consent to the modification and public policy only required the court to insure that the amount of child support was adequate to meet the needs of the children. Further, plaintiff husband only challenged those portions of the 14 June 2016 order on remand that required specific performance, and the portion of the order awarding defendant $46,480.71 in money damages did not involve specific performance.

2. Child Custody and Support—overpayment of child support—reduction in calculation of total arrearage

The trial court did not err in a child custody case by concluding that plaintiff husband already received credit for his overpayment of child support in the form of a reduction in the trial court's calculation of his total child support arrearage.

3. Attorney Fees—additional fees—breach of separation agreement

The trial court did not err by determining that plaintiff was in breach of a separation agreement, thus giving the court authority to

award additional attorney fees of $10,905. The trial court's holding in *Lasecki I*, 246 N.C. App. 518 (2016), merely affirmed the award of the amount of attorney fees for the work done up to the point of a 28 August 2014 order.

4. Specific Performance—alimony—separation agreement—lesser amount—incapable of performing obligations

The trial court did not err by ordering specific performance of alimony, reduced from $3,600 to $2,850, where it determined plaintiff husband was incapable of performing his obligations under a separation agreement.

5. Specific Performance—attorney fees—child support—alimony—sufficiency of findings—assets

The trial court did not err in a child support and alimony case by concluding that plaintiff husband had sufficient assets to support an order of specific performance to pay defendant wife's attorney fees in the amount of $10,905.

6. Divorce—separation agreement—alimony—child support—motion to reopen case—Rule 60 motion for relief

The trial court did not abuse its discretion in an action to enforce child support and alimony based on a separation agreement by denying plaintiff husband's motion to reopen the case in light of relevant new evidence, and by denying his N.C.G.S. § 1A-1, Rule 60(b) motion for relief from a 14 June 2016 order. Plaintiff used minimal effort in providing information relevant to the trial court's decision, the trial court gave a thorough explanation of its decision, and it could not be said that the denial was manifestly unsupported by reason and so arbitrary that it could not have been the result of a reasoned decision.

Appeal by Plaintiff from orders entered 14 June 2016 and 13 July 2016 by Judge Edward L. Hedrick, IV, in District Court, Iredell County. Heard in the Court of Appeals 15 May 2017.

Homesley, Gaines, Dudley & Clodfelter, LLP, by Christina Clodfelter and Edmund L. Gaines, for Plaintiff-Appellant.

No brief for Defendant-Appellee.

McGEE, Chief Judge.

I. *Factual and Procedural Background*

Kevin S. Lasecki ("Plaintiff") and Stacey M. Lasecki ("Defendant") married in 1993, and three children were born to the marriage. Plaintiff and Defendant separated and executed a separation agreement ("Separation Agreement") on 24 August 2012, that resolved issues of child custody, equitable distribution, child support, alimony, and attorney's fees. The separation agreement was never incorporated into an order of the trial court. Plaintiff had earned $286,505.00 in 2011, and earned $264,446.00 in 2012, working for Bath Solutions, Inc. ("Bath Solutions"). In the separation agreement, Plaintiff and Defendant agreed, *inter alia*, that Plaintiff would pay Defendant $2,900.00 per month in child support and $3,600.00 per month in alimony. They further agreed that, in the event either party breached the separation agreement, the breaching party would be liable for the other party's attorney's fees.

Plaintiff lost his job with Bath Solutions in early 2013, but soon found employment with Phoenix Sales and Distribution ("Phoenix Sales"), at an annual salary of $160,000.00. Plaintiff filed a complaint on 1 August 2013, alleging that his income had significantly decreased since the execution of the separation agreement and requested that the trial court issue an order setting his child support obligation pursuant to the North Carolina Child Support Guidelines. Defendant answered on 19 September 2013, and counterclaimed for specific performance of Plaintiff's child support and alimony obligations under the separation agreement. Defendant also sought specific performance of unpaid joint credit card debt and attorney's fees, payment of child support and alimony arrearages, and "such other and further relief as to the court may seem just, fit and proper."

Phoenix Sales terminated Plaintiff's employment on 1 May 2014. The trial court held a hearing on the pending claims on 17 and 18 July 2014, while Plaintiff was still unemployed and seeking a new job. Frontline Products, LLC ("Frontline") offered Plaintiff a job in Arizona on or about 21 July 2014, which Plaintiff immediately accepted. Plaintiff moved to reopen the case on 23 July 2014, to allow additional testimony regarding his new employment and income. The trial court denied Plaintiff's motion on 14 August 2014. The trial court entered an order on 28 August 2014, finding that it was "feasible for Plaintiff to earn $150,000.00 and with those earnings to support Defendant and their children." The trial court then concluded the $2,900.00 monthly child support amount set forth in the separation agreement was reasonable, and that Plaintiff was able to pay the full $2,900.00 monthly amount in child support and a reduced monthly amount of $1,385.00 in alimony. The trial court ordered

as specific performance that Plaintiff pay these monthly amounts, as well as $9,592.50 for Defendant's attorney's fees, and awarded a money judgment of $54,432.31 for child support and alimony arrearages.

Plaintiff moved for a new trial on 3 September 2014, arguing that the trial court should consider his new employment and income and that it erred in imputing to him an annual income of $150,000.00. The trial court denied Plaintiff's motion on 10 September 2014. Plaintiff gave notice of appeal on 23 September 2014, and the matter was heard by this Court on 9 September 2015. By opinion filed 5 April 2016, this Court affirmed in part and vacated and remanded in part, stating: "We vacate the portions of the order in which the trial court ordered specific performance of $2,900.00 monthly in child support and $1,385.00 monthly in alimony. We therefore remand the case to the trial court for further proceedings consistent with this opinion[.]" *Lasecki v. Lasecki*, __ N.C. App. __, __, 786 S.E.2d 286, 304 (2016) ("*Lasecki I*"). This Court's reasoning for vacating the child support and alimony award portions of the trial court's order was because the trial court based its decision on the amounts of child support and alimony that Plaintiff was capable of paying on an imputed income of $150,000.00 when Plaintiff was unemployed, which was improper absent a finding that Plaintiff "was 'deliberately depressing his income' or 'indulging in excessive spending in disregard of his marital obligation to support his dependent spouse[.]' " *Id.* at __, 786 S.E.2d at 302 (citations omitted).

The hearing on remand was held on 10 and 11 May 2016. At the time of the hearing, Plaintiff was still employed by Frontline, and was making approximately $135,000.00 annually. However, as of 23 May 2016, Plaintiff was no longer employed by Frontline, and was allegedly working as a driver for Uber, earning only a small fraction of his former income. Plaintiff filed a motion to reopen the case on 26 May 2016, arguing that his change in employment status should be considered by the trial court before it made its rulings on the amount of child support and alimony. Plaintiff's motion to reopen was scheduled for 29 June 2016; however, the trial court entered its order from the 10 and 11 May 2016 remand hearing on 14 June 2016, approximately two weeks before the scheduled hearing on Plaintiff's motion to reopen the evidence.

Plaintiff filed a Rule 60(b) motion on 20 June 2016 for relief from the 14 June 2016 order, arguing that he had not had any "meaningful hearing on his pending motion to reopen" and therefore entry of the 14 June 2016 order was premature. The trial court entered an amended remand order on 13 July 2016, *nunc pro tunc* 14 June 2016.

The trial court heard Plaintiff's motion to reopen the case and Plaintiff's Rule 60(b) motion for relief from the 14 June 2016 order concurrently, on 11 July 2016, and entered an order denying both of Plaintiff's motions on 13 July 2016. Plaintiff appeals.

II. *Analysis*

Plaintiff argues the trial court erred by: (1) "failing to reduce child support despite reduced needs of children, substantially decreased income of Plaintiff, and increased income of Defendant[;]" (2) "failing to give [Plaintiff] credit for overpayment of child support pursuant to court order[;]" (3) "granting Defendant additional judgment and attorney's fees when these issues were affirmed by the Court of Appeals[;]" (4) "ordering specific performance of alimony in [the] amount ordered[;]" (5) that even if the trial court did not err in awarding Defendant $10,905.00 in attorney's fees, it erred in ordering Plaintiff to pay those fees because there was insufficient evidence that Plaintiff had the ability to specifically perform payment in that amount; and (6) the trial court abused its discretion by denying Plaintiff's motion to reopen the case in light of relevant new evidence, and by denying his Rule 60(b) motion for relief from the 14 June 2016 order. We affirm.

A. Child Support from August 2014 through June 2015

[1] Plaintiff contends that the "trial court committed reversible error by failing to reduce child support despite reduced needs of children, substantially decreased income of Plaintiff, and increased income of Defendant." We disagree.

In *Lasecki I*, this Court looked to *Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003), to determine the appropriate standard of review of child support previously established in an unincorporated separation agreement:

> In *Pataky v. Pataky*, this Court established the following test for determining the appropriate amount of child support where the parties have executed an unincorporated separation agreement:
>
> > [I]n an initial determination of child support where the parties have executed an unincorporated separation agreement that includes provision for child support, the court should first apply a rebuttable presumption that the amount in the agreement is reasonable and, therefore, that application of the guidelines would be inappropriate. The court should determine the

> actual needs of the child at the time of the hearing, as compared to the provisions of the separation agreement. *If the presumption of reasonableness is not rebutted, the court should enter an order in the separation agreement amount and make a finding that application of the guidelines would be inappropriate.* If, however, the court determines by the greater weight of the evidence that the presumption of reasonableness afforded the separation agreement allowance has been rebutted, *taking into account the needs of the children existing at the time of the hearing and considering the factors enumerated in the first sentence of G.S. § 50–13.4(c)*, the court then looks to the presumptive guidelines established through operation of G.S. § 50–13.4(c1) and the *court may nonetheless deviate if*, upon motion of either party or by the court *sua sponte, it determines application of the guidelines would not meet or would exceed the needs of the child or would be otherwise unjust or inappropriate.*

The first sentence of N.C. Gen. Stat. § 50–13.4(c) provides:

> Payments ordered for the support of a minor child shall be in such amount as to meet 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.*

Lasecki I, __ N.C. App. at __, 786 S.E.2d at 291 (citations omitted) (some emphasis added). We review a trial court's decision to order child support payments in an amount different from the amount agreed to in the provisions of an unincorporated separation agreement only for " 'a clear abuse of discretion.' " *Bottomley v. Bottomley*, 82 N.C. App. 231, 235, 346 S.E.2d 317, 320 (1986) (citation omitted).

Further, an unincorporated separation agreement is generally treated as any other contract, and the equitable remedy of specific performance may be ordered only if no adequate remedy exists at law, *Condellone v. Condellone*, 129 N.C. App. 675, 681–82, 501 S.E.2d 690, 695 (1998), and the party who is ordered to specifically perform is capable of doing so. *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 657, 347 S.E.2d 19, 22–23 (1986). An order directing specific performance "rests in the

sound discretion of the trial court; and is conclusive on appeal absent a showing of a palpable abuse of discretion." *Harborgate Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 295, 551 S.E.2d 207, 210 (2001) (citations omitted).

Plaintiff states in his brief: "A party's ability to pay child support is determined by the party's income at the time the award is made. *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985)." This citation is flawed in the current context in multiple ways. First, it is an incomplete citation of the law as set forth in *Atwell*:

> Briefly, under N.C. Gen. Stat. Sec. 50–13.4(c)(1984), "an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount." These conclusions must be based upon factual findings sufficiently specific to indicate that the trial court took "due regard" of the factors enumerated in the statute, namely, 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."

Id. at 234, 328 S.E.2d at 49 (citations omitted). A party's ability to pay is thus determined based upon multiple factors, and the language in *Atwell* cited by Plaintiff is within the context of explaining:

> Only when there are findings based on competent evidence to support a conclusion that the supporting spouse or parent is deliberately depressing his or her income or indulging in excessive spending to avoid family responsibilities, can a party's capacity to earn [as opposed to that party's actual current income] be considered.

Id. at 235, 328 S.E.2d at 50 (citations omitted).

More importantly, *Atwell* is a case involving a court order initially determining child support, not a request to deviate from a child support amount previously agreed upon in an unincorporated separation agreement. The trial court has continuing jurisdiction to revisit and modify its own child support orders.

> A *judicial decree* in a child custody and support matter is subject to alteration upon a change of circumstances

> affecting the welfare of the child and, therefore, is not final in nature. Consequently, the jurisdiction of the court entering such a decree continues as long as the minor child whose custody is the subject of the decree remains within its jurisdiction. The Superior Court of Rowan County rendered the original support and custody judgment in this action and under the above principles maintained continuing jurisdiction over further proceedings. Unless that court was somehow divested of its continuing jurisdiction, it was the only court which could modify the earlier judgment upon a motion in the cause and a showing of a change of circumstances.

Stanback v. Stanback, 287 N.C. 448, 456, 215 S.E.2d 30, 36 (1975) (citations omitted) (emphasis added). A trial court has no such broad authority to modify the child support provisions of an unincorporated separation agreement based upon a showing of changed circumstances. *See Lasecki I*, __ N.C. App. at __, 786 S.E.2d at 291. The present case does not involve modification of court-ordered child support.

1. *Policy and Precedent*

We initially review the policies and precedent supporting our current law concerning a trial court's authority to *either* modify the child support provisions of an unincorporated separation agreement, or to order specific performance of child support payments in amounts different from those previously established in an unincorporated separation agreement. Prior opinions of our appellate courts have at times blurred the distinction between review of an order based upon breach of an unincorporated separation agreement and review of an order based upon a prior child support order of the trial court, and Plaintiff appears to misunderstand the authority of the trial court in this regard. "It is well-settled that 'a parent can assume contractual obligations to his child greater than the law otherwise imposes . . . and such agreements are binding and enforceable.' " *Ross v. Voiers*, 127 N.C. App. 415, 417, 490 S.E.2d 244, 246 (1997). Further:

> To accord sufficient weight to parties' separation agreements, as our common law directs, the benchmark for comparison must be the amount needed for the children at the time of the hearing, compared with that provided in the agreement. Further, "in the absence of evidence to the contrary," the court must respect a presumption that "the amount mutually agreed upon is just and reasonable."

Pataky, 160 N.C. App. at 303, 585 S.E.2d at 413 (citations omitted). Further,

> "A separation agreement is a contract between the parties and *the court is without power to modify it except* (1) to *provide for adequate support for minor children*, and (2) with the *mutual consent of the parties* thereto where rights of third parties have not intervened." However, our Courts have been quick to note:
>
> > [N]o agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to *protect the interests and provide for the welfare of infants*. They *may bind themselves* by a separation agreement or by a consent judgment, but they *cannot thus withdraw children of the marriage from the protective custody of the court*.

Id. at 296, 585 S.E.2d at 409 (citations omitted) (emphasis added).

Relative to the present case, and contrary to Plaintiff's position, the trial court *was without authority*, absent Defendant's consent, to modify the separation agreement solely for the purposes of *reducing* his child support obligation. Even with Defendant's consent, Plaintiff and Defendant could not, by contract, deprive the trial court of its inherent authority and obligation to insure their minor children were properly provided for. *Boyd v. Boyd*, 81 N.C. App. 71, 75, 343 S.E.2d 581, 584 (1986) ("[i]t is well established that the provisions of a separation agreement relating to . . . support of minor children are not binding on the court, which has the inherent and statutory authority to protect the interests of children"). In the present case, Plaintiff and Defendant have not mutually consented to modification of the separation agreement. Therefore, the trial court's rulings in the present case must be based solely upon its inherent and statutory authority to provide for the welfare of Plaintiff's and Defendant's minor children.

Traditionally, the authority of the trial court to order the supporting parent to pay child support in an amount different than established in an unincorporated separation agreement has been recognized as a means of insuring adequate maintenance of the children involved -- *not* as a means of lessening the agreed-upon contractual duties of the supporting parent based upon changed circumstances. Stated differently, the question for the trial court was limited to whether the needs of the children were being adequately met by the amount of child support agreed upon in the unincorporated separation agreement, or whether the amount of child support should be *increased* in order to meet the children's needs.

> Within the statutory framework, the North Carolina Supreme Court established a two-step process in claims for child support *in the presence of a prior, unincorporated agreement*. Our trial courts were required to first determine the current amount necessary to meet the needs of the children and, *if this amount "substantially exceeds" the amount provided in the agreement*, this would rebut the presumption that the amount in the separation agreement was reasonable. *In the absence of such a showing*, affording "due regard to the factors contained in G.S. § 50–13.4(b) and (c)," *the court was not allowed to change the amount of child support from what was set forth in the separation agreement.* (referring to statutory factors existing in 1986).

Pataky, 160 N.C. App. at 300–01, 585 S.E.2d at 412 (citations omitted) (emphasis added).

This Court has recognized that public policy only requires the trial court to insure that the amount of child support being provided for in an unincorporated separation agreement is adequate to the needs of the children involved:

> A separation agreement is modified by increasing child support payments where the party with custody establishes that the separation agreement provisions do not adequately protect the interests of and provide for the welfare of the children. But *no principal of public policy intervenes to relieve a party from the obligations of a separation agreement requiring support payments in excess of or other payments in addition to that required by law*.

McKaughn v. McKaughn, 29 N.C. App. 702, 704, 225 S.E.2d 616, 618 (1976) (citations omitted) (emphasis added).

Nonetheless, this Court eventually recognized the *discretionary* authority of the trial court to order specific performance of contractual child support obligations in a *decreased* amount, based upon the current needs of the children involved and the current financial standing of their parents.[1] *Bottomley*, 82 N.C. App. at 234, 346 S.E.2d at 320. One salutary purpose of this discretionary authority is that entry of the order

1. By "current" we mean at the time of the relevant hearing.

for specific performance provides the trial court with the authority to enforce the reduced child support obligation through its contempt powers, whereas the provisions of an unincorporated separation agreement are only enforceable through bringing an action for breach of contract, and thereby obtaining a judgment for monetary damages.

> "It is settled that any separation agreement dealing with the custody and the support of the children of the parties cannot deprive the [trial] court of its inherent as well as statutory authority to protect the interests of and provide for the welfare of minors." While in the *usual case* the custodial parent obtains an *increase* in the agreed-upon support, this Court has upheld an order setting a lesser amount than that provided for by the applicable separation agreement. [This] Court stated: "The judgment in this case does not change plaintiff's contractual obligations under the separation agreement. The question before the [trial] court was what amount it would *require* in the exercise of its inherent and statutory authority to provide for the welfare of [the] minors."
>
> . . . .
>
> [W]hile the [trial] court *could not relieve plaintiff-husband of any contractual obligation he assumed* to support his child in excess of what the law would require – it could, "in the exercise of its inherent and statutory authority to provide for the welfare of minors," order payment of an amount either larger or smaller than that provided for in the agreement. *That amount should be "a reasonable subsistence, to be determined by the trial [court] in the exercise of a sound judicial discretion from the evidence before [the trial court].* [Its] determination *. . . will not be disturbed in the absence of a clear abuse of discretion.*"
>
> The effect of such an order is not to deprive defendant-wife of her contractual right to recover the sums provided for in the agreement, but *to limit her contempt remedy to the sums provided for by the court order.*
>
> Although a court may increase or decrease its own prior award for the support of a minor child, *a court cannot intervene to reduce or relieve a parent from his contractual obligations to support his child in excess of that required by law.* A parent can by contract assume

> a greater obligation to his child than the law imposes. *Thus, if the court allows the child's [custodial parent] less money for support for [the] child than does the valid separation agreement between the child's parents, the remedy of the [custodial parent] is to sue the [non-custodial parent] for breach of contract and obtain a judgment for the difference. The [non-custodial parent's] duty under the court order may be enforced by contempt proceedings, while his [or her] contractual obligations may not be so enforced.*

Bottomley, 82 N.C. App. at 234-36, 346 S.E.2d at 320-21 (citations omitted) (some emphasis added).

If the trial court determines that a party to an unincorporated separation agreement is unable to perform the child support provisions therein, it *cannot modify the agreement* to lessen that party's burden; it can only decide not to order specific performance of the child support provision, or order specific performance of the child support provision in an amount less than that established in the agreement. *Id.* As noted above, a contract is only enforceable through the equitable remedy of specific performance where no adequate remedy at law exists, and the person ordered to perform has the ability to do so. *Condellone*, 129 N.C. App. at 681–82, 501 S.E.2d at 695. A plaintiff who "relies on damages to compensate for the breach of a separation agreement which has not been incorporated into a court order generally does not have an adequate remedy at law." *Id.* at 682, 501 S.E.2d 690, 695 (citation omitted) (" 'The plaintiff must wait until payments have become due and the obligor has failed to comply. Plaintiff must then file suit for the amount of accrued arrearage, reduce her claim to judgment, and, if the defendant fails to satisfy it, secure satisfaction by execution. As is so often the case, when the defendant persists in his refusal to comply, the plaintiff must resort to this remedy repeatedly to secure her rights under the agreement as the payments become due and the defendant fails to comply.' ").

We review a trial court's order in this regard on a case by case basis:

> What amount is reasonable for a child's support is to be determined with reference to the special circumstances of the particular parties. Things which might properly be deemed necessaries by the family of a [parent] of large income would not be so regarded in the family of a [parent] whose earnings were small and who had not been able to accumulate any savings. In determining that amount

> which is reasonable, the trial judge has a wide discretion with which this court will not interfere in the absence of a manifest abuse.

Williams v. Williams, 261 N.C. 48, 57–58, 134 S.E.2d 227, 234 (1964) (citations omitted).

2. *The Present Case*

In the case before us, Plaintiff *limits his argument to challenging the imposition of child support at $2,900.00 per month for the period of time from 1 August 2014 until 30 June 2015* (or, "the relevant period"). Plaintiff does not challenge the amount of child support for the period from 24 August 2012 through 1 August 2014; nor does he challenge the amount for the period from 1 August 2015 to the present. Plaintiff specifically contends:

> The trial court's finding that Plaintiff did not rebut the presumption of reasonableness as to the $2,900.00 per month in child support set forth in the separation agreement is not supported by competent evidence as the trial court failed to consider the reduced needs of the children, the substantially reduced income of [] Plaintiff, and the increased income of [] Defendant between the execution of the separation agreement in August 2012 and the parties' oldest child reaching the age of majority in July of 2016.

As noted above, the trial court in the present case has not, and cannot, *modify* the Separation Agreement to decrease the amount of child support Plaintiff owed Defendant in the past, or the amount of child support Plaintiff owes Defendant moving forward. The terms of the Separation Agreement establish Plaintiff's contractual duties, and these are not affected by the order of the trial court. *Bottomley*, 82 N.C. App. at 234-36, 346 S.E.2d at 320-21.

When the trial court addressed Plaintiff's breach of the Separation Agreement based upon his prior underpayment of the contractually established amount of child support, it was not making a determination of whether Plaintiff actually *owed* the unpaid amounts. *Id.* The trial court was limited to determining the proper remedy for Plaintiff's breach. In situations like the one before us, specific performance could be the proper remedy, but only if the trial court properly determined that no remedy at law was adequate, and that Plaintiff was capable of specifically performing that part of the contract: "A marital separation agreement which has

not been incorporated into a court order is 'generally subject to the same rules of law with respect to its enforcement as any other contract.' Where no adequate remedy at law exists, a contract is enforceable through the equitable remedy of specific performance." *Condellone*, 129 N.C. App. at 681–82, 501 S.E.2d at 695 (citations omitted).

In determining whether standard money damages will constitute an adequate remedy at law, the trial court considers factors which include the "difficulty and uncertainty of collecting such damages after they are awarded[.]" *Whalehead Properties v. Coastland Corp.*, 299 N.C. 270, 283, 261 S.E.2d 899, 908 (1980) (citation omitted). However, "[s]pecific performance will not be decreed against a defendant who is incapable of complying with his contract." *Cavenaugh*, 317 N.C. at 657, 347 S.E.2d at 22–23 (citations omitted). A trial court that has determined a party is not currently capable of specifically performing one or more of his obligations under a contract could still enter a money judgment against that party in the entire amount of the damages resultant from his breach. This award would establish the total amount of damages owed due to the breach, but the trial court could not order the party to specifically perform immediate payment of those damages.

In the present case, concerning child support moving forward, the trial court concluded:

> No adequate remedy at law exists with respect to the periodic payments required by the [separation] agreement and [D]efendant is entitled to specific performance of the contract. . . . . Th[is] court may not modify a separation agreement but may order specific performance of only that part of the agreement [P]laintiff is able [to] perform.

The trial court further concluded: "At this time, the [trial] court is unable to find that [P]laintiff could reasonably comply with an order requiring specific performance of a payment of all of the remaining damages suffered by [D]efendant due to [P]laintiff's breach[.]" In light of the trial court's determination that Plaintiff was incapable of fully performing under the Separation Agreement, it only ordered specific performance of his alimony obligations moving forward in the reduced amount of $2,850.00 per month and, more importantly to this analysis, the trial court ordered the following with respect to Plaintiff's child support and alimony arrearages:

> Defendant shall have and recover of [P]laintiff damages in the sum of $46,480.71 for [Plaintiff's] failure to pay alimony and child support pursuant to the terms of the

> [S]eparation [A]greement through April 30, 2016. *This portion of the judgment shall be enforceable as other money judgments* and shall bear interest at the legal rate from April 30, 2016 pursuant to N.C.G.S. § 24-5.

The trial court's order for *specific performanc*e of child support payments in the amount of $1,688.00 per month *did not go into effect until 1 May 2016*, and Plaintiff does not challenge this part of the remand order. Concerning child support for the period challenged by Plaintiff – 1 August 2014 until 30 June 2015 – *no specific performance was ordered.* Plaintiff was simply ordered to pay the damages resultant from his breach of the contract as an ordinary money judgment.[2] The trial court had no authority to deny Defendant her right to sue for breach of the specific terms of the Separation Agreement, and the trial court had no authority to order damages for Plaintiff's breach in an amount less than called for in the Separation Agreement. Plaintiff only challenges those portions of the 14 June 2016 order on remand that required specific performance, and the portion of the order awarding Defendant $46,480.71 in money damages did not involve specific performance. *Bottomley*, 82 N.C. App. at 234-36, 346 S.E.2d at 320-21.[3] The trial court did not err, much less abuse its discretion, by ordering Plaintiff to pay the full breach of contract damages, "enforceable as other money judgments[.]"

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2. Plaintiff had no difficulty recognizing this difference in his brief submitted for *Lasecki I*, where he argued: "The trial court committed reversible error by granting [] Defendant a judgment for unpaid alimony and child support . . . where Defendant did not request a judgment and a judgment is not a remedy available for specific performance, the only counterclaims made by Defendant."

3. It is clear that the child support and alimony arrearages in *Lasecki I* were ordered paid as money judgments and not through specific performance. It is equally clear that Plaintiff was aware of this distinction, and that specific performance did not apply to the award of the child support and alimony arrearages. *Lasecki I*, __ N.C. App. at __, 786 S.E.2d at 290–91 (citations omitted) ("[D]efendant specifically requested in her counterclaims that [P]laintiff pay the child support and alimony arrearages[.] Although [Defendant] requested an order for specific performance, she also requested 'such other and further relief as to the court may seem just, fit and proper.' In addition, at the hearing, [D]efendant's counsel cross-examined [P]laintiff specifically on the issues of the child support and alimony arrearages and the unpaid amount owed on the joint credit card. By awarding these unpaid amounts as money judgments, the trial court did not grant relief which 'was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial.' N.C. Gen. Stat. § 1A–1, Rule 54(c) (2013) ('Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.'). Accordingly, we hold that the trial court did not err in awarding these unpaid amounts as money judgments.").

B. *Overpayment of Prior Child Support*

[2] Plaintiff next argues that the trial court erred "by failing to give [Plaintiff] credit for overpayment of child support pursuant to court order." We disagree.

We first note that, in this argument, Plaintiff references a motion for contempt filed by Defendant on 25 July 2016, and the resulting order entered 4 October 2016, which Plaintiff includes in the record.[4] However, there is no record evidence that Plaintiff appealed the 4 October 2016 order and, more importantly, we cannot analyze the trial court's earlier orders based upon findings it made in a subsequent order. The 4 October 2016 order is not properly before us, and we do not consider it.

Plaintiff argues that, during the period between 1 August 2014 and 14 June 2016, he paid $2,900.00 per month in child support through centralized collections and wage withholding. However, according to the amended order, Plaintiff only owed $2,900.00 per month in child support from 1 August 2014 until 1 July 2015, and thereafter owed a reduced amount of $1,688.00 per month beginning 1 July 2015. For this reason, Plaintiff argues, he should receive a credit for the period "[b]etween July 1, 2015 and June 14, 2016 when the remand trial order was entered[.]" Plaintiff contends he "overpaid" his child support obligation during this time period by $1,212.00 per month, or $14,544.00 in total.[5] According to Plaintiff, "[t]he trial court's remand order failed to address how Plaintiff would be given credit for the overpayment of child support."

Plaintiff has already received credit for his overpayment of child support in the form of a reduction in the trial court's calculation of his total child support arrearage. In the remand order, the trial court found as fact that "[s]ince the hearing on July 18, 2014 [P]laintiff made [$89,899.29 in] payments to [D]efendant for alimony and child support through 4/30/2016[.]" However, during this same period, the trial court found

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4. We further take judicial notice that Plaintiff appealed an additional order for contempt entered in this matter on 13 December 2016. That appeal was recently decided by this Court in a separate unpublished opinion filed 17 October 2017. *Lasecki v. Lasecki*, __ N.C. App. __, 805 S.E.2d 566, 2017 WL 4638209 (2017).

5. Plaintiff argues in his brief that he overpaid twelve months, from 1 July 2015 until entry of the remand order on 14 June 2016, and that his total overpayment amounted to $14,544.00. However, the remand hearing concluded on 11 May 2016, so the trial court had no evidence to consider concerning the period between 11 May 2016 and entry of its order on 14 June 2016. As there is no record evidence of any payments after 11 May 2016, we are limited to the record evidence before us. During the appropriate time period – 1 July 2015 until 11 May 2016 – Plaintiff would have "overpaid" child support in the amount of $12,120.00.

that Plaintiff's total obligations for alimony and child support amounted to $136,380.00, leaving Plaintiff $46,480.71 in arrears for that period. In the table calculating Plaintiff's obligations for the relevant period, the trial court found that Plaintiff was obligated to pay $31,900.00 for: "Child Support 8/1/2014 through 6/1/2015 (11 months @ $2,900.00 per month)" and $16,880.00 for: "Child Support 7/1/2015 through 4/1/2016 (*10 months @ $1,688.00 per month*)."[6] (Emphasis added). The trial court made the following finding of fact: "[P]laintiff has continued to breach the separation agreement and [D]efendant has suffered additional damages in the sum of $46,480.71 through 4/30/2016." *This amount already factors in a reduction in Plaintiff's child support obligation from 1 July 2015 through 1 April 2016*. Had the trial court not credited Plaintiff with the $12,120.00 "overpayment" of child support from 1 July 2015 through 1 April 2016, and demanded that Plaintiff specifically perform based upon a $2,900.00 per month child support obligation for the entire 1 August 2014 to 1 April 2016 time period, Plaintiff would have been found to be $58,600.71 in arrears instead of $46,480.71. This argument is without merit.

C. *Attorney's Fees*

[3] Plaintiff contends the trial court erred "by granting Defendant additional judgment and attorney's fees when these issues were affirmed by the Court of Appeals[.]" We disagree.

Plaintiff is correct that the decision of this Court in *Lasecki I* constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974). "[O]ur mandate is binding upon [the trial court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered." *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966). Therefore, upon remand from *Lasecki I*, the trial court was without authority to alter any portion of its 28 August 2014 order that had been affirmed in *Lasecki I*. However, the trial court was free to address anew portions of its 28 August 2014 order that were vacated by *Lasecki I*. In *Friend-Novorska v. Novorska*, 131 N.C. App. 867, 509 S.E.2d 460 (1998) ("*Friend-Novorska I*"), this Court affirmed parts of an alimony order; however,

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6. Had the trial court not given Plaintiff credit for overpayment of child support between 1 July 2015 and 1 April 2016, the trial court would have found Plaintiff's child support obligation to have been $29,000.00, instead of $16,880.00, for that period. It was the reduced obligation of $16,880.00 that was used to establish $46,480.71 as the damages resultant from Plaintiff's breach.

> [t]he remainder of the trial court's decision was vacated and remanded to the trial court for "a new award of alimony" and "specific findings justifying that award." The term "vacate" means: "To annul; to set aside; to cancel or rescind. To render an act void; as, to vacate . . . a judgment." Thus, the vacated portions of the 17 October 1997 order were void and of no effect. On remand, therefore, the trial court was free to reconsider the evidence before it and to enter new and/or additional findings of fact based on the evidence, with the exception that the trial court was bound on remand by any portions of the 17 October 1997 order affirmed by this Court in *Friend-Novorska I*.

Friend-Novorska v. Novorska, 143 N.C. App. 387, 393–94, 545 S.E.2d 788, 793 (2001) ("*Friend-Novorska II*") (citation omitted). In *Lasecki I*, this Court held:

> For the foregoing reasons, we affirm in part and vacate in part the trial court's order. We affirm the portions of the order in which the trial court awarded money judgments for the child support and alimony arrearages and unpaid joint credit card debt and ordered specific performance of defendant's attorney's fees. We vacate the portions of the order in which the trial court ordered specific performance of $2,900.00 monthly in child support and $1,385.00 monthly in alimony. We therefore remand the case to the trial court for further proceedings consistent with this opinion[.]

Lasecki I, __ N.C. App. at __, 786 S.E.2d at 304. Plaintiff argues that the trial court violated the mandate of this Court by assessing Plaintiff $10,905.00 in additional attorney's fees associated "with the costs of the post remand trial that was created by the trial court's error [in establishing alimony and child support by improperly imputing income to Plaintiff]." The Separation Agreement states regarding attorney's fees: "If either party breaches any of the provisions of this Agreement, [then] the breaching party shall be required to pay reasonable attorney fees of the party whose contractual rights hereunder were violated by said breach." In its 28 August 2014 order, the trial court concluded: "Plaintiff has breached the Agreement. Defendant has incurred reasonable attorney fees in response to that breach. Pursuant to the Separation Agreement Defendant is entitled to recover these fees." This Court affirmed that portion of the 28 August 2014 order in *Lasecki I*, and Plaintiff was required to pay Defendant $9,592.50 in attorney's fees.

Contrary to Plaintiff's argument, our holding in *Lasecki I* did not establish a final determination of the attorney's fees Plaintiff might be required to pay Defendant. Instead, we merely affirmed the award of that particular amount of attorney's fees for the work done up to the point of the 28 August 2014 order. Plaintiff's obligation pursuant to the Separation Agreement to "pay reasonable attorney fees of the party whose contractual rights hereunder were violated by [Plaintiff's] breach" of the Separation Agreement is ongoing. If the trial court continues to find Plaintiff in breach, it may, pursuant to the terms of the Separation Agreement, continue to award Defendant reasonable attorney's fees. The fact that the matter was back in front of the trial court based upon our decision partially vacating and remanding the 28 August 2014 order is immaterial. Appeal is a normal and regular part of the judicial process, and since Plaintiff was the party in breach of the Separation Agreement, it would violate the terms of the Separation Agreement to compel Defendant to pay for additional attorney's fees associated with Plaintiff's breach.

In its 14 June 2016 order on remand, the trial court concluded: "The [S]eparation [A]greement entered by the parties on August 24, 2012 is a valid [A]greement. Defendant has performed her obligations under the contract and Plaintiff has breached the [A]greement." So long as the trial court properly determined that Plaintiff was in breach of the Separation Agreement, it had the authority to award additional attorney's fees. This argument is without merit.

D. *Alimony*

[4] Plaintiff argues the trial court "committed reversible error by ordering specific performance of alimony in amount ordered." We disagree.

Plaintiff states: "Pursuant to the remand order [Plaintiff] was ordered to pay $1,688.00 in child support *and specifically perform $2,850.00 in alimony beginning July 1, 2015*." (Emphasis added). Though Plaintiff is correct that his child support obligation dropped to $1,688.00 on 1 July 2015, Plaintiff is incorrect concerning the date on which specific performance of $2,850.00 in alimony was ordered to commence. Section four of the decretal portion of the 14 June 2016 order on remand states: "Plaintiff shall pay [D]efendant alimony pursuant to the [S]eparation [A]greement in the sum of $2,850.00 per month beginning 5/1/16." Because Plaintiff's income prior to the May 2016 hearing was irrelevant to the amount of alimony the trial court ordered Plaintiff to pay beginning on 1 May 2016, we do not address Plaintiff's arguments regarding salaries he was earning more than a year before the remand hearing in

May 2016. Further, Plaintiff seeks to have this Court analyze the four-month period from "August 2014 until December 2014" in isolation, in order to find an abuse of discretion in the trial court's ordering alimony in the reduced amount of $1,385.00 per month in its 28 August 2014 order. That portion of the *28 August 2014* order was vacated, and has no relevance to our current analysis.

The following relevant portion of the Separation Agreement established Plaintiff's alimony obligations: "[Plaintiff] shall pay [Defendant] base alimony in the amount of $3,600.00 per month. This alimony shall be payable for a period of nine years[.] This alimony shall be fixed and is non-modifiable in all respects."

> Under [N.C. Gen. Stat. § 52-10.1], both parties to a divorce may enter into [an] agreement to settle the question of alimony, and the terms of the agreement are binding and may be modified only with the consent of both parties. Further, a separation agreement not incorporated into a final divorce decree (as in the present case) may be enforced through the equitable remedy of specific performance.
>
> In *Cavenaugh*, our Supreme Court held that "when a defendant has offered evidence tending to show that he is unable to fulfill his obligations under a separation agreement or other contract the trial judge must make findings of fact concerning the defendant's ability to carry out the terms of the agreement before ordering specific performance."

Edwards v. Edwards, 102 N.C. App. 706, 708–09, 403 S.E.2d 530, 531 (1991) (citations omitted).

" 'Parties to a divorce may enter into a valid agreement settling the question of alimony, and unless the court then orders alimony to be paid, the terms of the agreement are binding and can only be modified by the consent of both parties.' " *Jones v. Jones*, 144 N.C. App. 595, 598, 548 S.E.2d 565, 567 (2001) (citation omitted). Unlike child support and custody issues involving minors, the trial court has no " 'inherent [or] statutory authority to protect the interests and provide for the welfare of' " competent adults. *See Pataky*, 160 N.C. App. at 296, 585 S.E.2d at 409 (citations omitted).

> "A separation agreement is a contract between the parties and *the court is without power to modify it* except (1) to provide for adequate support for minor children, and (2) *with the mutual consent of the parties thereto where rights of third parties have not intervened*."

Id. (citations omitted) (emphasis added). In Defendant's counterclaim, she requested specific performance of the alimony portion of the Separation Agreement, because Plaintiff had not been performing pursuant to the terms of that Agreement. As noted above:

> "A marital separation agreement is generally subject to the same rules of law with respect to its enforcement as any other contract." Specific performance will not be decreed against a defendant who is incapable of complying with his contract. "A court can properly order specific performance of only part of a contract if it deems another portion unworkable."

Cavenaugh, 317 N.C. at 657, 347 S.E.2d at 22–23 (citations omitted); *Condellone*, 129 N.C. App. at 682, 501 S.E.2d at 695 (citation omitted) ("As a general proposition, the equitable remedy of specific performance may not be ordered 'unless such relief is feasible[;'] therefore courts may not order specific performance 'where it does not appear that [the responsible party] can perform.' "). However,

> In finding that the defendant is able to perform a separation agreement, the trial court is not required to make a specific finding of the defendant's "present ability to comply" as that phrase is used in the context of civil contempt. In other words, the trial court is not required to find that the defendant "possess[es] some amount of cash, or asset readily converted to cash" prior to ordering specific performance.

Id. at 683, 501 S.E.2d at 696 (citations omitted).

Therefore, the trial court had *no* authority to alter the terms of alimony as set forth in the Separation Agreement, but it could order specific performance of the Agreement in an amount less than that demanded in the Agreement upon determining that Plaintiff *was not capable* of performing to the full extent of his obligations. *See Edwards*, 102 N.C. App. at 710, 403 S.E.2d at 532 (emphasis added) (although underestimating the defendant's monthly expenses "may have no effect on the trial court's order of specific performance [of the alimony portion of an unincorporated separation agreement], it may have an effect on *the amount* defendant can reasonably afford to pay plaintiff on a monthly basis").

Following the remand order, Plaintiff is still contractually obligated to pay Defendant alimony in the amount of $3,600.00 per month. However, the trial court only granted Defendant specific performance by Plaintiff for his alimony obligation in the amount of $2,850.00 per

month, beginning 1 May 2016. The trial court found that Plaintiff was in breach of the Separation Agreement, that specific performance was an appropriate remedy, but that "the [trial] court is unable to find that [P]laintiff could reasonably comply with an order requiring specific performance of a payment of all of the remaining damages suffered by [D]efendant due to [P]laintiff's breach of the [A]greement." Therefore, the trial court ruled:

> Defendant's prayer for specific performance of the alimony provisions of the [A]greement [is] granted in part. Plaintiff shall pay [D]efendant alimony pursuant to the [S]eparation [A]greement in the sum of $2,850.00 per month beginning 5/1/16. . . . . This paragraph is ordering specific performance of a portion of [P]laintiff's obligation under the [A]greement due to [P]laintiff's inability to currently fully perform. This decree is not a modification of [P]laintiff's obligation under the contract[.]

Plaintiff argues that there was insufficient evidence presented supporting his ability to pay alimony in the reduced amount of $2,850.00 per month. Plaintiff states that "[t]he ability of a party to perform an obligation *included in a separation agreement as required for specific performance* is ordinarily determined by the party's income at the time the award is made[.]" (Emphasis added). This is an incorrect statement of law. Determination of the ability to pay alimony agreed upon in an unincorporated separation agreement is not limited to the factors utilized in determining an ability to pay court ordered alimony, because the basis of the obligation in an unincorporated separation agreement is contract, not statute.

Plaintiff cites *Edwards* in support of this claim; *Edwards* is inapposite. In *Edwards*, this Court held that the trial court had incorrectly calculated the defendant's [responsible spouse's] expenses, which might affect the amount of alimony it would order the defendant to specifically perform pursuant to an unincorporated separation agreement. The plaintiff in *Edwards* argued that the error was harmless because the defendant had other sources of income that more than covered the deficit created by the underestimation of the defendant's expenses. In the context of this analysis, this Court stated:

> There is no evidence before this Court that either of the above income sources for the year may be considered regular income and therefore included in calculating defendant's net monthly income. *See Whedon v. Whedon*,

> 58 N.C. App. 524, 294 S.E.2d 29 (1982) (a spouse's ability to pay alimony is usually determined by his income at the time the award is made). Moreover, there is evidence that the income tax refund is a joint refund to both defendant and his present wife; therefore, for the purposes of the case before us, it would appear that defendant would be entitled to only half of such refund. We find that the trial court's miscalculation of defendant's expenses relative to his monthly income is a prejudicial error and therefore must be addressed by the trial court.

Edwards, 102 N.C. App. at 710–11, 403 S.E.2d at 532 (citation omitted).

We first note that *Whedon*, the decision relied upon in *Edwards*, is an opinion involving *court ordered* alimony, and does not involve an action for specific performance to enforce an unincorporated separation agreement. Even though *Edwards* concerns specific performance of an unincorporated separation agreement, the *Whedon* parenthetical does not constitute a holding that determination of an ability to pay alimony established in an unincorporated separation agreement is limited to the responsible party's income. Finally, Plaintiff seems to ignore that part of the parenthetical that states: "ability to pay alimony is usually determined by . . . income *at the time the award is made*[,]" *Edwards*, 102 N.C. App. at 710, 403 S.E.2d at 532 (citation omitted) (emphasis added), as Plaintiff directs this Court to his income at various times *prior* to the time the current award was made.

Further, the remand order limits specific performance of alimony in the reduced amount of $2,850.00 per month to the time period beginning 1 May 2016. To the extent that unpaid alimony prior to 1 May 2016 was included in the remand order, it was included as part of the $46,480.71 money judgment, and does not implicate any specific performance analysis.

At the time the award was made, Plaintiff was found to have an annual income of $135,000.00, or $11,250.00 per month. The trial court found that Plaintiff's total expenses before alimony – which included child support, taxes, Social Security, and Medicare – were $8,396.80 per month. Finding of fact 53 states: "Plaintiff's actual current income exceeds his reasonable expenses by $2,853.20 per month." Plaintiff does not specifically contest this finding of fact. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Although plaintiff excepted to . . . several findings of fact by the trial court, plaintiff [made no] exception to . . . finding of fact (2), quoted above. 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."). We are therefore bound by the trial court's finding that "Plaintiff's actual current income exceeds his reasonable expenses by $2,853.20 per month."

The trial court ordered specific performance of alimony reduced from $3,600.00 to $2,850.00 per month which, according to the trial court's calculations, Plaintiff could afford to pay entirely from his monthly income. Plaintiff argues that the trial court should have considered his attorney's fees and Defendant's attorney's fees as part of his monthly expenses; and that the trial court erred in finding that "Plaintiff's household expenses should be split evenly between Plaintiff and his current wife[.]" Plaintiff directs this Court to no authority supporting his claim that the attorney's fees he was required to pay due to his breach of the Separation Agreement should be factored into his monthly expenses, nor that the trial court erred in determining that Plaintiff's current wife contributes to their joint expenses. It was Plaintiff's duty,

> 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" [Plaintiff]. . . . . "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). Further, Plaintiff supports his arguments with references to the transcript of the 10 and 11 May 2016 hearing. However, Plaintiff did not include this transcript in the record, so we have no way of verifying Plaintiff's claims concerning whether there was evidence presented concerning the level of contribution Plaintiff's current wife made to their joint living expenses. This argument is without merit.

E. *Specific Performance of Attorney's Fees*

[5] Plaintiff argues that, even if the trial court did not err in awarding Defendant $10,905.00 in attorney's fees, it erred in ordering him to pay those fees when "there was no evidence before the [trial] court that Plaintiff had the ability to specifically perform the payment of $10,905.00 with not even enough money in Plaintiff's bank account to pay his obligations for one month and his depleted retirement." We disagree.

Plaintiff contends the amount he had in his checking account at the time of entry of the remand order, $7,425.94, was insufficient to

pay Defendant's attorney's fees, and that "Plaintiff still owed taxes on the withdrawals made in 2016" from his retirement accounts, though Plaintiff does not indicate the amount of his tax liability. Plaintiff includes no citations to authority in support of his argument and it is not the duty of this Court to search for such authority. *Sanchez*, __ N.C. App. at __, 791 S.E.2d at 245–46.

Further, in the remand order the trial court found the following facts regarding Plaintiff's assets that could be used to pay attorney's fees: Plaintiff (1) had at least two IRA accounts that, combined, contained $68,458.87 on 31 March 2016; (2) withdrew $25,000.00 "from his retirement" in early April 2016 "to pay taxes and his attorney fees[;]" (3) "[a]s of 4/27/2016 [P]laintiff had a vested balance in his 401K with his current employer in the sum of $8687.29[;]" (4) had approximately $7,725.94 in checking and savings accounts in late April 2016, during the prior year Plaintiff maintained an average monthly amount of $14,528.00 in these accounts – with a high of $19,205.15 in December 2015, and the April 2016 amount of $7,725.94 representing the lowest cash balance for the prior year period; (5) "engaged in a complicated lease to own arrangement with respect to his home ["the home"] in which [Plaintiff] was able to divest large sums of retirement savings and place any interest in the property obtained in the name of another[:]" specifically, Plaintiff and his current wife, respectively, contributed $70,000.00 and $35,000.00 toward the purchase of the home on 18 December 2014, Plaintiff's then employer, Frontline, financed the purchase of the home, and the home was titled in the name of Frontline, the "contract price was $290,161.00 plus $35,798.18 settlement charges to the borrower which primarily consisted of a pool to be built after the closing[,]" Plaintiff and his wife executed "a Lease Agreement with option to purchase" with Frontline, and Plaintiff and his wife "executed a promissory note to [Frontline] in the principal sum of $321,932.64 on 12/18/2014[;]" (6) "has retained significant assets in the form of retirement savings which will make it difficult for [D]efendant to collect a money judgment[;]" (7) and "[i]n light of [P]laintiff's maintenance of a large checking account balance he has the ability to comply with an order for the payment of [D]efendant's attorney's fees."

We hold that the remand order contains sufficient findings of fact to support the order of specific performance of Defendant's attorney's fees in the amount of $10,905.00. This argument is without merit.

F. *Motions to Reopen Case and for Relief from Order*

[6] Plaintiff argues the trial court abused its discretion by denying his motion to reopen the case in light of relevant new evidence, and by

denying his Rule 60(b) motion for relief from the 14 June 2016 order. We hold the trial court did not abuse its discretion.

The trial court's ruling on Plaintiff's motion to reopen can only be overturned upon a clear abuse of discretion. *Maness v. Bullins*, 33 N.C. App. 208, 211, 234 S.E.2d 465, 468 (1977). The same is true concerning the trial court's denial of Plaintiff's Rule 60(b) motion for relief. *Wallis v. Cambron*, 194 N.C. App. 190, 194, 670 S.E.2d 239, 242 (2008) (citations omitted) ("a trial court's decision to grant or deny relief pursuant to Rule 60(b) will not be overturned absent an abuse of discretion").

Plaintiff filed a motion on 26 May 2016 to reopen the case following the 10 and 11 May 2016 hearing on remand. In Plaintiff's motion, he argued:

> 2. The hearing of this action began on May 10, 2016 and testimony concluded on May 11, 2016, with both parties resting.
>
> 3. [] Plaintiff at the time of the hearing was employed with [Frontline] as Vice President of Sales earning $135,000 annually.
>
> 4. That on May 23, 2016 Plaintiff's employment with [Frontline] ended; and that as of the filing of this motion Plaintiff is unemployed.
>
> 5. The [trial court] has not yet entered a ruling upon the matters and issues before [it].
>
> 6. The hearing of this additional testimony would not in any way prejudice [] Defendant's contentions in this action.
>
> 7. That Plaintiff through this motion attempts to make [] Defendant and the [trial court] aware of his substantial change in circumstances.

As noted in Plaintiff's motion, at the time Plaintiff filed his motion the trial court had not yet entered its order on remand in the matter, which it first entered on 14 June 2016.[7]

Plaintiff filed a motion for relief from the 14 June 2016 order on 20 June 2016, arguing that "the filing of Plaintiff's motion to allow

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7. The trial court then entered an amended order on remand 13 July 2016, *nunc pro tunc* 14 June 2016.

additional testimony regarding termination of employment prior to the entry of the [14 June 2016] order in this matter and [] Plaintiff's loss of employment since the trial in this matter justify relief from the order entered June 14, 2016 pursuant to Rule 60(b)(6)." The trial court did not hear Plaintiff's motion to reopen until 11 July 2016, nearly a month after entering the remand order, and it denied Plaintiff's motion by order entered 13 July 2016. The trial court simultaneously heard Plaintiff's motion for relief from the 14 June 2016 order on 11 July 2016 and denied it in its 13 July 2016 order.

In its 13 July 2016 order, the trial court noted this Court's language from *Lasecki I* regarding the trial court's denial of Plaintiff's 23 July 2014 motion to reopen following the July 2014 hearing. In *Lasecki I*, this Court stated:

> We also note that on or about 21 July 2014, only three days after the close of the 17 and 18 July 2014 hearing, Frontline extended an offer to [P]laintiff to work as a salesman in Arizona, and [P]laintiff immediately accepted. The salary in Frontline's offer was one percent of all of [P]laintiff's sales, with a yearly guaranteed draw of $110,000.00. The trial court had taken the case under advisement at the close of the hearing on 18 July 2014 and had not yet announced a ruling. On 23 July 2014, [P]laintiff moved to reopen the case to allow testimony regarding this new employment and income, and although the trial court had still not entered an order, on 14 August 2014, the trial court denied plaintiff's motion. On 28 August 2014, the trial court entered the order which is on appeal, and on 3 September 2014, [P]laintiff moved for a new trial, again seeking to present evidence of [P]laintiff's actual income in his new job; the trial court denied this motion as well. Although [P]laintiff did not appeal from the orders on the post-trial motions and has not challenged them on appeal, we cannot help but note that if the trial court had allowed the evidence of [P]laintiff's actual income in his new job to be presented and considered, most of the issues addressed by this appeal would have been eliminated and there would have been no need for remand on those issues. Plaintiff accepted the new job only days after the hearing and even before the trial court had announced its rulings, and with newly available income information, the order could have been based upon [P]laintiff's actual income. We would also

> imagine that [P]laintiff's move to Arizona to begin the new employment would affect his visitation schedule with the children and travel costs associated with visitation, which are additional factors the trial court may need to consider when addressing the child support issue.

Lasecki I, __ N.C. App. at __, 786 S.E.2d at 300.

The trial court explained in its 13 July 2016 order its decision to deny Plaintiff's motions in part as follows:

> 22. On the date the [trial] court filed its order pursuant to the hearings on 5/10/16 and 5/11/16, the [trial] court was aware of the pleadings in the file at the time the order was filed. By filing the order, the [trial] court did not intend to deprive "[P]laintiff of the opportunity to have a meaningful hearing on his pending motion to reopen" as alleged in [Plaintiff's] motion for relief. The [trial] court merely intended to attempt to continue to comply with its obligation under the code of judicial conduct to dispose promptly of the business of the court.
>
> 23. Herein, the [trial] court will consider [P]laintiff's motions separately and in the sequence in which they were filed now that [P]laintiff has had the opportunity to present evidence upon his motions and to argue them. This court will consider [P]laintiff's first motion without regard to the filing of the 6/14/2016 order.
>
> . . . .
>
> 25. On July 7, 2016 [P]laintiff filed an affidavit with the [trial] court indicating that his only source of income was from his current employer as an Uber Driver from which he had earned just over $2,500.00 in 43 days. Counsel for [D]efendant objected to the [trial] court considering the affidavit for the reason that she was unable to cross examine [P]laintiff regarding his assertions. Plaintiff's assertions are not particularly detailed indicating only that his unemployment has ended, been lost, or terminated without stating in his pleadings particular reasons for his alleged change in circumstances. The [trial] court will give this affidavit the same weight as [P]laintiff's verified motion to re-open the case. The [trial] court will consider it only as an assertion by [P]laintiff as grounds upon which he is making an application for relief.

26. For more than 200 years the North Carolina Supreme Court has indicated that allowing additional evidence after closing arguments is within the discretion of the trial court. The Supreme Court notes that it is a departure from the normal rules of procedure which ought not be done except for good reasons shown to the [trial] court. [Citations omitted].

27. In exercising its discretion in considering [P]laintiff's motion to reopen the case to allow additional testimony, this court has weighed several factors. Allowing [P]laintiff's motion may allow the [trial] court to fashion an order based upon facts existing at a time nearer to the filing of the written order; however, in light of the work load of the Civil District Court in Iredell County, it would be difficult for a trial judge to be able to digest the testimony and exhibits regularly presented by these parties; decide the complicated issues raised by the pleadings considering the guidelines, statutory mandates, and case law presumptions; and dictate a decision in less time that [P]laintiff has twice asserted a desire to reopen his evidence: 5 days after a two day trial in 2014 and 14 days after a two day trial in 2016.[8] This court appreciates the Court of Appeals of North Carolina noting in this very case that if the [trial] court had allowed a similar motion of [P]laintiff in 2014 that most of the issues addressed in his prior appeal would have been eliminated. However, the current motion is not an invitation to avoid legal error in imputing income when actual income is available, but rather a request that the [trial] court consider assertions regarding actual income at a time 14 days after the close of the evidence and arguments rather than the evidence of actual income offered during the two day trial in which the parties indicated that they were ready to proceed and presented evidence and critically questioned the evidence of the other party.

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8. Although the meaning of this sentence is not entirely clear, we understand it to mean either that it would have been difficult for the trial court to have entered its orders prior to the dates upon which Plaintiff filed his 2014 and 2016 motions to reopen the case, or simply that allowing Plaintiff's motions to reopen the case would have caused delay more detrimental to the efficiency of the judicial process than denial of these motions in fact caused. We appreciate the need for maximum efficiency at the trial court level, but stress that ultimately it is the efficiency of the entire process that should be paramount.

Plaintiff's motion is not a request to produce evidence that actually existed at the time of the hearing which [P]laintiff merely wishes to introduce to correct some technical defect in his case; but it is a request to introduce additional evidence which could substantially change the complexion of the case which did not even exist until 12 days after the conclusion of a trial. The general rules used in trials have been developed to secure fairness, eliminate unjustifiable expense and delay, and to seek the truth. These purposes can be found in N.C.G.S. § 8C-[1, Rule] 102(a),[9] Rule 1 of the General Rules of Practice for the Superior and District Courts, and the 1813 decision of the North Carolina Supreme Court cited above.[10] Although denying [P]laintiff's motion may trigger an appeal, or motions to modify, or actions to enforce an order entered without the benefit of [P]laintiff's new evidence; the granting of his motion will certainly create expense for the parties and delay in the resolution of the issues before the [trial] court. Furthermore, additional hearings would not guarantee that the trial court would reach a better decision or that the party perceiving defeat would not seek the remedy of an appeal. After considering carefully [P]laintiff's motion the [trial] court fails to find good cause to allow additional evidence to be presented after both parties have rested and argued their cases.

28. The [trial] court now considers [P]laintiff's motion for relief from the [trial] court's judgment. . . . . Plaintiff's counsel has indicated that a ruling in favor of [P]laintiff may avert an appeal. Appeals delay the prompt determination of the business before the courts, are costly to the litigants, and place at risk the finality of judgments. Plaintiff's counsel also asserts that denying his motion will place an inappropriate impediment on his right to appeal by forcing him to choose between appealing or avoiding an appeal in

9. It is unclear that denial of Plaintiff's motions to reopen in the present case have served "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." N.C. Gen. Stat. 8C-1, 102(a) (2017).

10. *Par. v. Fite*, 6 N.C. 258, 259 (1813).

> hopes of winning a motion to modify the judgment based upon a change in circumstances. [This] court puts little weight on this assertion. Legal decisions are often based upon complicated analysis of risk and return. Although the failure of a court to exercise a discretionary equitable power of relief may complicate the future decisions of a litigant, that complication is not improper or inappropriate. Plaintiff also argues that allowing his motion may avoid future hearings regarding the collection of the sums mandated by the 6/14/2016 order. Facts and circumstances may or may not align to prove his assertion. On the other hand allowing [P]laintiff's motion will interfere with the finality of the trial court's judgment and cause certain and immediate hardship to [D]efendant. She will have to continue to retain counsel and prepare for and participate in yet another session in a trial on the merits regarding claims filed nearly three years ago.

The trial court then concluded that Plaintiff "failed to show good cause to allow his motion to re-open the case[,]" and "failed to show extraordinary circumstances and failed to show that justice demands that relief be granted pursuant to N.C.G.S. § 1A-1, Rule 60, and his motion [for relief from the 14 June 2016 order] should be denied."

We recognize the difficulties inherent in cases such as the present case, in which a substantial change in circumstances may occur at any time. However, "we cannot help but note that if the trial court had allowed the evidence of [P]laintiff's actual income in his new job to be presented and considered, [many] of the issues addressed by this appeal" might have become moot. *Lasecki I*, __ N.C. App. at __, 786 S.E.2d at 300. At a minimum, this Court would not have been required to go through the process of deciding issues based upon relevant facts that were no longer accurate at the time notice of appeal was filed. We agree with the trial court that "[a]llowing [P]laintiff's motion may [have] allow[ed] the [trial] court to fashion an order based upon facts existing at a time nearer to the filing of the written order[,]" and add that by so doing, the trial court's order would have more likely reflected the current financial situation of the parties, and our opinion would more likely address issues and facts that had not lost much of their relevance.

Nonetheless, the trial court discussed its decision to deny Plaintiff's motions in some detail. In particular, the trial court found that Plaintiff's affidavit in support of his motion to reopen provided scant information concerning the conditions surrounding Plaintiff's loss

of employment and, therefore, the trial court was not provided with information relevant to its discretionary decision. In light of the great discretion afforded the trial court in deciding whether to reopen the evidence in a case, Plaintiff's minimal effort in providing information relevant to the trial court's decision, and the trial court's thorough explanation of its decision, we cannot find that the decision to deny Plaintiff's motion to reopen the case was " 'manifestly unsupported by reason and so arbitrary that [it] could not have been the result of a reasoned decision.' " *Maldjian v. Bloomquist*, __ N.C. App. __, __, 782 S.E.2d 80, 83–84 (2016) (citations omitted). With regard to the trial court's denial of Plaintiff's Rule 60(b) motion, we similarly hold that Plaintiff has failed to meet his burden of showing the trial court abused its discretion. *In re L.C.*, 174 N.C. App. 622, 623, 621 S.E.2d 208, 209 (2005).

AFFIRMED.

Judges TYSON and INMAN concur.

LITTLE RIVER, LLC, PETITIONER
v.
LEE COUNTY, NORTH CAROLINA, RESPONDENT
AND
CAROLINA TRACE ASSOCIATION, INC.; SOUTH LANDING PROPERTY OWNERS ASSOCIATION, INC.; VILLAGE AT THE TRACE PROPERTY OWNERS ASSOCIATION; SEDGEMOOR PROPERTY OWNERS ASSOCIATION; ESCALANTE CAROLINA TRACE, LLC; SANDRA WARD; TERRY WARD; LAURA RIDDLE; BOBBY RIDDLE, JR.; DANIEL STANLEY; KAY COLES; FRED BERMAN; C. DAVID TURNER; JOHN BECK; LYONA BECK; GERALD MERRITT; CHERYL MERRITT; KERMIT KEETER; LOUANE KEETER; ALFRED RUSHATZ; SHARWYNNE BLATTERMAN; BARRY MARKOWITZ; MIRIAM MARKOWITZ; TERRI DUSSAULT; AND HOMER TODD SPOFFORD, NEIGHBOR-RESPONDENTS.

No. COA17-461

Filed 19 December 2017

1. Jurisdiction—standing—quasi-judicial board meeting—unified development ordinance—public hearing

Respondent intervenors who opposed a rock quarry had standing to participate in a quasi-judicial Board of Adjustment meeting to consider petitioner company's application for a special use permit to establish a rock quarry where a county's unified development ordinance provided that any person or persons may appear

at a public hearing and submit evidence, either individually or as a representative.

2. Zoning—special use permit—rock quarry—prima facie showing—public health or safety—specification and conditions—impact on adjoining property values—harmony with adjoining properties

The trial court erred in a zoning case by concluding that petitioner company failed to make a prima facie showing of entitlement to a special use permit (SUP) for operation of a rock quarry where the proposed quarry would be established on a parcel already zoned and permitted for this use and would not have a material adverse impact on public health or safety, met all required specifications and conditions, expert testimony showed no impact on the adjoining or abutting property values, and the adjoining or abutting property owners were in favor of issuing the SUP for the quarry and testified to it being in harmony with their adjoining properties and surrounding areas.

3. Zoning—special use permit—rock quarry—arbitrary and capricious denial—no rebuttal of prima facie case

A county Board of Adjustment's decision in a zoning case to deny petitioner company's application for a special use permit to operate a rock quarry was arbitrary and capricious where there was no competent, material, and substantial evidence to counter or rebut petitioner's prima facie case or to support the Board's denial.

4. Constitutional Law—due process—quasi-judicial hearing—agreed-upon procedures

Petitioner company was not denied due process in quasi-judicial hearings before a county Board of Adjustment in a zoning case, considering a special use permit to operate a rock quarry, where every party was represented by counsel who all agreed upon the procedures to be followed.

Appeal by petitioner from order entered 12 December 2016 by Judge John W. Smith in Lee County Superior Court. Heard in the Court of Appeals 1 November 2017.

Smith Moore Leatherwood LLP, by Karen M. Kemerait and M. Gray Styers, Jr., for petitioner-appellant.

Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough, and Lee County Attorney Whitney Parrish, for respondent-appellee.

Womble Carlyle Sandridge & Rice, LLP, by Michael C. Thelen, for intervenor-respondent-appellees.

TYSON, Judge.

Little River, LLC ("Petitioner") appeals from an order affirming the decision of the Lee County Board of Adjustment (the "Board") to deny Petitioner's application for a special use permit. We affirm in part, reverse in part, and remand.

I. Background

On 9 September 2015, Petitioner submitted its second application to the Lee County Planning and Community Development Department (the "Department") for a Special Use Permit ("SUP") to establish an aggregate rock quarry to be located at 5500 NC Highway 87, Sanford, North Carolina, on a proposed 48 acre portion of a 377 acre parcel. The property is predominately zoned Residential Agricultural ("RA"), with two Rural Residential ("RR") zoned parcels adjoining NC Highway 87. Quarries are a permitted use of right in the zoning districts under Article 4 of the Sanford-Broadway-Lee County Unified Development Ordinance ("UDO"), subject to a SUP.

The Department forwarded the application to the Board, which held public, quasi-judicial hearings during five nights over the course of a six-month period. All participants, including the Board, were represented by counsel. Special counsel for the Board, attorneys for Petitioner, and the attorney for Intervenor-Respondent Carolina Trace Association, Inc. ("CTA") all agreed upon procedures to ensure both fairness and expediency throughout the hearing. Petitioner and CTA presented evidence at the hearing.

At the close of all evidence, the Board denied Petitioner's application based upon fifteen findings of fact, leading to the following four conclusions of law:

> 1. The applicant failed to demonstrate that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved.
>
> 2. The applicant failed to demonstrate that the use met all required conditions and specifications.

> 3. The applicant failed to demonstrate that the use would not substantially injure the value of adjoining or abutting property or that the use is a public necessity.
>
> 4. The applicant failed to demonstrate that the location and character of the use, if developed according to the plan submitted and approved, would be in harmony with the area which it is located and in general conformity with all adopted land use plans.

Petitioner sought certiorari review of the Board's decision in the superior court. CTA and other interested parties (collectively "Respondent-Intervenors") moved to intervene. Petitioner consented to their intervention. After the hearing, in an order dated 12 December 2016, the superior court affirmed the Board's denial of the SUP, and concluded that for the Petitioner's purported errors of law:

> 10. Applying *de novo* review, the Court finds and concludes that the Lee County Board of Adjustments did not commit legal error, in that:
>
> a. It is not necessary that Neighbor-Respondent Carolina Trace Association, Inc. demonstrates legal standing to participate in the quasi-judicial proceedings to appear before the Lee County Board of Adjustments . . . .
>
> . . .
>
> g. The Lee County Board of Adjustments has the discretion to determine Petitioner did not establish a *prima facie* case . . . . and . . . has the discretion to require assurances regarding health, safety, and environmental risks . . . .

The superior court then applied a "whole record review," and found and concluded: (1) there was "competent, material, and substantial evidence" to support all the findings by the Board; (2) "each and every finding of fact . . . support the Board's conclusions of law; "[n]one of the findings of fact . . . is either arbitrary or capricious"; and, (3) "[a]ll of the Board's conclusions of law support the Board's decision to deny Petitioner Little River, LLC's application for a special use permit[.]" Petitioner appeals.

II. Jurisdiction

Jurisdiction lies in this Court from an appeal of right from a final judgment of the superior court. N.C. Gen. Stat. § 7A-27(b) (2015).

III. Issues

Petitioner argues: (1) the opponents of the quarry did not have standing in the quasi-judicial proceeding; (2) no competent, substantial, and material evidence supports the Board's denial of its SUP, presuming Petitioner established a *prima facie* case; (3) the Board's denial of the SUP was arbitrary and capricious; and, (4) its due process rights were violated. Respondent objects to Petitioner's issues on appeal, and asserts the only issue before this Court is whether the superior court properly exercised its scope of review of the Board's decision.

IV. Standard of Review

"A legislative body such as the Board, when granting or denying a [special] use permit, sits as a quasi-judicial body." *Sun Suites Holdings, LLC v. Bd. of Alderman of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000).

"The Board's decisions 'shall be subject to review of the superior court in the nature of certiorari.' " *Dellinger v. Lincoln Cty.*, __ N.C. App. __, __, 789 S.E.2d 21, 26, *disc. review denied*, 369 N.C. 190, 794 S.E.2d 324 (2016) (quoting N.C. Gen. Stat. § 160A-381(c) (2015)). "In reviewing the Commissioners' decision, the superior court sits as an appellate court, and not as a trier of facts." *Innovative 55, LLC v. Robeson Cty.*, __ N.C. App. __, __, 801 S.E.2d 671, 675 (2017) (citation and quotation marks omitted). Under the scope of its review, a superior court must only determine whether:

> 1) the [b]oard committed any errors in law; 2) the [b]oard followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the [b]oard's decision was supported by competent evidence in the whole record; and 5) [whether] the [b]oard's decision was arbitrary and capricious.

Overton v. Camden Cty., 155 N.C. App. 391, 393, 574 S.E.2d 157, 159 (2002) (alterations in original) (quoting *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjustment*, 152 N.C. App. 474, 475, 567 S.E.2d 440, 441 (2002) (citation omitted)).

The standard of review of the superior court depends upon the purported error. *Morris Commc'ns. Corp. v. Bd. of Adjustment of Gastonia*, 159 N.C. App. 598, 600, 583 S.E.2d 419, 421 (2003). Petitioner raises several issues, which require both *de novo* and whole record review. "When a party alleges the Board of Commissioners' decision

was based upon an error of law, both the superior court, sitting as an appellate court, and this Court reviews the matter *de novo*, considering the matter anew." *Dellinger*, ___ N.C. App. at ___,789 S.E.2d at 26 (citation omitted). "When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test." *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation and quotation marks omitted). "The whole record test requires that the [superior] court examine all competent evidence to determine whether the decision was supported by substantial evidence." *Morris Commc'ns.*, 159 N.C. App. at 600, 583 S.E.2d at 421.

"Where a party appeals the superior court's order to this Court, we review the order to (1) determine whether the superior court exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly. *Davidson Cty. Broad. Co. v. Iredell Cty.*, ___ N.C. App. ___, ___, 790 S.E.2d 663, 666 (2016) (citations and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 797 S.E.2d 13 (2017).

V. Analysis

A. Standing

[1] Petitioner argues Respondent-Intervenors did not have standing to participate in the quasi-judicial Board of Adjustment meeting. Petitioner asserts our decision in *Cherry v. Wiesner*, __ N.C. App. __, 781 S.E.2d 871 (2016), controls this issue in its favor. We disagree.

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, and is a question of law which this Court reviews de novo." *Smith v. Forsyth Cty. Bd. of Adjustment*, 186 N.C. App. 651, 653, 652 S.E.2d 355, 357 (2007) (citations, quotation marks, and brackets omitted). For zoning and land use decisions being made before a Board of Adjustment, "[t]he ordinance may provide that the board of adjustment may hear and decide special and conditional use permits in accordance with standards and procedures specified in the ordinance." N.C. Gen. Stat. § 160A-388(c) (2015).

In this case, section 3.1.5.3.3 of the UDO provides: "[a]ny person or persons may appear at a public hearing and submit evidence, either individually or as a representative." Petitioner applied for and appeared before the Board seeking a SUP to open and operate a quarry. As a quasi-judicial public hearing under the UDO, any member of the public was able to appear and present evidence, as Respondent-Intervenors did.

Unlike in *Cherry*, where the neighbor appealed the Board's decision allowing the applicants' design plans, Petitioner appealed the Board's decision denying its SUP. *See Cherry*, __N.C. App. at __, 781 S.E.2d at 874. Only petitioners with standing may appeal a quasi-judicial decision to the superior court in the nature of certiorari. N.C. Gen. Stat. § 160A-393(d). Any person with "an ownership interest in the property that is the subject of the decision being appealed" has such standing. *Id.*

Petitioner co-operatively worked to allow Respondent's counsel to help determine the procedures before the Board and expressly consented to Respondent-Intervenors' motion to intervene before the superior court. Any purported challenge to the standing of Respondent-Intervenors is without merit. That portion of the superior court's order is affirmed.

B. Little River's *Prima Facie* Showing

[2] Petitioner argues the Board failed to follow the appropriate procedure and did not first determine whether or not the Petitioner's evidence and testimony had made a *prima facie* showing of entitlement to a SUP. This threshold determination should be based upon the Petitioner's competent, material, and substantial evidence, or lack thereof. We hold Petitioner met its burden of producing a *prima facie* showing.

Petitioner is not seeking a rezoning, only a SUP to conduct a use expressly permitted in these zoning districts. "A conditional use permit is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist." *Woodhouse v. Bd. of Comm'rs of the Town of Nags Head*, 299 N.C. 211, 215, 261 S.E.2d 882, 886 (1980) (citation and quotation marks omitted). "When an applicant for a conditional use permit produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made a *prima facie* showing of entitlement to a permit." *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002) (citation and quotation marks omitted). A petitioner's burden to establish a *prima facie* showing is one "of *production*, and not a burden of proof." *Innovative 55*, __ N.C. App. at __, 801 S.E.2d at 676. Otherwise, "[t]o hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not impossible, burden on an applicant for a conditional use permit. An applicant need not negate every possible objection to the proposed use." *Woodhouse*, 299 N.C. at 219, 261 S.E.2d at 887-88 (citation and quotation marks omitted).

The property in question is zoned RR and RA. Article 4 of the UDO specifically allows quarries on property zoned RR and RA as a permitted use, subject to a special use permit and additional development regulations.

According to section 3.5.3 of the UDO, a SUP shall be granted if the applicant proves:

> [1] The use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved,
>
> [2] The use meets all required conditions and specifications,
>
> [3] The use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity, and
>
> [4] The location and character of the use, if developed according to the plan submitted and approved, will be in harmony with the area in which it is located and in general conformity with all adopted land use plans.

1. Public Health and Safety

Petitioner presented competent, substantial, and material evidence to show the proposed quarry is located in a zoning district where it is permitted and will not "materially endanger the public health or safety." Petitioner's evidence tends to show the proposed quarry will be subject to extensive regulation from state and federal agencies, including several subsets of the North Carolina Department of Environmental Quality ("NC DEQ"), the United States Mine Safety Health Administration, and the Bureau of Alcohol, Tobacco, Firearms and Explosives. Any blasting that occurs is strictly regulated and will be closely monitored and regulated to ensure no adverse effects due to ground vibrations will occur. Further, Petitioner's application included conditions restricting the peak particle velocity to below regulatory standards and restricting blasting to between 9:00 a.m. and 5:00 p.m. In North Carolina, blasting is an ultra-hazardous activity and Petitioner will be held strictly liable for any adverse consequences. *Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000).

Petitioner presented competent evidence of minimal off-site noise, producing no impact on public health and safety due to sound. The proposed quarry will be subject to stricter air quality standards than other existing quarries in the county, due to the applicability of the Clean Air Act. Further, Petitioner presented competent evidence

of dust suppression at the stages of processing, storing, and loading the aggregate.

Petitioner's evidence also tends to show the quarry's use of water will be heavily regulated by state agencies, ensuring no adverse impact to health or safety regarding ground or surface water. Petitioner's evidence also tends to show the majority of water usage will be maintained through rainwater, with some withdrawal of ground water. Water used in the quarry process will not contain any chemicals and will be recycled and stored on site. Any withdrawal from or discharge to surface water creeks or rivers will be subject to a National Pollutant Discharge Elimination System permit through NC DEQ.

Regarding increased traffic, Petitioner presented evidence of a 0.1 second delay due to truck ingress and egress from the proposed quarry. The additional trucks on the road would not materially impact any of the surrounding intersections. The North Carolina Department of Transportation did not express any concerns regarding the sightline from the proposed entrance of the quarry site, and did not require a signal light to be installed at the proposed entrance. Petitioner agreed to restripe the road and create a dedicated left turn lane into the quarry.

The Board incorrectly found Petitioner had "failed to prove that the proposed use would not create significant, negative" impacts to air quality and surface and ground water, language the superior court erroneously used in its findings of fact. Petitioner's burden is a burden of production, not proof. *See Innovative 55*, __ N.C. App. at __, 801 S.E.2d at 676. Petitioner presented competent, material, and substantial evidence the proposed quarry will be established on a parcel already zoned and permitted for this use and would not have a material, adverse impact on public health or safety.

2. Required Conditions and Specifications of Permitted Use

Lee County's Development Regulations for quarries are found in Article 5 of the UDO. Quarries are a permitted use and are subject to Development Regulations laid out in section 5.23.2, entitled "Standards."

> 5.23.2.1 Minimum lot area is five (5) acres.
>
> 5.23.2.2 Such uses shall have direct access to a paved Public Street with an all-weather surface.
>
> 5.23.2.3 Minimum front, side and rear yards shall be fifty (50) feet, which shall be used for landscaping and screening.

> 5.23.2.4 The excavated area shall be surrounded with a six (6) foot high security fence.
>
> 5.23.2.5 Only one (1) ground sign per entrance to the storage yard is permitted. Such sign shall not exceed fifty (50) square feet in area. If lighted, such sign may include indirect lighting or non-flashing illumination. Such sign shall be located on the same lot or parcel as the mining or quarrying operation.

The property where the proposed quarry is located contains 377 acres, with 48 acres of the property being proposed for mining, and 90 acres being disturbed. Petitioner's evidence tends to show that 75% of the property will be undisturbed vegetative buffer for screening from the adjoining properties. Petitioner presented competent evidence of a paved driveway to access the quarry from NC Highway 87 and leading to a parking lot near the sales center. Petitioner also presented evidence asserting a proposed fifty-foot vegetative barrier bordering the driveway, the narrowest point of vegetative barrier to be established and maintained between the quarry and surrounding areas. Petitioner presented a preliminary site plan and other evidence indicating the installation of a six-foot high security fence around the mining area and only one sign located at the entrance, all of which would conform to the standards set forth in the UDO.

The findings of the Board show no adjudication of and ignores this evidence presented by Petitioner. The requirements the Board alleges Petitioner failed to include in its application, including detail on lighting and grading, are not stated as requirements for a SUP application, but are requirements for issuance of a building permit, an entirely separate process. Petitioner presented substantial, material, and competent evidence of all required specifications and conditions to establish a *prima facie* case for the issuance of the SUP. The Board erroneously conflagrated the burden of producing a *prima facie* showing to support the SUP application with required development and building standards and conditions.

3. Value of Adjoining and Abutting Property

Petitioner presented expert testimony by a certified real estate appraiser tending to show no impact on the adjoining or abutting property values. The expert ran a paired sales analysis for 319 homes near surrounding quarries, including properties not immediately adjoining or abutting those other quarries. Based upon this analysis, the expert appraiser opined there would be no negative impact on property values.

4. Harmony of Quarry with Surrounding Area

"The inclusion of the particular use in the ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district." *Woodhouse*, 299 N.C. at 216, 261 S.E.2d at 886 (citation omitted). As quarries are a permitted use in this zoning district under the UDO, the proposed quarry has previously been legislatively determined to be in harmony with the surrounding uses and zoning districts.

Petitioner also presented expert testimony tending to show the use will be in harmony with the surrounding area. The majority of the acreage in the property, over 75%, will remain undisturbed and used as a buffer to protect surrounding properties from any view of the quarry. The one-mile radius around the proposed location is thinly populated. The only two adjoining or abutting property owners to speak at the hearing both were in favor of issuing the SUP for the quarry, and testified to it being in harmony with their adjoining properties and surrounding areas.

Petitioners provided substantial, material, and competent evidence of all four requirements listed in section 3.5.3 of the UDO. Petitioner met its *prima facie* showing of entitlement to its SUP for the proposed quarry operations. *See Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227. Respondent's arguments to the contrary are overruled.

C. Board's Denial of Little River's SUP

[3] Petitioner asserts there is no competent, material, and substantial evidence to counter or rebut their *prima facie* case, or to support the Board's denial of their SUP application, and the Board's decision was arbitrary and capricious. We agree.

"Once an applicant makes [a *prima facie*] showing, the burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls upon those who oppose the issuance of the permit." *Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227.

If after presentation of rebuttal evidence a Board denies a SUP application, the denial must be "based upon findings which are supported by competent, material, and substantial evidence appearing in the record." *Id.* "When a party alleges that a decision of the superior court is arbitrary and capricious or unsupported by substantial evidence, this Court reviews the whole record." *Cumulus Broad., LLC v. Hoke County Bd. of Comm'rs*, 180 N.C. App. 424, 428, 638 S.E.2d 12, 16 (2006) (citation

omitted). Here, we examine the whole record to determine the sufficiency of the evidence to support the Board's denial of Petitioner's SUP.

Many of the Board's findings of fact to support its conclusions are based solely upon opponents' evidence and wholly ignore the evidence presented to make a *prima facie* showing by Petitioner. As a reviewing court applying the whole record test, the superior court "may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

At the quasi-judicial hearing, CTA presented both expert and lay testimony concerning the proposed quarry. None of the CTA residents adjoin or abut Petitioner's property. All of the opponents to the quarry opined it would cause harm to public health due to blasting and dust, to the environment, to property values, and to public safety due to traffic. "Speculative opinions that merely assert generalized fears about the effects of granting a conditional use permit for development are not considered substantial evidence to support the findings [to deny the permit]." *Humane Society of Moore Cty. v. Town of S. Pines*, 161 N.C. App. 625, 631, 589 S.E.2d 162, 167 (2003). Without specific, competent evidence to support these "generalized fears," this evidence does not rebut Petitioner's *prima facie* showing. *See id.*

Respondent-Intervenors' experts agreed that the proposed quarry use would be heavily regulated, and, as such, would not endanger the public health and safety due to blasting, sound, air quality, water quality, or traffic. The only rebuttal evidence Respondent-Intervenors produced, beyond "generalized fears" and speculation, was that Petitioner had not yet received the required approvals and permits from other regulatory agencies.

The UDO does not mandate all required approvals to be granted and permits issued prior to the approval of the SUP application. If needed, the Board can condition issuance of the SUP upon Petitioner securing these approvals and permits. The lack of all required approvals and permits at the time of the hearings does not rebut Petitioner's *prima facie* showing for the SUP.

The expert witness evidence to rebut Petitioner's showing of compliance with the UDO's condition 2 mistakes the process for site approval in Lee County. Petitioner presented evidence of compliance with all requirements for a SUP, and any information the Board contends was

missing was not required at this application for approval. These missing elements may affect the site plan and building approvals, and conditions imposed, but are insufficient to rebut the substantial, material evidence and to overcome Petitioner's *prima facie* showing or to support the Board's denial of the SUP.

The UDO clearly states the impact on property values only applies to "adjoining or abutting property." No residents of CTA or other Respondent-Intervenors who testified or intervened own property that adjoins or abuts the Petitioner's property. Their expert's assertion that several properties located in CTA may be negatively impacted by the quarry does not, *ipso facto*, overcome Petitioner's showing in the consideration of conclusion 3. Additionally, it was improper for the superior court to weigh the evidence and to assert Respondent-Intervenors' expert was "substantially more compelling." The superior court erred by re-weighing the evidence, as compared to reviewing the whole record as an appellate court. The superior court's review is limited to competent evidence in the whole record. *See Thompson*, 292 N.C. at 410, 233 S.E.2d at 541.

As noted, the County has already made a legislative decision to permit the operation of quarries in RA and RR zoned districts with approval of a special use permit. Respondent-Intervenors' rebuttal evidence regarding the lack of harmony with the surrounding uses consisted of "generalized fears" and speculation of lay witnesses. This testimony is insufficient to rebut Petitioner's *prima facie* showing and the prior legislatively determined harmony of this use within these zoning districts and with the surrounding area. *See Woodhouse*, 299 N.C. at 216, 261 S.E.2d at 886; *see also Am. Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 638, 643, 731 S.E.2d 698, 702-03 (2012), *disc. review denied*, 366 N.C. 603, 743 S.E.2d 189 (2013).

The Board's findings are unsupported by competent, material, and substantial evidence, and its conclusions thereon are, as a matter of law, erroneous. Respondent-Intervenors did not present substantial, material, and competent evidence to rebut Petitioner's *prima facie* showing of entitlement to a SUP. The superior court erred by not properly reviewing the evidence of the whole record, and the conclusions thereon *de novo*, and by affirming the Board's decision.

D. Little River's Due Process Rights

[4] Petitioner argues it was denied due process in the quasi-judicial hearing before the Board of Adjustment. We disagree.

A Board "conducting a quasi-judicial hearing, can dispense with no essential element of a fair trial[.]" *Humble Oil & Refining Co. v. Bd. of Aldermen of the Town of Chapel Hill*, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974). The Board "must insure that an applicant is afforded a right to cross-examine witnesses, is given a right to present evidence, is provided a right to inspect documentary evidence presented against him and is afforded all the procedural steps set out in the pertinent ordinance or statute." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of the Town of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980).

Here, every party was represented by counsel who all mutually agreed upon the procedures to be followed at each of the five quasi-judicial hearings. Having already addressed Petitioner's argument concerning Respondent-Intervenors' standing, we find no violation of Petitioner's due process rights. Petitioner's arguments are overruled.

VI. Conclusion

Petitioner has failed to show any error in the superior court's ruling on Respondent-Intervenors' standing before the Board or by allowing intervention before the superior court, or with the due process afforded to Petitioner. We affirm the superior court's ruling on those issues.

Petitioner presented a *prima facie* showing of entitlement to a SUP. Respondent-Intervenors failed to offer substantial, material, and competent evidence to rebut or overcome this showing. We reverse the superior court's affirmation of the Board's denial of Petitioner's SUP.

This case is remanded to the superior court for further remand to the Lee County Board of Adjustment to acknowledge Petitioner's application and *prima facie* showing for a SUP for the construction and operation of a quarry on the site, and to consider and detail any conditions, approvals, or permits from state or federal regulatory agencies required of Petitioner to comply with the Developmental Regulations in the UDO in order to issue the SUP. *It is so ordered.*

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED.

Judges STROUD and HUNTER concur.

JOSEPH P. McVICKER AND WIFE, SUSAN McVICKER, PLAINTIFFS
v.
BOGUE SOUND YACHT CLUB, INC., DEFENDANT

No. COA17-447

Filed 19 December 2017

1. Appeal and Error—mootness—construction bond—architectural review application—contested fine

Plaintiff lot owners' appeal from defendant homeowner association's authority under its subdivision covenants to impose a $250 construction bond for plaintiffs' architectural review application for approval to remove trees and brush from their own yard was not moot where defendant's authority to require a bond directly related to defendant's power to impose a contested fine of $1,400 based on failure to post a bond.

2. Associations—homeowners association—subdivision covenants—architectural review application—no express or implied authority to require bond

The trial court erred by concluding that defendant homeowner's association could require plaintiff lot owners to pay a bond with their architectural review application for removal of trees and brush from their yard where there was no express or implied authority under the subdivision's covenants.

3. Associations—homeowners association—subdivision covenants—architectural review application—improper fines for failure to pay illegal bond

The trial court erred by allowing defendant homeowners' association to impose a fine against plaintiff lot owners under N.C.G.S. § 47F-3-102(12) based on plaintiffs' failure to pay a bond with its architectural review application for cutting down trees and brush on their property. Defendant was not authorized to impose a construction bond and failed to follow the North Carolina Planned Community Act.

Judge HUNTER dissenting in separate opinion.

Appeal by plaintiffs from order entered 4 March 2016 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 4 October 2017.

Harvell and Collins, P.A., by Russell C. Alexander and Wesley A. Collins, for plaintiff-appellants.

Parker Poe Adams & Bernstein LLP, by Michael J. Crook, for defendant-appellee.

TYSON, Judge.

Joseph and Susan McVicker ("Plaintiffs") appeal from the trial court's order granting summary judgment to the Bogue Sound Yacht Club, Inc. ("Defendant" or "the Association"). We reverse the trial court's order and remand to the trial court for entry of summary judgment in favor of Plaintiffs.

I. Background

Defendant is a non-profit corporation, which operates the homeowners' association for the Bogue Sound Yacht Club subdivision located in Carteret County. Plaintiffs are lot owners within the subdivision. The subdivision is subject to the Amendment of Declaration of Covenants, Restrictions, and Easements of Bogue Sound Yacht Club.

In October 2013, Plaintiffs hired independent contractors to cut trees and clear brush on their property in order to maintain the lot's appearance and to prevent overgrowth. Plaintiffs did not believe they were required to seek approval of the Architectural Control Committee prior to beginning this work to remove trees and clear brush on their lot and did not do so. Before work on the property was completed, Defendant sent Plaintiffs a "Notice of [Architectural Control Committee] Violation" demanding Plaintiffs stop clearing trees on their property "until the proper . . . application form and $250 Refundable Construction Bond has been submitted for approval." However, with crews already on site and nearly finished, Plaintiffs continued the work and completed it the following day.

Plaintiffs eventually offered to submit the application, but refused to pay the requested $250 bond on the grounds such bond was not authorized either by the Covenants or applicable law. Defendant refused to accept Plaintiffs' application without the $250 bond and sent Plaintiffs notice of a hearing. The hearing notice alleged Plaintiffs' noncompliance with Association standards by clearing trees without following Defendant's purportedly required procedure. The hearing notice also notified Plaintiffs of a hearing to be held on 4 November 2013 before the board of directors, in order to determine whether the Association

should impose a fine on Plaintiffs. The hearing notice invited Plaintiffs to be heard on the matter by attending the hearing in person or submitting a written response; Plaintiffs opted to attend the hearing.

On 17 November, Defendant mailed Plaintiffs written notice of the Association's decision to allow a seven-day period for Plaintiffs to submit the application and construction bond. The notice indicated Plaintiffs' failure to comply within seven days would result in imposition of a fine of one hundred dollars per day for thirty days. On or about 10 December 2013, Plaintiffs submitted the $250 bond, under protest, along with the required application. Defendant retroactively approved Plaintiffs' application and returned the $250 bond in full. Yet, because the bond was purportedly not submitted within the seven-day period, Defendant assessed $1,400 in fines. Defendant subsequently reduced the fines by twenty-five percent, to $1,050.

On 15 April 2014, Plaintiffs filed a verified complaint alleging two claims for declaratory relief and a claim for breach of fiduciary duty. Plaintiffs sought a declaration that: (1) Defendant failed to comply with requirements of the North Carolina Planned Community Act pertaining to the imposition of fines; and (2) Defendant is without authority to impose the construction bond. Additionally, Plaintiffs claimed Defendant had breached a fiduciary duty owed to Plaintiffs and other members of the Association by selectively enforcing covenants and "failing to evenly, uniformly, fairly and equitably apply the Covenants to its members."

Defendant answered the complaint on 18 June 2014, and both parties moved for partial summary judgment. In Defendant's motion, Defendant contended pursuant to the Covenants and bylaws of Bogue Sound Yacht Club, Defendant "is empowered and required to maintain, keep up, and supervise the use and condition of the common areas in the subdivision" and to "regulate the use and maintenance of the properties within the subdivision through the rules and regulations promulgated by its Board of Directors through its Architectural Control Committee." Defendant claimed "[i]n furtherance of these rights and responsibilities, [Defendant] . . . requires that homeowners submit an application containing plans and specifications for work that may impact property values, other structures, natural vegetation, topography, [and] privacy . . . ." Part of this application process purportedly includes the power to additionally require a $250 construction bond. Defendant attached Plaintiff Joseph P. McVicker's deposition to support its motion.

In support of their motion, Plaintiffs argued they were entitled to judgment as a matter of law, because the Covenants "contain no

authority for the imposition of such a bond" and because Defendant is without authority to impose the bond, the failure to post the bond cannot serve as a basis for imposing a fine. Plaintiffs further asserted Defendant failed to give legally sufficient notice of the charge, as required by North Carolina law.

The trial court heard the parties on their motions for partial summary judgment on 1 February 2016. On 4 March 2016, the court entered a written order granting Defendant's motion for partial summary judgment, denying Plaintiffs' motion, and dismissing with prejudice Plaintiffs' claims for declaratory relief. On 9 March 2016, Plaintiffs gave notice of appeal to this Court. In an opinion filed 6 December 2016, this Court dismissed Plaintiffs' appeal as interlocutory. *McVicker v. Bogue Sound Yacht Club, Inc.*, __ N.C. App. __, 794 S.E.2d 560, 2016 WL 7100634 (unpublished). Plaintiffs subsequently dismissed their third claim for relief entitled "Breach of Fiduciary Duty and Selective Enforcement." Plaintiffs then filed their second notice of appeal to this Court on 10 March 2017.

II. Jurisdiction

Plaintiffs' appeal from the superior court's final order lies of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Issues

Plaintiffs contend the trial court erred in granting summary judgment to Defendant on the issues of: (1) Defendant's authority to require a bond be submitted with a request for approval to Defendant prior to alterations, improvements or construction on Plaintiffs' lot; and (2) Defendant's imposition of a fine upon Plaintiffs.

IV. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015); *see Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 737 (2003) (citation omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted).

In reviewing a motion for summary judgment, the trial court must "view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor." *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 117 (2011) (citation omitted). This Court reviews a trial court's summary judgment order *de novo*. *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

V. Analysis

Plaintiffs argue the trial court erred in granting summary judgment in favor of Defendant, because Defendant is not authorized to impose the construction bond and because Defendant failed to follow the North Carolina Planned Community Act (the "PCA") in imposing fines upon Plaintiffs. We agree.

A. *Mootness*

[1] We first address our dissenting colleague's contention that Plaintiffs' challenge to Defendant's authority under the Amendment of Declaration of Covenants, Restrictions, and Easements of Bogue Sound Yacht Club (the "Covenants") to impose the $250 construction bond is moot.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citation omitted). "A case is not moot where there is a sufficient real or immediate interest evidencing an existing controversy[.]" *Guilford Cty. Dep't of Emergency Servs. v. Seaboard Chem. Corp.*, 114 N.C. App. 1, 13, 441 S.E.2d 177, 184 (citations and internal quotation marks omitted), *disc. review denied*, 336 N.C. 604, 447 S.E.2d 390 (1994). This Court has also previously held that "cases which are technically moot may be considered if they are 'capable of repetition yet evading review.' " *Ballard v. Weast*, 121 N.C. App. 391, 394, 465 S.E.2d 565, 568 (citation and quotation marks omitted), *disc. review denied*, 343 N.C. 304, 471 S.E.2d 66 (1996).

Our dissenting colleague attempts to separate and not address or rule upon Defendant's authority to require a bond from Plaintiffs from Defendant's power under the PCA to assess fines for Plaintiffs' failure to post the bond. The issue of Defendant's authority to require a construction bond with an application is necessarily intertwined and has a "practical effect" upon the issue of Defendant's power to fine Plaintiffs

$1,400 for not initially posting the bond as part of the Plaintiffs' application. *Roberts*, 344 N.C. at 398-99, 474 S.E.2d at 787.

We view the allegations in the pleadings in the light most favorable to Plaintiffs. Plaintiffs initially submitted their application for approval to remove trees and brush from their own yard, but did not submit the $250 bond because they did not believe they were required to under the Covenants. Defendant refused to accept Plaintiffs' application for approval without Plaintiff additionally posting the $250 construction bond. Defendant fined Plaintiffs based upon its own refusal to accept Plaintiffs' architectural review application without the additional $250 bond.

Plaintiffs' argue the Covenants do not expressly authorize Defendant to require a bond with a submission of an architectural review application, and they refused to submit the construction bond. To determine whether Defendant possessed the authority to impose a fine for Plaintiffs' refusal to post a bond, necessarily requires us to resolve the controversy of whether the Covenants expressly authorize Defendant to require applicants to post a construction bond with their application. *See Roberts*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787.

Defendant's authority to require a bond directly bears upon Defendant's power to impose the contested fine upon Plaintiffs, and is not moot. Even were we to agree that the return of the bond mooted Plaintiff's claims, this issue remains properly before us, as "cases which are technically moot may be considered if they are 'capable of repetition yet evading review.' " *Ballard* 121 N.C. App. at 394, 465 S.E.2d at 568; *see also Cumberland Cty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Sers.*, 242 N.C. App. 524, 530, 776 S.E.2d 329, 334 (2015) ("[W]e are not required to find that a future dispute will involve the exact same parties and circumstances before applying the exception [to mootness.]").

B. *The Covenants*

[2] Plaintiffs argue the Covenants do not authorize Defendant to require a construction bond be posted with an approval application. Defendant asserts the following Covenants provide authority to require Plaintiffs to post a bond with submission of an approval application. Although not raised by the parties, we presume, without deciding, for the purpose of analyzing the bond requirement that Defendant has the authority to require an approval application for lot owners conducting yard maintenance upon their own property.

The Covenants provide, in part:

> ARTICLE 4 (COMMON AREAS)
>
> 2. Easements. Every Owner shall have a right and easement of enjoyment in and to the Common Areas, on a nonexclusive basis, which right and easement shall be appurtenant in and shall pass with the title to every Lot; provided, however, the easements created hereunder shall be subject to the following:
>
> (a) the right of the Association to establish reasonable rules and to charge reasonable fees for the use of the Common Areas, any such fees being charged being for the cost of maintenance, upkeep, and supervision of said Common Area;
>
> . . . .
>
> ARTICLE 6 (ARCHITECTURAL CONTROL COMMITTEE)
>
> . . . .
>
> 3. Procedure. Two copies of the complete set of plans and specifications, including landscape plans, describing any improvement, alteration, repair, or other item requiring approval of the Committee, shall be submitted to the Committee, at the place of address designated by the Association. The Committee shall either approve or disapprove the proposed work in writing within twenty (20) days of the receipt of said plans and specifications. If the Committee disapproves the proposed work, the Committee shall state its reasons for such disapproval in the written notification. In the event the Committee fails to approve or disapprove in writing any proposed work within said twenty (20) day period approval shall be deemed granted. An applicant shall have the right to appeal an adverse Committee decision to the Board of Directors of the Association who may reverse or modify such decision by a two-thirds vote of the directors present at a duly called meeting.
>
> 4. Required Approval. No improvements, alterations, repairs, or excavations, nor any maintenance which requires or would result in a change in appearance (such as a change of color), or any other activity which would

> noticeabl[y] and visibly change the exterior appearance of a house or a Lot, or of any improvement located thereon, shall be made or done without the prior approval of the Committee. No building, fence, wall, residence or other structure shall be commenced, erected, maintained, improved, altered, or otherwise modified without the prior approval of the Committee, upon compliance with the procedures for approval as set out in subparagraph 3 of this Article 7.

The Covenants also state, in pertinent part:

> ARTICLE 15 (BUILDING RESTRICTIONS)
>
> . . . .
>
> 5. Damage to Common Properties. Each Owner shall be an insurer on behalf of their employees, contractors, subcontractors, and material suppliers, to the Association, for any damage to roads or to any other Common Areas caused by the passage of vehicles and equipment over the roads in the subdivision, or by any other activity associated with construction on Lots within the subdivision. In the event of such damage, the Association shall have the authority to repair such damage and assess the cost of such repairs to the Owner, which assessment shall become a lien on the property, just as other assessments are a lien, as set out in Article 7 of this Amended Declaration.

Over sixty-three years ago, the Supreme Court of North Carolina set forth and has since re-affirmed how courts are to review and construe restrictive covenants: "[R]estrictive covenants clearly expressed may not be enlarged by implication or extended by construction. They must be given effect and enforced as written." *Callaham v. Arenson*, 239 N.C. 619, 625, 80 S.E.2d 619, 624 (1954). "North Carolina follows the rule of strict construction when interpreting restrictive covenants. That is, any ambiguities will be resolved in favor of unrestricted use. But this rule must not be applied to defeat the plain and obvious purposes of the restriction." *Barber v. Dixon*, 62 N.C. App. 455, 457, 302 S.E.2d 915, 916-17 (1983) (citing *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967)). "[E]ach part of the covenant must be given effect according to the natural meaning of the words . . . ." *J.T. Hobby & Son, Inc. v. Family Homes of Wake Cty.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981).

> [I]n interpreting restrictive covenants, *doubt and ambiguity are resolved in favor of the unrestricted use*

> *of property*, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than *the one which extends it*, *should be adopted*, and that construction should be embraced which least restricts the free use of the land.

Hultquist v. Morrow, 169 N.C. App. 579, 584-85, 610 S.E.2d 288, 292 (emphasis supplied) (citations and quotation marks omitted), *disc. review denied*, 359 N.C. 631, 616 S.E.2d 235 (2005).

Defendant is a planned community created before 1 January 1999 and is therefore subject to particular sections of the PCA. *See Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 399-400, 584 S.E.2d 731, 735 (2003). The PCA allows property owners' associations to "(6) [r]egulate the use, maintenance, repair, replacement, and modification of common elements[,]" and to "(17) [e]xercise any other powers necessary and proper for the governance and operation of the association." N.C. Gen. Stat. § 47F-3-102(6), (17) (2015). "Unless the articles of incorporation or the declaration expressly provides to the contrary, the [homeowners'] association may" exercise these powers. N.C. Gen. Stat. § 47F-3-102.

Defendant asserts it possesses authority to impose a bond requirement with the submission of an application for approval under its right "to establish reasonable rules and to charge reasonable *fees* for the use of the Common Areas. . ." under the Covenants. The Covenants expressly authorize Defendant to "charge reasonable fees *for the use* of the Common Areas[,]" but not to impose a bond as part of the approval process to conduct maintenance or improvements upon a lot owner's own property.

No express language in the Covenants or the PCA grants Defendant the authority to additionally require a bond to be submitted with a request for approval of activities on an owner's lot, not part of any common area. Defendant cannot assert this power by implication. *See Callaham*, 239 N.C. at 625, 80 S.E.2d at 624. Construing the Covenants strictly, as this Court is required to do, Defendant does not have the express or implied authority to additionally require Plaintiffs to post a bond as a condition to consider their application for approval. *See Long*, 271 N.C. at 268, 156 S.E.2d at 239.

The Covenants expressly set out the requirements for what Plaintiffs must submit with a request for approval to the Architecture Control Committee: "Two copies of the complete set of plans and specifications, including landscape plans, describing any improvements, alteration, repair, or other item requiring approval of the Committee, shall

be submitted to the Committee[.]" Nothing in the Covenants' specified procedure indicates, implies, or requires the additional requirement of a bond to be posted.

The Covenants also specifically provide that, in the event of damage to the Common Areas, "caused by any other activity associated with construction on Lots within the subdivision . . . [the Association] shall have the authority to repair such damage and assess the cost of such repairs to the Owner[.]"

While not before us here, Plaintiffs' cutting and removal of trees upon their own property might arguably come within the ambit of "any other activity associated with construction[.]" The Covenants expressly provide the procedure for Defendant to assess costs for any damage to the Common Areas caused by "activity associated with construction on Lots within the subdivision[.]" It does not appear in the record that Plaintiffs were doing construction on their lot or preparing for construction.

Although the Covenants expressly allow Defendant to charge "reasonable fees for the use of the Common Areas, any such fees being charged being for the purpose of reimbursing the Association for the cost of maintenance, upkeep, and supervision of said Common Areas[,]" the Covenants expressly require only the submission of plans and specifications to the Architectural Review Committee, and do not additionally require posting a bond. "[R]estrictive covenants clearly expressed may not be enlarged by implication or extended by construction." *Callaham*, 239 N.C. at 625, 80 S.E.2d at 624.

Additionally, the Covenants specifically provide that in the event of damage to the Common Areas caused by "activity associated with construction on Lots within the subdivision," Defendant is to first repair the damage and then assess the lot owner. The requirements of the Covenants can "not be enlarged by implication" to additionally require Plaintiffs to post a bond to pay for potential damage to the Common Areas, when the Covenants expressly provide a procedure by which Defendant may repair and assess the costs of damage to the Common Areas caused by approved activity on the owner's lot. *See id.* Defendant possesses no express or implied authority under the Covenants to additionally require Plaintiff to post a bond with their application for approval. The superior court's order to the contrary is erroneous.

C. *The Fine*

[3] Plaintiffs contend the Defendant's imposition of a fine for failure to pay the $250 bond is improper because the bond requirement is void,

and Defendant failed to follow the requirements of the PCA for imposing a fine. We agree.

Our dissenting colleague would decline to address whether Defendant has the authority to impose the fine, because Plaintiffs did not ask the trial court to decide whether the Association had the authority to impose fines in their complaint. However, Plaintiffs specifically alleged in their claim for declaratory relief under the PCA:

> 21. Upon information and belief, *Defendant failed to comply with the requirements of the North Carolina Planned Community Act pertaining to the procedure for the imposition of fines* and related matters.
>
> [And]
>
> 22. The attempt of BSYC [Defendant] to impose a fine upon Plaintiffs is void due *to failure to comply with the statutory requirements for the imposition of fines.* (emphasis supplied).

Instead of addressing Defendant's authority to assess a fine for Plaintiffs' initial refusal to pay an unenforceable bond, our dissenting colleague expounds at length on the issue of whether Defendant followed proper procedure under the PCA before imposing the fine. Our dissenting colleague quotes Plaintiffs' brief in an attempt to bolster the notion that the only issue before us regarding the fine is whether Defendant followed proper procedure in imposing it, as follows: "Specifically, the issue before this Court is whether the notice of hearing issued by the Association was sufficient to put the Plaintiff-Appellants on 'notice of the charge,' as required by G.S. 47F-3-107.1." However, this selective quotation ignores Plaintiffs' later contention in their brief that, "[s]ince the purported obligation to pay the $250.00 construction bond is void and fails as a matter of law, the requirement that a fine be imposed for a violation of the Covenants is not satisfied under G.S. 47F-3-102(12), and the fine is improper for that reason, alone."

N.C. Gen. Stat. § 47F-3-102(12) (2015) provides for the imposition of *reasonable* fines. The association may

> After notice and an opportunity to be heard, impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association[.]

The record clearly indicates, and there is no factual dispute, that Defendant refused to accept or review Plaintiffs' application without them also posting a $250 bond. Defendant fined Plaintiffs $100 for each day they did not submit the illegal $250 bond, totaling $1,400 worth of fines. Defendant subsequently reduced the amount of the fine to $1,050. The additional requirement of a bond is not authorized either by the Covenants or required by the PCA.

Plaintiffs attempted to submit their application without the bond, which Defendant refused to accept until the bond was submitted, under protest. Defendant then fined Plaintiffs for each day it had refused to accept Plaintiffs' application without the illicit bond. Defendant did not impose the fine for any other violation. Defendant's imposition of the fine was unlawful. *See* N.C. Gen. Stat. § 47F-3-102(12).

Defendant's imposition of a fine for Plaintiffs not submitting the illegal $250 bond is plainly not reasonable. *See Id.* Presuming *arguendo*, Defendant provided Plaintiffs with proper statutory notice and an opportunity to be heard before imposing the fine, imposing the fine itself is, *ipso facto*, to the illegal bond requirement, unlawful as it is not authorized by the Covenants and is not required under the PCA. *Id.*

VI. Conclusion

Viewing the evidence in the light most favorable to Plaintiffs, as is required upon Defendant's motion, no genuine issue of material fact exists that Defendant unlawfully required Plaintiffs to post a bond with their application, and illegally imposed a fine for Plaintiffs' failure to do so.

The trial court's grant of summary judgment to Defendant is reversed and the matter remanded to the superior court with instructions to enter summary judgment in favor of Plaintiffs. *It is so ordered.*

REVERSED AND REMANDED.

Judge STROUD concurs.

Judge HUNTER dissents in a separate opinion.

HUNTER, JR., Robert N., Judge, dissenting in a separate opinion.

I respectfully disagree with the majority's decision reversing the trial court's order. I would dismiss the portion of Plaintiffs' appeal arguing imposition of the bond was improper. I would affirm the trial court's order granting summary judgment for Defendant and dismissing

with prejudice Plaintiffs' claims for declaratory relief as to the issue of whether Defendant failed to properly impose the fine.

Trial courts have discretion to decline to enter declaratory judgment. The North Carolina Declaratory Judgment Act provides in pertinent part: "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding . . . ." N.C. Gen. Stat. § 1-257 (2015).

The issue of whether Defendant had authority to impose the $250 construction bond is moot, as both parties agree Defendant fully refunded the bond to Plaintiffs. The majority asserts the issue is "capable of repetition yet evading review" and therefore, not moot. This Court has stated cases are capable of repetition yet evading review when "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989) (quoting *Leonard v. Hammond*, 804 F. 2d 838, 842 (4th Cir. 1986)).

Because the bond had been fully refunded at the time of trial there was no longer a controversy present needing judicial wisdom. The issue of imposition of a bond is not ordinarily an event of short duration so as to evade full litigation. If Defendant had not refunded the bond, then the imposition would not expire, and Plaintiffs would have ample opportunity to litigate their claim. Yet here, because the bond has been fully refunded, addressing the issue will have no practical effect on the controversy and the trial court properly exercised its discretion to decline to enter declaratory judgment.

As to the issue of whether imposition of the fine was improper, Plaintiffs did not ask the trial court to decide whether Defendant had the authority to impose the fine in their complaint. Instead, Plaintiffs challenged Defendant's failure to comply with the proper procedures and statutory requirements for imposition of fines. Lacking an allegation in the complaint asking for a determination of the authority to impose fines, this Court should decline to address whether Defendant had authority to impose the fines and instead only address whether Defendant complied with the procedural requirements for imposition of the fines. Plaintiffs' brief states "[s]pecifically, the issue before this Court is whether the notice of hearing issued by the Association was sufficient to put the Plaintiff-Appellants on 'notice of the charge,' as required by G.S. 47F-3-107.1."

I would conclude Defendant complied with statutory requirements when it issued Plaintiffs two notices. The procedure for imposing fines for violations of the Association's rules and regulations is set forth in N.C. Gen. Stat. § 47F-3-107.1 which provides, in pertinent part:

> Unless a specific procedure for the imposition of fines or suspension of planned community privileges or services is provided for in the declaration, a hearing shall be held before the executive board or an adjudicatory panel appointed by the executive board to determine if any lot owner should be fined or if planned community privileges or services should be suspended pursuant to the powers granted to the association in G.S. 47F-3-102(11) and (12). Any adjudicatory panel appointed by the executive board shall be composed of members of the association who are not officers of the association or members of the executive board. The lot owner charged shall be given notice of the charge, opportunity to be heard and to present evidence, and notice of the decision.

Because the covenants at issue in this case do not contain a specific procedure for the imposition of fines, the procedure set forth in the Act governs. The Act provides certain minimal due process guarantees, allowing imposition of fines only after an owner is given: (1) notice of the charge; (2) an opportunity to be heard and to present evidence; and (3) notice of the decision. N.C. Gen. Stat. § 47F-3-107.1; *Reidy v. Whitehart Ass'n*, 185 N.C. App. 76, 84, 648 S.E.2d 265, 271 (2007).

Here, Defendant issued Plaintiffs two notices. First, Defendant sent "Notice of ACC Violation" dated 3 October 2013, ordering Plaintiffs to "cease and desist" clearing the trees on their property until Plaintiffs submitted the proper application form and $250 "Refundable Construction Bond." The letter included the regulation outlining the procedure for obtaining the approval of the Architectural Committee prior to conducting construction or improvements. Defendant sent another notice dated 23 October and titled "Hearing Notice." This letter again indicated Plaintiffs failed to comply with the proper procedure for obtaining Architectural Committee approval prior to clearing the trees on their property, and it indicated Defendant's authority to impose fines against Plaintiffs which could be as much as one hundred dollars per occurrence or per day. The letter also included notice of a hearing to be held on 4 November 2013 and invited Plaintiffs to attend. Nothing in the Act, or our case law suggests any particular form of notice is required beyond simply providing the owner with notice of the violation. Here, Plaintiffs

were given adequate notice in the form of two written letters. Thus, I would conclude Defendant complied with the requirements of the Act in imposing a fine on Plaintiffs, and affirm the trial court's order granting summary judgment for Defendant as to this issue.

Therefore, because Defendants fully refunded the bond, Plaintiffs' complaint did not contest Defendant's authority to impose the fines, and because notice of the fines complied with statutory requirements, the trial court's order granting summary judgment to Defendant and dismissing Plaintiffs' claim for declaratory relief was proper.

MID-AMERICA APARTMENTS, L.P., PLAINTIFF

v.

THE BLOCK AT CHURCH STREET OWNERS ASS'N, INC., DEFENDANT

No. COA16-819

Filed 19 December 2017

1. Appeal and Error—standard of review—de novo for summary judgment—abuse of discretion for injunctive relief

Although de novo review is applied to orders granting summary judgment as to contracts claimed void for illegality, the abuse of discretion standard applies for the trial court's fashioning of injunctive relief.

2. Easements—express easement—access and parking rights—permanent injunction—public policy

The trial court did not err by entering summary judgment permanently enjoining defendant homeowner's association from interfering with the rights of plaintiff mixed-use retail and residential development owner under an express easement allowing access and parking rights where municipal law did not render the easement void as an illegal contract or contrary to public policy, even if the exercise of some easement rights might result in a parking fine.

3. Injunctions—permanent injunction—express easement—access and parking rights

The trial court did not abuse its discretion by granting a permanent injunction against defendant homeowner's association regarding an express easement allowing plaintiff mixed-use retail and residential development owner to have access and parking rights

where it enjoined conduct that was prohibited by the easement that was previously agreed to by both parties.

Appeal by Defendant from summary judgment entered 15 April 2016 by Judge Mark E. Klass in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 January 2017.

McAngus, Goudelock & Courie, PLLC, by Colin E. Scott and Jeffrey B. Kuykendal, for Defendant-Appellant.

Womble Bond Dickinson (US) LLP, by Mark P. Henriques and Jackson R. Price, for Plaintiff-Appellee.

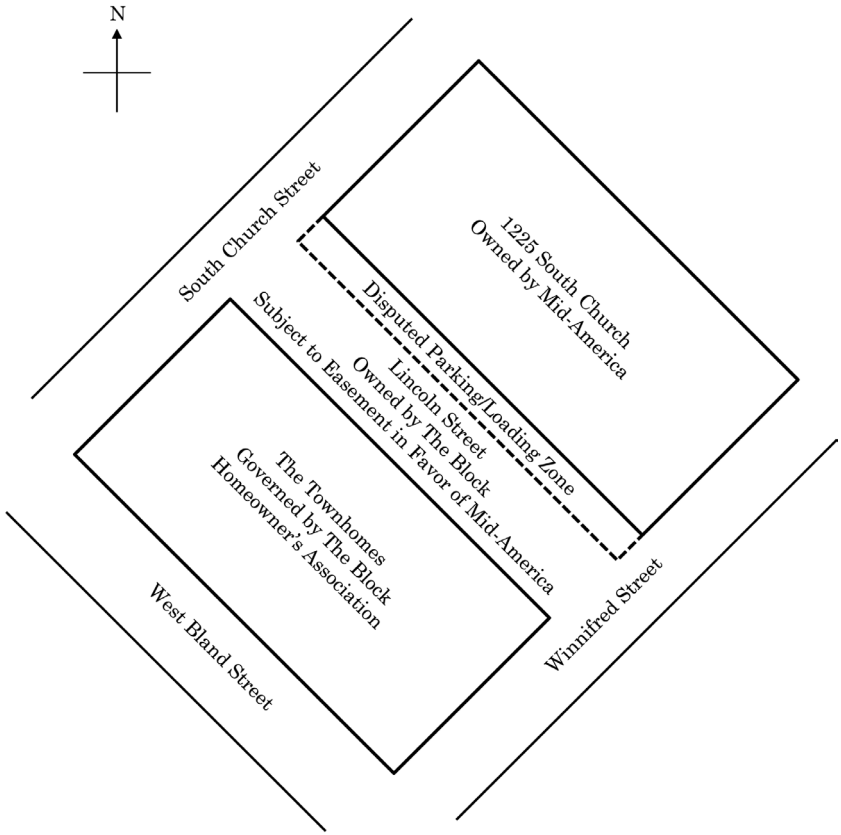
INMAN, Judge.

This appeal concerns a private street subject to an express easement and later declared a fire lane by municipal authorities. We hold that the municipal law does not render the easement void as an illegal contract or contrary to public policy, even if the exercise of some easement rights may result in a parking fine.

Defendant The Block at Church Street Owners Association, Inc., ("The Block") appeals from entry of summary judgment permanently enjoining it from interfering with the rights of Plaintiff Mid-America Apartments, L.P., ("Mid-America") under an express easement. The Block argues that: (1) the easement is a void illegal contract that the trial court cannot enforce by injunction; and (2) if the easement is valid, the permanent injunction impermissibly expands Mid-America's rights thereunder. After careful review, we affirm the judgment of the trial court.

I. Factual and Procedural History

The Block is a homeowner's association comprised of townhome (the "Townhomes") owners in Charlotte, North Carolina. The Townhomes governed by The Block are bordered by South Church Street, Lincoln Street, Winnifred Street, and West Bland Street. Opposite Lincoln Street from the Townhomes is a mixed-use retail and residential development currently owned by Mid-America ("1225 South Church"). The parties' respective interests and issues disputed in this appeal are depicted by the following simplified graphic:



Before The Block came to own Lincoln Street, it was owned by The Boulevard at Church and Bland LLC, while 1225 South Church was owned by The Boulevard at 1225 South Church LLC (collectively, the "Boulevard Entities"). During the development of 1225 South Church, the Boulevard Entities and The Block entered into an "Access, Storm Water and Sanitary Sewer Easement Agreement" (the "Easement"), which established "a non-exclusive, perpetual easement . . . over, upon and across Lincoln Street, for the purposes of providing pedestrian and vehicular access [and] ingress and egress" in favor of 1225 South Church's owner. Three months later, The Block and the Boulevard

Entities amended the Easement's Lincoln Street access provisions to add the following language:

> The purpose of this Access Easement shall include, and this Access Easement shall allow for, service and delivery vehicles to be parked on Lincoln Street for such periods of time as are reasonably necessary (i) to provide customary services, including waste removal service, or (ii) to make deliveries, including moving services for any apartments, all for the benefit of the . . . [1225 South Church] Parcel.

After amending the Easement, the Boulevard Entities permitted The Block to add striped parking spaces for its members on Lincoln Street adjacent to 1225 South Church, but left open a portion of the street as a loading area for tenants of 1225 South Church.

By 2015, The Block had come to own Lincoln Street, Mid-America owned 1225 South Church, and the Boulevard Entities no longer had any interest in the properties. Thus, Mid-America was the beneficiary of the Easement and its access rights, encumbering The Block's property interest in Lincoln Street.

In May of 2015, the president of The Block, Paul Podgorski ("Mr. Podgorski"), contacted Mid-America regarding leaky dumpsters and debris on Lincoln Street and speeding by motorists, which Mr. Podgorski attributed to Mid-America's tenants. Mr. Podgorski suggested renegotiating the Easement to avoid The Block temporarily prohibiting Mid-America's access to Lincoln Street. Mid-America replied, promising to remedy the leaky dumpster and debris problems but refusing to renegotiate the Easement and instead asserting that any limit to Mid-America's access to Lincoln Street would violate the Easement.

Mr. Podgorski then asserted that The Block possessed the right to temporarily shut down Lincoln Street under the Easement and announced that The Block would be restriping existing parking spaces and would add additional striped spaces in the loading zone used by Mid-America's tenants. Mr. Podgorski also stated that The Block would be barring access to Lincoln Street for Mid-America's tenants for a business day and halting all ingress and egress from one of 1225 South Church's parking decks to perform the striping. He also threatened to file a materialman's lien on 1225 South Church in the event that Mid-America refused to cover fifty percent of the striping costs as "necessary repairs or maintenance" under the Easement.

In response, Mid-America offered to provide The Block with assistance in securing favorable pricing for restriping the existing spaces

and informed Mr. Podgorski that additional dumpster repairs and debris cleanup was underway. However, it also notified Mr. Podgorski that it would secure an injunction against The Block to protect its rights under the Easement in the event The Block removed Mid-America's loading zone and barred Mid-America's access to Lincoln Street for striping.

Undeterred by a potential injunction, Mr. Podgorski responded once more, informing Mid-America that the striping would be limited to removing Mid-America's loading zone and insisting that the entire street and parking deck used by Mid-America's tenants would be closed for painting. Two business days later, on 26 May 2015, Mid-America filed suit seeking a temporary restraining order, preliminary injunction, permanent injunctive relief, and monetary damages against The Block.

The trial court entered a restraining order (the "Restraining Order") prohibiting The Block from striping the loading zone, restricting access to the parking deck or the portion of Lincoln Street subject to the Easement, threatening such restrictions, and interfering with Mid-America's use of the Easement. Mid-America then amended its complaint to pursue only permanent injunctive relief.

On 31 August 2015, The Block submitted an affidavit from a Charlotte deputy fire marshal to the trial court stating that Lincoln Street was a fire apparatus access road and that neither The Block nor Mid-America, including tenants of 1225 South Church and The Block's members, could use Lincoln Street as parking or a loading zone without violation of the North Carolina Fire Code (the "Fire Code").

On 9 September 2015, the trial court entered a preliminary injunction (the "Preliminary Injunction"). The Preliminary Injunction included the restrictions imposed by the earlier Restraining Order and further provided that "[i]f [The Block] is ordered by the Charlotte Fire Department to remove the loading zone from Lincoln Street, then it may seek modification of this injunction from the Court." That same day, the deputy fire marshal ordered The Block to remove any marked parking on the street and the loading zone and informed the parties that "enforcement of illegal parking will be handled by [the Charlotte-Mecklenburg Police Department] and [the Charlotte Fire Department]." Mid-America amended its amended complaint on 30 November 2015 to include reference to the fire marshal's order, and The Block thereafter filed an answer to the amended complaint asserting, *inter alia*, that the Easement was void for illegality. On 8 January 2016, the trial court modified the Preliminary Injunction to permit The Block's compliance with the fire marshal's order.

Entry of both the Restraining Order and the Preliminary Injunction notwithstanding, Mr. Podgorski continued to interfere with Mid-America's rights under the Easement. On 11 December 2015, Mr. Podgorski had an altercation with a Mid-America company police officer over the placement of dumpsters on Lincoln Street. Mr. Podgorski pushed the officer and moved the dumpsters; when the officer attempted to stop him, Mr. Podgorski brandished a pistol and told the officer he "better back off." Two days later, a moving truck for a residential tenant of 1225 South Church was towed by a towing service called by Mr. Podgorski after he saw the truck parked on Lincoln Street. Following a motion to show cause, the trial court held The Block in contempt of the Preliminary Injunction for towing the moving truck.

Mid-America filed a motion for summary judgment on 17 February 2016, seeking final resolution of its sole claim for entry of a permanent injunction. The trial court entered summary judgment for Mid-America and imposed a permanent injunction against The Block on 15 April 2016 (the "Permanent Injunction"). Under the operative language of the injunction:

> [The Block] is permanently enjoined from interfering with [Mid-America's] use and enjoyment of the Easement in any way, including but not limited to:
>
> (1) Pushing [Mid-America's] dumpsters away from the curb on Lincoln Street;
>
> (2) Blocking or otherwise preventing garbage trucks from accessing [Mid-America's] dumpsters;
>
> (3) Harassing delivery trucks and vehicles parked on Lincoln Street, or [Mid-America's] residents;
>
> (4) Preventing delivery trucks and vehicles from being parked on Lincoln Street;
>
> (5) Calling towing companies to tow trucks and vehicles parked on Lincoln Street pursuant to the terms of the Easement . . . ; and
>
> (6) Using Lincoln Street as parking for residents of the Townhomes in a way that interferes with [Mid-America's] use and enjoyment of the Easement, unless expressly authorized by [Mid-America] in writing.

The order also provides, however, that "[nothing] in this Order [shall] be construed to prevent enforcement of the North Carolina Fire Code." The Block timely filed its notice of appeal.[1]

II. Analysis

The Block argues that the trial court erred in granting summary judgment and entering the Permanent Injunction on two grounds: (1) because parking on Lincoln Street would be in violation of the North Carolina Fire Code, the Easement is void; and (2) alternatively, the Permanent Injunction impermissibly expands the rights granted to Mid-America under the Easement. We address each in turn.

A. Standard of Review

[1] The parties disagree about the appropriate standard of review. The Block contends that *de novo* review is properly applied to resolve both of its arguments. Mid-America concedes that *de novo* review governs resolution of whether the Easement is void as a matter of law, but argues that the abuse of discretion standard applies to our review of the permanent injunction.

The parties are correct that we apply *de novo* review to orders granting summary judgment as to contracts claimed void for illegality. *Botts v. Tibbens*, 232 N.C. App. 537, 539, 754 S.E.2d 708, 710 (2014). As to the review of error in the trial court's fashioning of its injunctive relief, we hold that the abuse of discretion standard applies. In *Federal Point Yacht Club Ass'n, Inc. v. Moore*, 233 N.C. App. 298, 758 S.E.2d 1 (2014), this Court applied the abuse of discretion standard on review of a summary judgment order imposing a permanent injunction to enforce a restrictive covenant. 233 N.C. App. at 309-10, 758 S.E.2d at 8. In doing so, we expressly rejected the contention that the order was subject to *de novo* review. *Id.* at 312, 758 S.E.2d at 9-10. Because a restrictive covenant is "a negative easement[,]" *Craven Cnty. v. First-Citizens Bank & Trust Co., Inc.*, 237 N.C. 502, 513, 75 S.E.2d 620, 628 (1953), we employ the same standard to review the summary judgment order and permanent injunction appealed here. *See also Buie v. High Point Assocs. Ltd. P'ship*, 119 N.C. App. 155, 161, 458 S.E.2d 212, 216 (1995) ("Whether injunctive relief

1. The Permanent Injunction did not deter The Block from further attempts to restrict Mid-America's use of Lincoln Street. On 2 June 2016, Mid-America filed a motion for additional injunctive relief after The Block announced plans to completely shut down Lincoln Street for a full business day in order to restripe Lincoln Street as a fire lane without any input or effort to accommodate Mid-America. The trial court granted Mid-America's motion. That order is not before us in this appeal.

will be granted to restrain the violation of such [negative easements] is a matter within the sound discretion of the trial court . . . and the appellate court will not interfere unless such discretion is manifestly abused." (internal quotation marks and citation omitted)).

We reject The Block's argument that the permanent injunction is subject to *de novo* review because it requires interpretation of the Easement. Mid-America's second amended complaint sought either injunctive relief or, in the alternative, a declaration of Mid-America's rights under the Easement pursuant to the Uniform Declaratory Judgment Act. But the trial court granted only equitable relief and did not enter a declaratory judgment. So the only issue before us is whether the trial court abused its discretion in granting that relief. *See*, *e.g.*, *Kinlaw v. Harris*, 364 N.C. 528, 533, 702 S.E.2d 294, 297 (2010) ("Because the fashioning of equitable remedies is a discretionary matter for the trial court, we review such actions under an abuse of discretion standard.").

B. The Easement Is Neither Void for Illegality Nor Contrary to Public Policy

[2] The Block first argues that the decisions in *Marriott Financial Services*, *Inc. v. Capitol Funds*, *Inc.*, 288 N.C. 122, 217 S.E.2d 551 (1975), and *Carolina Water Service of North Carolina*, *Inc. v. Town of Pine Knoll Shores*, 145 N.C. App. 686, 551 S.E.2d 558 (2001), necessitate a holding that the Easement is void as a matter of law for illegality in light of the fact that the parking and loading rights granted under the Easement cannot be exercised without facing a $100 fine for illegal parking in violation of the Fire Code. A close reading of these decisions and other decisions interpreting them does not support this argument.

In *Marriott Financial*, the plaintiffs sought to rescind a sale of land from the defendants, contending that the sale violated a city ordinance and its enabling statute. 288 N.C. at 126-27, 217 S.E.2d at 555. The ordinance and statute in question were penal in nature; the seller in a noncompliant sale would be guilty of a misdemeanor. *Id.* at 128, 217 S.E.2d at 555. On appeal, this Court determined that the sale was not subject to rescission for illegality, and the North Carolina Supreme Court affirmed the holding in a lengthy analysis of the issue. *Id.* at 127, 217 S.E.2d at 555. Recognizing that "[t]he general rule is that an agreement which violates a constitutional statute or municipal ordinance is illegal and void[,]" the Supreme Court went on to note that "there is also ample authority that the statutory imposition of a penalty, without more, will not invariably avoid a contract which contravenes a statute or ordinance when the agreement or contract is not immoral or criminal in itself."

Id. at 128, 217 S.E.2d at 555-56. Reviewing "a remarkable divergence in results in cases presenting the question of illegality of contracts because of violation of statutory provisions[,]" *id.* at 128, 217 S.E.2d at 556, the Supreme Court ultimately "ascertain[ed] the intent of the legislative bodies" and held that, because the legislature identified the criminal conduct, the person culpable for such conduct, the penalty imposed therefor, and the means of enforcement, "the Legislature has dealt with the subject completely and did not intend, in addition thereto, that the drastic consequences of invalidity should be visited upon the victim of the offender by mere implication." *Id.* at 134-35, 217 S.E.2d at 559-60 (internal quotation marks and citation omitted).

In *Hazard v. Hazard*, 46 N.C. App. 280, 264 S.E.2d 908 (1980), this Court interpreted *Marriott Financial* in the context of a consent judgment entered in a divorce action. 46 N.C. App. at 283, 264 S.E.2d at 910. There, the ex-husband agreed to transfer his interest in certain life insurance policies to his ex-wife, as well as to name her a beneficiary of certain federal benefit plans. *Id.* at 281-82, 264 S.E.2d at 909. However, federal regulations at the time prohibited such acts. *Id.* at 282, 264 S.E.2d at 909. In holding that the consent judgment was not void for illegality under *Marriott Financial*, this Court wrote that "[t]he contract was not immoral, or criminal in itself, or contrary to public policy, but merely provided for the assignment or transfer of a right or benefit which federal law or regulation would not recognize." *Id.* at 283, 264 S.E.2d at 910.

In this case, the portions of the Fire Code identified by the Charlotte fire marshal and cited by The Block do not disclose an intent to invalidate or prohibit easement agreements, or to penalize parties who execute easement agreements. Rather, the Fire Code makes unlawful the limited act of parking in a fire lane, subject to a $100 fine levied against the offender. Thus, the Easement is not "criminal in itself[,]" *Marriott Financial*, 288 N.C. at 128, 217 S.E.2d at 556, but instead merely "provide[s] for the assignment . . . of a right or benefit which [the Fire Code] would not recognize." *Hazard*, 46 N.C. App. at 283, 264 S.E.2d at 910.

Nor does *Carolina Wate*r, the other case cited by The Block, support its position. There, a private water utility had secured an exclusivity agreement with a subdivision in an unincorporated part of Carteret County, North Carolina. *Carolina Water*, 145 N.C. App. at 687, 551 S.E.2d at 559. The agreement required the occupants and landowners within the subdivision to buy all of their water from the private utility and prohibited other water providers from building water lines to service the subdivision. *Id.* at 687, 551 S.E.2d at 558. The Town of Pine Knoll Shores

was incorporated after execution of the exclusivity agreement and the subdivision conveyed the streets therein to the new municipality. *Id.* at 688, 551 S.E.2d at 559. The town then sought to build its own municipal water system to serve the subdivision. *Id.* at 688, 551 S.E.2d at 559. The private water utility filed suit to enjoin such action on the basis that it was prohibited by the exclusivity agreement. *Id.* at 688, 551 S.E.2d at 560.

On appeal to this Court, we observed that "[a]n agreement which cannot be performed without violation of a statute is illegal and void," *id.* at 689, 551 S.E.2d at 560, and held that the exclusivity agreement violated: (1) N.C. Gen. Stat. §§ 160A-311, 312, 314, and 317, which granted municipalities the "absolute" authority to build their own water utility system; and (2) N.C. Gen. Stat. § 75-2.1, which prohibited monopolization of any trade or commerce. *Carolina Water* at 689-90, 551 S.E.2d at 560-61.

The case before us is easily distinguished from *Carolina Water*. Nothing in the Easement prevents the City of Charlotte from declaring Lincoln Street a fire lane or enforcing the Fire Code's prohibition on parking in a fire lane by levying fines or other penalties. Nor does an easement that grants a party parking rights on a private road violate any statute. Had the Easement contained an exclusivity agreement analogous to the one in *Carolina Water* that allowed only Mid-America access to Lincoln Street and barred the City of Charlotte from declaring it a fire lane or prohibited enforcement of the Fire Code on the road, or violated a statute by containing such an exclusivity agreement, then the Easement would be void for illegality; it contains no such restrictive provisions, however, and does not violate the law. Indeed, The Block admitted during oral argument of this appeal that if Lincoln Street were widened by ten feet, parking by Mid-America under the Easement would not violate the Fire Code.

We decline to hold that the Fire Code prohibiting parking in fire lanes invalidates the Easement because it is specific conduct allowed by the Easement, rather than the granting of rights by the Easement, that violates the law. This is the distinction between an illegal contract and an impossible contract. *See*, *e.g.*, *Botts*, 232 N.C. App. at 540, 754 S.E.2d at 711 (distinguishing, in a breach of contract action, the defense of illegality of contract, where a statute renders a contract unlawful, from the defense of legal impossibility, where "performance is rendered impossible by the law" (internal quotation marks and citation omitted)).

Moreover, even if we assume performance of some of the Easement's requirements is impossible because of the City of Charlotte's

enforcement of the Fire Code, that may not always be the case. For example, as a result of changes in technology or fire prevention practices, the City might at some point determine that Lincoln Street no longer needs to be designated as a fire lane, or that vehicles may stop or park on Lincoln Street without violating the Fire Code.

For this same reason, we also reject The Block's contention that the Easement is contrary to public policy. We acknowledge that the Fire Code exists "to preserve and protect public health and safety," N.C. Gen. Stat. § 143-138(b1) (2015), but the granting of an easement allowing access and parking rights itself is not contrary to public policy when the factual circumstances, and not the provisions of the easement, would violate the Fire Code. The Easement does not give Mid-America the right to violate the Fire Code. Nor does the Permanent Injunction grant Mid-America any positive right to violate the Fire Code, as it contains the express limitation that nothing "in the Order [shall] be construed to prevent enforcement of the North Carolina Fire Code." By contrast, the exclusivity agreement at issue in *Carolina Wate*r directly frustrated the "public policy in favor of municipalities' rights to construct and operate water systems, even when private systems are already in operation." 145 N.C. App. at 690, 551 S.E.2d at 561.

That Mid-America and The Block bargained for and received rights that they may not enjoy under the present factual circumstances does not violate public policy, and "the law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish." *Knutton v. Cofield*, 273 N.C. 355, 363, 160 S.E.2d 29, 36 (1968) (internal quotation marks and citation omitted); *see also Hazard*, 46 N.C. App. at 283, 264 S.E.2d at 910 (holding that although a consent judgment in a divorce action "provided for the assignment or transfer of a right or benefit which federal law or regulation would not recognize," it was nonetheless "not . . . contrary to public policy" (internal citations omitted)).

Easements themselves are governed by common law principles of property, *Happ v. Creek Pointe Homeowner's Ass'n*, 215 N.C. App. 96, 109, 717 S.E.2d 401, 409 (2011), and the common law constitutes the public policy of the State until supplanted by statute. *See*, *e.g.*, *White v. Smith*, 256 N.C. 218, 219, 123 S.E.2d 628, 630 (1962) ("[T]he public policy of this state [is] ascertained by a consideration of the common law and legislative enactments modifying that law."). "[W]hen statutes are in derogation of common law principles, they must be strictly construed. 'Strict construction of statutes requires only that their application be limited to their express terms . . . .' " *Happ*, 215 N.C. App. at 109, 717 S.E.2d at 409 (quoting *Turlington v. McLeod*, 323 N.C. 591, 594,

374 S.E.2d 394, 397 (1988)) (internal citation omitted). Again, nothing inherent to the Easement violates the Fire Code, and nothing in the Fire Code's prohibition against parking in fire lanes serves to supplant the common law of easements. Applying long established common law principles, we decline to hold the Easement void as contrary to public policy.

C. The T*rial Court Did Not Abuse Its Discretion in Fashioning the Permanent Inju*nction

[3] The Block argues that, in the event the Easement is not void, the trial court's entry of the Permanent Injunction impermissibly expands the rights available to Mid-America under the Easement. We disagree.

The Block contends that the Permanent Injunction impermissibly expands the Easement in three ways: (1) it prohibits The Block from parking on Lincoln Street at all; (2) it prohibits The Block from removing trash receptacles belonging to Mid-America from Lincoln Street; and (3) it fails to limit Mid-America's use of the Easement to a "reasonable time." These interpretations of the Permanent Injunction and the Easement are not supported by the documents, and we decline to reverse the trial court for abuse of discretion.

The Block relies on an affidavit stating that the Easement and its subsequent amendment were designed to protect The Block's ability to park on Lincoln Street. Consideration of this affidavit would violate the parol evidence rule, which "prohibits the admission of parol evidence to vary, add to, or contradict a written instrument," *Van Harris Realty, Inc. v. Coffey*, 41 N.C. App. 112, 115, 254 S.E.2d 184, 186 (1979), and The Block has offered no substantive argument or legal authority in support of an exception to this "well-nigh axiomatic" rule. *Jefferson Standard Life Ins. Co. v. Morehead*, 209 N.C. 174, 175, 183 S.E. 606, 607 (1936). Nor is there any ambiguity in the language of the Easement that requires resorting to such extrinsic evidence. *Crider v. The Jones Island Club, Inc.*, 147 N.C. App. 262, 266-67, 554 S.E.2d 863, 866 (2001).

The Block contends in its appellate brief that that it cannot exercise its parking rights without "potentially preventing [Mid-America's] delivery trucks and vehicles from also being parked on Lincoln Street[,]" and that the trial court abused its discretion in "impos[ing] a permanent injunction on [The Block] and its residents from parking on Lincoln Street, which has no basis in the Easement Agreement." The Easement expressly allows for delivery trucks and vehicles to park and service Mid-America and 1225 South Church on Lincoln Street. If The Block's members cannot park without infringing on Mid-America's rights under the Easement, it should have considered such a consequence when it agreed

to the Easement. Courts will not intervene on behalf of a party simply because it realizes that a contract was "bad" or "foolish." *Knutton*, 273 N.C. at 363, 160 S.E.2d at 36. Considering that the Permanent Injunction prohibits "preventing delivery trucks and vehicles from being parked on Lincoln Street" because such conduct "interfer[es] with [Mid-America's] use and enjoyment of the Easement[,]" we hold that the trial court did not abuse its discretion in enjoining conduct clearly prohibited by the Easement.

The Block also contends that the trial court abused its discretion in prohibiting The Block from "removing dumpsters from Lincoln Street, which has no basis in the Easement Agreement." The Block cites no legal authority for this argument. The Easement expressly allows Mid-America to use Lincoln Street "to provide customary services, including waste removal service," while the Permanent Injunction makes no reference to dumpsters in Lincoln Street and simply prohibits The Block from "[p]ushing [Mid-America's] dumpsters away from the curb on Lincoln Street[,]" as such conduct "interfer[es] with [Mid-America's] use and enjoyment of the Easement[.]" The Block interprets the Permanent Injunction to allow Mid-America to leave its dumpsters in the middle of Lincoln Street and prohibit The Block from moving the dumpsters off its property. Irrespective of the fact that the Permanent Injunction provides Mid-America with no additional positive rights, moving a dumpster in the middle of Lincoln Street back onto the curb along 1225 South Church would be moving it *towards* the curb, not away from it. Once on the curb and out of Lincoln Street, moving a dumpster away from the curb and Lincoln Street such that a waste removal service is unable to empty it would violate Mid-America's rights under the Easement, as it expressly permits Mid-America's usage of the street to provide waste removal services, making accessible trash disposal a "right[] . . . necessary or incident to the enjoyment of the easement." *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 687-88, 51 S.E.2d 191, 195 (1949) (internal citation omitted). Logically, so too would pushing a dumpster into the middle of Lincoln Street, as such actions would block the usage of the street and impede Mid-America's access rights.

The Block concedes that "if the [Permanent Injunction] were limited to enjoining [The Block] from interfering with [Mid-America's] use and enjoyment of the Easement Agreement, the only issue would be whether the Easement Agreement is valid[;]" because the Permanent Injunction does only that, the trial court did not abuse its discretion.

The Block's final alternative argument posits that "it is an abuse of discretion for the trial court to impose a permanent injunction

without the qualifying time language expressly included in the Easement Agreement," and that such an omission "fails to provide any recourse to [The Block] if the use of the street expands beyond [a 'reasonable time.']" Again, The Block fails to cite to any legal authority for this proposition. Rule 65 of the North Carolina Rules of Civil Procedure provides: "Every order granting an injunction . . . shall be specific in terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained[.]" N.C. Gen. Stat. § 1A-1, Rule 65(d) (2015). The Block does not cite Rule 65 in its argument, nor does it contend that it is unable to discern the scope of or acts enjoined by the Permanent Injunction.

Nothing in the Permanent Injunction serves to modify the rights provided to Mid-America under the Easement such that it now has a positive right to use Lincoln Street without regard for the limitations imposed thereunder. Nor do the Permanent Injunction's prohibitions against "[h]arassing delivery trucks and vehicles parked on Lincoln Street, or [Mid-America's] residents; . . . [p]reventing delivery trucks and vehicles from being parked on Lincoln Street; . . . [or c]alling towing companies to tow trucks and vehicles parked on Lincoln Street" as "interfer[ences] with [Mid-America's] use and enjoyment of the Easement" constitute an impermissible restriction of The Block's rights, as it was never permitted to engage in such acts inconsistent with the rights granted to Mid-America once the Easement was executed. *Coastal Plains Utils., Inc. v. New Hanover Cnty.*, 166 N.C. App. 333, 341, 601 S.E.2d 915, 921 (2004).

Finally, The Block argues that filing a lawsuit or a complaint with the proper authorities could be construed as "harassment" or attempts at "prevention" of Mid-America's exercise of rights that are precluded by the Permanent Injunction. This argument is at best unripe. The Permanent Injunction is in no way a gatekeeping order that imposes limitations on The Block's ability to file a lawsuit, *see, e.g.*, *Fatta v. M & M Props. Mgmt., Inc.*, 224 N.C. App. 18, 30, 735 S.E.2d 836, 844 (2012) (reviewing an appeal of a gatekeeping order entered pursuant to Rule 11 of the North Carolina Rules of Civil Procedure), and the injunction in question does not prohibit notifying the authorities for a legitimate, non-harassing purpose. *See, e.g.*, *Lee v. O'Brien*, No. COA01-1231, 151 N.C. App. 748, 567 S.E.2d 468, 2002 WL 1792200, at *4 (N.C. Ct. App. 6 Aug. 2002) (unpublished) ("Plaintiff retains the ability to call the police with legitimate complaints which are not for harassing purposes."). The Block has already been informed by the deputy fire marshal that police and fire department officials—not The Block—will enforce the parking law, and the Permanent Injunction does not prohibit The Block from reporting unlawful conduct to those departments. Rather, it expressly

provides that nothing "in this Order [shall] be construed to prevent enforcement of the North Carolina Fire Code." Nor does the Permanent Injunction expand the acts already prohibited under the Easement itself, as it merely bars The Block "from interfering with [Mid-America's] use and enjoyment of the Easement in any way," which includes "[h]arassing delivery trucks and vehicles parked on Lincoln Street, or [Mid-America's] residents[,]" and "[p]reventing delivery trucks and vehicles from being parked on Lincoln Street[.]" By law, the Easement already prohibited such interference. *See*, *e.g.*, *Carolina Central Gas Co. v. Hyder*, 241 N.C. 639, 642, 86 S.E.2d 458, 460 (1955) (noting that a landowner may not "materially impair or unreasonably interfere with the exercise of the rights granted in the easement" (citations omitted)). Whether any future conduct by The Block constitutes a violation of the Permanent Injunction would depend on the facts and circumstances then presented, and any improper determination of contempt or other penalty by the trial court at that stage would be subject to appellate review at that time. *See*, *e.g.*, *Selective Ins. Co. v. Mid-Carolina Insulation Co., Inc.*, 126 N.C. App. 217, 219, 484 S.E.2d 443, 445 (1997) ("Only a 'party aggrieved' has a right to appeal. A 'party aggrieved' is one whose legal rights have been denied or directly and injuriously affected by the trial court." (quoting N.C. Gen. Stat. § 1-271 (1996) (citations omitted)).

While The Block would be an "aggrieved party" if the Permanent Injunction entered against it was insufficiently clear to satisfy Rule 65 of the North Carolina Rules of Civil Procedure, The Block has not made that argument, and we decline to engage in such an analysis. *See*, *e.g.*, *Abbott v. N.C. Bd. of Nursing*, 177 N.C. App. 45, 48, 627 S.E.2d 482, 484 (2006) (noting that where a party has not argued an issue, "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant" (internal quotation marks and citation omitted)). This argument is overruled.

III. Conclusion

For the foregoing reasons, we hold that the Easement is not void for illegality or as contrary to public policy. We further hold that, because a trial court enjoys "broad discretion to fashion equitable remedies[,]" *Kinlaw v. Harris*, 364 N.C. 528, 532, 702 S.E.2d 294, 297 (2010), and The Block has failed to present any law or argument demonstrating an abuse of that discretion, we must affirm the trial court.

AFFIRMED

Judges CALABRIA and DIETZ concur.

MARKET AMERICA, INC., PLAINTIFF
v.
PAMELA LEE AND RUSTY ANCHOR GROUP, INC., DEFENDANTS

No. COA17-342

Filed 19 December 2017

1. Appeal and Error—writ of certiorari—considerations of judicial economy—covenant not to compete

Assuming, without deciding, that plaintiff company failed to make the requisite showing of a substantial right with regard to the court's ruling under North Carolina Rule of Civil Procedure 12 in a case involving an alleged breach of a covenant not to compete, the Court of Appeals elected to treat plaintiff's appeal as a petition for certiorari and considered the appeal on its merits based on considerations of judicial economy and pursuant to its discretion under Rule 21 of the North Carolina Rules of Appellate Procedure.

2. Civil Procedure—voluntary dismissal—bad faith exception—trial court already informed parties of ruling—covenant not to compete

The trial court did not err in a case involving an alleged breach of a covenant not to compete by vacating plaintiff company's notice of voluntary dismissal under North Carolina Rule of Civil Procedure 41(a)(1) as to its claim against defendant former employee based on the bad faith exception where the trial court had already informed the parties of its ruling against plaintiff on defendant's dispositive motion.

3. Employer and Employee—breach of covenant not to compete—enforceability—pleadings stage—additional evidence needed—reasonableness

The trial court erred in a case involving an alleged breach of a covenant not to compete by granting defendant former employee's motions under North Carolina Rule of Civil Procedure 12 where a ruling on the enforceability of the agreement could not be made at the pleadings stage when additional evidence was needed to show the reasonableness of the restrictions.

Appeal by plaintiff from orders entered 17 August 2016 and 16 November 2016 by Judge Patrice A. Hinnant in Guilford County Superior Court. Heard in the Court of Appeals 19 September 2017.

Womble Carlyle Sandridge & Rice, LLP, by Pressly M. Millen and Samuel B. Hartzell, for plaintiff-appellant.

Essex Richards, P.A., by Marc E. Gustafson, for defendants-appellees.

DAVIS, Judge.

There are two questions presented in this appeal. The first issue is whether a plaintiff is permitted to voluntarily dismiss its claims pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure after the trial court has announced its ruling against the plaintiff on the defendant's dispositive motion but before the court's ruling is memorialized in a written order. The second issue concerns the circumstances under which a covenant not to compete contained in an employment contract can be held unenforceable as a matter of law under Rule 12 of the North Carolina Rules of Civil Procedure.

Market America, Inc. ("Market America") appeals from the trial court's 17 August 2016 order vacating its notice of voluntary dismissal and dismissing with prejudice its claims against Pamela Lee[1] and from the court's 16 November 2016 order denying its motion for reconsideration. Because we conclude that Market America's voluntary dismissal was improperly taken, we affirm the portion of the trial court's order vacating the voluntary dismissal. However, in light of our determination that the court's dismissal of Market America's claims under Rule 12 constituted error, we reverse that portion of the trial court's order.

Factual and Procedural Background

We have summarized the pertinent facts below using Market America's own statements from its complaint, which we treat as true in reviewing a trial court's order granting a motion to dismiss. *See, e.g.*, *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true.").

Market America is a product brokerage company that is headquartered in Greensboro, North Carolina and "sells its products through a network of independent distributors." Its employees have the opportunity to attain the status of "certified trainers" in order to provide specialized

1. While the body of the trial court's 17 August 2016 order refers to Lee as Pamela *Everett*, the captions of both orders being appealed refer to her as Pamela Lee. For the sake of consistency, we refer to her herein as Pamela Lee.

training to Market America's distributors. Certified trainers are required to sign a Certified Trainer Agreement, which requires them to agree not to compete or solicit other distributors in a specified geographic area for one year after ceasing their employment with Market America.

Market America's employees can also become "approved speakers" who "represent the company's finest distributors and, as a result of their role, also attain a high profile with the Market America field sales organization." Approved speakers must sign a Speakers Bureau Agreement, which also imposes "certain restrictions concerning confidentiality and non-solicitation of Market America distributors."

Lee was hired as an independent distributor in 1997. During her employment with Market America, she became a certified trainer and later — through her corporate entity, Rusty Anchor Group, Inc. — an approved speaker. On 14 March 2008, she signed the Certified Trainer Agreement. On 26 June 2015, she signed the Speakers Bureau Agreement.

In 2015, while she was still employed with Market America, Lee began working with a network marketing company called ARIIX, which used "person-to-person and/or Internet sales of products or services directly to consumers in their homes or at places other than fixed, permanent retail establishments, through independent distributors or salespersons." Market America learned of Lee's involvement with ARIIX and discovered that she had "actively solicited other Market America distributors to become involved in ARIIX." Based on this discovery, Lee's employment with Market America was terminated. After her employment with Market America ended, Lee continued to solicit Market America distributors to join ARIIX.

On 22 December 2015, Market America filed a complaint against Lee and Rusty Anchor Group, Inc. (collectively "Defendants") in Guilford County Superior Court, alleging that Lee had breached the Certified Trainer Agreement and the Speakers Bureau Agreement. On or about 2 March 2016, Defendants filed an answer along with a motion to dismiss based on Rule 12(b)(6) and a motion for judgment on the pleadings pursuant to Rule 12(c).

On 6 July 2016, a hearing was held before the Honorable Patrice A. Hinnant on the Rule 12 motions. At the close of the hearing, Judge Hinnant announced from the bench that she was granting Defendants' motions and directed Defendants' counsel to draft a written order.

A few hours after Judge Hinnant announced her ruling in open court, Market America filed a notice of voluntary dismissal stating that

it was dismissing without prejudice all of its claims against Defendants pursuant to Rule 41(a)(1). On 11 July 2016, Defendants filed a motion to vacate the notice of voluntary dismissal on the ground that the dismissal was ineffective because it was not taken in good faith.

On 17 August 2016, Judge Hinnant entered a written order (1) granting Defendants' motion to vacate the voluntary dismissal; (2) dismissing Market America's claims against Rusty Anchor Group without prejudice; and (3) dismissing its claims against Lee with prejudice to the extent that those claims were based upon a breach of paragraphs 18(b) and (c) and 19(b) and (c) of the Certified Trainer Agreement.

Market America filed a motion for reconsideration on 31 August 2016. On 16 November 2016, Judge Hinnant entered an order denying this motion. Market America subsequently filed a notice of appeal as to both of the trial court's orders.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must determine whether we have jurisdiction to hear this appeal. "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). In the present case, Lee asserts that Judge Hinnant's rulings were interlocutory because "the trial court did not dismiss those portions of Market America's claim involving [Lee]'s alleged breach of the Speakers Bureau Agreement or [Lee]'s alleged breach of Paragraph 18(a) and Paragraph 19(a) of the Certified Trainer Agreement."

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). The prohibition against interlocutory appeals "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

Judge Hinnant's order does not contain a certification under Rule 54(b). Therefore, Market America's appeal is proper only if it can demonstrate a substantial right that would be lost absent an immediate appeal. *See Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) ("The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." (citation omitted)).

Here, Lee concedes — and we agree — that a substantial right is affected with respect to the trial court's order vacating Market America's voluntary dismissal. However, Lee argues that Market America will not be deprived of a substantial right in the event it is required to await a final judgment in this case before it is permitted to appeal Judge Hinnant's ruling on Lee's Rule 12 motions.

Assuming, without deciding, that Market America has failed to make the requisite showing of a substantial right with regard to the court's ruling under Rule 12, based on considerations of judicial economy and pursuant to our discretion under Rule 21 of the North Carolina Rules of Appellate Procedure, we elect to treat Market America's appeal as a petition for *certiorari* with regard to this issue. *See Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (2007) ("[B]ecause the case *sub judice* is one of those exceptional cases where judicial economy will be served by reviewing the interlocutory order, we will treat the appeal as a petition for a writ of certiorari and consider the order on its merits."). Thus, we address below each of the arguments Market America has raised in its appeal.

II. Voluntary Dismissal

[2] We first consider Market America's challenge to the portion of the trial court's order vacating its notice of voluntary dismissal as to its

claim against Lee.[2] Market America does not specifically contest any of Judge Hinnant's findings as to the circumstances under which the notice of voluntary dismissal was filed. Instead, it challenges only the conclusion that the voluntary dismissal was legally ineffective, arguing that "[s]trategic dismissals are not bad faith."

Rule 41(a)(1) of the North Carolina Rules of Civil Procedure states, in pertinent part, as follows:

> (1) **By Plaintiff; by Stipulation.** — Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case . . .

N.C. R. Civ. P. 41(a)(1).

Our Supreme Court has explained that

> [t]he purpose of our long-standing rule allowing a plaintiff to take a voluntary dismissal . . . is to provide a one-time opportunity where the plaintiff, for whatever reason, does not want to continue the suit. The range of reasons clearly includes those circumstances in which the plaintiff fears dismissal of the case for rule violations, shortcomings in the pleadings, evidentiary failures, or any other of the myriad reasons for which the cause of action might fail. *The only limitations are that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial.*

Brisson v. Santoriello, 351 N.C. 589, 597, 528 S.E.2d 568, 573 (2000) (emphasis added).

Thus, two limitations exist on the general rule permitting voluntary dismissals. First, voluntary dismissals may not be taken in bad faith. Second, a voluntary dismissal cannot be taken after the plaintiff has rested its case. *Boyd v. Rekuc*, __ N.C. App. __, __, 782 S.E.2d 916, 918, *disc. review denied*, __ N.C. __, 792 S.E.2d 517 (2016).

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2. The parties do not challenge in this appeal the trial court's dismissal without prejudice of Market America's claim against Rusty Anchor Group. Therefore, we do not address that portion of the trial court's ruling.

In the present case, the trial court relied on the bad faith exception in vacating Market America's voluntary dismissal. In so doing, the court made the following pertinent findings:

> 1. At the time [Market America] filed its Notice of Voluntary Dismissal, [Market America] knew that the Court had ruled against [Market America] on the merits of Defendants' Rule 12 Motions just hours before and that the Court was awaiting the submission by counsel for Defendants of a written order of dismissal.
>
> 2. The timing of the filing of [Market America]'s Notice of Voluntary Dismissal permits no conclusion other than that [Market America] was attempting to prevent the Court from dismissing [Market America's] claims as set forth above.
>
> 3. [Market America]'s attempt at voluntary dismissal, taken under these circumstances, cannot be said to have been made in good faith.
>
> 4. The Voluntary Dismissal is therefore void and should be vacated.

Market America does not challenge Finding Nos. 1 and 2 in which the trial court found that it took a voluntary dismissal in order to prevent the court from entering a written order memorializing its decision to grant Lee's Rule 12 motions after Judge Hinnant had informed the parties of her ruling. Indeed, in its appellate brief Market America fails to offer any other reason for its decision to file the notice of voluntary dismissal. Thus, Finding Nos. 1 and 2 are binding on appeal. *See 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.").[3]

Instead, Market America contests the trial court's legal ruling that its voluntary dismissal was taken in bad faith. Specifically, it argues that no published opinion exists in which North Carolina's appellate courts have invalidated an attempted voluntary dismissal based on the bad

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3. While Market America describes the trial court's ruling on this issue as based purely on the "timing" of the notice of voluntary dismissal, this characterization is incomplete. The trial court's findings were that Market America took the voluntary dismissal for the sole purpose of preventing the court from following through with the ruling it had announced to the parties hours earlier.

faith exception under these circumstances. Market America asserts that the scope of this exception is restricted exclusively to the unique fact pattern existing in *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986), *superseded by statute on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 381 S.E.2d 706 (1989) — the case in which our Supreme Court first recognized the bad faith exception.

In *Estrada*, the plaintiff suffered complications during a surgery to repair his leg wound. *Estrada*, 316 N.C. at 319, 341 S.E.2d at 539-40. One day before the applicable three-year statute of limitations was set to expire, the plaintiff filed a bare-bones medical malpractice complaint. Two minutes after the complaint was filed, the plaintiff filed a notice of voluntary dismissal. No attempt was ever made to serve the summons and complaint upon the defendant. *Id.*

Over eleven months later, he filed a new complaint arising out of the same incident that provided more detail as to the basis for his claims. The defendant moved to dismiss the second complaint as time-barred. In response, the plaintiff argued that the second complaint was timely because Rule 41 had granted him an additional one-year period from the date the voluntary dismissal was taken in which to refile the action. *Id.* at 321, 341 S.E.2d at 540. Nevertheless, the trial court dismissed the second complaint as untimely. *Id.*

The issue on appeal was whether the voluntary dismissal of the first appeal was taken in good faith so as to be legally effective and thereby extend the limitations period for an additional year as provided for in Rule 41. In rejecting the plaintiff's argument, our Supreme Court observed that the plaintiff made a "candid admission that the . . . lawsuit was filed with the sole intention of dismissing it in order to avoid the lapse of the statute of limitations" and that such an admission was "tantamount to a concession that his only purpose in certifying the complaint was to extend the deadline by which he must draft and file a sufficient complaint." *Id.* at 325, 341 S.E.2d at 543. For this reason, the Court held that the voluntary dismissal had been taken in bad faith and was without legal effect. *Id.*

In *Eubank v. Van-Riel*, 221 N.C. App. 433, 727 S.E.2d 25, 2012 N.C. App. LEXIS 727 (2012) (unpublished), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 380 (2013), this Court addressed the applicability of the bad faith exception under Rule 41(a)(1) to the precise circumstances at issue in the present case. In *Eubank*, the trial judge notified the parties that it was granting the defendants' motion to dismiss and directed the

defendants' counsel to prepare an order for the judge's signature. After the court's ruling was announced but before the order was signed, the plaintiff filed a voluntary dismissal of his claim against the defendants. *Id.* at *32. The trial court ruled that the voluntary dismissal under these circumstances was ineffective. *Id.* at *28.

Writing for a panel of this Court, Judge (now Justice) Ervin stated as follows:

> The record in this case clearly shows that, on 30 March 2011, the trial court notified the parties that it had granted Defendants' dismissal motion and directed Defendants' counsel to prepare an order to that effect for the court's signature. Plaintiff's "voluntary dismissal" was filed on the following day, a point in time after Plaintiff knew that the trial court had ruled against him on the merits of Defendants' motion and prior to the entry of a formal dismissal order. The timing of Plaintiff's motion permits no conclusion other than that he was attempting to prevent the trial court from dismissing his complaint. A voluntary dismissal taken under these circumstances cannot possibly be said to have been taken in good faith, so that the purported voluntary dismissal by plaintiffs is void and is hereby vacated.

Id. at *32-33 (internal citation, quotation marks, and brackets omitted).

Unpublished opinions of this Court lack precedential authority. *See* N.C. R. App. P. 30(e)(3) (providing that "an unpublished decision . . . does not constitute controlling legal authority"). Nevertheless, we deem *Eubank* to be instructive on this issue and reach a similar conclusion in the present case.

While Rule 41(a)(1) clearly permits plaintiffs to voluntarily dismiss their claims for a multitude of reasons, such a dismissal must be taken in good faith. Taking a voluntary dismissal based on concerns about the *potential* for a future adverse ruling by the Court is permissible. Dismissing an action after such a ruling has actually been announced by the court is not. Once the trial court has informed the parties of its ruling against the plaintiff on the defendant's dispositive motion, Rule 41 does not permit the proceeding to devolve into a footrace between counsel to see whether a notice of voluntary dismissal can be filed before the court's ruling is memorialized in a written order and filed with the clerk of court. To hold otherwise would "make a mockery of" the court's

ruling. *Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 592, 248 S.E.2d 430, 433 (1978).[4]

We are unable to agree with Market America's argument that the bad faith exception under Rule 41 should be limited to the specific type of bad faith at issue in *Estrada* because it has failed to offer any persuasive argument as to why that should be the case. Bad faith can exist in a variety of forms, and we are satisfied that it occurred in connection with Market America's attempted voluntary dismissal here.

Market America also contends that application of the bad faith exception on the facts of this case would be inconsistent with this Court's decisions in *Schnitzlein v. Hardee's Food Sys., Inc.*, 134 N.C. App. 153, 516 S.E.2d 891, *disc. review denied*, 351 N.C. 109, 540 S.E.2d 365 (1999); *Carlisle v. CSX Transp., Inc.*, 193 N.C. App. 509, 668 S.E.2d 98 (2008), *cert. denied and disc. review denied*, 363 N.C. 123, 675 S.E.2d 40 (2009); and *Whitehurst v. Va. Dare Transp. Co.*, 19 N.C. App. 352, 198 S.E.2d 741 (1973). However, this assertion is incorrect. In none of those cases was the issue of bad faith actually addressed by this Court. Thus, while Market America states that *Eubank* is the only North Carolina appellate decision finding bad faith in this context, a more accurate statement would be that *Eubank* is the only case in which this issue has ever been expressly addressed by our appellate courts, and it expressly rejected the argument being advanced here by Market America.

Finally, Market America's contention that Judge Hinnant's ruling impermissibly infringed upon its "unfettered ability to dismiss its claims" is equally unavailing. (Quotation marks omitted.) As our case law makes abundantly clear, a plaintiff's right to take a voluntary dismissal is, in fact, "fettered" by the requirements that such a dismissal not be taken in bad faith or after a party has rested its case. *See, e.g.*, *Brisson*, 351 N.C. at 597, 528 S.E.2d at 573. Thus, our holding today simply applies an exception that our Supreme Court has expressly recognized. Accordingly,

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4. While Market America notes that a footnote in *Eubank* raised the possibility that scenarios may exist where the taking of a voluntary dismissal after the trial court has announced its ruling does not constitute bad faith, we need not address the possible existence of such scenarios given that — as noted above — Market America has not attempted to challenge Judge Hinnant's findings as to its motive for filing its notice of voluntary dismissal. We observe that in the same footnote this Court stated that under the circumstances at issue in *Eubank* — which are identical to the circumstances at issue here — the voluntary dismissal was "clearly [taken] in bad faith . . . ." *Eubank*, at *32 n.3.

we affirm the portion of the trial court's 17 August 2016 order vacating Market America's voluntary dismissal.[5]

III. Lee's Rule 12 Motions

[3] Market America's final argument on appeal is that the trial court erred by granting Lee's motions under Rule 12. We agree.

"It is well settled that both a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim upon which relief can be granted should be granted when a complaint fails to allege facts sufficient to state a cause of action or pleads facts which deny the right to any relief." *Bank of Am., N.A. v. Rice*, __ N.C. App. __, __, 780 S.E.2d 873, 882 (2015). "This Court will review *de novo* the grant of a motion to dismiss under Rule 12(b)(6) and for judgment on the pleadings under Rule 12(c)." *Freedman v. Payne*, __ N.C. App. __, __, 800 S.E.2d 686, 689, *disc. review denied*, __ N.C. __, 803 S.E.2d 387 (2017).

"Under North Carolina law, a covenant not to compete is valid and enforceable if it is (1) in writing; (2) made a part of the employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and, (5) designed to protect a legitimate business interest of the employer." *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 88, 638 S.E.2d 617, 620 (2007) (citations omitted).

In its 17 August 2016 order, the trial court granted Lee's Rule 12 motions based on its ruling that the territorial restrictions contained in Paragraphs 18(b) and (c) and 19(b) and (c) of the Certified Trainer Agreement were "unreasonable and overbroad as a matter of law." Market America argues that the trial court's order was erroneous at the Rule 12 stage because the enforceability of the provisions at issue could not be determined absent evidence to be obtained through discovery showing the precise scope of the restrictions placed on Lee.

In determining whether the geographic scope of a covenant not to compete is reasonable, this Court has looked to the following factors: "(1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was

5. Market America argues in the alternative that even assuming Judge Hinnant's interpretation of Rule 41(a)(1) on these facts was correct, her order vacating its notice of voluntary dismissal should not have encompassed its dismissal of those claims unaffected by her ruling on the Rule 12 motions — that is, those claims alleging a breach of provisions of the agreements at issue other than paragraphs 18(b) and (c) and 19(b) and (c) of the Certified Trainer Agreement. While Market America is technically correct on this point, the issue is moot in light of our holding below reversing the court's ruling on Lee's Rule 12 motions.

subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation." *Hartman v. W.H. Odell & Assocs.*, 117 N.C. App. 307, 312, 450 S.E.2d 912, 917 (1994), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995). Moreover, we have held that

> the time and geographic limitations of a covenant not to compete must be considered in tandem, such that a longer period of time is acceptable where the geographic restriction is relatively small, and *vice versa*. Although either the time or the territory restriction, standing alone, may be reasonable, the combined effect of the two may be unreasonable. Nevertheless, the scope of the geographic restriction must not be any wider than is necessary to protect the employer's reasonable business interests.

Okuma, 181 N.C. App. at 89, 638 S.E.2d at 620 (internal citations, quotation marks, and brackets omitted). "In deciding what is reasonable, the court looks to the facts and circumstances of the particular case." *Clyde Rudd & Assocs., Inc. v. Taylor*, 29 N.C. App. 679, 684, 225 S.E.2d 602, 605 (internal citation and quotation marks omitted), *disc. review denied*, 290 N.C. 659, 228 S.E.2d 451 (1976).

In their respective briefs, the parties' arguments on this issue are based on the portion of Market America's complaint that discusses — and quotes from — the Certified Trainer Agreement.[6] The complaint alleges, in relevant part, as follows:

> . . . Certified Trainers . . . based on their high profile and positive reputation with the field network of Market America distributors, agree that for a period of one year after they cease to be Market America distributors they will not solicit any current or former Market America distributors within the following geographical territory:

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6. We note that the trial court's order makes clear that it reviewed not only Market America's complaint but also "the documents specifically referred to therein." Presumably, this means that the trial court reviewed the Certified Trainer Agreement itself even though this document was not attached to Market America's complaint. In so doing, the trial court was not required to convert Lee's motions into a motion for summary judgment. "[A] trial court's consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing and does not create justifiable surprise in the nonmoving party." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001) (citation omitted). Here, the Certified Trainer Agreement was a subject of Market America's complaint and was quoted from therein.

> (a) within 100 miles of Distributor's residence during the time he/she was a Market America independent distributor; or (b) within 100 miles of the residences of any of Distributor's personally sponsored Market America independent distributors, or (c) within 100 miles of the residence of any Market America independent distributor in distributor's downline who achieved the level of Executive Coordinator or above during the time that Distributor was a Market America independent distributor.
>
> . . . Certified Trainers also agree to a limited non-compete in that same geographical territory. Specifically, for a period of one year after ceasing to act in that role, they agree that they will not act in any capacity for another network marketing company.[7]

Our appellate courts have made clear that non-compete agreements are unenforceable where the time and territorial restrictions contained therein are overbroad. *See*, *e.g.*, *Henley Paper Co. v. McAllister*, 253 N.C. 529, 535, 117 S.E.2d 431, 434 (1960) (three-year restriction on manufacture, sale, or distribution of paper or paper products within 300-mile radius of any office or branch of defendant company that had offices in 13 states was void); *CopyPro*, *Inc. v. Musgrove*, 232 N.C. App. 194, 204, 754 S.E.2d 188, 195 (2014) (three-year restriction on working for similar business within geographical area consisting of over twenty counties in North Carolina or within a 60-mile radius of Greenville and Wilmington was void); *Hartman*, 117 N.C. App. at 315, 450 S.E.2d at 919 (five-year restriction on working for "competitors" in eight states was void).

However, this Court has previously held that a ruling on the enforceability of such an agreement cannot be made at the pleadings stage in cases where evidence is needed to show the reasonableness of the restrictions contained therein. In *Okuma*, the plaintiff brought an action against its former employee for violation of a non-compete agreement. *Okuma*, 181 N.C. App. at 87-88, 638 S.E.2d at 619. The agreement stated that the defendant could not work for a direct competitor of the plaintiff for six months following the cessation of his employment in "areas in which [the plaintiff] does business[.]" *Id.* at 87, 638 S.E.2d at 619. It also

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7. The complaint states that the Speakers Bureau Agreement also contained a non-solicitation agreement. However, because the Speakers Bureau Agreement was not a basis for the trial court's 17 August 2016 order, we do not address the enforceability of the restrictions contained in that document.

prohibited the defendant "from soliciting business from [the plaintiff]'s customers" during this six-month time period. *Id.* at 89, 638 S.E.2d at 620. The defendant filed a motion to dismiss, asserting that the non-compete language was overly broad and therefore unenforceable as a matter of law. *Id.* at 86, 638 S.E.2d at 618. The trial court granted the motion, and the plaintiff appealed. *Id.*

This Court held that "the covenant's enforceability in this case rests on questions of fact and cannot be determined as a matter of law." *Id.* We held that the six-month period was "well within the established parameters for covenants not to compete in this State" and that although "the geographic effect of the restriction is quite broad . . . taken in conjunction with the six-month duration, it is not *per se* unreasonable in light of our courts' past rulings." *Id.* at 90, 638 S.E.2d at 620. Upon consideration of the legitimate business interest alleged in the plaintiff's complaint, we determined that because the non-compete agreement took into account the defendant's senior position in the company and only barred his employment with direct competitors the restrictions were not necessarily unreasonable. *Id.* at 91-92, 638 S.E.2d at 621-22. We concluded that

> when examining the time and geographic restrictions of a covenant not to compete, we are unable to conclude that a covenant restricting employment for six months with a direct competitor in a related capacity, even with a geographic scope potentially extending throughout North and South America due to the client-based restrictions, is overly broad and unenforceable as a matter of law. In this case, the enforceability of the covenant not to compete rests on factual questions such as whether the geographic effect of the client-based restriction is excessive in light of [the defendant's] actual contacts with customers, the nature of his duties, the level of his responsibilities, the scope of his knowledge, and other issues relating to how closely the geographic limits fit with [defendant's] work for [the plaintiff]. Accordingly, we hold that, when taken as true, [plaintiff's] complaint stated a claim for which relief might be granted.

Id. at 92, 638 S.E.2d at 622.

Here, Market America has alleged in its complaint that certified trainers maintain a "high profile[,]" hold a "sensitive position . . . in the hierarchy of the company[,]" and are "expos[ed] to [a] wide variety of Market America distributors . . . ." For these reasons, the complaint

asserts, the restrictions contained in the Certified Trainer Agreement are necessary to protect Market America's confidentiality concerns.

The provisions at issue in the Certified Trainer Agreement contain a time restriction of one year. As an initial matter, we recognize that this Court has previously held that a "one year time restriction is well within the established parameters for covenants not to compete." *Precision Walls v. Servie*, 152 N.C. App. 630, 638, 568 S.E.2d 267, 273 (2002). Nevertheless, as noted above, the duration of the time restriction in a covenant not to compete cannot be evaluated in a vacuum. Rather, the time restriction must be analyzed in conjunction with the geographic restrictions imposed on Lee.

In this case, it is impossible to determine based solely on the four corners of the complaint whether the territorial restrictions in the Certified Trainer Agreement are appropriately tailored to protect Market America's legitimate business interests. Indeed, because of the way the provisions are worded, we presently have no way of knowing the actual effect of the geographic restrictions on Lee. The complaint does not specify the number of independent distributors Lee personally sponsored or the locations of the residences of the independent distributors in Lee's "downline" who achieved the level of executive coordinator or above during the time period specified in the agreement. Without this and other additional relevant information, the potential overbreadth of the Certified Trainer Agreement's restrictions on Lee cannot be meaningfully assessed.

Taking Market America's allegations in the complaint as true, as we must, we hold that the trial court lacked a sufficient basis to rule as a matter of law that the provisions of paragraphs 18(b) and (c) and 19(b) and (c) of the Certified Trainer Agreement are overbroad and unreasonable. Accordingly, we reverse the portion of the trial court's 17 August 2016 order granting Lee's Rule 12 motions.

Conclusion

For the reasons stated above, we (1) affirm the portion of the trial court's 17 August 2016 order vacating Market America's notice of voluntary dismissal; and (2) reverse the portion of the court's order granting Lee's Rule 12 motions.

AFFIRMED IN PART; REVERSED IN PART.

Judges BRYANT and INMAN concur.

N.C. STATE BAR v. FOSTER

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

THE NORTH CAROLINA STATE BAR, Plaintiff
v.
JENNIFER NICOLE FOSTER, Attorney, Defendant

No. COA17-443

Filed 19 December 2017

1. Attorneys—misconduct—violation of Rules of Professional Conduct—conduct intended to disrupt tribunal—magistrate

The Disciplinary Hearing Commission did not err by concluding that defendant attorney violated Rules of Professional Conduct 3.5(a)(4)(B) by engaging in conduct intended to disrupt a tribunal where defendant directed vulgarities at a magistrate. A magistrate fits within the meaning of a tribunal.

2. Attorneys—misconduct—violation of Rules of Professional Conduct—conduct intended to disrupt tribunal—engaging in conduct prejudicial to administration of justice

The Disciplinary Hearing Commission did not err by concluding that defendant attorney violated Rule of Professional Conduct 8.4(d) by engaging in conduct that was prejudicial to the administration of justice where defendant made vulgar and profane statements toward and in the presence of a magistrate, who is a judicial officer of the district court.

Appeal by defendant from order entered 13 September 2016 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 18 October 2017.

The North Carolina State Bar, by Counsel Katherine Jean and Deputy Counsel David R. Johnson, for plaintiff-appellee.

Jennifer Nicole Foster, pro se, for defendant-appellant.

ELMORE, Judge.

Attorney Jennifer Nicole Foster ("defendant") appeals from an order of discipline issued by the Disciplinary Hearing Commission ("DHC") of the North Carolina State Bar. In its order, the DHC determined that defendant violated Rules of Professional Conduct 3.5 and 8.4. The DHC thus imposed a two-year suspension of defendant's law license, stayed for the duration of the suspension so long as defendant complies with certain conditions. After careful review, we affirm the order of the DHC.

I. Background

Defendant was admitted to the North Carolina State Bar in 1995 and was practicing law in Asheville as of 2011. On the evening of 5 November 2011, defendant entered the magistrate's office in the Buncombe County Detention Center to inquire about arrest warrants that had been issued for several members of the Occupy Asheville movement. Defendant encountered Magistrate Amanda Fisher, one of two magistrates on duty at the time, and identified herself as an attorney there on behalf of the movement. Defendant then asked Magistrate Fisher "what the hell is going on around here" regarding the warrants. Magistrate Fisher warned defendant to watch her language and told her that she was in a courtroom. Defendant, however, maintains that Magistrate Fisher never mentioned the word "court" or warned defendant to watch her language.

Office policy prohibited Magistrate Fisher from providing defendant with information regarding outstanding warrants on other individuals, but she did inform defendant there were no outstanding warrants on defendant herself. Defendant responded "what the f*** is going on around here," prompting Magistrate Fisher to renew her warning to defendant, but defendant nevertheless repeated the profanity multiple times. As Magistrate Fisher told defendant she was being held in contempt of court, defendant walked out of the magistrate's office, loudly repeating more vulgarities as she left.

At Magistrate Fisher's request, detention officers stopped defendant from leaving the premises and returned her to the magistrate's office. The second magistrate on duty that evening appeared and witnessed the remainder of defendant's profanities while Magistrate Fisher entered the order for contempt. On 17 January 2012, defendant was convicted of direct criminal contempt of court following a 1 December 2011 hearing in Buncombe County Superior Court. Defendant appealed, and this Court ultimately reversed her conviction on procedural grounds. *In re Foster*, 227 N.C. App. 454, 744 S.E.2d 496, 2013 WL 2190072 (2013) (unpublished).

Based on these events, the State Bar filed a complaint against defendant with the DHC on 25 March 2014. The proceedings were continued pending federal action initiated by defendant against Magistrate Fisher, among others, and the DHC eventually held a hearing on 8 July 2016. In its order of discipline dated 13 September 2016, the DHC found that defendant's conduct violated Rules of Professional Conduct 3.5(a)(4)(B) and 8.4(d), and it stayed a two-year suspension of her license pending compliance with certain conditions (e.g., that defendant follow the recommendations and treatment program of her therapist). Defendant filed timely notice of appeal.

II. Discussion

Any attorney admitted to practice law in this state is subject to the disciplinary jurisdiction of the DHC for, *inter alia*, violation of the Rules of Professional Conduct adopted by the State Bar. N.C. Gen. Stat. §§ 84-28(a)–(b)(3) (2015). Either party may appeal a final order from the DHC to this Court, where our review is limited to "matters of law or legal inference." N.C. Gen. Stat. § 84-28(h).

Disciplinary actions are reviewed under the whole record test. *N.C. State Bar v. Talford*, 356 N.C. 626, 632–33, 576 S.E.2d 305, 309–10 (2003). The whole record test "requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law. Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion." *Id.* (citation omitted). In addition to being substantial, the evidence the DHC uses to support its findings and conclusions must be clear, cogent, and convincing. *Id.* (citing *In re Suspension of Palmer*, 296 N.C. 638, 648, 252 S.E.2d 784, 790 (1979)). Although the reviewing court must consider contradictory evidence, the presence of such evidence "does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the DHC. The DHC determines the credibility of the witnesses and the weight of the evidence." *N.C. State Bar v. Adams*, 239 N.C. App. 489, 495, 769 S.E.2d 406, 411 (2015). Thus, when there are two reasonably conflicting views, " 'the whole record test does not allow the reviewing court to replace the DHC's judgment . . . even though the court could justifiably have reached a different result had the matter been before it *de novo*.' " *N.C. State Bar v. Sutton*, ___ N.C. App. ___, ___, 791 S.E.2d 881, 890 (2016) (brackets omitted) (quoting *N.C. State Bar v. Nelson*, 107 N.C. App. 543, 550, 421 S.E.2d 163, 166 (1992)).

A. Rule 3.5(a)(4)(B) Violation

[1] Rule of Professional Conduct 3.5 states in relevant part that "a lawyer shall not . . . engage in conduct intended to disrupt a tribunal, including . . . undignified or discourteous conduct that is degrading to a tribunal." N.C. R. Prof. Conduct 3.5(a)(4)(B). While defendant admits to disrespecting Magistrate Fisher, she argues that a magistrate is not a "tribunal" as defined in Rule 1.0(n), and thus denies disrespecting a tribunal in violation of Rule 3.5(a)(4)(B). At issue then is what constitutes a tribunal and whether a magistrate fits within the meaning of that definition as applied in Rule 3.5.

Rule of Professional Conduct 1.0 defines certain terms that appear within the substantive rules. Under Rule 1.0(n),

> "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. The term encompasses any proceeding conducted in the course of a trial or litigation, or conducted pursuant to the tribunal's rules of civil or criminal procedure or other relevant rules of the tribunal, such as a deposition, arbitration, or mediation. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, may render a binding legal judgment directly affecting a party's interests in a particular matter.

N.C. R. Prof. Conduct 1.0(n). While Rule 1.0 does not include the term "magistrate," a magistrate may be defined as a "judicial officer with strictly limited jurisdiction and authority, often on the local level and often restricted to criminal cases," and a magistrate's court is a "court with limited jurisdiction over minor criminal and civil matters." *Black's Law Dictionary* (10th ed. 2014).

The North Carolina Constitution describes our General Courts of Justice to include appellate, superior, and district courts. N.C. Const. art. IV, § 2; *see also* N.C. Gen. Stat. § 7A-4 (2015). Magistrates are created in this article and declared "officers of the District Court." N.C. Const. art. IV, § 10; *see also* N.C. Gen. Stat. § 7A-170. They are nominated by the clerk of superior court and appointed by the senior resident superior court judge. N.C. Const. art. IV, § 10; N.C. Gen. Stat. § 7A-171(b). Magistrates must retire and may be removed on the same grounds as a judge of the General Courts of Justice. N.C. Gen. Stat. §§ 7A-170, 173. In sum, magistrates are judicial officers. *See Bradshaw v. Admin. Office of Courts*, 320 N.C. 132, 133, 357 S.E.2d 370, 370 (1987) (holding that magistrates are "members of the judiciary" for limited purpose of statute making members ineligible for employment benefits).

Most powers of magistrates are rooted in criminal law. *See* N.C. Gen. Stat. § 7A-273. Magistrates have the power to enter judgments for pre-determined infractions and misdemeanors; to issue arrest warrants, search warrants, and grant bail in certain cases; to conduct initial appearances; and to accept waivers, pleas, and enter judgments for certain worthless check cases. *Id.*; *see also* N.C. Gen. Stat. §§ 15A-243, 304, 305 (2015). Additionally, magistrates have the power "[t]o punish

for direct criminal contempt." N.C. Gen. Stat. § 7A-292(a)(2). Although the general statutes are silent about the physical office for magistrates, these can vary from small offices to large courtrooms, depending on the needs and budget of the district. John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. Rev. 467, 477 (1988).

The definitions and core functions described above and applied here indicate that a magistrate is a tribunal as that term appears in Rule 3.5. Consistent with Rule 1.0, the State Bar defines "tribunal" as a court or other adjudicative body that administers justice. Like a tribunal, a magistrate is an adjudicative body led by a judicial officer, but typically with limited jurisdiction over criminal or civil matters. However, it is clear based on the powers conferred upon them by our legislature that magistrates administer justice within their limited jurisdiction.

The State Bar's definition of tribunal also includes "a court or *other body acting in an adjudicative capacity*." N.C. R. Prof. Conduct 1.0(n) (emphasis added). "A . . . body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, *may render a binding legal judgment* directly affecting a party's interests in a particular matter." *Id.* (emphasis added). Like a tribunal, a magistrate can render a binding legal judgment; she possesses the power to enter judgments for pre-determined infractions, misdemeanors, and worthless check cases. After the presentation of evidence by a law enforcement officer, a magistrate may issue search warrants and arrest warrants, which directly affect a party's liberty interests. When a magistrate enters an order for contempt, as Magistrate Fisher did here, it is based on a magistrate's own observations of the party in contempt. The order itself carries penalties including fines and imprisonment. N.C. Gen. Stat. § 5A-12 (2015).

The nature of our state constitution and general statutes also indicates that magistrates are intended to be a court. Significantly, magistrates are created in the same constitutional article as the state's judicial branch and are declared officers of the district court. The laws that establish the confines of magistrates — such as method for appointment, qualifications, age limits, hours, and salary — are listed in the same chapter of the general statutes as the laws of the judicial department. Moreover, the rules governing the removal and retirement of magistrates are the same as those for any judge of the appellate, superior, or district courts. *In re Kiser*, 126 N.C. App. 206, 208, 484 S.E.2d 441, 442 (1997). Thus, a magistrate appears to be a tribunal according to the definition set forth in Rule 1.0 and applied in Rule 3.5.

Defendant first contends that a magistrate does not constitute a tribunal here because the signage at the detention center only indicated an office and not a court. However, whether the signs indicated an office or a court is not dispositive of this issue. Depending on the jurisdiction, a magistrate in this state may have a courtroom or an office. Conley & O'Barr, *Fundamentals of Jurisprudence*, at 477. Defendant also argues that a magistrate is not a tribunal because the comments to Rule 3.5 indicate that a judge, as opposed to a judicial official, presides over a tribunal. This assertion is simply incorrect. Although comment 8 to Rule 3.5 states that "a lawyer should not communicate with a judge relative to a matter pending before . . . a tribunal over which the judge presides," a great leap in logic is required to conclude from this comment that a tribunal only exists when presided over by a judge.

For the reasons stated above, we find defendant's contention that a magistrate is not a tribunal to be unpersuasive. We therefore hold that the DHC did not err in concluding that defendant disrespected a tribunal in violation of Rule 3.5(a)(4)(B).

B. Rule 8.4(d) Violation

[2] Rule of Professional Conduct 8.4 states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice[.]" N.C. R. Prof. Conduct 8.4(d). Defendant does not deny her conduct itself; rather, she contends that the DHC "rendered wholly conclusory findings of fact" that her conduct harmed the administration of justice and interfered with the ability of the magistrates to perform their duties on the night at issue. We disagree.

"Threats, bullying, harassment, and *other conduct serving no substantial purpose* other than to intimidate, humiliate, or embarrass anyone associated with the judicial process including judges, opposing counsel, litigants, witnesses, or court personnel violate the prohibition on conduct prejudicial to the administration of justice." N.C. R. Prof. Conduct 8.4, cmt. 5 (emphasis added).

> A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. . . . The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings.

N.C. R. Prof. Conduct 8.4, cmt. 4. Rule 3.5, which prohibits disrespectful conduct toward a tribunal as described above, discusses similar conduct.

> Therefore, the prohibition against conduct intended to disrupt a tribunal applies to conduct that does not serve a legitimate goal of advocacy or a requirement of a procedural rule and includes angry outbursts, insults, slurs, personal attacks, and unfounded personal accusations as well as to threats, bullying, and other attempts to intimidate or humiliate judges, opposing counsel, litigants, witnesses, or court personnel. . . . "Conduct of this type breeds disrespect for the courts and for the legal profession. Dignity, decorum, and respect are essential ingredients in the proper conduct of a courtroom, and therefore in the proper administration of justice." *Attorney Grievance Comm'n v. Alison*, 317 Md. 523, 536, 565 A.2d 660, 666 (1989).

N.C. R. Prof. Conduct 3.5, cmt. 10.

In *Attorney Grievance Comm'n v. Alison*, the defendant was found guilty of misconduct by the Maryland State Bar for, *inter alia*, directing vulgarities and profanities at two judges separately in open court, opposing counsel in open court, and two clerks of court. 317 Md. at 536, 565 A.2d at 666. The defendant appealed and alleged that his conduct was not prejudicial to the administration of justice. *Id.* at 525, 565 A.2d at 661. The Maryland Court of Appeals disagreed, reasoning that it does not matter if the conduct "delay[s] the proceedings or cause[s] a miscarriage of justice" because "[c]onduct of this type breeds disrespect for the courts and for the legal profession." *Id.* at 536, 565 A.2d at 666. With respect to the clerks, the court determined the analysis is the same even though clerks do not have courtrooms. *Id.* at 538, 565 A.2d at 667. The court ultimately upheld the defendant's disciplinary sanctions, noting "[i]t is not difficult to visualize the damage to the court system and to the reputation of the legal profession that would result if attorneys were free to conduct their daily business with court clerks in the manner employed by [the defendant]." *Id.*

Defendant's case is similar to *Alison*. Here, defendant made vulgar and profane statements toward and in the presence of Magistrate Fisher, who is a judicial officer of the district court. As to defendant's criminal contempt conviction, this Court reversed her conviction on procedural grounds while expressing serious concern with defendant's underlying behavior, which is at issue in this action.

> We are, however, very troubled by defendant's use of profanity in the magistrate's office while conducting court-related business despite warnings by the magistrate about the inappropriate language. Such disrespect, particularly by an attorney familiar with proper courtroom practices, is wholly inappropriate. . . . Given defendant is a lawyer practicing in our State's courts, we find defendant's attitude offensive and incomprehensible.

Foster, 2013 WL 2190072, at *8. We again emphasize that defendant's conduct — regardless of whether it occurred in a courtroom or a magistrate's office — was clearly offensive and inappropriate. Further, there is a reasonable likelihood that such conduct encourages disrespect for our court system and damages the reputation of the legal profession. We thus hold that the DHC did not err in finding that defendant exhibited conduct prejudicial to the administration of justice in violation of Rule 8.4(d).

III. Conclusion

Because the definitions and core functions of tribunals and magistrates are similar, and in light of the nature of our state constitution and general statutes, the DHC did not err in finding that defendant disrespected a tribunal in violation of Rule of Professional Conduct 3.5(a)(4)(B). Additionally, because defendant disrespected a judicial officer and damaged the reputation of the legal profession, the DHC did not err in finding that defendant exhibited conduct prejudicial to the administration of justice in violation of Rule of Professional Conduct 8.4(d). Accordingly, we affirm the disciplinary order of the DHC.

AFFIRMED.

Judges DIETZ and INMAN concur.

N.C. STATE BAR v. LIVINGSTON

[257 N.C. App. 121 (2017)]

THE NORTH CAROLINA STATE BAR, PLAINTIFF
v.
CHRISTOPHER W. LIVINGSTON, ATTORNEY, DEFENDANT

No. COA17-277

Filed 19 December 2017

1. Constitutional Law—due process—equal protection—attorney misconduct in evidentiary hearing—amount of time of hearing—prosecutorial misconduct—findings of fact

The Disciplinary Hearing Commission did not violate defendant attorney's due process and equal protection rights in an evidentiary hearing for attorney misconduct where there was no required amount of time to consider the evidence, no prosecutorial misconduct, and the findings of fact were not vague.

2. Attorneys—misconduct—violation of Rules of Professional Conduct—sharing legal fees with nonlawyer—conduct prejudicial to administration of justice—filing lawsuit without legal basis—threats to file monthly lawsuits

The Disciplinary Hearing Commission did not err by concluding that defendant attorney violated the Rules of Professional Conduct where the findings of fact supported the conclusions that defendant entered into an agreement which contemplated the sharing of legal fees with a nonlawyer entity in violation of Rule 5.4(a); failed to amend the pleadings or certify a class action constituting conduct prejudicial to the administration of justice in violation of Rule 8.4(d); threatened to and did file a lawsuit against opposing counsel and members of opposing counsel's law firm without a basis in law or fact in violation of Rules 3.1, 4.4(a), and 8.4(d); and threatened to file lawsuits monthly where his only purpose in doing so was to coerce a settlement in violation of Rule 4.4(a).

3. Attorneys—misconduct—violation of Rules of Professional Conduct—significant harm to public, profession, or administration of justice—not excessive amount of discipline—administrative fee

The Disciplinary Hearing Commission did not order excessive discipline by imposing a five-year suspension of defendant attorney's law license with an opportunity to petition for a stay after two years where defendant violated the Rules of Professional Conduct and his conduct caused significant harm or potentially significant harm to the public, the profession, or the administration of justice.

Further, N.C.G.S. § 84-34.2 provides that an administrative fee can be collected from any attorney against whom discipline has been imposed.

Appeal by defendant from orders entered 1 July 2015, 8 and 24 February 2016, 8, 9, and 18 March 2016, and 14 July 2016, by the Honorable Beverly T. Beal, Hearing Panel Chair of the North Carolina State Bar, Disciplinary Hearing Commission. Heard in the Court of Appeals 5 September 2017.

Deputy Counsel David R. Johnson and Counsel Katherine Jean for plaintiff-appellee, The North Carolina State Bar.

Christopher W. Livingston, defendant-appellant pro se.

BRYANT, Judge.

Where the Disciplinary Hearing Commission's conclusions that Christopher W. Livingston violated the Rules of Professional Conduct are supported by the findings of fact which are in turn supported by the evidence, and where Livingston's conduct caused significant harm or potentially significant harm to the public, the profession, or the administration of justice, we affirm the order disciplining Livingston and imposing a five year suspension of a law license with an opportunity to petition for a stay after two years.

In March 2008, defendant Christopher W. Livingston, an attorney, entered into an agreement with a business known as Credit Collections Defense Network ("CCDN") to serve as an "Associate Attorney." In that position, Livingston agreed to accept referrals of debt-laden consumers from CCDN, which is not a law firm, whereby CCDN would collect fees from customers and convey a portion to Livingston for his legal services to those customers. Per the agreement, Livingston was responsible for "legal advice, litigation, filing of pleadings, discovery responses (if necessary), and . . . cover[ing] court appearances (if necessary)" for CCDN's customers.

Around 20 April 2008, Livingston concluded that CCDN was engaged in the unauthorized practice of law by preparing court documents for CCDN's customers to file *pro se*. Livingston so advised CCDN through its representative, Colleen Lock, but did not terminate his relationship with CCDN. As such, CCDN continued to represent to North Carolina residents that CCDN was affiliated with licensed North Carolina lawyers, namely Livingston.

In September 2008, Livingston filed three lawsuits against CCDN (respectively, "Lawsuits 1, 2, and 3") in Bladen County District Court on behalf of three CCDN customers—William Harrison, Sheryl Lucas, and Cathy Hunt—alleging fraud, unfair and deceptive trade practices, gross and willful legal malpractice, and violations of both the North Carolina and federal Racketeer Influenced and Corrupt Organizations Acts ("RICO"). Livingston named a number of individuals and out-of-state business entities, including Robert Lock, Philip Manger, and R.K. Lock & Associates d/b/a "CCDN," but did not name the legal entity "CCDN, LLC" as a defendant. After making appearances to challenge personal jurisdiction over the named defendants, counsel for CCDN informed Livingston that CCDN was a limited liability company organized in Nevada. Livingston confirmed that fact but did not amend the complaints he had filed.

On 7 January 2009, while Lawsuits 1, 2, and 3 were still pending, Livingston filed another lawsuit ("Lawsuit 4") in Bladen County Superior Court against many of the same individual named defendants. Lawsuit 4 also named CCDN, LLC as a defendant. Livingston framed Lawsuit 4 as a class action and named an individual plaintiff, Sharon Southwood, as the class representative.[1] In a motion to certify the class, Livingston stated that he would not provide notice to class members as required by law. No class was ever certified.

In May 2009, the trial court dismissed Lawsuits 1, 2, and 3 for failure to name a necessary party—CCDN, LLC—and for lack of personal jurisdiction over the remaining defendants. The trial court concluded that none of the individual defendants had sufficient minimum contacts for personal jurisdiction before a North Carolina court. *See Lucas v. R.K. Lock & Assocs.*, Nos. COA10-874, COA10-875, COA10-891, 2011 WL 721289, at **5–6 (N.C. Ct. App. Mar. 1, 2011) (unpublished), *rev. denied*, 365 N.C. 347 (2011).[2]

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1. The defendants in Lawsuit 4 subsequently removed the case to federal district court and the matter was disposed of in the federal court's opinion, *Taylor v. Bettis*, 976 F. Supp. 2d 721, 727 (2013).

2. Livingston filed a motion for reconsideration of the dismissals under Rule 59, which motion was denied. Livingston appealed, and this Court held that Livingston failed to give notice of appeal of the trial court's order dismissing the complaints and only appealed the denial of the motion to reconsider. This Court dismissed the appeal and vacated an order imposing Rule 11 sanctions in a consolidated, unpublished opinion. *Lucas v. R.K. Lock & Assocs.*, Nos. COA10-874, COA10-875, COA10-891, 2011 WL 721289, at *6 (N.C. Ct. App. Mar. 1, 2011) (unpublished), *rev. denied*, 365 N.C. 347 (2011).

On 11 November 2009, Livingston commenced a RICO class action against CCDN and other named defendants in U.S. District Court for the Eastern District of North Carolina ("Lawsuit 5"). On or about 17 November 2009, Livingston contacted a South Carolina attorney, Andrew Arnold, who was representing CCDN in South Carolina litigation. Livingston left Arnold a voicemail message stating that he represented a "national class" in his suit, that Arnold had participated in a money laundering scheme by accepting legal fees from CCDN, and demanded that Arnold forfeit to Livingston all fees he had received from CCDN. Livingston also threatened to join Arnold in Lawsuit 5.

A week later, Livingston filed an amended complaint in Lawsuit 5, adding Arnold, Arnold's firm, the North Carolina lawyer who represented CCDN in Lawsuits 1–4 (Lee Bettis), Bettis's firm, and individual members of Bettis's firm who had not participated in representing CCDN. Livingston accused the lawyers and their firms of having knowledge of their clients' fraudulent conduct and participating in the fraud by accepting legal fees and representing CCDN clients. The federal court later dismissed the aforementioned lawyers and their firms from Lawsuit 5 as Livingston had no basis in law or fact to sue them. *See Taylor v. Bettis*, 976 F. Supp. 2d 721, 733–34, 736–39, 741–42, 745–47, 752–54 (E.D.N.C. 2013) (denying defendants' motion to dismiss but finding for defendants on their motion for judgment on the pleadings and dismissing plaintiffs' claims).

While Lawsuit 5 was still pending, on 7 January 2011, Livingston filed Lawsuit 6 in Columbus County Superior Court against the North Carolina attorneys on substantially the same underlying facts as alleged in Lawsuit 5. By email, Livingston informed Philip Collins, opposing counsel for the North Carolina attorneys in Lawsuit 6, that he planned to file suits against them each month for the remainder of the year. On 22 February 2011, the Columbus County Superior Court dismissed Lawsuit 6, which dismissal was affirmed by this Court. *Cullen v. Emanuel & Dunn, PLLC*, No. COA11-921, 2012 WL 3573696, at *3, *11 (N.C. Ct. App. Aug. 21, 2012) (unpublished).

On 10 April 2015, the North Carolina State Bar filed a complaint with the Disciplinary Hearing Commission (the "DHC") against Livingston alleging attorney misconduct in violation of the North Carolina Rules of Professional Conduct ("RPC"). Livingston filed his answer on 4 May 2015.

A hearing was held before the DHC from 17 to 20 May 2016. On 14 July 2016, the DHC entered its Order of Discipline suspending

Livingston's law license for five years with the possibility of a stay after two years. On 5 August 2016, Livingston filed notice of appeal from the Order of Discipline and other orders entered against him.[3]

On appeal, Livingston argues the DHC (I) violated his due process and equal protection rights; (II) erroneously found RPC violations; and (III) ordered excessive discipline.

I

[1] Livingston first argues the DHC violated his due process and equal protection rights, arguing that he received "no meaningful evidentiary hearing." Specifically, Livingston argues the DHC took an insufficient amount of time to consider the evidence presented, the State Bar engaged in prosecutorial misconduct, and the findings of fact in the DHC's order are vague. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). However, "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted).

To the extent Livingston makes a constitutional challenge for the first time on appeal, he contends he received "no meaningful evidentiary hearing, violating his Fourteenth Amendment due process and equal protection and N.C. Const. Art. I § 19 Law-of-the-Land rights[.]" We briefly address this argument.

Based on our thorough review of the record in this case, we are satisfied that "the DHC conducted a fair and unbiased process that fully comported with the principles of due process." *See N.C. State Bar v. Sutton*, ___ N.C. App. ___, ___, 791 S.E.2d 881, 891 (2016), *appeal dismissed*, ___ N.C. ___, 797 S.E.2d 296 (2017). Due process was satisfied

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3. Defendant brings forth no argument in support of his appeal of the other orders; therefore, per Rule 28(a) of the North Carolina Rules of Appellate Procedure, we deem any issues related to those orders abandoned. *See* N.C. R. App. P. 28(a) (2017) ("Issues not presented and discussed in a party's brief are deemed abandoned."); *see also* 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."). Accordingly, as defendant has abandoned any argument related to these orders, we dismiss any appeal therefrom. *See State v. Bacon*, ___ N.C. App. ___, ___, 803 S.E.2d 402, 406 (2017) ("Defendant has abandoned this argument, and we dismiss it.").

where Livingston was given notice of the allegations against him, he filed an answer to the DHC's complaint, served discovery on the DHC, took depositions, attended the trial, examined witnesses, and made arguments before the DHC, availing himself of a full and fair opportunity to participate. *See N.C. State Bar v. Braswell*, 67 N.C. App. 456, 458, 313 S.E.2d 272, 274 (1984) ("The filing of a formal complaint satisfies [a] defendant's right to be informed of and respond to the charges against him."). Contrary to Livingston's argument, due process does not require the DHC to deliberate for any prescribed length of time. Livingston also alleges the State Bar engaged in prosecutorial misconduct by failing to correct false testimony given by Bettis. But Livingston is unable to show that Bettis's testimony was false, and is therefore unable to sustain a claim of prosecutorial misconduct based on "failure to correct false testimony." Finally, as set forth in Section II, *infra*, the findings of fact in the Order of Discipline are not vague. Indeed, the DHC "ruled on numerous motions filed by [Livingston] and issued orders containing detailed findings of fact and conclusions of law. Therefore, the record belies [Livingston's] assertion that he was denied due process in connection with his disciplinary proceeding." *Sutton*, ___ N.C. App. at ___, 791 S.E.2d at 891. Accordingly, Livingston's argument that the DHC violated his due process and equal protection rights, as well as his N.C. Constitutional rights, is overruled.

II

[2] Livingston next argues the DHC erroneously found that he violated the Rules of Professional Conduct because the findings of fact are not supported by the evidence. We disagree.

Appeals from orders of the DHC "are conducted under the 'whole record test,' which requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law[.]" *N.C. State Bar v. Talford*, 356 N.C. 626, 632, 576 S.E.2d 305, 309 (2003) (internal citations omitted).

> Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion. The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn. Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to

> support its findings and conclusions must rise to the standard of "clear[, cogent,] and convincing."

Id. at 632, 576 S.E.2d at 309–10 (alteration in original) (internal citations omitted) (quoting *In re Suspension of Palmer*, 296 N.C. 638, 648, 252 S.E.2d 784, 790 (1979)). "Ultimately, the reviewing court must apply all the aforementioned factors in order to determine whether the decision in the lower body, e.g., the DHC, 'has a rational basis in the evidence." *Id.* at 632–33, 576 S.E.2d at 310 (citation omitted) (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979).

> [U]nder the whole record test, . . . the following steps are necessary as a means to decide if a lower body's decision has a "rational basis in the evidence": (1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision? . . . [I]n cases such as . . . those involving an "adjudicatory phase" (Did the defendant commit the offense or misconduct?), and a "dispositional phase" (What is the appropriate sanction for committing the offense or misconduct?), the whole-record test must be applied separately to each of the two phases.

Id. at 634, 576 S.E.2d at 311.

A. Conclusions 2(a) and 2(b)

Livingston challenges Conclusions 2(a) and 2(b) as unsupported by the findings of fact, specifically Findings of Fact Nos. 4–12, as he contends those findings are not supported by competent evidence. Conclusions 2(a) and 2(b) state as follows:

> (a) By entering into a contractual agreement with CCDN which contemplated the sharing of legal fees with a nonlawyer in violation of Rule 5.4(a), Livingston attempted to violate the Rules of Professional Conduct in violation of Rule 8.4(a);
>
> (b) By affiliating with CCDN and providing legal services to customers of CCDN, which was engaged in the unauthorized practice of law in North Carolina, Livingston assisted another in the unauthorized practice of law in violation of Rule 5.5(d)[.]

Findings of Fact Nos. 4–12 are as follows:

> 4. In March 2008, Livingston entered into a contractual agreement with Credit Collections Defense Network, LLC ("CCDN"), whereby CCDN would refer debtors seeking debt-relief assistance to Livingston for legal representation (this contract hereinafter referred to as "the Associate Attorney Agreement").
>
> 5. CCDN was not a law firm, and was not authorized to engage in the practice of law in North Carolina.
>
> 6. The Associate Attorney Agreement provided that CCDN would collect fees from customers and then remit a portion of those fees to Livingston for legal services Livingston rendered to those customers.
>
> 7. The Associate Attorney Agreement provided that CCDN would "prepare drafts of all [court] filings for review and approval" by Livingston.
>
> 8. The Associate Attorney Agreement prohibited Livingston from "directly or indirectly attempting in any manner to persuade any client of CCDN to cease to do business with or to reduce the amount of business which any such client has customarily done or actively contemplates doing with CCDN."
>
> 9. On or about 20 April 2008, Livingston determined that CCDN and/or its marketing partners had prepared legal documents for CCDN customers to file pro se or to be used to otherwise guide pro se litigation and thus had engaged in the unauthorized practice of law.
>
> 10. On or about 20 April 2008, Livingston advised a CCDN representative, Colleen Lock, that, in preparing pleadings to be filed pro se, CCDN was engaged in the unauthorized practice of law.
>
> 11. Despite becoming aware, at least as early as April 2008, that CCDN was engaged in the unauthorized practice of law, Livingston accepted additional clients from CCDN rather than immediately terminate his contractual relationship with CCDN.
>
> 12. Livingston aided CCDN's unauthorized practice of law in North Carolina by maintaining his affiliation with CCDN.

> This allowed CCDN to continue to represent to North Carolina residents that it was affiliated with licensed lawyers in the state.

1. *Conclusion 2(a)—Sharing of Legal Fees*

Livingston contends that because he at most agreed to share fees, and binding precedent holds that "agreement" falls short of "attempt," Findings of Fact 4–12 are "legally erroneous," and the DHC's conclusions that he violated Rule 5.4(a) (sharing legal fees with a nonlawyer) and attempted to violate Rule 8.4(a) (violating/attempting to violate the RPC or knowingly assist another to do so) should be vacated.

Rule 5.4(a) states that "[a] lawyer or law firm shall not share legal fees with a nonlawyer . . . ." N.C. Rev. R. Prof. Conduct, Rule 5.4(a) (2015). Although the Rules of Professional Conduct are not criminal statutes, Livingston's conduct in agreeing to share fees with CCDN met each of the required elements for criminal attempt: "(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citation omitted) (quoting *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996)). Here, the findings of fact show that Livingston (1) intended to improperly share fees with CCDN, a nonlawyer entity, and entered into a contract for that purpose; (2) performed his services under the contract; and (3) expected to be paid, but was not. These findings, which support Conclusion 2(a), are also supported by the evidence.

First, Livingston has offered no evidence that contradicts the findings other than his declaration that it was not his intent to share fees with a nonlawyer.[4] Second, Livingston testified he entered into the agreement, the agreement itself was entered into evidence at trial, and one of

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4. Indeed, the following facts were previously before this Court and set out in this Court's opinion in *Lucas* as follows:

> Livingston had previously entered into an "Associate Attorney Agreement" (the agreement) with Credit Collections Defense Network (aka CCDN and CCDN, LLC), which described itself in the agreement as "a national network of consumer protection attorneys, paralegals and administrative support personnel ('CCDN, LLC')[.]" *Pursuant to the agreement, Livingston was to represent clients referred by CCDN, LLC. He would provide legal services to those clients and they would pay a fee to CCDN, LLC. Livingston would be paid by CCDN, LLC, pursuant to a fee schedule included in the agreement.*

2011 WL 721289, at *1 (emphasis added).

Livingston's own witnesses testified the only reason fee sharing never happened was because CCDN failed to make the payments. Accordingly, the findings of fact are supported by the evidence, which in turn support the DHC's conclusion that Livingston entered into an agreement which contemplated the sharing of legal fees with a nonlawyer entity in violation of Rule 5.4(a).

2. *Conclusion 2(b)—Assisting Another in the Unauthorized Practice of Law*

The version of Rule 5.5(d) in effect at the time of Livingston's conduct provided that "[a] lawyer shall not assist another person in the unauthorized practice of law." N.C. R. Prof. Cond., Rule 5.5(d) (2016).[5] The unauthorized practice of law in North Carolina is defined by statute, *see* N.C. Gen. Stat. § 84-2.1 (2015), which prohibits the practice of law by corporations:

> It shall be unlawful for any corporation to practice law . . . or hold itself out to the public or advertise as being entitled to practice law; and no corporation shall organize corporations, or draw agreements, or other legal documents, or draw wills, or practice law, or give legal advice, or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular.

N.C. Gen. Stat. § 84-5(a) (2015). Under North Carolina law, a business corporation may not provide legal services or the services of lawyers even if those services are performed by licensed North Carolina attorneys. *See Gardner v. The N.C. State Bar*, 316 N.C. 285, 294, 341 S.E.2d 517, 523 (1986).

Here, Livingston concedes that CCDN was engaged in the unauthorized practice of law. Livingston claims to have learned that CCDN was so engaged in April 2008, after CCDN customers referred to him told him what CCDN was doing. Livingston also concedes that he did not end his relationship with CCDN for another six weeks. Thus, even if Livingston did not become aware that CCDN was engaged in the unauthorized practice of law before April 2008, by his own concession, his failure to immediately terminate his relationship with CCDN when he did become aware of its unauthorized practice of law enabled CCDN to continue to promote having a North Carolina attorney (Livingston) available for its

5. The rule in effect at the time of Livingston's conduct was Rule 5.5(d), but this rule was amended in 2017 and is now Rule 5.5(f).

customers. Livingston's challenges to Conclusion 2(b) and the supporting findings of fact are unavailing and are overruled.

B. Conclusion 2(c)

Livingston challenges the DHC's Conclusion 2(c) as unsupported by the findings of fact, specifically Findings of Fact Nos. 13–29, as he contends those findings are not supported by competent evidence. Conclusion 2(c) states that "[b]y filing civil actions against defendants in a court that he knew lacked the ability to obtain jurisdiction over the defendants and by failing to join necessary defendants in those actions, Livingston engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)[.]" Findings of Fact Nos. 13–29 are as follows:

> 13. Later in 2008, after undertaking representation of several clients that CCDN referred to Livingston, Livingston concluded that CCDN practices were frivolous and fraudulent and began representing CCDN customers against CCDN.
>
> 14. In September 2008, Livingston filed three complaints against CCDN on behalf of clients CCDN had referred to Livingston.
>
> 15. Livingston filed these three complaints in Bladen County District Court (hereinafter collectively referred to as "the Bladen County actions").
>
> 16. The Bladen County actions were captioned as follows: (i) Hunt v. R.K. Lock & Associates, an Illinois general partnership d/b/a Credit Collections Defense Network or CCDN; Robert K. Lock Esp.; Colleen Lock; Philip M. Manger Esq.; Tracy Webster; and Lawgistix, LLC, a Florida limited liability company, Defendants, Bladen County District Court file no. 08 CVD 883; (ii) Lucas v. R.K. Lock & Associates, an Illinois general partnership d/b/a Credit Collections Defense Network or CCDN; Robert K. Lock Esq.; Colleen Lock; Philip M. Manger Esq.; and Mark A. Cella, Bladen County District Court file no. 08 CVD 884, (iii) Harrison v. Aegis Corporation, a Missouri corporation; Debt Jurisprudence, Inc., a Missouri corporation; R.K. Lock & Associates, an Illinois general partnership d/b/a Credit Collections Defense Network or CCDN; Robert K. Lock Esq.; Colleen Lock; Philip M. Manger Esq.; David Kramer; Marcia M. Murphy; and Tracy Webster, Defendants, Bladen County District Court file no. 08 CVD 885.

17. Livingston alleged on behalf of his clients in the Bladen County action that the defendants' actions constituted unfair and deceptive trade practices, fraud, breach of contract, gross and willful legal malpractice, violations of the "North Carolina Racketeer and Corrupt Organizations Act", violations of the "Credit Repair Organizations Act", and violations of the Racketeer Influenced and Corrupt Organizations Act."

18. Livingston further alleged that "CCDN sometimes refers to itself as 'CCDN LLC' but no limited liability company by that name can be found meaning that CCDN is a general partnership."

19. None of the other defendants Livingston named in the Bladen County actions had personal minimum contacts with the State of North Carolina.

20. Those defendants only had contact with North Carolina by and through their employment by or management of CCDN, LLC.

21. The North Carolina General Court of Justice Bladen County, District Court Division, did not have jurisdiction over the defendants in the Bladen County actions.

22. CCDN, LLC was a necessary party to each of the Bladen County actions.

23. In December 2008, after Livingston filed the complaints in the Bladen County actions, Livingston was informed by counsel for CCDN that CCDN was a limited liability company existing under the laws of the State of Nevada.

24. After being so informed, Livingston confirmed that CCDN was a limited liability company existing under the laws of the State of Nevada.

25. Livingston did not amend the pleadings he filed in the Bladen County actions to name CCDN, LLC as a defendant in such actions.

26. At the time that he filed the complaints in the Bladen County actions, Livingston knew or should have known that Bladen County District Court did not have jurisdiction over the named defendants.

> 27. In May 2009, the Bladen County District Court concluded that CCDN, LLC was a necessary party to the Bladen County actions.
>
> 28. The Bladen County District Court further concluded that the defendants in the Bladen County actions did not have minimum contacts with North Carolina.
>
> 29. The Bladen County District Court dismissed the Bladen County actions without prejudice in part on the aforementioned conclusions.

Livingston makes various contentions to support his argument that the above findings are unsupported by evidence, purely frivolous, and require "vacating" Conclusion 2(c). However, the main thrust of his argument seems to be that he disagrees with the DHC's finding that he "knew or should have known that Bladen County District Court did not have jurisdiction over the named defendants." He also makes the convoluted argument that if the Bladen County District Court dismissed Lawsuits 1, 2, and 3 for lack of jurisdiction, "it lacked power to decide any other issue, rendering Finding [of Fact No.] 27 . . . unproven." This argument is without merit.

Rule 8.4(d) prohibits "engag[ing] in conduct prejudicial to the administration of justice." N.C. Rev. R. Prof. Conduct, Rule 8.4(d) (2015).

> [A] showing of actual prejudice to the administration of justice is not required to establish a violation of Paragraph (d). Rather, it must only be shown that the act had a *reasonable likelihood of prejudicing the administration of justice*. . . . The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings.

Sutton, ___ N.C. App. at ___, 791 S.E.2d at 897 (quoting N.C. Rev. R. Prof. Conduct 8.4, cmt. 4).

In the instant case, there is no dispute that Livingston filed Lawsuits 1, 2, and 3 on behalf of three customers of CCDN in Bladen County District Court, naming "R.K. Lock & Associates, an Illinois general partnership doing business as Credit Collections Defense Network or CCDN" as a defendant in each lawsuit. The individuals named as defendants were identified as employees of R.K. Lock & Associates, and before filing his lawsuit, Livingston failed to determine that Lock & Associates was not

doing business as CCDN. Rather, CCDN was a Nevada limited liability company, CCDN, LLC. *See Lucas*, 2011 WL 721289, at *6, *6 n.3 (stating that "Plaintiffs failed to name a necessary party, being, CCDN, LLC[,]" but acknowledging that "we make no determination *on the merits* of this issue, as it is not properly before us" (emphasis added)).

Thus, through reasonable diligence, Livingston knew or should have known that Lock & Associates was not CCDN. But, even after learning that CCDN was separate from Lock & Associates, Livingston proceeded with his flawed complaints rather than amending them or taking a voluntary dismissal and filing new complaints, properly naming the parties. Then, after the trial court dismissed the complaints without prejudice, Livingston proceeded to appeal rather than file new complaints with accurate information. The appeal was dismissed because Livingston failed to give proper notice of appeal, *id.* at *6, and as a result, his clients were deprived of any opportunity to pursue whatever potentially legitimate claims they had against the proper parties. Thus, Livingston's failure to amend the pleadings—his failure to take corrective action on behalf of his clients—constituted conduct prejudicial to the administration of justice. The findings of fact are supported by the evidence, and those findings in turn support Conclusion 2(c).

C. Conclusion 2(d)

Livingston challenges the DHC's Conclusion 2(d) as unsupported by the findings of fact, specifically Findings of Fact Nos. 30–35, as he contends those findings are not supported by competent evidence. Conclusion 2(d) states that "[b]y filing a motion for class certification without providing adequate notice for and to the class members, Livingston engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)[.]" Findings of Fact Nos. 30–35 state as follows:

> 30. On 7 January 2009, Livingston filed a verified complaint in Bladen County Superior Court against CCDN and others on behalf of Sharon Southwood, an individual client referred to him by CCDN, and a class of similarly situated plaintiffs (hereinafter referred to as "the Southwood action").
>
> 31. The Southwood action was captioned: Sharon Southwood, for herself and all others similarly situated, Plaintiffs, v. The Credit Card Solution, a Texas general partnership or sole proprietorship; CCDN LLC, a Nevada limited liability company; R.K. Lock & Associates, an Illinois general partnership dba Credit Collections Defense

> Network or CCDN; Robert K. Lock, Jr., Esq.; Colleen Lock; Philip M. Manger, Esq.; and Robert M. "Bob" Lindsey, Defendants, Bladen County Superior Court file no. 09 CVS 19.
>
> 32. Livingston filed a Motion for Class Certification in the Southwood action.
>
> 33. In order to certify a class in the Southwood action, Livingston was required to provide adequate notice to the class members.
>
> 34. In the Motion for Class Certification, Livingston stated that he did not intend to satisfy the adequate notice requirement, asserting that the notice requirement "will be Defendants' job, because they are the ones who have records of all participants in their programs."
>
> 35. No class was ever certified in the Southwood action.

Livingston contends that he was under no duty to provide adequate notice to class members, where he "had no contact information for the 2,219 families . . . in the putative class besides his individual clients."

While Rule 23 of the North Carolina Rules of Civil Procedure is silent on the issue, "fundamental fairness and due process dictates [sic] that adequate notice of the class action be given to [the members of the class]." *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 283, 354 S.E.2d 459, 466 (1987) (citation omitted). In a later decision, the North Carolina Supreme Court stated, "[w]e affirm our general agreement with 'the principle . . . that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action.' " *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 198, 540 S.E.2d 324, 331 (2000) (alteration in original) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 359, 57 L. Ed. 2d 253, 269 (1978)).

In the instant case, Livingston filed a motion for class certification concurrently with filing Lawsuit 4, stating as follows:

> Element 6 [notice to class members] will be Defendants' job, because they are the ones who have records of all participants in their programs, and they can pay the costs of notification, since they have done this wrong and should be the only ones paying for anything to fix it.

Livingston acknowledges that the class was never certified. And, pursuant to *Crow*, Livingston's clients—the plaintiffs in Lawsuit 4—were

required to give notice to the members of the class as soon as possible after filing suit. *See* 319 N.C. at 283, 354 S.E.2d at 466. Therefore, failing to take the necessary steps to properly pursue a class action on behalf of his clients and the proposed class jeopardized any chance of recovery. Thus, Livingston's position harmed his clients and was prejudicial to the administration of justice.

With regard to Livingston's claim that copies of the complaint filed in Lawsuit 4 and the motion for class certification were not properly introduced into evidence, this argument also fails. At the DHC hearing, Livingston did not object to the copies as hearsay, he objected to them based on lack of authentication. And, in any event, as the statement of a party opponent, Livingston's writings were admissible as an exception to the rule against hearsay. N.C. Gen. Stat. § 8C-1, Rule 801(d) (2015). As such, Findings of Fact Nos. 30–35 are supported by the evidence, and the findings in turn support Conclusion 2(d).

D. Conclusion 2(e)

Livingston challenges the DHC's Conclusion 2(e) as unsupported by the findings of fact, specifically Findings of Fact Nos. 43–50, as he contends those findings are not supported by competent evidence. Conclusion 2(e) states that "[b]y falsely asserting to Arnold that he represented a national class of plaintiffs in a federal lawsuit, Livingston knowingly made a false statement of material fact to a third person in violation of Rule 4.1[.]" Findings of Fact Nos. 43–50 are as follows:

> 43. On or about 11 November 2009, Livingston filed a "RICO Class Complaint" (hereinafter "the federal action") against CCDN and other defendants in the U.S. District Court for the Eastern District of North Carolina, case no. 7:09-cv-00183.
>
> 44. On or about 17 November 2009, Livingston telephoned and left two voicemail messages for Andrew Arnold (hereinafter "Arnold"), an attorney representing CCDN in South Carolina litigation.
>
> 45. Livingston stated in the voicemail messages that he represented "a national class" in a federal action against CCDN, asserted that Arnold had participated in money laundering by accepting legal fees from CCDN, and demanded that Arnold forfeit to Livingston all the attorney fees he had received from CCDN.

> 46. Livingston further stated that, if Arnold failed to turn over funds to Livingston as demanded, Livingston would join Arnold as a defendant in the federal action.
>
> 47. The fact that Livingston represented "a national class" was material to Livingston's goal of getting Arnold to believe that the litigation at issue was substantial. By establishing that the litigation at issue was substantial, Livingston could further his ultimate goal of obtaining money from Arnold.
>
> 48. At the time Livingston telephoned Arnold, Livingston did not represent a national class in the federal action against CCDN.
>
> 49. Livingston knew that his statements to Arnold about representing a national class were false.
>
> 50. At the time Livingston telephoned Arnold, Livingston had no reasonable basis for asserting that he had a valid cause of action against Arnold.

Livingston contends that these findings are unproven without recordings or transcripts of the voicemails he left for Arnold, and that because Arnold already knew that Livingston did not represent a "national class," the DHC cannot prove that he had "deceptive intent."

Intent is a question that may be proved by the circumstances even in the face of denial by a defendant. *See State v. Octetree*, 173 N.C. App. 228, 230, 617 S.E.2d 356, 358 (2005). In the instant case, Arnold, who represented CCDN, LLC in 2009 in defense of civil litigation that had been filed against it in South Carolina, testified as follows regarding Livingston's statements that he represented a national class:

> Q. In connection with your representation of CCDN, LLC, were you contacted by the defendant in this matter, Mr. Christopher Livingston?
>
> A. I was.
>
> . . . .
>
> Q. And what did he say?
>
> . . . .
>
> A. That he represented some individuals who had been defrauded by CCDN; that it was his belief that anyone who

> received monies from CCDN, and I -- and since I was representing them, that I would have been paid a fee from CCDN, that that made me liable to his clients for any fees that I would have been paid because those monies represented the defrauded proceeds, or the proceeds from the defraud [sic] of CCDN. So that was in general what I recall about his -- his communication.
>
> . . . .
>
> A. . . . I think he may have mentioned . . . that at least one of the causes of -- causes of action was a RICO cause of action . . . and that -- *I do believe he had indicated that he was . . . that the representative claimants were part of a larger group, and I believe he may have mentioned a class action associated with that -- that representation.*
>
> . . . .
>
> Q. Okay. At the time that Mr. Livingston represented to you that he represented a class, did you have any information about, or understanding about, whether or not that was true?
>
> A. No; this was the first -- his phone call to me was the first I had heard of any such action.

(Emphasis added).

As stated previously, Livingston has acknowledged that the class was never certified. Thus, by stating that he represented a "national class" of plaintiffs to Arnold, which fact is supported by the evidence, he knowingly made a false statement of material fact to Arnold. Thus, Findings of Fact 43–50 are supported by the evidence and in turn support the DHC's Conclusion 2(d).

E. Conclusion 2(f)

Livingston challenges Conclusion 2(f) as unsupported by the findings of fact, specifically Findings of Fact Nos. 40–43 and 50–59, as he contends those findings are not supported by competent evidence. Conclusion 2(f) states as follows:

> By threatening to join and joining the defendant lawyers in the federal action when there was no basis in law or fact to do so, Livingston used means that had no substantial purpose other than to embarrass or burden a third person

in violation of Rule 4.4(a), brought claims for which there was no basis in law or fact in violation of Rule 3.1 and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)[.]

Findings of Fact Nos. 40–43 and 50–59 are as follows:

40. Emmanuel and R. Dunn did not participate in the representation of CCDN.

41. Livingston cited Emanuel & Dunn's representation of CCDN as the basis for the litigation he threatened against them.

42. At the time Livingston wrote the letter to Bettis and S. Dunn, Livingston had no reasonable basis for asserting that he had a valid cause of action against Bettis and S. Dunn or their firm.

43. On or about 11 November 2009, Livingston filed a "RICO Class Complaint" (hereinafter "the federal action") against CCDN and other defendants in the U.S. District Court for the Eastern District of North Carolina, case no. 7:09-cv-00183.

. . . .

50. At the time Livingston telephoned Arnold, Livingston had no reasonable basis for asserting that he had a valid cause of action against Arnold.

51. On or about 23 November 2009, Livingston filed an amended complaint in the federal action.

52. Livingston included the following persons as named defendants in the amended complaint for the federal action: Bettis, S. Dunn, R. Dunn and Arnold (hereinafter "defendant lawyers").

53. Livingston named the defendant lawyers in their individual capacities.

54. Livingston also named the law firm of Emanuel & Dunn, its four managing partners, and Arnold's firm, The Law Offices of W. Andrew Arnold, P.C., as defendants in the federal action.

55. In the amended complaint Livingston filed in the federal action, Livingston alleged that CCDN and other

> defendants obtained the plaintiffs' property by wire, mail, and bank fraud and engaged in money laundering and racketeering, causing $1,044,000,000.00 in damages.
>
> 56. Livingston also alleged that the defendant lawyers and their law firms had knowledge of the other defendants' fraudulent conduct and participated in fraud by accepting legal fees from the other defendants and representing the other defendants in litigation.
>
> 57. Livingston did not have a valid basis in law or fact to join the defendant lawyers and their law firms in the federal action.
>
> 58. Livingston's act of naming the defendant lawyers and law firms in the amended federal complaint had no substantial purpose other than to embarrass or burden those defendants.
>
> 59. The federal court dismissed the defendant lawyers and their law firms from the federal action.

Rule 4.4(a) states that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." N.C. Rev. R. Prof. Conduct, Rule 4.4(a) (2015). Rule 3.1 states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . ." N.C. Rev. R. Prof. Conduct, Rule 3.1 (2015).

In the instant case, the federal court dismissed the claims brought by Livingston in Lawsuit 5 against the attorneys of Emmanuel & Dunn as baseless. *Taylor*, 976 F. Supp. 2d at 736 ("Under Plaintiffs' logic, any attorney daring to serve as defense counsel to a defendant named in a RICO action automatically could be named as a RICO defendant himself. This, of course, is untenable. Concomitantly, under these facts, accepting money in exchange for providing these traditional legal services fails to go to the heart of CCDN's alleged debt elimination and credit restoration scheme." (footnote omitted)). The federal court repeatedly observes that Livingston presented "conclusory allegations" on behalf of his clients, but did not present facts to support those claims. *See id.* at 742 ("[A]gain, this court cannot find sufficient Plaintiffs' wholly conclusory allegations . . . ."). Accordingly, the DHC was correct in concluding that Livingston violated Rules 3.1, 4.4(a), and 8.4(d), where he threatened to

and did file a lawsuit against opposing counsel and members of opposing counsel's law firm without a basis in law or fact.

F. Conclusion 2(g)

Livingston challenges Conclusion 2(g) as unsupported by the findings of fact, specifically Findings of Fact Nos. 60–72, as he contends those findings are not supported by competent evidence. Conclusion 2(g) states as follows:

> By filing the Cullen complaint, Livingston brought claims for which there was no basis in law or fact in violation of Rule 3.1, engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d) and used means that had no substantial purpose other than to embarrass a third person in violation of Rule 4.4(a)[.]

Findings of Fact Nos. 60–72 are as follows:

> 60. On or about 7 January 2011, Livingston filed a complaint on behalf of former CCDN clients Kimberly Cullen ("Cullen") and William Harrison, Sr. ("Harrison") in Columbus County Superior Court, case no. 11 CVS 20 (hereafter "Cullen complaint").
>
> 61. Livingston named Emanuel & Dunn, Bettis, S. Dunn, Emanuel, and R. Dunn as defendants in the case.
>
> 62. Cullen was not a resident of North Carolina and had not had any contact with the defendants named in the Cullen complaint.
>
> 63. Harrison had not had any contact with Emmanuel and Dunn, S. Dunn, Emanuel or R. Dunn.
>
> 64. Harrison's only contact with Bettis was in Bettis's capacity as attorney for CCDN.
>
> 65. In a 7 January 2011 email to opposing counsel, Philip Collins, in reference to the Cullen complaint, Livingston made the following statements: (i) "As promised, our state level campaign kicked off yesterday with the first of many Superior Court actions seeking justice for CCDN victims, carefully constructed so as not to be removable to federal court."; (ii) [regarding service] "I don't think sending swarms of deputies or piles of certified mail will do anybody any good."; and (iii) "For the rest of 2011, you

> can expect a new Cullen-type Superior Court case every month, each an improvement over its predecessors. Each will also carry its own set of written discovery, followed by depositions of all [Emmanuel & Dunn] personnel with relevant knowledge."
>
> 66. The federal action was pending when Livingston filed the Cullen complaint.
>
> 67. The underlying facts in the Cullen complaint were substantially the same as the underlying facts set forth in the federal action.
>
> 68. Harrison was a named plaintiff in the federal action and was the only named plaintiff in the Cullen complaint with any ties to North Carolina.
>
> 69. The Cullen complaint failed to establish (i) any tie between plaintiff Kimberley Cullen and North Carolina, and (ii) harm to Cullen caused by actions of the lawyer-defendants.
>
> 70. Livingston alleged in the Cullen complaint that Bettis engaged in illegal conduct during his representation of a client in Bladen County District Court. These allegations that Livingston made against Bettis were without basis in law or fact.
>
> 71. On 22 February 2011, the court dismissed the plaintiff's claims with prejudice.
>
> 72. The North Carolina Court of Appeals affirmed the lower court's dismissal of the Cullen Complaint.

Findings of Fact Nos. 60–72 are supported by the evidence, including the deposition testimony of attorney Lee Bettis, an associate with Emanuel & Dunn who represented the defendants as well as CCDN, LLC during the *Lucas* proceedings, *see Cullen*, 2012 WL 3573696, at *2, and attorney Philip Collins, who represented Bettis and others in the federal lawsuit filed by Livingston. *Taylor*, 976 F. Supp. 2d at 727.

First, with regard to Livingston's allegation, among others, that Bettis engaged in "illegal conduct during his representation of a client," specifically that Bettis "extend[ed] the obviously unethical offer to **help Livingston draft valid complaints against Mr. Bettis's own clients**," Bettis testified (and clarified) as follows:

> Q. Didn't you offer to help me draft valid complaints against your own clients?
>
> A. What I did was I offered to help you straighten out the procedural issues that were so prevalent in your cases that we never would have gotten to the merits which would have required me to drive from here down to Bladen County and waste my client's time, everybody's time and money. So what I did was I said Chris and this is when you threatened to -- wanted me to go outside and fight with you. I said, "Chris, let's just -- you've sued the wrong people, you've sued the wrong corporations and it's real easy to fix it," and I told you let's fix it so we can get down to the merits and stop wasting my time, my client's time and the Court's time and you didn't like that.

In the Cullen complaint, Livingston attempted to argue that Bettis's actions—described above—constituted "two or more offenses of obtaining property by false pretenses in violation of NCGS § 14-100(a)." *Cullen*, 2012 WL 3573696, at **9–10 (affirming the order granting the defendants' motion for judgment on the pleadings with regard to the Cullen complaint). As this Court summarized,

> [t]he majority of plaintiffs' claims [brought by Livingston] are based entirely on the conduct of Mr. Bettis while representing the *Lucas* defendants and CCDN, LLC in the *Lucas* litigation. The complaint alleges that Mr. Bettis acted with an improper purpose, made knowingly fraudulent arguments, and sought to delay any recovery for the plaintiffs until CCDN, LLC could go out of business, rendering any recovery against it impossible.

Id. at *3. Thus, as this Court's opinion affirming the trial court's grant of the defendants' motion for judgment on the pleadings was based on "the [in]sufficiency of the allegations" in the Cullen complaint, *see id.* at *5, the DHC's findings of fact are supported by the evidence.

Second, with regard to the federal lawsuit, Collins, the attorney who represented Bettis and others, testified that the federal court disposed of the matters on the defendants' motion for judgment on the pleadings as follows: "Dismissed all the claims with the exception of the conversion and constructive trust," *see Taylor*, 976 F. Supp. 2d at 745, 755, and later dismissed those claims as well. Collins also testified that the factual allegations in the *Cullen* case, Lawsuit 4, were similar to those contained in the federal lawsuit, *Taylor v. Bettis*, Lawsuit 5. Finally, Finding of Fact

No. 65, *see infra* Section G, is taken verbatim from Plaintiff's Exhibit 21. Accordingly, it is also supported by the evidence, and this finding in turn supports the DHC's ultimate conclusion Livingston violated the Rules of Professional Conduct by filing the Cullen complaint in Bladen County Superior Court.

G. Conclusion 2(h)

Livingston challenges the DHC's Conclusion 2(h) as unsupported by Finding of Fact Nos. 65, as he contends that finding is not supported by competent evidence. Conclusion 2(h) states that "[b]y threatening to file monthly additional lawsuits based on similar allegations against Bettis and Emmanuel & Dunn and threatening to engage in separate discovery for each lawsuit, Livingston used means that had no substantial purpose other than to embarrass or burden a third person in violation of Rule 4.4(a)." Finding of Fact No. 65 states, in relevant part, as follows:

> 65. In a 7 January 2011 email to opposing counsel, Philip Collins, . . . Livingston made the following statements: . . . "*For the rest of 2011, you can expect a new Cullen-type Superior Court case every month*, each an improvement over its predecessors. Each will also carry its own set of written discovery, followed by depositions of all [Emmanuel & Dunn] personnel with relevant knowledge."

(Emphasis added).

Comment 2 to Rule 4.4 of the Rules of Professional Conduct states as follows:

> Threats, bullying, harassment, insults, slurs, personal attacks, unfounded personal accusations generally serve no substantial purpose other than to embarrass, delay, or burden others and violate this rule. Conduct that serves no substantial purpose other than to intimidate, humiliate, or embarrass lawyers, litigants, witnesses, or other persons with whom a lawyer interacts while representing a client also violates this rule.

N.C. Rev. R. Prof. Conduct, Rule 4.4, cmt. 2.

As stated *supra* in Section F, this finding quotes verbatim the text of the email Livingston sent to Collins on 7 January 2011. Livingston does not dispute that he sent the email or made the threat that "[f]or the rest of 2011, you can expect a new *Cullen*-type Superior Court case every month . . . ." The email also includes other vaguely threatening

statements such as, "it is not our goal to personally bankrupt the lawyers at E&D [(Emanuel & Dunn)] if recovery can be had some other way" and "I really, really suggest, not for the first time, that we all be content with $3 million for the class of CCDN victims . . . . This will take care of fall fees and costs, too, and I will not move for sanctions, and your individual clients' assets will be safe." Accordingly, Finding of Fact No. 65 is supported by the evidence, which finding in turn supports the DHC's conclusion that Livingston violated Rule 4.4(a) by threatening to file lawsuits monthly where his only purpose in doing so was to coerce a settlement.

III

[3] Livingston also argues the DHC ordered excessive discipline where no evidence justified his suspension, specifically challenging disciplinary Findings of Fact Nos. 1–10 as unsupported by the evidence, and the DHC's Conclusions of Law Nos. 1 and 4–10 as failing the whole record test. We disagree.

This Court reviews additional findings of fact and conclusions of law with respect to the disciplinary phase under the whole record test. *See Talford*, 356 N.C. at 634, 576 S.E.2d at 311 ("[T]he whole-record test must be applied separately to each of the two phases [(adjudicatory and dispositional)].").

> "Suspension [of an attorney's license]," is . . . a form of punishment imposed for misconduct that either results in or threatens *significant* harm to "a client, the administration of justice, the profession or members of the public." Thus, when imposed, findings must be made explaining how the misconduct caused significant harm or threatened significant harm, and why the suspension of the offending attorney's license is necessary in order to protect the public.

Id. at 637, 576 S.E.2d at 312–13 (first alteration in original) (internal citation omitted).

The trial court made the following additional findings of fact regarding discipline which defendant challenges on appeal:

> 1. R. Dunn did not participate in his firm's representation of CCDN in defense of the claims [Livingston] brought against CCDN on behalf of his clients.
>
> 2. Pat Leigh Pittman was a transactional lawyer who did not participate in her firm's representation of the claims [Livingston] brought against CCDN on behalf of his clients.

3. Joanne K. Partin was a transactional lawyer who did not participate in her firm's representation of the claims [Livingston] brought against CCDN on behalf of his clients.

4. Robert L. Emmanuel was an eighty year old, semi-retired lawyer who did not participate in his firm's representation of CCDN in defense of the claims [Livingston] brought against CCDN on behalf of his clients.

5. When R. Dunn was served with the complaint in the federal action, media was present and media reported about the lawsuit [Livingston] filed.

6. A long-time client of Emmanuel & Dunn questioned the ability of Emmanuel & Dunn to continue in its representation of this client because the client had become aware of the allegations [Livingston] made against Emmanuel and Dunn in the federal action.

7. Emmanuel & Dunn had to obtain legal representation to defend against the lawsuits [Livingston] filed against Emmanuel & Dunn and its lawyers.

8. Arnold had to obtain legal representation to defend him[self] against the allegations [Livingston] made against him and his firm in the federal action.

9. It was costly to defend against the frivolous actions [Livingston] brought against the defendant lawyers and their law firms.

10. On 9 August 2011, [Livingston] was sanctioned by the United States District Court for the Eastern District of North Carolina, Southern Division for making baseless allegations that lawyer defendants in Caraballo v. Bagbeh had engaged in racketeering, wire fraud, money laundering and receipt of illegally obtained funds.

A. Five-Year Suspension

The DHC's additional findings of fact are supported by the evidence presented in Phase I of the trial as well as by additional evidence presented in Phase II. With regard to "significant harm" caused by Livingston's actions, Raymond Dunn of Emanuel & Dunn testified as follows:

> A The TV news coverage was allegedly Mr. Livingston saying that our firm were fraudsters and money launderers, and the person who was stating that represented himself to be Mr. Livingston on the TV.
>
> . . . .
>
> A We're a small firm. We've been in existence . . . since 1952. We don't advertise. The only way we get business is by word of mouth and our reputation, and when there's media coverage alleging fraudulent conduct, it impacts a small town lawyer. We don't advertise. It's a significant impact on your business and on your reputation, which is the only way that we get business.

Collins testified about Livingston's "scurrilous allegations" and testified to the chilling effect on the profession caused by Livingston's filing such lawsuits against opposing counsel. He also testified that the defense of the lawsuits cost approximately $200,000.00. In a federal court order sanctioning Livingston in 2011 for making similar allegations against an opposing counsel, and which was admitted into Phase II of the hearing without objection by Livingston, the federal court noted as follows:

> The court must also consider the minimum necessary to deter future abuse. This factor is a difficult one, as Mr. Livingston sees no error in his ways. Furthermore, the sarcastic nature of his comments toward this court contained within the filings leads the court to believe that sanctions may not deter Mr. Livingston at all.

Caraballo v. Bagbeh, NO. 7:10-CV-122-H, 2012 WL 12914657, at *2 (E.D.N.C. June 14, 2012) (unpublished).

In its order, the DHC explained its analysis of the disciplinary factors it was required to consider and which it did consider, including the harm to Livingston's clients, the profession, and the administration of justice. Accordingly, imposing a five-year suspension with an opportunity to petition for a stay after serving two years active and upon demonstrating compliance with the enumerated conditions was fully supported by the harm shown. *See Talford*, 356 N.C. at 637, 576 S.E.2d at 312–13.

B. Administrative Costs

The Order of Discipline requires defendant to pay the administrative fees and costs of the proceeding within thirty days of service of the statement by the Secretary of the State Bar. Livingston did not object to

inclusion of this provision in the order and argues for the first time on appeal that the administrative fees assessed against him are "not permitted by law." However, our General Statutes state that the State Bar Council "may charge and collect the following fees in amounts determined by the Council: . . . (5) An administrative fee for any attorney against whom discipline has been imposed." N.C. Gen. Stat. § 84-34.2 (2015). Accordingly, Livingston's argument is without merit and is overruled.

In conclusion, where the DHC's conclusions of law that Livingston violated the Rules of Professional Conduct are supported by the findings of fact which are supported by the evidence and where defendant's conduct caused significant harm or potentially significant harm to the public, the profession, or the administration of justice, the order disciplining Livingston and imposing a five-year suspension with an opportunity to petition for a stay after two years is

AFFIRMED.

Judges DAVIS and INMAN concur.

ZACKERY RAY PROFFITT, PLAINTIFF
v.
JAMES KELLY GOSNELL, DEFENDANT

No. COA17-233

Filed 19 December 2017

1. Motor Vehicles—contributory negligence—low IQ

Where plaintiff was standing on a fallen tree in the road and was injured when another driver collided with the tree, plaintiff failed to forecast sufficient evidence that his low IQ diminished his capacity such that he could not be expected to exercise ordinary care in the circumstances that led to his injury.

2. Motor Vehicles—contributory negligence—failure to yield right of way—standing on fallen tree in road

Where plaintiff was standing on a fallen tree in the road and was injured when another driver collided with the tree, plaintiff's forecast of evidence showing his own failure to yield the right of way established that he was contributorily negligent as a matter of law. The risks of standing on a fallen tree in the middle of a curvy

mountain road were obvious, and plaintiff knew family members had died in similar circumstances yet made no effort to move off the road when he saw defendant's car approaching.

3. Motor Vehicles—last clear chance—powerlessness to extricate

Where plaintiff was standing on a fallen tree in the road and was injured when another driver collided with the tree, the doctrine of last clear chance was not applicable because plaintiff's own evidence showed that he was facing defendant's lane of traffic while standing in the tree, waving and yelling at defendant rather than attempting to move out of the roadway to safety. Plaintiff was not in a position from which he was "powerless to extricate himself."

Appeal by Plaintiff from order entered 10 November 2016 by Judge Bradley B. Letts in Superior Court, Buncombe County. Heard in the Court of Appeals 18 September 2017.

Lakota R. Denton, P.A., by Lakota R. Denton, for Plaintiff-Appellant.

Ball Barden & Cury, P.A., by Alexandra Cury, for Defendant-Appellee.

McGEE, Chief Judge.

Zackery Ray Proffitt ("Plaintiff") appeals from the trial court's order granting summary judgment in favor of James Kelly Gosnell ("Defendant"). For the reasons discussed below, we affirm.

I. Background

Plaintiff was driving a truck east on Bear Creek Road, near Asheville, shortly before 6:00 p.m. on 16 October 2015. Plaintiff's father, Manon Proffitt ("Plaintiff's father"), was a passenger in the truck. About a quarter mile from their home, Plaintiff and Plaintiff's father observed a fallen tree obstructing both lanes of traffic in the road ahead. The tree's vertical branches held its trunk approximately five feet above the surface of the road. Plaintiff's father told Plaintiff to slow down, and Plaintiff pulled off the road and stopped the truck thirty or forty feet from the tree. Plaintiff's father turned on the truck's hazard lights and called Plaintiff's mother to ask that she bring down a chainsaw so he could cut up the tree and remove it from the road. Plaintiff's father instructed Plaintiff "to get across the tree and try to wave traffic down, slow [cars] down, [while] waiting on his mom to get there [with the chainsaw]." Plaintiff climbed on the tree. After noticing he was getting pine sap on his hands, Plaintiff asked his father for a pair of gloves.

While Plaintiff's father searched for gloves for Plaintiff, Plaintiff stood on top of the tree. According to Plaintiff's father, shortly after Plaintiff climbed onto the tree, they heard an oncoming vehicle approaching an uphill curve in the road ahead. Plaintiff began waving his arms at the approaching vehicle and yelling in an attempt to get the driver's attention. Plaintiff's father testified that Plaintiff "never got down" from the tree; had been "goofing off" while standing on the tree; and was "just being a teenager[,] . . . [b]ecause [he] thought [the other driver] was going to stop." Plaintiff's father said he told Plaintiff to jump down from the tree, and Plaintiff turned to jump, but Plaintiff's pants snagged on a tree limb.

Defendant was driving a truck on Bear Creek Road coming from the opposite direction around 6:00 p.m. on 16 October 2015. Defendant testified that as he approached the curve in the road, the sunlight hit his windshield, creating a glare. Defendant stated he "took [his] foot off the gas, moved it towards the brake[,]" and reached up for his sun visor. Defendant was driving forty-five miles per hour, five miles per hour over the posted speed limit. Defendant testified that, as he moved his foot toward the brake to slow down, he noticed something in the corner of his windshield. Defendant alleged he did not realize there was a tree in the road, or see Plaintiff, before colliding with the fallen tree.

On impact, one of the tree's branches struck Plaintiff in the back of the head, propelling Plaintiff through the air and into the roadway, where he landed on his back. Plaintiff was unconscious, barely breathing, and bleeding from his ears. He was airlifted to Mission Hospital, where he was treated for injuries that included skull fractures and swelling of the brain. At a deposition in June 2016, Plaintiff indicated he had no recollection of the several days preceding the 16 October 2015 collision, the collision itself, or the days he spent in the hospital thereafter.

Plaintiff filed a complaint on 22 December 2015 alleging he was seriously injured as a result of Defendant's negligence.[1] In response, Defendant asserted numerous affirmative defenses, including contributory negligence. Defendant filed a motion for summary judgment on 5 October 2016. Following a hearing on 24 October 2016, the trial court entered an order on 10 November 2016 finding that Defendant was entitled to summary judgment as a matter of law. Plaintiff appeals.

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1. Plaintiff filed an amended complaint on 6 January 2016, adding as a second defendant one of the owners of the real property from which the tree fell, but that defendant was subsequently dismissed from this action.

II. Standard of Review

This Court "review[s] a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the [reviewing] court considers the matter anew and freely substitutes its own judgment for that of the lower [court]." *Blackmon v. Tri-Arc Food Systems, Inc.*, ___ N.C. App. ___, ___, 782 S.E.2d 741, 743 (2016) (citation and quotation marks omitted).

Summary judgment is appropriately 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." *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). The party moving for summary judgment bears the burden of showing that no triable issue of fact exists, and may satisfy its burden "by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that an affirmative defense would bar the [non-moving party's] claim." *CIM Ins. Corp. v. Cascade Auto Glass, Inc.*, 190 N.C. App. 808, 811, 660 S.E.2d 907, 909 (2008) (citation omitted). "[I]n ruling on a motion for summary judgment[,] the [trial] court does not resolve issues of fact and must deny the motion if there is any issue of genuine material fact." *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972) (citation omitted).

This Court reviews 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) (citation and quotation marks omitted). "If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision." *Nifong v. C.C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465 (1996) (citation omitted).

While this Court has cautioned that summary judgment "is rarely an appropriate remedy in cases of negligence or contributory negligence[,]" we have clarified that "summary judgment is appropriate in a cause of action for negligence where the [plaintiff's] forecast of evidence fails to show negligence on [the] defendant's part, or establishes [the] plaintiff's contributory negligence as a matter of law." *Blackmon*, ___ N.C. App. at ___, 782 S.E.2d at 744 (citation, quotation marks, and internal quotation marks omitted).

III. Defendant's Motion for Summary Judgment

Plaintiff argues summary judgment was improper in the present case because he was not contributorily negligent as a matter of law. He further contends that, even assuming Plaintiff was negligent, Defendant had the last clear chance to avoid the collision that resulted in Plaintiff's injuries. We address each argument in turn.

A. *Contributory Negligence*

[1] "Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Meinck v. City of Gastonia*, ___ N.C. App. ___, ___, 798 S.E.2d 417, 423 (2017) (citation and internal quotation marks omitted). "In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: (1) [a] want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Daisy v. Yost*, ___ N.C. App. ___, ___, 794 S.E.2d 364, 366 (2016) (citation and internal quotation marks omitted) (alteration in original). However, a plaintiff "may relieve the defendant of the burden of showing contributory negligence when it appears from [the plaintiff's] own evidence that he was contributorily negligent." *Price v. Miller*, 271 N.C. 690, 694, 157 S.E.2d 347, 350 (1967) (citation and quotation marks omitted).

This Court has held that

> [a p]laintiff cannot recover if she, too, was negligent where that negligence was a proximate cause of her injuries. [C]ontributory negligence consists of conduct which fails to conform to an *objective* standard of behavior – the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury. The existence of contributory negligence is ordinarily a question for the jury; such an issue is rarely appropriate for summary judgment, and only where the evidence establishes a plaintiff's negligence so clearly that no other reasonable conclusion may be reached. Contradictions or discrepancies in the evidence even when arising from [the] plaintiff's evidence must be resolved by the jury rather than the trial judge.

Cone v. Watson, 224 N.C. App. 241, 245, 736 S.E.2d 210, 213 (2012) (citations and internal quotation marks omitted) (emphasis in original) (first alteration added). In general, a person who possesses the

> *capacity to understand and avoid a known danger* and fails to take advantage of that opportunity, and [is injured as a] result[], . . . is chargeable with contributory negligence, . . . [and] [summary judgment] is proper on the theory that [the] defendant's negligence *and* [the] plaintiff's contributory negligence are proximate causes of the injury[.]

Blue v. Canela, 139 N.C. App. 191, 193-94, 532 S.E.2d 830, 832 (2000) (citation omitted) (first emphasis added).

1. Plaintiff's Mental Capacity

Plaintiff first argues that, because his IQ "falls into the category of mild mental retardation[,]" the ordinary standard of care does not apply in this case. Instead, Plaintiff contends, a jury must determine whether "[he] acted with the degree of care he [was] able to perceive based on his diminished [mental] capacity." We disagree. The record discloses insufficient evidence that Plaintiff lacked the capacity to "understand and avoid a clear danger." *See Burgess v. Mattox*, 260 N.C. 305, 307, 132 S.E.2d 577, 578 (1963). Accordingly, we conclude Plaintiff was "subject to [the] universal rule" that "[e]very person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fail[ed] to exercise such care, and such failure . . . contribute[d] to the injury complained of, he is guilty of contributory negligence." *See Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980).

Plaintiff overstates this Court's holding in *Stacy v. Jedco Construction, Inc.*, 119 N.C. App. 115, 457 S.E.2d 875 (1995), which he cites for the apparent proposition that any evidence of an injured party's "diminished mental capacity" *necessarily* precludes summary judgment based on the affirmative defense of contributory negligence. *Stacy* is both factually and procedurally distinguishable from the present case. In *Stacy*, we considered, as a matter of first impression, "whether an adult whose mental capacity has been impaired or diminished due to *advanced age, disease, or senility* is capable of contributory negligence." *Id.* at 120, 457 S.E.2d at 878-79 (emphasis added). The *Stacy* plaintiff's intestate, who was approximately eighty-five years old when he was injured, "suffer[ed] from senile dementia, with progressively worse short term memory loss[.]" *Id.* at 117, 457 S.E.2d 877. Although he was repeatedly instructed not to enter a construction zone at his retirement facility, his near-total short term memory loss "made these warnings ineffective[,]" and he was subsequently injured when he entered the

construction site after-hours and fell on a wooden ramp. *Id.* at 118, 457 S.E.2d at 877. At trial, the plaintiff moved for a directed verdict on the issue of contributory negligence on the basis that "mental incompetence due to senility rendered [the plaintiff's intestate] incapable of contributory negligence." *Id.* at 120, 457 S.E.2d at 878.

On appeal, this Court held the plaintiff's motion was properly denied. We first observed that "[i]t is generally held that one who is so insane or devoid of intelligence as to be totally unable to apprehend danger and avoid exposure to it is not a responsible human agency and cannot be guilty of contributory negligence." *Id.* at 120, 457 S.E.2d at 879 (citation and internal quotation marks omitted). Our Court then concluded:

> However, where an injured plaintiff suffers from diminished mental capacity not amounting to insanity or total incompetence, it is a question for the trier of fact as to whether he exercised the required degree of care for his own safety, and the effect of his diminished mental faculties and capabilities may be taken into account in determining his *ability to perceive and avoid a particular risk of harm*. Thus, we hold that one whose mental faculties are diminished, not amounting to total insanity, is capable of contributory negligence, but is not held to the objective reasonable person standard. Rather, such a person should be held only to the exercise of such care as he was capable of exercising, i.e., the standard of care of a person of like mental capacity under similar circumstances.

Id. (citations omitted) (emphasis added). Accordingly, in *Stacy*, this Court held the jury was properly permitted to consider the injured party's mental infirmity "in determining his ability to perceive and avoid a particular risk of harm." *Id.*

In the present case, Plaintiff appears to argue that, under *Stacy*, he is generally subject to a less stringent standard of care because his low IQ constitutes a "diminished mental capacity not amounting to insanity." As an initial observation, we do not find Plaintiff's low IQ factually analogous to senility, *i.e.*, the "diminished mental capacity" at issue in *Stacy*. Additionally, we note that *Stacy* involved the denial of a plaintiff's motion for a directed verdict, not the allowance of a defendant's motion for summary judgment.[2] *See Edwards v. Northwestern Bank*, 53 N.C.

2. In *Hawley v. Cash*, 155 N.C. App 580, 574 S.E.2d 684 (2002), this Court observed the case

App. 492, 495, 281 S.E.2d 86, 88 (1981) (contrasting pre-trial motions for summary judgment and post-trial motions for directed verdict, and noting that "[t]he stage of the trial is different. The evidence before the court is different."). This Court's holding in *Stacy* does not relieve Plaintiff of his burden to forecast evidence tending to show he was unable, as a result of the specific "diminished mental capacity" he alleges, to perceive and avoid a particular risk of harm.

At the hearing on Defendant's motion for summary judgment, Plaintiff's counsel told the trial court:

> One [issue] is that [] [P]laintiff's mental capacity creates a question for the jury with respect to contributory negligence. The [precedent] is [that] where an injured plaintiff suffers from diminished capacity not amounting to insanity or total incompetence [it] is a question for the trier of fact as to whether he exercised the required degree of care for his own safety and the effect [of] the diminished mental faculties and capabilities may be taken into account in determining his ability to proceed [sic] and avoid a particular risk of harm.
>
> Without getting into too much detail, Your Honor, [] [P]laintiff had an IQ of around 65 prior to the [16 October 2015] incident. That's in the lowest [five] percent of the population.
>
> I've cited a case here that says that is an issue for the jury to determine. Someone with [Plaintiff's] mental capacity[,] what kind of danger can he perceive? Not his

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> [was] unusual in that [the] *plaintiff* made the motion for [a] directed verdict on [the] defendants' defense of contributory negligence at the close of all the evidence at trial. In most cases that set out the applicable standard of review, the defendant moves for a directed verdict on its affirmative defense that the plaintiff is barred from recovery as a result of [the] plaintiff's contributory negligence. Thus, the evidence viewed in the light most favorable to the non-moving party[] is normally viewed in the light most favorable to the plaintiff. Here, however, the evidence must be considered in the light most favorable to [the] defendants, since [the] plaintiff was the moving party. Therefore, if there is more than a scintilla of evidence supporting each element of [the] [defendants'] claim that [the] plaintiff was contributorily negligent, then the issue should have been submitted for the jury to decide.

Id. at 583, 574 S.E.2d at 686 (emphasis in original) (internal quotation marks omitted).

> parents or other eyewitnesses, but [] [P]laintiff himself. And that is a question for the jury.

Plaintiff presented no additional evidence at the hearing in support of this argument.

Counsel's mere statement that Plaintiff "had an IQ of around 65" at the time of the collision did not create an issue of fact regarding Plaintiff's ability to exercise ordinary care in the circumstances in which he was injured. Plaintiff's IQ was not itself in dispute; Defendant acknowledged at the hearing that Plaintiff "has a relatively low IQ[.]" *See Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 47-48, 727 S.E.2d 866, 869 (2012) (observing that, on a motion for summary judgment, non-moving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth *specific facts* showing that there is a genuine issue for trial." (citing N.C.G.S. § 1A-1, Rule 56(e)) (quotation marks omitted) (emphasis added)). Moreover, this Court has explicitly held that mental impairment is not the sole measure of "[t]he ability to understand the nature of one's acts[,] [which] can be the product of multiple factors, including age, experience, or mental impairment." *See Erie Ins. Exch. v. St. Stephen's Episcopal Church*, 153 N.C. App. 709, 715, 570 S.E.2d 763, 767 (2002) (rejecting as too narrow an interpretation of the phrase "mental capacity" to encompass only "mental retardation or other learning disorders."). Just as we have observed that "[m]erely showing that a child is bright, smart, or industrious is not enough to rebut the presumption [that children between the ages of seven and fourteen are incapable of negligence][,]" merely showing that a plaintiff has a low IQ or other intellectual disability is insufficient to establish that he should not be held to the objective reasonable person standard for purposes of contributory negligence. *See Frank v. Funkhouser*, 169 N.C. App. 108, 115, 609 S.E.2d 788,794 (2005) (citation omitted).

Plaintiff's evidence showed that, at the time of the 16 October 2015 accident, he held a valid driver's license. He passed his driver's license test the first time he took the test. Plaintiff's father testified that "[Plaintiff] drove [him] everywhere[,]" and was "a very good driver." Plaintiff was permitted to drive with his younger siblings in the car without parental supervision. Plaintiff had lived on Bear Creek Road for several years, approximately one-quarter mile from the accident site, and drove that stretch of road "[e]very single day, several times a day sometimes." Plaintiff continued to drive frequently, both alone and with passengers, after recovering from the accident.

Plaintiff was eighteen years old at the time of the 16 October 2015 collision. Notwithstanding the serious head injuries he sustained in the

accident, he obtained his high school diploma the following spring. During his final semester in high school, Plaintiff completed an auto-mechanics internship while also working for the school's maintenance department. According to Plaintiff's father, Plaintiff had a natural aptitude for auto-mechanics, because Plaintiff "[had] been working on cars . . . since he was old enough to pick up a wrench[,]" and because Plaintiff possessed "commonsense." Plaintiff planned to apply for admission to an auto-mechanics program at a local technical college.

Plaintiff's father answered in the affirmative when asked whether he believed Plaintiff "underst[ood] the difference, when he's behind the wheel, between a safe and a dangerous condition on the roadway[.]" When asked whether Plaintiff "was someone who could identify a hazard or a risk, when he was driving . . . in order to avoid it[,]" and whether, "even though [Plaintiff] had some challenges mentally, he knew right from wrong[,]" Plaintiff's father responded: "Yes." He indicated he agreed Plaintiff "knew danger from safety, before [the 16 October 2015] accident." Plaintiff's father also stated in a deposition: "I mean, my cousin [] hit a tree no bigger than that and it killed him and his brother and his wife; . . . *[Plaintiff] knows that.*" (emphasis added).

Plaintiff was unable to answer many of the questions he was asked during his deposition. However, the transcript reveals that Plaintiff's inability to answer was largely attributable to his memory loss, not an inability to understand the questions asked of him. When asked whether he had "been able to hear and understand all [of counsel's] questions so far[,]" Plaintiff responded: "Yes, ma'am." He was able to answer questions about a number of subjects unrelated to the accident, including his family life, his interest in auto-mechanics, his recreational hobbies, and his driving experience and familiarity with local roads. Plaintiff said he was working with a psychologist to "talk about me building my life[.] . . . I told him I wanted to build a career."

Plaintiff consistently stated he did not remember anything related to the 16 October 2015 accident, but he did indicate that, in climbing the fallen tree prior to the collision, his purpose was to warn oncoming traffic. When asked whether he thought it was safe to stand on the fallen tree in the middle of a lane of traffic, Plaintiff responded: "No." When asked whether it would have been safer to "just go around or underneath the [fallen] tree and down by the curve and wave to the traffic from there[,]" Plaintiff said: "I guess." And when asked whether he wished he had "not climbed on the [fallen] tree in the oncoming lane of traffic on Bear Creek Road on October 16th, 2015[,]" Plaintiff replied: "Do I wish I had never climbed on that tree? It's a Samaritan's job to help. . . . I have helped

younger and older people all my life." He further indicated he would be willing to do it again if necessary "[t]o save somebody else's life."

Plaintiff's evidence also included a psychological assessment report ("Pisgah report") summarizing the results of testing conducted several weeks after the 16 October 2015 collision at the Pisgah Institute for Psychotherapy and Education ("Pisgah Institute"). Plaintiff had seen doctors at the Pisgah Institute "since he was [five] or [six] years old[,] and continue[d] to do so." Based on testing in 2010 and 2013, Plaintiff was diagnosed with Oppositional Defiant Disorder, Generalized Anxiety Disorder, and Mild Mental Retardation. Notably, the 3 November 2015 Pisgah report concluded Plaintiff no longer qualified for the diagnosis of Mild Mental Retardation.

The Pisgah report found that Plaintiff's nonverbal reasoning abilities fell within the "[a]verage range" and were "much better developed than his verbal reasoning abilities." Plaintiff scored in the "Cognitively Impaired" range on one test that specifically found he "struggled with: visuospatial, executive, attention, language, and abstraction skills." Plaintiff's performance in broad reading, mathematics, and math calculation skills was rated "Very Low." Behaviorally, the report noted, Plaintiff struggled with "control[ling] his impulses," "acting out verbally and physically [at school][,]" " 'not making good choices' when it comes to controlling his emotions[,]" "rule-breaking behavior[,]" "aggressive behavior[,]" and "bragging[.]" The psychologist who administered the testing made the following observations:

> Overall, [Plaintiff] did seem to take the testing session seriously and tried hard but seemed tired much of the time. . . . He was able to report when he was done with a particular item and indicate when he did not know an answer. [Plaintiff] was able to answer all of the questions asked of him. He asked some clarifying questions before he attempted tasks but also needed many of the directions repeated on occasion. [Plaintiff] did display flexible ways to solve problems, using different strategies for different problems. [Plaintiff] was able to successfully follow multiple step directions accurately. [Plaintiff did not] seem to be distracted by the noise and activity outside or inside the testing environment. As a result of [Plaintiff's] cooperation, a minimal measure of his cognitive, academic, behavioral, adaptive, and personality functioning were obtained at this time.

The report concluded that "[Plaintiff's] cognitive ability [would] need to be re-evaluated in the next few years after a full recovery from his recent head injury has occurred."

Plaintiff's evidence thus showed he was an experienced driver, highly familiar with Bear Creek Road and surrounding roads. *See*, *e.g.*, *Haskins v. Carolina Power and Light Co.*, 47 N.C. App. 664, 665-66, 267 S.E.2d 587, 587-88 (1980) (affirming summary judgment for defendant and finding fifteen-year-old plaintiff contributorily negligent as a matter of law, where plaintiff "*was very familiar with the roadway*" and, "by driving his motorbike on the defendant's roadway after dark without a light, [he] did something a reasonable [fifteen]-year-old boy would not have done under the circumstances and he should reasonably have seen that he might collide with a cable or something else on the roadway[.]" (emphasis added)). Plaintiff's low IQ did not prevent him from completing a technical internship, graduating from high school, and pursuing a career in auto-mechanics. *See*, *e.g.*, *Welch v. Jenkins*, 271 N.C. 138, 143, 155 S.E.2d 763, 768 (1967) (holding fourteen-year-old boy was contributorily negligent as a matter of law where "there was no contention and no evidence tending to show [he] was lacking in the ability, capacity, or intelligence of the ordinary [fourteen]-year-old boy. *On the contrary, there was evidence that before the accident he made good grades in school, [and] played basketball, baseball, and football.*" (emphasis added)). Plaintiff's own testimony indicated he understood that a fallen tree obstructing a roadway posed a danger to other drivers. *See*, *e.g.*, *Jenkins v. Lake Montonia Club*, 125 N.C. App. 102, 107, 479 S.E.2d 259, 263 (1997) (affirming summary judgment for defendant and finding eighteen-year-old plaintiff, who was paralyzed after diving into shallow water, was contributorily negligent as a matter of law, because he "was aware that the water beneath the [water] slide was shallow, and that if he hit his head on the bottom of the swimming area it would hurt."). Plaintiff also knew family members had died under similar circumstances. Finally, while the Pisgah report documented Plaintiff's various cognitive and behavioral challenges, nothing in it specifically suggested Plaintiff's low IQ compromised his ability to exercise due care for his own safety.

We emphasize that we do not decide whether Plaintiff *in fact had* the "ability to perceive and avoid a particular risk of harm." *See Stacy*, 119 N.C. App. at 120, 457 S.E.2d at 879. We hold only that Plaintiff failed to forecast sufficient evidence tending to show that, as a result of the specific "diminished mental capacity" alleged – Plaintiff's low IQ – he could not be expected to exercise ordinary care in the circumstances that led to his injuries. Absent such showing, this argument is overruled.

2. Failure to Yield Right of Way

[2] Plaintiff next contends that, irrespective of his mental capacity, he was not contributorily negligent "because he did not fail to yield to the right of way of other vehicles." We disagree.

Our General Statutes provide that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk . . . shall yield the right-of-way to all vehicles upon the roadway." N.C. Gen. Stat. § 20-174(a) (2015). "[This] statutory duty is derived from the common law duty to use ordinary care to protect oneself from injury." *Meadows v. Lawrence*, 75 N.C. App. 86, 89, 330 S.E.2d 47, 50 (1985). As Plaintiff notes,

> [o]ur courts have held that a pedestrian's failure to yield the right of way as dictated by [N.C.]G.S. [§] 20-174(a) is not contributory negligence per se, but is only evidence of negligence to be considered with other evidence in the case in determining whether the plaintiff is chargeable with negligence which proximately caused or contributed to his injury.

McNeil v. Gardner, 104 N.C. App. 692, 697, 411 S.E.2d 174, 176 (1991) (citation omitted). Nevertheless, "[a]lthough a violation of [N.C.]G.S. [§] 20-174(a) is not contributory negligence *per se*, a failure to yield the right-of-way to a motor vehicle may constitute contributory negligence as a matter of law." *Meadows*, 75 N.C. App. at 89, 330 S.E.2d at 49 (citation omitted); *see also Turpin v. Gallimore*, 8 N.C. App. 553, 555, 174 S.E.2d 697, 699 (1970) ("No inflexible rule can be laid down as to whether the evidence discloses contributory negligence as a matter of law, but each case must be determined upon its own particular facts." (citation omitted)). If a plaintiff-pedestrian had a duty "to yield the right-of-way [to an approaching driver] and all the evidence so clearly establishes the plaintiff-pedestrian's failure to yield the right-of-way as one of the proximate causes of his injuries that no other reasonable conclusion is possible, summary judgment should [] [be] entered in favor of the defendant." *Gaymon v. Barbee*, 52 N.C. App. 627, 628, 279 S.E.2d 91, 92 (1981).

Plaintiff contends the following evidence shows he did not negligently fail to yield the right of way: (1) "Plaintiff climbed onto the tree and stood on top of the tree before [] Defendant could be seen coming from the opposite direction[;]" (2) "There was 400 feet of sight distance in the direction from [which] [] Defendant [was driving][;]" and (3) "Upon seeing [] Defendant's vehicle coming toward him, [Plaintiff's] father yelled at [Plaintiff] to get down and [Plaintiff] attempted to jump

out of the tree before he was struck." Even taking these statements as true, we find Plaintiff's argument unpersuasive.

When Plaintiff and his father encountered the fallen tree, it was thickly covered with vertical branches, leaving "only [one] open spot" for Plaintiff to crawl through. Contrary to Plaintiff's contention, the mere fact that he "enter[ed] the roadway and climb[ed] the tree before he could see an oncoming vehicle" and "did not see any approaching vehicles until he was upon the tree" does not preclude a finding of contributory negligence as a matter of law. *See*, *e.g.*, *Williams v. Davis*, 157 N.C. App. 696, 698, 702, 580 S.E.2d 85, 87, 89 (2003) (holding plaintiff was contributorily negligent as a matter of law, despite the fact that plaintiff "did not see any vehicular traffic in the two through lanes when he entered [an] intersection[,]" because "a reasonable person should have seen it was unsafe to enter the intersection."). Plaintiff's evidence showed he had reason to know his actions were unsafe. Plaintiff was familiar with the stretch of highway surrounding the fallen tree, which was curvy, thus reducing the distance from which Plaintiff could see an approaching vehicle. He also knew several family members had been killed in a motor vehicle that collided with a tree. *See*, *e.g.*, *Diorio v. Penny*, 103 N.C. App. 407, 409, 405 S.E.2d 789, 791 (1991) ("A plaintiff who knowingly exposes herself to a risk of which she has had long-term prior notice, has a reasonable choice or option to seek to avoid that danger and fails to exercise that option, is contributorily negligent as a matter of law." (citation omitted)).

Plaintiff's father testified he did not intend for Plaintiff to stand on the tree in order to direct traffic; he instructed Plaintiff "to go *climb across the tree* [to the other side of the road] and warn traffic coming about the accident." (emphasis added). However, the uncontroverted evidence – including Plaintiff's evidence – showed that, once Plaintiff climbed onto the tree, he made no further effort to cross the road. Plaintiff "never got down. He was still standing up there. He was goofing off, [being a] teenager."[3] When Plaintiff saw Defendant's vehicle rounding the curve, he started waving his arms at Defendant and "[saying things] like, 'Hey, big

3. Eyewitness Evelyn May ("Ms. May"), one of the owners of the real property from which the tree fell, gave similar statements during a deposition. For example, Plaintiff's counsel asked: "Did you see [Plaintiff] climb up along the [tree] trunk, or did you see him just climb up once and stand and stay in the same spot?" Ms. May replied: "[Plaintiff] just climbed up and stood there." When asked whether Plaintiff "[w]as [] starting to try and get down from the tree when he was hit[,]" Ms. May responded: "[N]o. [Plaintiff] was not trying to get down. He was standing on the tree." Ms. May also observed that Plaintiff acted "excited" and appeared to think the fallen tree was "cool."

dummy. I'm standing here[.]' " As Defendant approached, Plaintiff "was screaming and yelling trying to get [Defendant's] attention."[4] Plaintiff continued "waving his arms at [Defendant] and [Defendant was] still just coming." Plaintiff's father testified Plaintiff was "waving, [saying] 'Hey.' You know, *just being a teenager . . . [b]ecause we thought [Defendant] was going to stop*."[5] (emphasis added). When asked whether Plaintiff "had time to get off the tree[,]" Plaintiff's father said: "When you're standing there waving your arms like that at somebody, you expect them to see you and start slowing down, you know. By the time I started hollering at [Plaintiff] to get down, it was too late."[6]

The present case is distinguishable from cases in which pedestrians were injured while attempting to cross, actively crossing, or finishing crossing a road, and there was evidence the pedestrians had taken some safety precautions, such as looking both ways before entering the road, keeping a continual lookout, and accelerating their pace upon noticing a motorist's approach. For example, in *Ragland v. Moore*, 299 N.C. 360, 261 S.E.2d 666 (1980), which Plaintiff cites favorably, the plaintiff-pedestrian was "over halfway across the road" when she saw the defendant's car approaching at a high speed, at which point she "started to

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4. Consistent with Plaintiff's father's account, eyewitness Wendy Andrei, who was driving east on Bear Creek Road just prior to the collision, stated in an affidavit that she saw Plaintiff standing on top of the tree and that, when "[a] truck came around the corner from the other direction[,] . . . [Plaintiff] began waving his arms at [the] truck. It was apparent . . . that [Plaintiff] was trying to draw attention to himself so that [Defendant] would see him."

5. Ms. May made similar observations about Plaintiff's conduct while he was standing on the tree. Prior to the collision, Ms. May saw Plaintiff "go toward the tree in an excitable manner . . . [like] it was cool." She stated in her deposition: "[Plaintiff] was [acting like] an excited kid climbing a tree that was in the middle of the road[.] . . . I just got the impression that [Plaintiff] just got excited and wasn't thinking." Ms. May later elaborated that Plaintiff's "actions denoted an excited kid[,] . . . [such as] [g]etting out of the car, ignoring his father['s] [instructions to direct traffic][,] . . . [and] the arm-waving thing[,] [as if to say] 'Look at me.'" *See Cozart v. Chapin*, 39 N.C. App. 503, 507, 251 S.E.2d 682, 685 (1979) ("On motion for judgment as of nonsuit, . . . [a]ll the evidence must be considered in the light most favorable to [the] plaintiff, giving him the benefit of every fact and inference of fact pertaining to the issues, which may be reasonably deducted from the evidence. *Defendant's evidence may be considered to the extent that it is not in conflict with [the] plaintiff's evidence and tends to make clear or explain [the] plaintiff's evidence*." (citations omitted) (emphasis added)).

6. Plaintiff's father contradicted himself at various times during his deposition about whether Plaintiff ever in fact tried to jump down from the tree prior to the collision. However, even resolving these contradictions in Plaintiff's favor (*i.e.*, even assuming Plaintiff made a last-ditch effort to jump down), the evidence consistently showed that, *even after realizing Defendant's vehicle was approaching*, Plaintiff did not *immediately* try to get out of Defendant's way; rather, he remained in the same spot on the tree and tried to alert Defendant by waving his arms and yelling.

run across the road[,]" and she "had one foot on the gravel driveway and the other on the pavement when she was struck by [the] defendant's car." *Id.* at 362, 261 S.E.2d at 667; *see also Landini v. Steelman*, 243 N.C. 146, 147, 90 S.E.2d 377, 378 (1955) (holding injured pedestrian was not contributorily negligent as a matter of law, where she looked both ways before entering the roadway, was two-thirds of the way across when she noticed vehicle approaching, and "attempted to get out of its way by increasing [her] pace[.]"); *McNeil*, 104 N.C. App. at 696-97, 411 S.E.2d at 176 (finding plaintiff's intestate was not contributorily negligent as a matter of law where evidence showed, *inter alia*, intestate was wearing bright clothing and had "crossed [thirty] feet of the travel portion of the highway before she was struck by defendant's vehicle."). By contrast, Plaintiff's own evidence showed he was not actively attempting to cross the road and, further, made no immediate effort to get out of harm's way when he realized Defendant's vehicle was approaching.

There was conflicting evidence about precisely where on the tree Plaintiff was standing when the collision occurred. Plaintiff's father's testimony was that Plaintiff never stood in the oncoming (*i.e.*, Defendant's) lane of travel. When asked to examine a photograph of the scene of the accident, Plaintiff's father stated:

> That limb's what hit [Plaintiff] in the back of the head. So how is it that [Plaintiff] was [allegedly] on [Defendant's] side of the yellow line and the tree limb was still on this side of the yellow line [after the collision]? . . . [Plaintiff] was in this lane is what I was trying to tell you earlier, and the state trooper put it down that he was in the other lane. [Plaintiff] wasn't in the other lane. So that's another thing that the state trooper didn't get right in [the accident report] because he never talked to me about it. I wasn't there to talk to him when he showed up [at the scene of the accident]. See [the state trooper's drawing] showing [Plaintiff] in the other lane? He wasn't. He was over here in this lane.

We find Plaintiff's exact location in the road immaterial. Plaintiff's father testified Plaintiff was "just to the right side" of the center yellow line. Thus, even if Plaintiff was not technically in Defendant's lane, he was standing near the middle of the road. *See Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) ("[A]n issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not

prevail. A question of fact which is immaterial does not preclude summary judgment.").

> It is a basic legal tenet that the law imposes upon a person the duty to use due care to protect himself or herself from injury, and the degree of care should be commensurate with the danger to be avoided. Furthermore, it is well settled that a person is contributorily negligent if he or she knows of a dangerous condition and voluntarily goes into a place of danger.

Dunbar v. City of Lumberton, 105 N.C. App. 701, 703, 414 S.E.2d 387, 388 (1992) (citations omitted). In light of the clear safety risks associated with standing on a fallen tree that was largely obscured by branches and obstructing both lanes of traffic on a curvy mountain road, along with the fact that Plaintiff knew family members had died in similar circumstances but nevertheless made no immediate effort to leave the roadway, we conclude Plaintiff's failure to yield the right of way amounted to contributory negligence as a matter of law. Plaintiff's negligence was a proximate cause of his injuries. *See Williamson v. Liptzin*, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (defining proximate cause as "a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, *or consequences of a generally injurious nature*, was probable under all the facts as they existed." (citation omitted) (emphasis added)).

Other issues of fact in the record relate to the existence and extent of negligence by Defendant. However, because Plaintiff's forecast of evidence establishes contributory negligence as a matter of law, we need not address Defendant's negligence. *See Sawyer v. Food Lion, Inc.*, 144 N.C. App. 398, 401, 549 S.E.2d 867, 869 (2001) ("In North Carolina, if an issue of contributory negligence is raised as an affirmative defense, and proved, it completely bars [a] plaintiff's recovery for injuries resulting from [the] defendant's negligence." (citation omitted)).

B. Last Clear Chance

[3] Plaintiff argues in the alternative that, even if he was contributorily negligent, genuine issues of material fact exist as to whether Defendant had the last clear chance to avoid striking Plaintiff. "Last clear chance is a plea in avoidance to the affirmative defense of contributory negligence[.]" *Vernon v. Crist*, 291 N.C. 646, 650, 231 S.E.2d 591, 593 (1977). Our Supreme Court has articulated the doctrine of last clear chance as follows:

> Where an injured pedestrian who has been guilty of contributory negligence invokes the last clear chance or discovered peril doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

VanCamp v. Burgner, 328 N.C. 495, 498, 402 S.E.2d 375, 376-77 (1991) (citation and quotation marks omitted). "The issue of last clear chance [m]ust be submitted to the jury if the evidence, when viewed in the *light most favorable to the plaintiff*, will support a reasonable inference of each essential element of the doctrine." *Scheffer v. Dalton*, ___ N.C. App. ___, ___, 777 S.E.2d 534, 542 (2015) (citation and internal quotation marks omitted) (alteration and emphasis in original). "[U]nless *all the necessary elements* of the doctrine are present, the case is governed by the ordinary rules of negligence and contributory negligence." *Culler v. Hamlett*, 148 N.C. App. 372, 379, 559 S.E.2d 195, 200 (2002) (citation omitted) (emphasis added). In the present case, the evidence did not show Plaintiff placed himself in a position of peril "from which he could not escape[,]" and, by extension, Plaintiff cannot show Defendant knew or should have known of Plaintiff's "incapacity to escape." *See Davis v. Hulsing Enterprises, LLC*, ___ N.C. App. ___, ___, 783 S.E.2d 765, 773 (2016).

Plaintiff was required to forecast evidence showing not only that Defendant "owed [him] a duty to keep a reasonable and proper lookout in the direction of travel, [but] also, that if [D]efendant had fulfilled that duty, he would have discovered [P]laintiff's *helpless peril* in time to avoid injuring him by then exercising reasonable care." *Sink v. Sumrell*, 41 N.C. App. 242, 249, 254 S.E.2d 665, 670 (1979) (emphasis added); *see also Exum v. Boyles*, 272 N.C. 567, 577, 158 S.E.2d 845, 854 (1968)

(noting that "to invoke the doctrine of the last clear chance[,] the plaintiff must plead it and the burden of proof is upon him." (citations omitted)). "A plaintiff is in a position of helpless peril when that plaintiff's prior contributory negligence has placed her in a position from which she is *powerless to extricate herself*." *Outlaw v. Johnson*, 190 N.C. App. 233, 238, 660 S.E.2d 550, 556 (2008) (citation and internal quotation marks omitted) (emphasis added); *see also Trantham v. Estate of Sorrells*, 121 N.C. App. 611, 614, 468 S.E.2d 401, 403 (1996) (holding proper inquiry is whether negligent plaintiff was "in helpless peril [at the time] *immediately before the accident* which results in her injury[.]" (emphasis in original)).

This Court has held that "[t]he last clear chance doctrine is [] inapplicable where the injured party is at all times in control of the danger and simply chooses to take the risk." *See Williams v. Odell*, 90 N.C. App. 699, 704, 370 S.E.2d 62, 66 (1988); *see also Clodfelter v. Carroll*, 261 N.C. 630, 635-36, 135 S.E.2d 636, 639 (1964). For example, in *Stephens v. Mann*, 50 N.C. App. 133, 272 S.E.2d 771 (1980), we held the plaintiff did not place herself in a position of "helpless peril" when she climbed into the back of a pickup truck loaded with unsecured furniture and was injured when the defendant began driving the truck:

> Although [the] plaintiff may have placed herself in a dangerous position, danger alone is not the equivalent of helpless peril. The evidence [in *Stephens* did] not support a conclusion that once [the] plaintiff entered the loaded truck and it began moving, she could do nothing to protect herself or was inadvertent to her precarious position.

Id. at 137, 272 S.E.2d at 773. Similarly, in *Culler*, we concluded the plaintiff's evidence failed to show she was in helpless peril where, despite knowing an

> [oncoming] vehicle was steadily approaching, [the] plaintiff chose to ignore the dangers from which she had the power to extricate herself. When asked . . . if there was anything that prevented her from running or stepping quickly [as she crossed the road] . . . she responded, 'No, other than I didn't think I needed to run[.]'

148 N.C. App. at 380, 559 S.E.2d at 201.

In the present case, Plaintiff's own evidence – including evidence presented to show Defendant had "ample time and distance" to avoid striking the tree – suggested Plaintiff's presence in the tree was not

a position from which he was "powerless to extricate himself." *See Nealy v. Green*, 139 N.C. App. 500, 505, 534 S.E.2d 240, 244 (2000). It is undisputed that Plaintiff was facing Defendant's lane of traffic while standing in the tree, and continued standing there, waving and yelling, even after seeing Defendant's vehicle approaching. *Compare with Privett v. Yarborough*, 166 N.C. App. 664, 667, 603 S.E.2d 579, 581 (2004) ("[E]vidence tending to show the injured pedestrian either was not facing oncoming traffic or did not see the approaching vehicle has been found sufficient to satisfy [the helpless peril requirement], our courts reasoning that the pedestrian who did not apprehend imminent danger could not reasonably have been expected to act to avoid injury." (citation and quotation marks omitted)); *Williams v. Spell*, 51 N.C. App. 134, 136, 275 S.E.2d 282, 284 (1981) (finding decedent-pedestrian "placed himself in a position of helpless peril by walking on the roadway with the flow of traffic, that is, with his back to traffic.").

While standing on the tree, Plaintiff was "goofing off, [being a] teenager." Plaintiff's father testified they could "hear[] [Defendant's] [truck] pipes bellowing out the whole way up the hill[.]" According to Plaintiff, after rounding the curve in the road, "Defendant had [four to five] seconds and 400 feet in which to see [] Plaintiff and the tree in the roadway, *giving him . . . time and distance to avoid crashing into . . . the tree*." (emphasis added). When Plaintiff saw Defendant's vehicle approaching, however, he did not immediately attempt to get out of the way – not for lack of opportunity, but because he "thought [Defendant] was going to stop." *See, e.g.*, *Asbury v. City of Raleigh*, 48 N.C. App. 56, 63, 268 S.E.2d 562, 566 (1980) (finding that, when defendant bus driver "was 172 feet from the point of impact[,] . . . decedent[-bicyclist] was still not in peril and could, by the exercise of reasonable vigilance, have extricated himself from possible danger."). On these facts, we cannot conclude Plaintiff's position was "one of true helplessness[.]" *See Williams v. Odell*, 90 N.C. App. at 704, 370 S.E.2d at 66. Accordingly, the doctrine of last clear chance is inapplicable.

IV. Conclusion

Because we conclude Plaintiff was contributorily negligent as a matter of law, and the doctrine of last clear chance is unavailing in this case, we affirm the trial court's order granting summary judgment for Defendant.

AFFIRMED.

Judges DIETZ and BERGER concur.

GLEN LEWIS RING, WANDA JOYCE RING, WILLIAM THOMAS RING AND PAMELA ANN RING, PLAINTIFFS

v.

MOORE COUNTY, CAMP EASTER MANAGEMENT, LLC AND BOB KOONTZ, DEFENDANTS

No. COA16-1034

Filed 19 December 2017

Declaratory Judgments—rezoning—lack of standing—failure to allege actual or imminent injury

The trial court did not err by dismissing plaintiff adjacent landowners' declaratory judgment action against defendants challenging the rezoning of a tract of land to allow for the development of a new elementary school and single-family development on the property, where defendants lacked standing. A county ordinance rezoning a tract of land is not subject to challenge in court by owners of an adjacent tract who fail to allege actual or imminent injury resulting from the rezoning.

Appeal by Plaintiffs from an order entered 7 July 2016 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 5 April 2017.

Law Office of Marsh Smith, P.A., by Marsh Smith, for Plaintiffs-Appellants.

Van Camp, Meacham & Newman, PLLC, by William M. Van O'Linda, Jr., and James R. Van Camp, for Defendants-Appellees Camp Easter, LLC, and Bob Koontz.

Moore County Attorney Misty Leland for Defendant-Appellee Moore County.

INMAN, Judge.

A county ordinance rezoning a tract of land is not subject to challenge in court by owners of an adjacent tract who fail to allege actual or imminent injury resulting from the rezoning.

Glen Lewis Ring, Wanda Joyce Ring, William Thomas Ring, and Pamela Ann Ring (collectively "Plaintiffs") appeal from an order dismissing their declaratory judgment action against Moore County, Camp

Easter Management LLC ("Camp Easter"), and Bob Koontz (collectively "Defendants"), challenging the rezoning of a tract of land in Moore County, North Carolina (the "Property"). Plaintiffs argue that the trial court erred in concluding that Plaintiffs lacked standing to assert their spot zoning claims and to challenge the procedural defects in the rezoning process for the Property. After careful review, we affirm the trial court's order.

Facts and Procedural History

The subject of this appeal is a 108-acre tract of land in Moore County, North Carolina, the Property, owned by Camp Easter. In 2015, Camp Easter applied to the Moore County Board of Commissioners (the "Board") to rezone the Property from Residential and Agricultural – 40 ("RA-40") to Residential and Agricultural – 20 ("RA-20"). The application's stated purpose was "to allow for the development of a new elementary school and single-family development on the property." The Board rezoned the Property as requested in 2016. The rezoning reduced the minimum lot size from 40,000 square feet to 20,000 square feet.

Plaintiffs own 150 acres of land adjacent to the Property. Since 1948, the family has owned and operated a commercial poultry farm on this land. The operation includes three active poultry houses, the waste from which Plaintiffs use to fertilize their fields. In addition to the farming operations, Plaintiffs use their property for deer and small game hunting. There is also a residential subdivision across from Plaintiffs' land.

In April 2016, Plaintiffs filed a summons and complaint in Moore County against Defendants. Plaintiffs' complaint sought certiorari and a declaratory judgment ordering that the rezoning of the Property was null and void and of no effect because it was illegal spot zoning that was made arbitrarily and capriciously. Plaintiffs, within weeks, filed an amended complaint seeking only declaratory judgment. Defendants filed motions to dismiss the action on grounds including that Plaintiffs lacked standing.

Following a motion by Plaintiffs, the trial court entered an order granting Plaintiffs leave to file and serve a second amended complaint. The second amended complaint alleged that Moore County provided inadequate or improper notice of rezoning, violated Plaintiffs' right to procedural and substantive due process under the Fourteenth Amendment to the United States Constitution and Article 1, § 19 of the North Carolina Constitution, and arbitrarily and capriciously engaged in impermissible spot zoning.

On 7 July 2016, the trial court entered an order granting Defendants' motions to dismiss for lack of standing. Plaintiffs' timely filed notice of appeal.

Analysis

Plaintiffs argue that the trial court erred by dismissing the action, asserting that they have standing under both the North Carolina Supreme Court's decision in *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976), and this Court's decision in *Morgan v. Nash Cty.*, 224 N.C. App. 60, 735 S.E.2d 615 (2012). We disagree.

A. Standard of Review

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Cook v. Union Cty. Zoning Bd. of Adjustment*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007) (internal quotation marks and citations omitted). "A ruling on a motion to dismiss for want of standing is reviewed de novo." *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009) (citation omitted). "In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008) (citation omitted).

B. Discussion

In *Taylor*, the North Carolina Supreme Court held that "the validity of a municipal zoning ordinance, when directly and necessarily involved, may be determined in a properly constituted action under our Declaratory Judgment Act." 290 N.C. at 620, 227 S.E.2d at 583. However, that decision also held that only a person with proper standing may bring such a challenge. *Id.* at 620, 227 S.E.2d at 583. *Taylor* provided a two-part analysis for determining whether standing exists to challenge a rezoning decision under the Declaratory Judgment Act: first, a plaintiff must demonstrate "a specific personal and legal interest in the subject matter affected by the zoning ordinance[,]" and second, he must show that he is "directly and adversely affected thereby." *Id.* at 620, 227 S.E.2d at 583.

In *Taylor*, the City of Raleigh brought condemnation actions against the plaintiffs, seeking easements across their land to construct water and sewer lines to newly rezoned land. *Id.* at 616, 227 S.E.2d at 581. In response, the plaintiffs challenged the rezoning of the land which was done to allow for the construction of multiple apartment homes. *Id.* at

616, 227 S.E.2d at 581. The Court held that the plaintiffs lacked standing to challenge the rezoning ordinances because the plaintiffs failed to establish that they were "persons aggrieved[,]" and specifically because the evidence of record revealed: (1) the distance from the rezoned property to the plaintiffs' property was approximately one-half mile, and (2) the rezoned property would not be used for any new purpose. *Id.* at 620-21, 227 S.E.2d at 583-84 (holding that the rezoning did not "for the first time, authorize multi-family dwellings in the area; *it merely increased the permissible types and units of dwellings*") (emphasis added). The Court concluded that "the impact of the rezoning ordinance on any of the plaintiffs was minimal[,]" that the plaintiffs were not directly or adversely impacted by the rezoning, and therefore the plaintiffs did not have standing to challenge the zoning decision. *Id.* at 620-21, 227 S.E.2d at 583-84.

In *Morgan*, this Court reviewed whether the City of Wilson had standing to challenge a rezoning decision by the Nash County Board of County Commissioners. 224 N.C. App. at 62-63, 735 S.E.2d at 617-18. Following the test for standing established by the United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992), we considered whether the City of Wilson demonstrated:

> (1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Morgan, 224 N.C. App. at 65, 735 S.E.2d at 619 (quoting *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002)). We held that the city failed to show that "the alleged injury w[ould] be redressed by a favorable decision[,]" and that the injury was "actual or imminent." *Id.* at 66, 735 S.E.2d at 620 (internal quotation marks and citation omitted). The *Morgan* decision explained that the city did not have standing even under the *Taylor* test, because "the contested zoning amendment does not 'directly' affect the City as required by *Taylor*[.]" *Id.* at 67, 735 S.E.2d at 620.

It is undisputed that Plaintiffs' land borders the Property subject to the rezoning, a factor considered in both *Taylor* and *Morgan*. *Morgan*, 224 N.C. App. at 67-68, 735 S.E.2d at 621 ("The *Taylor* Court considered the fact that the plaintiff's property that was nearest to the rezoned

property was located one-half mile from the rezoned property . . . [and] [h]ere, the City's property [was] located three and a half miles from the rezoned property and thus [was] too remote to support the City's claim of standing to challenge the zoning amendment." (citations omitted)). However, despite the close proximity of their land to the Property rezoned in this case, Plaintiffs have failed to allege an actionable injury.

Taylor and *Morgan* impose upon Plaintiffs the burden of establishing that the challenged rezoning directly and adversely affects them, *Taylor*, 290 N.C. at 621, 227 S.E.2d at 584, or results in an actual or imminent, concrete and particularized injury, *Morgan*, 224 N.C. App. at 65, 735 S.E.2d at 619. Plaintiffs' second amended complaint alleges the following injuries: "increase in traffic, noise and light pollution[,]" making "trespassing . . . more difficult to control[,]" and "the virtual certainty of complaints about odors, dust, feathers and allergic reactions thereto, arising from the Ring Family's poultry operation[.]" Plaintiffs assert that the rezoning of the Property from RA-40 and RA-20, specifically the increased density allowed by the rezoning, will result in these injuries. However, the permitted uses of the Property are unchanged by the rezoning. While it is not required that a rezoning ordinance change the permitted uses of the affected property to establish standing, it is a factor. *See Taylor*, 290 N.C. at 621, 227 S.E.2d at 583-84 (weighing the fact that the zoning ordinance did not alter the types of permissible units and dwellings on the subject property against the plaintiffs' assertion for standing). Plaintiffs do not allege any concrete injury or direct consequence beyond conjecture of possible interference with their enjoyment of their property. We therefore hold that Plaintiffs have failed to alleged sufficient injuries required to establish standing. *See Morgan*, 224 N.C. App. at 65, 735 S.E.2d at 619.

Plaintiffs contend, citing this Court's decision in *Thrash Limited Partnership v. County of Buncombe*, 195 N.C. App. 727, 673 S.E.2d 689 (2010), that a party challenging the validity of a rezoning action under the Declaratory Judgment Act need not allege a direct injury to establish standing. In *Thrash*, this Court noted that "to require a plaintiff to demonstrate a direct injury in order to challenge a zoning regulation would allow counties to make zoning decisions without complying with the statutory requirements of Article 18 Chapter 153A of the General Statutes." *Id.* at 731, 673 S.E.2d at 692. *Thrash*, however, is inapposite to this case. There, the "plaintiff's use of its land was limited by the zoning regulations." *Id.* at 731, 673 S.E.2d at 692. By contrast, in this case Plaintiffs have not alleged that the zoning ordinance directly limits the use of their land.

In sum, because Plaintiffs have failed to allege an actual or imminent injury to their property resulting from the challenged rezoning decision, they have failed to establish standing to challenge the decision in court.

Conclusion

For the foregoing reasons, we affirm the trial court's dismissal of Plaintiffs' claims for lack of standing.

AFFIRMED.

Judges ELMORE and BERGER concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER DAVID BARKER

No. COA17-97

Filed 19 December 2017

Evidence—testimony—horizontal gaze nystagmus test—reliability—Rule 702

The Court of Appeals allowed defendant's writ of certiorari and concluded that the trial court did not err in a driving while impaired case by admitting a trooper's testimony about the results of a horizontal gaze nystagmus (HGN) test where there was sufficient evidence to support the trial court's determination that the trooper was qualified to testify as an expert as to the reliability of the HGN test, and N.C.G.S. § 8C-1, Rule 702 established that HGN tests are sufficiently reliable to be admitted in our courts.

Judge DIETZ concurring with separate opinion.

Appeal by Defendant from judgment entered 24 August 2016 by Judge Ola M. Lewis in Superior Court, Brunswick County. Heard in the Court of Appeals 21 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Richard J. Costanza for Defendant.

McGEE, Chief Judge.

Christopher David Barker ("Defendant") appeals from judgments entered after a jury found him guilty of driving while impaired ("DWI"). Defendant argues that the trial court erred by admitting testimony about the results of a horizontal gaze nystagmus test ("HGN") because the testifying officer did not establish the evidentiary foundation required for expert testimony. We disagree and find no error.

I. Background

Defendant was convicted of driving while impaired in Brunswick County District Court ("the district court") on 10 December 2015. Upon appeal, Defendant's case was then tried before a jury in Brunswick County Superior Court ("the superior court") on 22 August 2016. The State's sole witness at trial was Trooper David Inman of the North Carolina Highway Patrol ("Trooper Inman"). Trooper Inman testified he responded to a call on 7 February 2015 regarding a vehicle accident near Leland, North Carolina. When Trooper Inman arrived at the scene of the accident, approximately thirty to forty-five minutes after receiving the call, he saw that a single vehicle had become stuck in a small wooded area after having driven through a T-shaped intersection. Defendant was at the scene and admitted that he had been driving the vehicle, but claimed he did not see the stop sign at the intersection because he was distracted by his cell phone.

Trooper Inman noted that Defendant seemed unsteady, sleepy, and "thick-tongued." He also testified there was a moderate odor of alcohol coming from Defendant's breath. Trooper Inman asked Defendant if he had been drinking. Defendant admitted that he had consumed a twenty-two ounce beer and a few sips of another. Trooper Inman asked Defendant to blow into an Alco-Sensor, which Defendant did, and the Alco-Sensor indicated Defendant had, in fact, consumed alcohol. As a result, Trooper Inman asked Defendant to perform a variety of standardized field sobriety tests ("SFSTs"). The SFSTs included the walk-and-turn test ("WAT"), the one-leg-stand test ("OLS"), and the HGN test. After Defendant completed all the tests, Trooper Inman testified he was of the opinion that Defendant's mental and physical capacities were impaired by alcohol. He then arrested Defendant for DWI.

Trooper Inman described the HGN testing procedures he had used and the State tendered him as an expert in HGN testing. Trooper Inman testified the HGN test involves "ask[ing] someone to follow a stimulus with just their eyes," while the administering officer looks for

nystagmus, which is "a twitching of the eye." These eye twitches occur when a person has consumed alcohol, and at different angles depending on the level of intoxication. Trooper Inman testified that the administering officer is looking for whether the nystagmus had "onset prior to 45 degrees." Before beginning the test, the officer must observe the eye while the subject is looking forward in order to determine whether the subject has a natural, resting nystagmus. Trooper Inman explained that:

> [I]f whenever you're watching the tip of my finger, if I see your eyes shaking, then it's occurring naturally. So there's no sense in me taking -- doing the test at all, because if it's occurring naturally, I can't tell if there is anything in your system that's causing that to happen.

Trooper Inman testified that a resting nystagmus occurs in "less than 1 percent of the population" and "can occur when someone has some type of head injury." He then testified that Defendant did not have a resting nystagmus, that Defendant's eyes were unable to smoothly follow the object, and that his nystagmus had onset prior to forty-five degrees in both eyes.

Defendant objected to Trooper Inman being qualified as an expert and moved for a *voir dire* of the witness. Trooper Inman then testified that, as part of his basic law enforcement training, he received twenty-four hours of training on standard field sobriety testing; that he later participated in a sixteen-hour training course called Advanced Roadside Impaired Driving Enforcement ("ARIDE"); and that he received two-hour refresher courses on a yearly basis as part of his in-service training. The ARIDE training course included reading medical studies regarding the SFSTs, including HGN testing. The trial court overruled Defendant's objection and Trooper Inman was permitted to testify as an expert. After Trooper Inman was accepted as an expert, Defendant did not object to or move to strike any of Trooper Inman's testimony regarding the HGN testing.

Trooper Inman further discussed the method of administering the SFSTs, including HGN. He testified that Defendant displayed six out of six indicators of impairment during the HGN test. Trooper Inman testified that, based on the results of the various SFSTs, it was his opinion that Defendant had "consumed a sufficient amount of impairing substance so as to appreciably impair his mental and physical faculties." During cross-examination, Trooper Inman testified that if someone displayed four out of six indicators, there was an eighty-eight percent probability that they would have a blood alcohol concentration of .08 or above. At

the conclusion of all the evidence, the trial court instructed the jury on the appreciable impairment theory under N.C. Gen. Stat. § 20-138.1(a) and the jury found Defendant guilty of driving while impaired.

II. Analysis

Defendant argues that the trial court erred in admitting Trooper Inman's testimony regarding the HGN test results. Specifically, Defendant argues that the trial court failed to comply with its gatekeeping function under Rule 702 of the North Carolina Rules of Evidence by failing to establish the reliability of the HGN test.

A. Appellate Jurisdiction

As a threshold matter, we must address whether Defendant's appeal is properly before us. In order for this Court to have jurisdiction to hear this appeal, the appellant has the responsibility of establishing the jurisdiction of the superior court in the appellate record. *State v. Phillips*, 149 N.C. App. 310, 313-314, 560 S.E.2d 852, 855 (2002). Defendant originally filed the record on appeal in this case on 23 January 2017. The copy of the district court's judgment provided in the appellate record did not reflect that Defendant had given an oral notice of appeal. A party may appeal from a judgment of the district court only by giving oral notice of appeal at trial or filing a written notice of appeal within fourteen days after entry of the judgment. N.C. Gen. Stat. § 15A-1431 (2015); N.C. R. App. P. 4(a).

Appellant subsequently filed a petition for a writ of certiorari on 21 March 2017, which contained a certified copy of the district court's minutes taken during the trial, a certified copy of the back of the district court file containing a notation acknowledging Defendant's notice of appeal, as well as an affidavit from Defendant's trial attorney. These documents tended to show that Defendant gave oral notice of appeal in the district court following the entry of the judgment and that the absence of the notation on the district court's judgment was a clerical error. This Court has discretion to allow the amendment of the appellate record under N.C. R. App. 9(b)(5). We believe that the documents provided are sufficient to show that Defendant gave oral notice of appeal to the superior court under N.C. R. App. 9(a)(3)(h). We therefore allow Defendant's writ of certiorari to review the merits of the appeal.

B. Standard of Review

A trial court's ruling regarding the admissibility of expert testimony "will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citing

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E. 2d 674, 686 (2004)). A trial court may only be reversed for abuse of discretion "upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (citing *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

C. Rule 702 Requirements

Our Supreme Court clarified the effects of the 2011 amendments to N.C. Gen. Stat. § 8C-1, Rule 702 (2011) in *McGrady*. 368 N.C. 880, 787 S.E.2d 1. The Court noted the General Assembly amended Rule 702(a) to mirror the language of the federal rule of evidence to read:

> (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.
>
> (a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

N.C.G.S. § 8C-1, Rule 702.

McGrady stated that the amended language signaled the General Assembly's intent to incorporate the federal standards for the admission of expert witness testimony. *McGrady*, 368 N.C. at 888, 787 S.E.2d at 8. The federal standard for the admission of expert witness testimony has been articulated in a line of cases beginning with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993). Our Supreme Court confirmed in *McGrady* that North Carolina is now a

Daubert state; however, the Court was careful to note that "[o]ur previous cases are still good law if they do not conflict with the *Daubert* standard." *McGrady*, 368 N.C. at 888, 787 S.E.2d at 8.

Under *Daubert*, a trial court is required to make an inquiry into the reliability of the expert testimony. *Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 469. The primary focus of the inquiry is on "the reliability of the witness's principles and methodology, not on the conclusions that they generate." *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. The Court in *McGrady* set out the five *Daubert* factors including:

> (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.

McGrady, 368 N.C. at 890–91, 787 S.E.2d at 9 (citing *Daubert*, 509 U.S. at 593–94, 125 L. Ed. 2d at 469) (internal citations omitted). Decisions by North Carolina courts following *Daubert* have added additional reliability factors, including consideration of "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert." *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (citing *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990)). The inquiry is flexible, and "*Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141, 143 L. Ed. 2d 143, 143 (1999).

Defendant argues that Trooper Inman failed to provide the trial court with the necessary foundation to establish the reliability of the HGN test. Under *McGrady* and subsequent cases, such a finding is simply unnecessary. Recently, in *State v. Godwin*, our Supreme Court stated that "with the 2006 amendment to Rule 702, our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State." *Godwin*, ____ N.C. ____, ____, 800 S.E.2d 47, 53 (2017). *See also State v. Younts*, ____ N.C. App. ____, ____, 803 S.E.2d 641 (2017). Additionally, where such a reliability inquiry is required, the test is much less rigid than Defendant would ask this Court to require. In *McGrady*, our Supreme Court was clear that

"[the factors articulated in *Daubert*] are part of a 'flexible' inquiry, so they do not form 'a definitive checklist or test[.]' " *McGrady*, 368 N.C. at 890-891, 787 S.E.2d at 9-10. The trial court may consider other factors that assist the court in assessing reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Id.* (citing *Kumho*, 526 U.S. at 150, 143 L. Ed. 2d at 238) (internal citations omitted). Because Rule 702 established that HGN tests are sufficiently reliable to be admitted in our courts, the trial court in the present case did not abuse its discretion in admitting the results of the HGN test.

Defendant relies heavily on the decision in *State v. Helms*, 348 N.C. 578, 504 S.E.2d 293 (1998), which, critically, was decided prior to the General Assembly's amendments to Rule 702 in 2006 and 2011, as well as the decision in *McGrady*. In *Helms*, our Supreme Court decided that "the HGN test does not measure behavior a lay person would commonly associate with intoxication but rather represents specialized knowledge that must be presented to the jury by a qualified expert." *Helms* at 581, 504 S.E.2d at 295. However, our Supreme Court found in *Godwin* that reading subsections (a) and (a1) of Rule 702 together, "it is evident that the General Assembly envisioned the precise scenario we address today and made clear provision to allow testimony from an individual 'who has successfully completed training in HGN' and meets the criteria set forth in Rule 702(a)." *Godwin*, ____ N.C. App. at ____, 800 S.E.2d at 50. *See also State v. Shore*, ____ N.C. App. ____, ____, 804 S.E. 2d 606 (2017) ("experience alone or experience combined with knowledge and training is sufficient to establish a proper foundation for reliable expert testimony[.]"). The trial court in *Godwin* never determined that the officer was an expert witness in HGN testing, yet our Supreme Court held "when the record contains sufficient evidence upon which the trial court could have based an explicit finding that the witness was an expert, an appellate court may conclude that the trial court found the witness to be an expert." *Godwin*, ____ N.C. App. at ____, 800 S.E.2d at 48, 50-51 ("such explicit recognition is not required[.]"). In the present case, the court determined that Trooper Inman was an expert in HGN testing.

McGrady clearly states that the inquiry still involves a "three-step framework-namely, evaluating qualifications, relevance, and reliability" and "expert testimony must satisfy each to be admissible." *McGrady*, 368 N.C. at 889-892, 787 S.E.2d at 8-10. The trial court's important role includes examining the qualifications of a witness tendered as an expert, the basis for the witness's opinions, and the extent of the witness's testimony. *See, e.g. State v. Holloman*, 2017 WL 4365111 (2017) (determining that because the highway patrolman did not specifically mention any

training in HGN testing, there was insufficient evidence on the record to support finding that a highway patrolman was an expert in HGN testing, despite the findings in *Godwin*). The depth of the inquiry is limited only in the context of HGN testing, where the General Assembly has clearly signaled that the requirements be applied leniently. In the present case, there was sufficient evidence to support the trial court's determination that Trooper Inman was qualified to testify as an expert as to the reliability of the HGN test.

III. Conclusion

We find no error in Defendant's trial for driving while impaired.

NO ERROR.

Judge BERGER concurs.

Judge DIETZ concurs with separate opinion.

DIETZ, Judge, concurring.

I concur in the majority's judgment in this case. Barker argues that the State failed to establish the reliability of HGN testing at trial, as required by Rule 702(a) and *McGrady*. While this appeal was pending, our Supreme Court decided *State v. Godwin* and held that, through Rule 702(a1), "our General Assembly clearly signaled that the results of the HGN test are sufficiently reliable to be admitted into the courts of this State." __ N.C. __, __, 800 S.E.2d 47, 53 (2017). In other words, *Godwin* held that the legislature has deemed HGN testing to be reliable as a matter of law, and therefore trial courts need not assess that reliability factor before admitting expert testimony on the issue.

I acknowledge, as Barker observes in his brief, that courts in other jurisdictions have questioned the reliability of HGN testing under standards similar to our Rule 702(a). But it is axiomatic that this Court must follow precedent from our Supreme Court. Thus, we have no choice but to reject Barker's argument. If Barker seeks to challenge the *Godwin* holding, he must do so in the Supreme Court.

STATE v. FULLER

[257 N.C. App. 181 (2017)]

STATE OF NORTH CAROLINA
v.
KENNETH ROBERT FULLER

No. COA17-692

Filed 19 December 2017

Search and Seizure—motion to suppress cocaine—nonconsensual warrantless search—arrest—reasonableness

The trial court did not commit plain error in a possession of cocaine case by denying defendant's motion to suppress evidence of cocaine seized after a nonconsensual and warrantless search of his person following his arrest for driving with a revoked license. The place, manner, justification, and scope of the search of defendant's person were reasonable.

Appeal by defendant from judgment entered 17 November 2016 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristine M. Ricketts, for the State.

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

TYSON, Judge.

Kenneth Robert Fuller ("Defendant") appeals from a judgment imposing a suspended sentence of 6 to 17 months imprisonment, with 18 months supervised probation, after a jury found him guilty of possession of cocaine. On appeal, Defendant challenges the denial of his motion to suppress evidence of cocaine, which was seized after a search of his person was conducted, following his arrest for driving with a revoked license. We affirm the trial court's denial and find no error.

I. Background

On 19 December 2014, Charlotte-Mecklenburg Police Officer Wayne Goode ("Officer Goode") was on duty in the area of Dalton Street and Tryon Street in Charlotte. Officer Goode and other officers conducted surveillance of Defendant as he sat in the driver's seat of a gold-colored Mercedes-Benz sedan, parked at a gas station located on North Tryon

Street. Officer Goode was familiar with Defendant from previous investigations, and suspected Defendant was selling narcotics from that gas station parking lot. Officer Goode also knew Defendant's driver's license was suspended.

During the surveillance operation, Officer Goode observed Defendant driving away from the gas station. Officer Goode followed Defendant in order to conduct a traffic stop. While following Defendant, Officer Goode observed Defendant's Mercedes turn right off of Tryon Street onto Ashby Street and then make a quick turn into a parking lot. After the Mercedes parked in the parking lot, Officer Goode observed Defendant exit the driver's door and walk to the trunk of the Mercedes.

Officer Goode parked behind Defendant's vehicle, approached Defendant and requested his identification. After Defendant obtained his identification from inside the Mercedes, Officer Goode arrested Defendant for driving with a revoked license. Officer Goode handcuffed Defendant and placed him inside his police cruiser.

At the suppression hearing, Officer Goode testified, and the trial court found, after Officer Goode had placed Defendant into the police cruiser, he asked Defendant for consent to search the Mercedes, and that Defendant had consented. Defendant denied he consented to the search of his Mercedes.

Officer Goode and other officers conducted an initial search of the Mercedes and did not locate any contraband or narcotics. A few minutes after this initial search, a K-9 dog unit arrived to conduct a sniff search of the vehicle.

While sniffing the Mercedes, the dog "hit" on the front right fender and driver's seat cushion. Officers then conducted a more thorough search of the vehicle, but did not discover any contraband or narcotics. Officer Goode concluded that because the K-9 had "hit" on the driver's seat and no narcotics were found in the Mercedes, the narcotics were hidden on Defendant's person. Officer Goode informed his sergeant that he wanted to conduct a search of Defendant's person.

Defendant was transported to the Charlotte-Mecklenburg Police Department's Metro Division Office and placed into a private interview room. Officer Goode conducted the search and another officer assisted by holding one of Defendant's handcuffed arms. Officer Goode did not seek Defendant's consent or a warrant to conduct the search.

Officer Goode searched Defendant by first removing and inspecting Defendant's belt and the contents of his front pants pockets. Officer

Goode observed a hidden area next to the fly of Defendant's pants. Officer Goode then inspected Defendant's back pockets and the contents thereof. Officer Goode continued his search by lowering Defendant's pants and long johns to his knee area. Officer Goode pulled out, but did not pull down, Defendant's underwear and observed Defendant's genitals and buttocks.

Officer Goode pulled up Defendant's long johns and then inspected the hidden area on the fly of his pants. Officer Goode retrieved a bag from the hidden area near the fly of Defendant's pants. This bag was later determined to contain .83 grams of cocaine and weigh 1.7 grams. Defendant was indicted for possession with intent to sell or distribute a controlled substance and for having obtained habitual felon status.

At a pretrial hearing, Defendant made an oral motion to suppress the evidence of the cocaine obtained from the strip search conducted by Officer Goode. The trial court denied Defendant's motion to suppress in an order filed 30 October 2015.

The case came to trial on 7 November 2016. Defendant moved to dismiss the possession with intent to sell or deliver cocaine charge for insufficiency of the evidence, which motion the court granted. The lesser-included charge of possession of cocaine was submitted to the jury. On 14 November 2016, the jury returned verdicts of guilty of possession of cocaine and of Defendant having obtained habitual felon status. Upon the motion of Defendant, the trial court set aside the jury's verdict on obtaining habitual felon status.

On 17 November 2016, the trial court entered judgment and sentenced Defendant to a suspended sentence of 6 to 17 months imprisonment, with 18 months supervised probation. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court as an appeal of a final judgment of the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) (2015) and 15A-1444(a) (2015).

III. Issue

Defendant argues the trial court committed plain error by denying his motion to suppress the evidence obtained from a non-consensual and warrantless search of his person in violation of his constitutional rights.

IV. Standard of Review

A pre-trial motion to suppress evidence is insufficient to preserve for appeal the question of the admissibility of the challenged evidence, if

Defendant fails to object to the admission of that evidence at the time it is offered at trial. *State v. Grooms*, 353 N.C. 50, 65-66, 540 S.E.2d 713, 723 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

Defendant concedes his counsel failed to object at trial to the admission of the illegal drug evidence obtained pursuant to the search. Defendant concedes this issue was not preserved for appellate review. He asserts the trial court's denial of his motion to suppress constituted plain error. N.C. R. App. P. 10(a)(4).

Under a plain error standard of review, "a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted). "Thus . . . the defendant must first demonstrate that the trial court committed error, and next that absent the error, the jury probably would have reached a different result." *State v. Larkin*, 237 N.C. App. 335, 339, 764 S.E.2d 681, 685 (2014) (citation and internal quotation marks omitted).

In reviewing a trial court's ruling on a motion to suppress for error,

> [i]t is well established that . . . the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Campbell, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008) (citations, quotation marks, and brackets omitted).

V. Analysis

Defendant argues the trial court committed plain error by denying his motion to suppress the evidence of the cocaine obtained from the search of his person, following the K-9 dog sniff of the vehicle he was driving, and plainly erred by admitting that evidence at trial. Defendant asserts the trial court failed to make required findings of the voluntariness

of his consent to the search of his vehicle and argues the search of his person was unreasonable under the totality of the circumstances.

A. Warrantless Searches

It is a "basic constitutional rule" that "searches conducted outside the judicial process, without prior approval by [a] judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 29 L. Ed.2d 564, 576 (1971) (footnote omitted).

"Among the exceptions to the warrant requirement is a search incident to a lawful arrest," which "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant*, 556 U.S. 332, 338, 173 L. Ed.2d 485, 493 (2009) (citations omitted).

"Under this exception, . . . an officer may conduct a warrantless search of the arrestee's person and the area within the arrestee's immediate control." *State v. Carter*, 200 N.C. App. 47, 50-51, 682 S.E.2d 416, 419 (2009) (citation and quotation marks omitted). A search may be justified as incident to lawful arrest if "[the] warrantless arrest is . . . based upon probable cause," *State v. Mills*, 104 N.C. App. 724, 728, 411 S.E.2d 193, 195, *disc. review denied*, 367 N.C. 283, 752 S.E.2d 476 (1991), and the search is "substantially contemporaneous with the arrest." *State v. McHone*, 158 N.C. App. 117, 119, 580 S.E.2d 80, 82 (2003) (citation and quotation marks omitted).

"Probable cause has been defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Yates*, 162 N.C. App. 118, 122, 589 S.E.2d 902, 904 (2004) (citation and internal quotation marks omitted). "This Court has determined that probable cause to search exists when a reasonable person acting in good faith could reasonably believe that a search of the defendant would reveal the controlled substances sought which would aid in his conviction." *State v. Pittman*, 111 N.C. App. 808, 813, 433 S.E.2d 822, 825 (1993) (citation and internal quotation marks omitted).

Defendant argues the police were required to have probable cause and exigent circumstances to search his person under both the facts before us and under *State v. Battle*, 202 N.C. App. 376, 688 S.E.2d 805 (2010). In *Battle*, a case involving a roadside "strip search" of an arrestee, we noted that "[a] valid search incident to arrest . . . will not normally

permit a law enforcement officer to conduct a *roadside* strip search." *Battle*, 202 N.C. App. at 387-88, 688 S.E.2d at 815 (emphasis supplied). Rather, "[i]n order for a *roadside strip search* to pass constitutional muster, there must be both probable cause and exigent circumstances that show some significant government or public interest would be endangered *were the police to wait until they could conduct the search in a more discreet location—usually at a private location within a police facility*." *Id.* at 388, 688 S.E.2d at 815 (emphasis supplied).

Here, the search was conducted as incident to Defendant's lawful arrest, and was conducted inside a private interview room at a police facility, and not on a roadside. It is unnecessary to address whether the search of Defendant's person was made with probable cause and under exigent circumstances. *See id.*

"The search incident to a lawful arrest exception has resulted in two different formulae. The first concerns searches of the person arrested and the second concerns searches of the area within the control of the arrestee." *State v. Nesmith*, 40 N.C. App. 748, 750, 253 S.E.2d 594, 595 (1979) (emphasis omitted).

In *United States v. Robinson*, 414 U.S. 218, 235, 38 L. Ed.2d 427, 441 (1973), the Supreme Court of the United States held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."

North Carolina's appellate courts have long recognized *Robinson's* categorical rule allowing a full search of the person incident to a lawful arrest. *State v. Brooks*, 337 N.C. 132, 144-45, 446 S.E.2d 579, 587 (1994) (recognizing under *Robinson*, that "officers automatically have the right to make a search incident to arrest; they do not need to consider the particular defendant's dangerousness or the likelihood that the defendant may destroy evidence before they conduct their search"); *Nesmith*, 40 N.C. App. at 751, 253 S.E.2d at 596 (recognizing *Robinson's* holding in 1979).

B. Voluntariness of Defendant's Consent to Search Car

Defendant argues his consent to the search of the car he was driving was not voluntary. However, Defendant failed to raise or make this argument before the trial court.

At the hearing on Defendant's oral motion to suppress, Defendant did not raise the issue of the voluntariness of his consent. Instead, Defendant made the separate argument that he *never gave consent* for

the officers to search the car at all. The theory Defendant purports to raise on appeal is different than the one he raised in the trial court.

"[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation and quotation marks omitted). Because Defendant never raised this belated voluntariness argument before the trial court, he failed to preserve it for appellate review. *Id.*; *see State v. Holliman*, 155 N.C. App. 120, 124, 573 S.E.2d 682, 686 (2002) (dismissing defendant's challenge to denial of motion to suppress because he presented "a different theory on appeal than argued at trial"). We decline to address the merits of Defendant's new and different argument on this issue and dismiss his assertions.

C. Reasonableness of the Search of Defendant's Person

Defendant argues the search of his person, even if incidental to a lawful arrest, was unreasonable under the totality of the circumstances. We disagree.

Although the search of a person may be authorized as incident to arrest, our appellate courts have recognized that " '[t]he Fourth Amendment precludes . . . those intrusions into privacy of the body which are unreasonable under the circumstances.' " *State v. Norman*, 100 N.C. App. 660, 663, 397 S.E.2d 647, 649 (1990) (quoting *State v. Cobb*, 295 N.C. 1, 20, 243 S.E.2d 759, 770 (1978)). Our Supreme Court reasoned, "[d]eeply imbedded in our culture . . . is the belief that people have a reasonable expectation not to be unclothed involuntarily, to be observed unclothed or to have their private parts observed or touched by others." *State v. Stone*, 362 N.C. 50, 55, 653 S.E.2d 414, 418 (2007) (citation and internal quotation marks omitted).

In determining the reasonableness of a search of the person or a full "strip search," this Court has explained:

> the trial court must balance the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

State v. Fowler, 220 N.C. App. 263, 266-67, 725 S.E.2d 624, 627-28 (2012) (internal citations and quotation marks omitted).

With regard to the scope of the search of Defendant's person, the evidence presented by the State during the hearing on Defendant's motion to suppress, and the findings of the trial court, tend to show the K-9 dog alerted to the driver's seat of Defendant's car. The police limited the search to the area of Defendant's body and clothing that would come into contact with the cushion of the driver's seat, the area between Defendant's knees and waist.

With regard to the manner of the search, the trial court found and the video and testimonial evidence shows Defendant was searched inside a private interview room at the Metro Division Office. Defendant and the two officers were the only individuals present inside the interview room. The video recording of the search shows the officers did not remove Defendant's clothing above the waist, did not fully remove his undergarments, nor did they touch Defendant's genitals or any body cavity.

Defendant argues the video recording of the search shows the officers "smiling" and "smirking at one another throughout the process." Defendant's allegation that the officers were purportedly "smiling" and "smirking", and somehow this activity tainted the manner in which the search was conducted, was not raised before the trial court. Even if the officers appear to "smirk" or make facial changes at each other at points during the search, the recording does not show this "smirking" was visible to Defendant. Also, Defendant does not attempt to explain how this purported conduct by the officers, even if true, rendered the manner of the search unreasonable or the results obtained therefrom inadmissible.

With regard to the justification for initiating the search, the trial court made several findings of fact bearing upon this factor. The court found: Officer Goode was familiar with Defendant through previous interactions, including the execution of a search warrant for narcotics on the Defendant's premises; a K-9 drug dog alerted to the driver's seat area of Defendant's car; and, that Officer Goode had previously observed suspects hiding controlled substances in their pants, underwear, genitals, and buttocks.

Officer Goode testified that he knew from his training and experience that a K-9 dog will alert to odors transferred from a person to another object via contact. Officer Goode also testified that Defendant was the last person to occupy the driver's seat of Defendant's car. The initiation of the search of Defendant's person as incident to a lawful arrest was also justified due to the K-9 alerting to the driver's seat of the car. Defendant was the last person to occupy the driver's seat, and the officers and K-9 dog did not discover any narcotics present inside the car.

With regard to the place of the search, the search took place inside a private interview room at the Metro Division Office. As noted, only Defendant and two officers were present during the search and the search was limited to areas where Defendant's body had been in contact with the driver's seat of his vehicle. Defendant's search did not take place in a public area or on the side of a road. *See Battle*, 202 N.C. App at 388, 688 S.E.2d at 815 (expressing the preference for strip searches to be conducted at "a private location within a police facility.")

The evidence presented and the trial court's findings of fact show the place, manner, justification and scope of the search of Defendant's person were reasonable.

Defendant cites *State v. Smith*, 222 N.C. App. 253, 729 S.E.2d 120, *disc. review denied*, 366 N.C. 410, 735 S.E.2d 190 (2012), to support his contention that neither the K-9 drug dog's alert to the driver's seat of his car, nor Defendant's criminal history, were sufficient to justify subjecting Defendant to a warrantless search of his person.

In *Smith*, the defendant was the passenger in a vehicle that was driven by a driver, who was cited for a noise violation. 222 N.C. App. at 253-54, 729 S.E.2d at 122. While police officers were preparing to issue the citation to the driver, an officer checked the defendant's criminal history and found "an extensive local record which included numerous drug offenses[.]" *Id.* at 254, 729 S.E.2d at 122. Police brought a drug dog to the scene and the defendant and driver were placed in the rear of a patrol car. *Id.* The drug dog sniffed the exterior of the driver's car and "alerted to a controlled substance at the driver's door." *Id.* When the police conducted a search of the vehicle, no contraband was discovered inside the vehicle, other than an open container of alcohol in the back seat. *Id.* Police subsequently searched the defendant's person and discovered cocaine. *Id.*

This Court held that, under the circumstances, "[t]he fact that defendant was formerly a passenger in a motor vehicle as to which a drug dog alerted, and a subsequent search of the vehicle found no contraband, is not sufficient, without probable cause more particularized to defendant, to conduct a warrantless search of defendant's person." *Id.* at 261, 729 S.E.2d at 126.

Several factors distinguish *State v. Smith* from the instant case. Here, the trial court found that "[D]efendant testified that he owned the Mercedes and that it was registered to him." The trial court found Officer Goode's testimony to be credible, and Defendant does not dispute, that Officer Goode had observed Defendant exit the driver's side of

the Mercedes. The dash cam footage from the cruiser and testimony of the officers do not indicate anyone else drove Defendant's Mercedes immediately prior to being pulled over. The K-9 dog alerted to the driver's seat cushion of the vehicle, where Defendant's body was previously known to have been in immediate contact with, rather than any other area of the vehicle.

Unlike the defendant in *Smith*, Defendant was found to have been sitting in the exact spot where the K-9 dog alerted, inside the vehicle that Defendant testified to owning and driving. *See Smith*, 222 N.C. App. at 253-54, 729 S.E.2d at 122. The only individuals officers observed in or near the vehicle were Defendant and a female passenger. The police did not locate any evidence of the female passenger possessing narcotics while inside the Mercedes. These facts present a set of circumstances, solely to Defendant, from which "a reasonable person acting in good faith could reasonably believe that a search of the defendant would reveal the controlled substances sought which would aid in his conviction." *Pittman*, 111 N.C. App. at 813, 433 S.E.2d at 825 (citation and internal quotation marks omitted).

The trial court properly denied Defendant's motion to suppress the cocaine recovered from the search of his person and clothing. Defendant's arguments are overruled.

VI. Conclusion

Following his lawful arrest for driving with a revoked license, the trial court properly denied Defendant's motion to suppress the evidence of the cocaine obtained from the warrantless and non-consensual search of Defendant's person. The trial court did not commit plain error in admitting the evidence of the recovered cocaine to the jury.

Defendant has failed to show any error in the jury's conviction for possession of cocaine, or in the judgment entered thereon. Defendant received a fair trial, free from errors he preserved and argued. Defendant has also failed to demonstrate any plain error. *It is so ordered.*

NO ERROR.

Judges CALABRIA and DAVIS concur.

STATE v. MALLOY

[257 N.C. App. 191 (2017)]

STATE OF NORTH CAROLINA
v.
JONATHAN KEITH MALLOY

No. COA17-408

Filed 19 December 2017

Motor Vehicles—felonious hit and run resulting in injury—lesser-included offense of hit and run resulting in death

The trial court did not err by submitting to the jury and entering judgment upon conviction for felonious hit and run resulting in injury, an offense for which defendant was not indicted, where the essential elements of hit and run resulting in death necessarily included the essential elements of hit and run resulting in injury.

Appeal by defendant from judgment entered 18 October 2016 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley, for the State.

Meghan Adelle Jones for defendant-appellant.

BRYANT, Judge.

Where the essential elements of hit and run resulting in death necessarily include the essential elements of hit and run resulting in injury, the trial court did not err by submitting to the jury and entering judgment upon conviction for felonious hit and run resulting in injury.

On 1 January 2010, defendant Jonathan Keith Malloy called his girlfriend, Sandra Hoover, to let her know that his friends were "hanging out" at their shared home on Lakecrest Drive. When Hoover arrived home around 4:00 p.m., she found defendant and his friends "sitting on the couch and having a good time . . . drinking and smoking." Defendant went to Hoover and asked her to take his friends home around 6:00 p.m., but Hoover refused, even though she could smell the alcohol on defendant's breath and his eyes were red and glassy, "like he had been drinking." Defendant then took the keys to Hoover's gray 1990 Volvo and got in the driver's seat. Hoover also got in the car with defendant and his friends.

Defendant was driving and turned onto North Tryon Street. Hoover, who was sitting in the back seat, heard "like a bump, like a thump," and Hoover said "John, you hit somebody." Defendant replied, "no, I didn't," and Hoover responded, "yes, you did."

Defendant did not stop immediately but continued driving until he reached a gas station a few minutes later. There, they discovered the windshield had been cracked and the right headlight was out. Defendant drove to another gas station, where Hoover told defendant's friends to get out of the car. She and defendant drove back to their home, got into a different car with Hoover driving, and went to "see what happened."

They were unable to return to the precise location where they heard the bump, because there were police officers and police cars blocking the street. As a result, Hoover stopped at a gas station and defendant went inside to find out what had happened. When he returned, he told Hoover that "somebody had got hit, someone was dead out there." Police had found a deceased person on Tryon Street.[1]

Hoover and defendant went home around 8:00 p.m., and Hoover told defendant that if she saw "it" on the 11:00 news, she would call the police. Defendant told her not to call " 'cause he could fix the car." Defendant then took a nap before being picked up to go to work at 10:30 that evening. After seeing coverage of "it" on the news at 11:00, Hoover called police.

During the early morning hours of 2 January 2010, Officer Jonathan Wally with the Charlotte-Mecklenburg Police Department responded to Hoover's 911 call. He met Hoover, and Hoover told him she had seen her car on television, which had been identified as being involved in a hit and run on Tryon Street. Hoover told the officer that defendant had been driving down North Tryon Street when she "felt, heard a bump." She then took him outside to show him the Volvo. Officer Wally seized the Volvo, and it was taken to a crime scene vehicle bay. Hoover and defendant both gave statements to police that day.

On 12 April 2010, defendant was indicted for felonious hit and run resulting in death and for driving while license revoked ("DWLR"). Defendant pled guilty to the charge of DWLR on 10 October 2016 and stipulated that he had been driving at the time of the offense. The case was tried on the remaining charges at the 10 October 2016 Session

1. A pathologist with the Mecklenburg County medical examiner's office testified that the deceased's blood alcohol concentration at the time of death was almost four times the legal limit.

of Superior Court for Mecklenburg County, the Honorable Linwood O. Foust, Judge presiding.

At trial, the State requested that the jury be instructed on the offense of felonious hit and run resulting in injury. Defendant objected to this instruction, but the trial court overruled defendant's objection. Defendant also objected to including the lesser-included offense on the verdict sheet, but the trial court again overruled defendant's objection.

The jury found defendant guilty of the lesser-included offense of felonious hit and run resulting in injury. Defendant moved for a directed verdict of not guilty, renewing his objection to the instruction on felonious hit and run resulting in injury. Defendant argued that felonious hit and run resulting in injury is not a lesser-included offense of hit and run resulting in death. The trial court denied the motion, and thereafter entered judgment and imposed a sentence of eleven to fourteen months imprisonment for hit and run resulting in injury. The trial court also sentenced defendant to a consecutive sentence of 120 days on the DWLR charge. Defendant appeals.

On appeal, defendant contends the trial court erred by instructing the jury on and entering judgment upon conviction for felonious hit and run resulting in injury, an offense for which defendant was not indicted. Specifically, defendant contends that felonious hit and run resulting in injury is not necessarily a lesser-included offense of hit and run resulting in death. We disagree.

The elements of felonious hit and run resulting in *death* are (1) the defendant was driving a vehicle, (2) that vehicle was involved in a crash, (3) that a person *died* as a result of the crash, (4) that the defendant knew, or reasonably should have known, that the defendant was involved in a crash and that a person had *died* as a result of the crash, (5) that the defendant did not stop the vehicle immediately at the scene of the crash, and (6) that the defendant's failure to stop was willful; that is, intentional and without justification or excuse. N.C. Gen. Stat. § 20-166(a) (2015).

The elements of felonious hit and run resulting in *injury* are (1) the defendant was driving a vehicle, (2) the vehicle was involved in a crash, (3) that a person *suffered injury* as a result of the crash, (4) that the defendant knew, or reasonably should have known, that the defendant was involved in a crash and that a person had *suffered injury* as a result of the crash, (5) that the defendant did not stop the vehicle immediately at the scene of the crash, and (6) that the defendant's failure

to stop was willful; that is, intentional and without justification or excuse. *Id.* § 20-166(a1).

The only differences between these two offenses are those italicized above and that the greater offense is a Class F felony, while the lesser offense is a Class H felony. *Compare id.* § 20-166(a), *with id.* § 20-166(a1). Otherwise, the elements of the two offenses are exactly the same. *See id.* § 20-166(a), (a1).

Defendant essentially argues that "[d]eath does not necessarily include injury[,]" and that because our courts have recognized the concept of "instantaneous death," *see State v. Hudson*, 345 N.C. 729, 731, 483 S.E.2d 436, 437 (1997) (involving a boat collision which "instantly killed" three people); *State v. McDonald*, 151 N.C. App. 236, 238, 565 S.E.2d 273, 274 (2002) (involving a motor vehicle collision where a driver was "instantly killed"), a felonious hit and run could result in death, but not necessarily in injury.

While the cases cited by defendant, *Hudson* and *McDonald*, found that death may be and, in those cases was, instantaneous, neither case stands for the proposition that "injury" is not an element or precursor to death. Indeed, even *Black's Law Dictionary* includes the word "injury" in its definition of "instantaneous death" as "[d]eath occurring in an instant or within an extremely short time after an *injury* or seizure." *Black's Law Dictionary*, "instantaneous death" (10th ed. 2014). Per this definition, death occurs after "injury," and "injury" is a component of death.

In the instant case, the language used by the medical examiner regarding the cause of death belies the entire premise of defendant's argument on appeal. The medical examiner stated the victim's cause of death was "blunt trauma head *injury* due to pedestrian struck by motor vehicle." (Emphasis added). The victim was injured as a result of the crash, and his injury resulted in death. Therefore, the essential elements of hit and run resulting in death necessarily include the essential elements of hit and run resulting in injury.[2]

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2. Because we conclude that the elements of felonious hit and run resulting in injury are a lesser-included offense of felonious hit and run resulting in death, we need not address defendant's argument that a fatal variance existed in the indictment, nor whether defendant properly preserved this issue for review.

Accordingly, the trial court did not err by submitting to the jury and entering judgment upon conviction for felonious hit and run resulting in injury.

NO ERROR.

Judges MURPHY and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
BERNARDO ROBERTO PENA AKA MARTIN RANGEL PENA, DEFENDANT

No. COA16-1075

Filed 19 December 2017

1. Constitutional Law—right to counsel—pro se—clear and unequivocal waiver required

The trial court erred in a rape and kidnapping case by denying defendant his constitutional right to counsel by requiring him to proceed to trial pro se when he did not clearly and unequivocally elect to do so. While defendant did state that he would represent himself, it was not an outright request but instead a decision he made when faced with the option to continue with appointed representation where there was an impasse with regard to representation.

2. Constitutional Law—right to counsel—pro se—knowing, intelligent, and voluntary waiver—written waiver insufficient

The trial court erred in a rape and kidnapping case by forcing defendant to proceed to trial pro se without performing a proper inquiry under N.C.G.S. § 15A-1242 into whether defendant was knowingly, intelligently, and voluntarily electing to proceed without an attorney. A written waiver did not suffice to show that the trial court informed defendant of his right to the assistance of counsel or the range of permissible punishments defendant may face.

3. Constitutional Law—right to counsel—no forfeiture of right—no serious misconduct or flagrant tactics

A defendant in a rape and kidnapping case did not engage in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. There was no indication

of flagrant tactics or that defendant engaged in any inappropriate behavior either in court or with his assigned counsel.

Appeal by defendant from judgments entered 23 April 2015 by Judge Robert T. Sumner and amended judgments entered 6 November 2015 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 4 April 2017.

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

Goodman Carr, PLLC, by W. Rob Heroy, for defendant-appellant.

STROUD, Judge.

Defendant Bernardo Roberto Pena ("defendant") appeals from the trial court's judgments convicting him of attempted second degree sex offense, attempted second degree rape, second degree sex offense, second degree kidnapping, and sexual battery. On appeal, defendant's primary argument is that the trial court denied his constitutional right to counsel by requiring him to proceed to trial *pro se* when he did not clearly and unequivocally elect to do so and without performing a proper inquiry into whether defendant knowingly, intelligently, and voluntarily elected to proceed without an attorney. After review, we conclude that it is not clear from the record or trial transcript that defendant clearly and unequivocally requested to proceed *pro se*, and we agree that the trial court did not complete a proper inquiry into his purported waiver as required under N.C. Gen. Stat. § 15A-1242 (2015). Accordingly, we reverse and remand for a new trial.

Facts

Defendant was initially charged by arrest warrant on 29 May 2012 and then later indicted on or about 20 August 2012 for second degree sexual offense, second degree kidnapping, sexual battery, attempted second degree sexual offense, and attempted second degree rape. He signed a waiver of counsel form on or about 30 May 2012 waiving his right to assigned counsel. Defendant was later found to be indigent and Timothy Emry was appointed as his counsel by the public defender. On 26 January 2015, Mr. Emry filed a motion and order to withdraw as counsel, claiming that he and defendant were at a "complete impasse with regard to representation." In the motion, Mr. Emry explained that defendant "is unwilling to discuss the facts, evidence, and theory of defense with counsel any further in preparation of trial." In addition, defendant

was upset with Mr. Emry for asking him to sign a form acknowledging that he understood a plea offer and the consequences of either taking or rejecting it.

The court held a hearing on that same day, 26 January 2015, addressing Mr. Emry's motion to withdraw as counsel. At the hearing, the State claimed that "if the Court grants [defendant]'s request for a new attorney, this will be his fourth attorney since these cases were pending." Mr. Emry later clarified for the court that this was an inaccurate representation of the events that had occurred, noting there had been an attorney who made one brief district court appearance on behalf of defendant at a bond hearing early in the process, and another attorney at the Public Defender's Office who was initially appointed as defendant's counsel after he was found indigent, but that Mr. Emry quickly spoke with that attorney and had the case reassigned to him, as he had already been working on it. Mr. Emry stated that he had "been on this case throughout its Superior Court life." Mr. Emry also explained to the court that while it was an old case -- dating back to 2012 -- it had only been put on a calendar for trial once previously, and there had been no previous delay due to the defendant.

After hearing from both sides, the trial court asked defendant:

> Just one final thing, sir, what do you want me to do? Do you want me to -- do you want to rep -- what do you want to do? Do you want to represent yourself? Do you want to hire your own lawyer? Do you want me to appoint another lawyer? What do you want me to do?

Defendant, helped by his translator, replied: "I just need some time because I will undergo surgery that is going to put me out of commission for about four weeks." The trial court then concluded:

> All right. Very well. Sir, under these circumstances, I'm going to find that there's no just basis for appointing another counsel for you. It appears from your statement there as long -- as the other things that you're interested in a delay in this matter. I can't find anything before me to think that your attorney's done anything inappropriate or that he would not adequately represent you.
>
> So your options are this at this point. If you want to have Mr. Emry continue on as your lawyer, that will be fine. If you want me to release him, if you want to sign a waiver saying that you will represent yourself, that'll be fine. Or I may need to determine whether or not you've

> forfeited your right for right to counsel, which seems to be the place we are given what I've just indicated.
>
> So do you want Mr. Emry to continue to assist you or do you want to represent yourself? Or course, if you represent yourself or if I find that you've forfeited your right to counsel, there's nothing to say that you can't hire an attorney to come in here and represent you, but given how soon your trial date is, that may not be a practical thing for you to be able to do. May be impractical for you to do that.

Defendant asked, through his translator: "Are you saying I must make a decision about one of those options?" After being told that, yes, that is what he must do, this conversation between defendant and the court took place:

> [Defendant]: Like I say, Mr. Emry is a great person, but he's been all the time wanting to take one choice -- or two choices, and I want (inaudible).
>
> THE COURT: I've heard what you've had to say, I've listened to what everyone has said, and I made the decision that I've made. So right now, I need for you to tell me what you want me to do. Do you want Mr. Emry to continue to help you or do you want me to release him and find that you've forfeited your right to counsel, and you can either hire your own lawyer or come to represent yourself in court. Those are your choices.
>
> [Defendant]: Yeah, I want to give up Mr. Emry.
>
> THE COURT: All right. What do you want to do about a lawyer? Do you want to represent yourself?
>
> [Defendant's translator]: Could I get four to six months to find a new attorney?
>
> THE COURT: No, sir. That's what I'm -- that's what I'm telling you. Your case is scheduled for trial. I don't find there's a reason to delay; find that Mr. Emry has not done anything improper in his representation. He's able to represent you. Don't -- haven't heard anything from you saying why it would be appropriate for him to be removed. He's perfectly able to assist you, if you'd like.
>
> . . . .

[Defendant's translator]: I'm going to have surgery the next month, and I cannot come to court.

THE COURT: Well, sir, if you don't come to court, you don't present some valid reason for the judge to excuse you, very likely an order for arrest will be issued.

But beyond that, that's not what's before me right now. What I want to know is do you want me to release your attorney at this point and find that you are either going to represent yourself or that you've forfeited your right to counsel or do you want Mr. Emry to continue to try to help you as best he can?

[Defendant]: I'll be by myself.

THE COURT: Pardon?

[Defendant]: Prefer to be by myself.

The trial court then appointed Mr. Emry as standby counsel. Afterwards, the court then asked that defendant "be sworn to [his] waiver." The clerk asked defendant: "Do you solemnly swear that you have the right to an appointed attorney, you've waived that right to represent yourself (inaudible)?" Defendant replied: "I so swear." A waiver of counsel form was signed by defendant and filed on that same day, 26 January 2015. On the form, defendant checked the box indicating he "freely, voluntarily, and knowingly declare[d] that . . . I waive my right to assigned counsel and that I, hereby, expressly waive that right." In addition, defendant checked the box indicating that he elected in open court to be tried in this matter "without the assignment of counsel." He did *not* check either box indicating that he elected to waive his right to all assistance of counsel.

The case proceeded to a jury trial before a different Superior Court judge on 20 April 2015. The transcript from trial is indecipherable in many spots, and portions of the transcript are in italics to note they are just based on the court reporter's notes, because they were not captured by a recording. Before trial began, the State noted that Mr. Emry was present as standby counsel and asked that the court inquire into defendant's need for a translator and to address the issue of counsel. This colloquy between the trial court and defendant ensued:

THE COURT: Okay, and it's my understanding that you have, through a conversation with . . . some other judge . . . waived court-appointed counsel, is that correct?

[Defendant]: Yes.

THE COURT: And that you thereby elected to either represent yourself or hire your own attorney.

[Defendant]: I tried to hire an attorney, but the reason I ---

(The recording stopped and restarted. Again, portions of the record not corroborated by the recording are italicized.)

[Defendant]: ---- breach amount of time I had since February, I couldn't find anybody to take (indecipherable) it.

So I take it you shall proceeding [sic] today as your own counsel.

[Defendant]: Yes.

THE COURT: Do you understand, Mr. [Emry] has been appointed . . . as standby counsel.

[Defendant]: Yes, I understand.

THE COURT: I would like to give you some information about his role if he remains as standby counsel so that, to the extent that you want to utilize his services, you will know how to do that.

[Defendant]: Okay.

THE COURT: (Indecipherable) are choosing to represent yourself today, you will be called upon to handle some of the functions that a lawyer might otherwise handle for you. That includes trial strategy, jury selection, examination and cross examination of witnesses, among other functions that you may choose to present to the Court.

Mr. [Emry] will be available for you to answer legal questions that you might have. Strategy questions that you might (indecipherable) proceed (indecipherable) questions that you might have. While I will not conduct any part of the trial for you, you will be free to ask him any questions (indecipherable) that you want his assistance. Do you understand that?

[Defendant]: Yes, I understand that, but (indecipherable) to do (indecipherable) defense.

THE COURT: (Indecipherable), you don't (indecipherable) to ask (indecipherable) any questions, he will be (indecipherable) for you with regard to that.

(Indecipherable) the other matter is that I want you to understand, since you are representing yourself, I, as the judge, will not be able to assist you in trying your case in any way.

[Defendant]: I understand.

THE COURT: (Indecipherable) you to the extent that you have legal questions that need to be answered that you make use of your standby counsel for those purposes, (indecipherable) that's fine.

I want you to understand that you are representing yourself. If you need time [to] ask questions from Mr. [Emry] or need an extra moment, you certainly feel free to do so at any time.

[Defendant]: That's fine.

On 23 April 2015, the jury returned guilty verdicts on all five counts. The trial court sentenced defendant and entered multiple judgments of conviction on 23 April 2015. Corrected judgments of conviction were later entered in May 2015 and then amended once again on 6 November 2015 after correction requests were received from the Department of Public Safety. Defendant timely appealed to this Court.

Discussion

I. Sixth Amendment Right to Counsel

Defendant raises several issues on appeal but his primary arguments all relate to whether the trial court erred in requiring him to represent himself at trial, so we begin by addressing his arguments that relate to this issue.

This Court reviews "a trial court's decision to permit a defendant to represent himself *de novo*." *State v. Garrison*, __ N.C. App. __, __, 788 S.E.2d 678, 679 (2016).

> A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the

Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution. Our appellate courts have recognized two circumstances, however, under which a defendant may no longer have the right to be represented by counsel.

First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. Waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242. This statute provides:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;

(2) Understands and appreciates the consequences of this decision; and

(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

State v. Blakeney, __ N.C. App. __, __, 782 S.E.2d 88, 93 (2016) (citations, quotation marks, brackets, and ellipses omitted).

a. Clear and Unequivocal Invocation of Right of Self-Representation

[1] Defendant first argues that the trial court denied him his constitutional right to counsel by requiring him to proceed to trial *pro se* when he did not clearly and unequivocally elect to do so.

Here, the transcript indicates that at the hearing on 26 January 2015, which was held to address Mr. Emry's request to withdraw as defendant's counsel, the trial court asked defendant "What do you want me to do?" Defendant replied that he just needed time and that he would be

having surgery soon; the court replied that defendant's options at this point in time would be to either let Mr. Emry continue to assist him or represent himself. After more back and forth, defendant indicated that he wished "to give up Mr. Emry."

The court then asked, "All right. What do you want to do about a lawyer? Do you want to represent yourself?" Defendant replied -- via his translator -- and asked if he could have four to six months to find an attorney. He was told no, because his case was scheduled for trial and the court had found no reason to delay. Ultimately, the court once again asked defendant to choose between Mr. Emry or representing himself, and defendant stated he would "[p]refer to be by [him]self."

Defendant argues that the situation here is similar to that in *State v. Bullock*, 316 N.C. 180, 185, 340 S.E.2d 106, 108-09 (1986). In *Bullock*:

> The defendant consented to the withdrawal of his retained counsel because of irreconcilable differences but stated that he would employ other counsel. On the day of the trial, he said that he had been unable to get any attorney to take his case because of the inadequate preparation time. The trial court reminded the defendant that he had warned him he would try the case as scheduled.

Id., 340 S.E.2d at 108. Ultimately, the *Bullock* Court concluded that "[t]he defendant acquiesced to trial without counsel *because he had no other choice*. Events here do not show a voluntary exercise of the defendant's free will to proceed *pro se*." *Id.*, 340 S.E.2d at 108-09 (emphasis added).

Here, while the record and transcript indicate that defendant did eventually state that he would represent himself, it was not an outright request but was the decision he ultimately made when faced with no other option other than to continue with Mr. Emry's representation. Like the defendant in *Bullock*, defendant similarly acquiesced to proceeding to trial without counsel because he felt he had no other choice. *Id.* *See also State v. Thomas*, 331 N.C. 671, 678, 417 S.E.2d 473, 478 (1992) ("We likewise hold that defendant's repeated requests here to appear as 'leading attorney' at the head of 'assistant' counsel did not amount to clear and unequivocal expressions of a desire to proceed *pro se*. The trial court thus erred in allowing him to do so."). Without a clear and unequivocal request to waive representation and proceed *pro se*, the trial court should not have proceeded with such assumption. This requirement -- that a defendant clearly and unequivocally express his or her desire to proceed *pro se* -- helps courts "avoid confusion and prevent gamesmanship by savvy defendants sowing the seeds for claims of

ineffective assistance of counsel." *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476. This case is a good example of the confusion that can occur when the record lacks a clear indication that a defendant wishes to proceed without representation.

As explained in more detail in the next section, however, even if we found defendant *did* clearly and unequivocally waive his right to counsel, he would still be entitled to a new trial, because the trial court did not ensure that his waiver was knowing and voluntary as required by N.C. Gen. Stat. § 15A-1242.

b. Knowing and Voluntary Waiver of Right to Counsel

[2] Defendant also argues that the trial court erred by forcing him to proceed to trial *pro se* without performing a proper inquiry into whether defendant was knowingly, intelligently, and voluntarily electing to proceed without an attorney.

Under N.C. Gen. Stat. § 15A-1242 (2015):

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied the defendant:
>
> (1) Has been clearly advised on his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Furthermore,

> A trial court's failure to conduct the inquiry entitles defendant to a new trial.
>
> The record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will. In cases where the record is silent as to what questions were asked of defendant and what his responses were this Court has held, we cannot presume that the defendant knowingly and intelligently waived his right to counsel.

> When there is no transcription of those proceedings, the defendant is entitled to a new trial.
>
> The execution of a written waiver is no substitute for compliance by the trial court with the statute; a written waiver is something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not an alternative to it.

State v. Seymore, 214 N.C. App. 547, 549, 714 S.E.2d 499, 501 (2011) (citations, quotation marks, brackets, and ellipses omitted).

Here, even assuming defendant clearly and unequivocally asserted his desire to proceed without representation, the trial court's inquiry into defendant's waiver did not meet the standard required by N.C. Gen. Stat. § 15A-1242. *See*, *e.g.*, *Seymore*, 214 N.C. App. at 550, 714 S.E.2d at 501-02 ("In the present case, the transcript of the superior court proceedings shows that the court advised Defendant of the charges against him; however, there is no evidence that any other inquiry as required by N.C. Gen. Stat. § 15A-1242 was made. The transcript does not reveal that Defendant clearly and unequivocally expressed his desire to proceed *pro se*, or that the court clearly advised Defendant of his right to the assistance of counsel or the range of permissible punishments Defendant faced. This falls well short of the requirements of N.C. Gen. Stat. § 15A-1242. Moreover, this Court cannot presume Defendant intended to proceed *pro se* based on only an express waiver of appointed counsel and no evidence of a thorough inquiry as mandated by N.C. Gen. Stat. § 15A-1242.").

The trial court discussed the issue of representation both at the hearing on 26 January 2015 and on the day defendant's trial began, 20 April 2015. At the January hearing, after explaining to defendant that his options were either to keep Mr. Emry or represent himself, the court asked that defendant "be sworn to [his] waiver" of his right to counsel, and the clerk of court simply asked defendant "Do you solemnly swear that you have the right to an appointed attorney, you've waived that right to represent yourself (inaudible)?" Defendant responded, "I so swear[,]" and then signed a written waiver form. This colloquy did not meet the requirements of N.C. Gen. Stat. § 15A-1242, since the trial court did not inform defendant of his right to the assistance of counsel or the range of permissible punishments defendant may face.[1]

---

1. *See* Formal Advisory Opinion 2015-02 (N.C. Judicial Standards Commission) (Setting forth judge's responsibility to clarify scope of waiver and not allow a defendant to proceed without counsel based on waiver of appointed counsel only).

The fact that defendant signed a written waiver acknowledging that he was waiving his right to assigned counsel does not relieve the trial court of its duty to go through the requisite inquiry with defendant to determine whether he understood the consequences of his waiver. *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) ("The provisions of N.C. Gen. Stat. § 15A-1242 are mandatory where the defendant requests to proceed *pro se*. The execution of a written waiver is no substitute for compliance by the trial court with the statute. A written waiver is something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not an alternative to it." (Citations, quotation marks, and ellipses omitted)). *See also State v. Sorrow*, 213 N.C. App. 571, 577, 713 S.E.2d 180, 184 (2011) ("Even though defendant executed two written waivers of counsel, one of which was certified by the trial court, these waivers are not presumed to have been knowing, intelligent, and voluntary because the rest of the record indicates otherwise. Although the transcript shows that the trial court advised defendant of his right to counsel for the probation revocation hearing, there is nothing in the record or the transcript indicating that the trial court conducted a thorough inquiry that showed that defendant understands and appreciates the consequences of the decision to proceed *pro se*, and that the defendant comprehends the nature of the charges and proceedings and the range of possible punishments. In omitting the second and third inquiries required by N.C. Gen. Stat. § 15A-1242, the trial court failed to determine whether the defendant's waiver of his right to counsel was knowing, intelligent and voluntary. Failure to conduct the mandatory inquiry under N.C. Gen. Stat. § 15A-1242 is prejudicial error. Accordingly, we vacate the judgment revoking defendant's probation and remand for a new hearing." (Citations, quotation marks, and brackets omitted)). Defendant's written waiver form only contains a checkmark indicating that defendant elected in open court to be tried "without the assignment of counsel"; he did not check either box on the form indicating that he was electing to waive his right to all assistance of counsel.

At the start of defendant's trial, the Superior Court judge conducting the trial engaged in another colloquy with defendant regarding the issue of counsel. The court noted that defendant had previously waived court-appointed counsel, and defendant agreed. The court then stated: "And . . . you thereby elected to either represent yourself or hire your own attorney." Defendant replied: "I tried to hire an attorney, but the reason I ---- **(The recording stopped and restarted. Again, portions of the record not corroborated by the recording are italicized.)** ---- *breach amount of time I had since February, I couldn't find anybody else to take (indecipherable) it.*" (Emphasis in original). The court then

confirmed that defendant was proceeding today as his own counsel and then the trial judge stated that he "would like to give [defendant] some information about [Mr. Emry's] role if he remains as standby counsel[.]"

The transcript as provided to defendant contains many "indecipherable" sections during the portion of the colloquy where the court explained how standby counsel would work, and the entire section is part of the transcript not corroborated by the recording. The transcript as it stands states:

> *THE COURT: (Indecipherable) are choosing to represent yourself today, you will be called upon to handle some of the functions that a lawyer might otherwise handle for you. That includes trial strategy, jury selection, examination and cross examination of witnesses, among other functions that you may choose to present to the Court.*
>
> *Mr. [Emry] will be available for you to answer legal questions that you might have. Strategy questions that you might (indecipherable) proceed (indecipherable) questions that you might have. While I will not conduct any part of the trial for you, you will be free to ask him any questions (indecipherable) that you want his assistance. Do you understand that?*
>
> *[Defendant]: Yes, I understand that, but (indecipherable) to do (indecipherable) defense.*
>
> *THE COURT: (Indecipherable), you don't (indecipherable) to ask (indecipherable) any questions, he will be (indecipherable) for you with regard to that.*
>
> *(Indecipherable) the other matter is that I want you to understand, since you are representing yourself, I, as the judge, will not be able to assist you in trying your case in any way.*
>
> *[Defendant]: I understand.*
>
> *THE COURT: (Indecipherable) you to the extent that you have legal questions that need to be answered that you make use of your standby counsel for those purposes, (indecipherable) that's fine.*
>
> *I want you to understand that you are representing yourself. If you need time [to] ask questions from*

Mr. [Emry] or need an extra moment, you certainly feel free to do so at any time.

[Defendant]: That's fine.

Due to the transcription issues with the trial transcript, it is not entirely clear what defendant did and did not understand about the role of standby counsel. But simply informing defendant about standby counsel's role is not an adequate substitute for complying with N.C. Gen. Stat. § 15A-1242. *See*, *e.g.*, *State v. Stanback*, 137 N.C. App. 583, 586, 529 S.E.2d 229, 230-31 (2000) ("Furthermore, neither the statutory responsibilities of standby counsel nor the actual participation of standby counsel is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver." (Citation, quotation marks, and ellipses omitted)).

In addition, even if we assume that the trial court did clearly advise defendant of his right to the assistance of counsel and that defendant understood and appreciated the consequences of the decision, there is no indication that the trial court inquired into whether defendant comprehended the nature of the charges and the range of permissible punishments, as required by N.C. Gen. Stat. § 15A-1242(3). The State even acknowledges in their brief: "To be sure, the trial court did not advise Defendant of the range of permissible punishments during the pretrial colloquy." Instead, as the State also points out, the only indication in the record this information was ever relayed to defendant is through a document submitted by defendant and Mr. Emry indicating that Mr. Emry had advised him of the nature of the charges against him and the permissible punishments. This document is signed and dated on 20 September 2013, about a year and a half before the hearing took place.

N.C. Gen. Stat. § 15A-1242 places the requirement on the trial judge, *not* defendant's attorney, to ensure that defendant fully understands the charges and possible punishment he faces. *See State v. Jacobs*, 233 N.C. App. 701, 705, 757 S.E.2d 366, 369 (2014) ("We cannot assume that defendant understood the legal jargon . . . as it related to his sentence. . . . Further, the trial judge had an unequivocal duty to ask defendant whether he understood the nature of the charges and proceedings and disclose the range of permissible punishments. He neglected to do so. The foregoing is clearly inadequate to constitute the 'thorough inquiry' necessary to satisfy N.C. Gen. Stat. § 15A-1242(3). Although we recognize that defendant signed a written waiver of his right to assistance of counsel, the trial court was not abrogated of its responsibility to ensure the requirements of N.C. Gen. Stat. § 15A-1242 were fulfilled. We need

not discern whether the first two subparts of the statute were satisfied -- all three must be met to ensure that a defendant's waiver was made knowingly, intelligently, and voluntarily." (Citations omitted)). That Mr. Emry apparently told defendant about his charges and got him to sign a document many months earlier does not negate *the trial court's* obligation to ensure that defendant understood the nature of the charges against him and the potential punishment he faced.

In January 2015, the trial court failed to conduct the inquiry as required by N.C. Gen. Stat. § 15A-1242 before defendant signed the waiver of his right to assigned counsel. In April 2015, before trial, it appears that the trial court may have conducted a more thorough inquiry, but due to the extremely poor quality of the recording and transcript, we simply cannot find this second waiver fulfilled the requirements of N.C. Gen. Stat. § 15A-1242 either. We hold that the trial court's failure to conduct a proper inquiry of defendant's purported waiver constituted prejudicial error, and defendant is entitled to a new trial. *See*, *e.g.*, *Garrison*, __ N.C. App. at __, 788 S.E.2d at 680 ("Accordingly, as the inquiry is a mandatory one, the trial court's failure to satisfy the statutory requirements before permitting defendant to proceed *pro se* constitutes prejudicial error.").

II. Misconduct

[3] Defendant also argues that he did not engage in misconduct sufficient to warrant the "extreme sanction" of forfeiture of his right to counsel.

> A defendant may lose his constitutional right to be represented by the counsel of his choice when the right to counsel is perverted for the purpose of obstructing and delaying a trial. Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel.

State v. Quick, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006) (citations omitted). As this Court explained in *Blakeney*,

> There is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel. However, our review of the published opinions of our appellate courts indicates that, as discussed in *Wray*, forfeiture has generally been limited to situations involving "severe misconduct" and specifically to cases in which the defendant engaged in one or more of the following: (1) flagrant or extended delaying tactics, such

> as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

Blakeney, __ N.C. App. at __, 782 S.E.2d at 94.

Here, defendant did not engage in such conduct as to forfeit his right to counsel. While the State and trial court hinted that defendant was intentionally delaying the start of his trial and that he would be on his fourth attorney after his counsel was dismissed, the record indicates this was an incorrect characterization of the facts. As explained by Mr. Emry, although a couple of other attorneys had been listed as defendant's counsel at various points early in the proceedings, defendant received substantial assistance only from him prior to Mr. Emry's request to be removed as counsel. In addition, nothing in the transcript indicates such "flagrant" tactics by defendant as to constitute extreme misconduct that warranted forfeiture of his right to counsel. There is no indication that defendant sought other delays of his trial or that he engaged in any inappropriate behavior either in court or with his assigned counsel.

III. Other Issues

Defendant raises several other issues on appeal[2], but as we have concluded the trial court did not conduct the mandatory inquiry under N.C. Gen. Stat. § 15A-1242 into defendant's waiver of counsel, we need not address his additional arguments. *See*, *e.g.*, *State v. Cox*, 164 N.C. App. 399, 402, 595 S.E.2d 726, 728 (2004) ("Because of our disposition of this issue [concluding that the trial court failed to conduct a proper inquiry under N.C. Gen. Stat. § 15A-1242], we need not address defendant's remaining arguments on appeal. Accordingly, we reverse and remand.").

Conclusion

We conclude that defendant "neither voluntarily waived the right to be represented by counsel, nor engaged in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court." *Blakeney*, __ N.C. App. at __, 782 S.E.2d at 98. We therefore

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2. One such issue relates to the State's failure to provide a complete transcript of the proceedings. As is obvious from the quotes in this opinion from the transcript, the transcript is of very poor quality. Large portions of the trial were not recorded or are incomprehensible, including pertinent portions relating to the trial court's inquiry into defendant's decision to proceed *pro se*.

hold that the trial court's failure to conduct a proper inquiry into defendant's waiver violated defendant's Sixth Amendment right to representation by counsel and requires that we remand this matter for a new trial.

REVERSED AND REMANDED.

Judges BRYANT and DAVIS concur.

STATE OF NORTH CAROLINA
v.
JESSE SANTIFORT, DEFENDANT

No. COA17-202

Filed 19 December 2017

1. Appeal and Error—appealability—special proceeding—extraordinary circumstances—petition for writ of certiorari

The Court of Appeals in an involuntary manslaughter case denied the State's motion to dismiss defendant police officer's appeal of two ex parte orders (compelling the production of his personnel files and educational records) that were not filed in connection with an "action." The Court treated Judge Pittman's order as a final judgment in a special proceeding, and based upon the extraordinary circumstances presented in this case, exercised its discretion under N.C. R. App. P. 21 to treat defendant's brief as a petition for certiorari with respect to the orders of Judges Stephens and Lock.

2. Parties—motions to intervene—ex parte proceedings—disclosure of personnel and education records of police officer—Rule 24(a)(2)

The trial court erred in an involuntary manslaughter case by denying defendant police officer's motions to intervene under N.C.G.S. § 1A-1, Rule 24(a)(2) in ex parte proceedings relating to the disclosure of his personnel and educational records where defendant was not notified of either the State's motions or the court's orders. The decision to consolidate the ex parte motions and orders into defendant's criminal file was erroneous.

3. Discovery—motion for relief—ex parte proceedings—police officer's personnel files and educational records—failure to

produce affidavits or other evidence showing need—no special proceeding or action initiated

The trial court erred in an involuntary manslaughter case by denying defendant police officer's N.C.G.S. § 1A-1, Rule 60(b)(4) motion for relief in ex parte proceedings where the orders were void ab initio. The State did not present affidavits or other evidence in support of their motions for the release of a police officer's personnel files and educational records sufficiently demonstrating their need. Further, there was no special proceeding, civil action, or criminal action ever initiated in connection with the ex parte motions and orders.

Appeal by defendant from order entered 4 November 2016 by Judge William R. Pittman in Johnston County Superior Court. Heard in the Court of Appeals 27 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

The Webster Law Firm, by Walter S. Webster, for defendant-appellant.

DAVIS, Judge.

Prior to charging Jesse Santifort with a crime, the State obtained two separate *ex parte* orders compelling the production of his personnel files and educational records. Santifort was not provided with any notice that these documents were being sought. He was subsequently indicted on a charge of involuntary manslaughter. Approximately two months after his indictment, Santifort filed motions to set aside the two *ex parte* orders, which were denied by the trial court. Because we conclude the two *ex parte* orders were void *ab initio*, we reverse.

Factual and Procedural Background

On 3 March 2016, Santifort was employed as a police officer with the Kenly Police Department. On that date, he became involved in a vehicle pursuit that had been initiated by deputies employed by the Wilson County Sheriff's Office.

Eventually, Alexander Thompson — the driver of the vehicle being pursued — wrecked his truck in an open field. Shortly after calling in the wreck, Santifort reported over the radio that he had deployed his Taser against Thompson. Shortly thereafter, Santifort requested emergency medical assistance for Thompson. Paramedics arrived and transported Thompson to WakeMed Hospital where he died three days later.

On 7 March 2016, the State filed an *ex parte* motion in Johnston County Superior Court pursuant to N.C. Gen. Stat. § 160A-168 seeking the production of Santifort's personnel records from four North Carolina police departments where he had been employed. On that same day, the Honorable Ronald L. Stephens entered orders compelling the disclosure of Santifort's personnel records from all four agencies.

The State filed another *ex parte* motion in Johnston County Superior Court on 13 June 2016 seeking to obtain educational records from Johnston County Community College related to a Basic Law Enforcement Training class attended by Santifort. The Honorable Thomas H. Lock entered an order that same day compelling the disclosure of those records.

Neither of the *ex parte* motions filed by the State contained accompanying affidavits. Furthermore, neither the State's motions nor the orders entered by Judges Stephens and Lock bore a docket number.

On 6 September 2016, Santifort was indicted by a grand jury for involuntary manslaughter. He subsequently learned of the existence of the orders that had been entered by Judges Stephens and Lock. On 30 September 2016, Santifort filed in Johnston County Superior Court — through counsel — notices of appearance, motions to intervene pursuant to Rule 24 of the North Carolina Rules of Civil Procedure, and motions for relief under Rule 60(b) seeking to have the *ex parte* orders vacated.

On 3 November 2016, a hearing was held on Santifort's motions before the Honorable William R. Pittman in Johnston County Superior Court. The following day, Judge Pittman entered an order stating, in pertinent part, as follows:

> 1. Even though relevant authority suggests a special proceeding as one method of pursuing the kinds of records sought by the State in this matter in the absence of a civil or criminal action, the creation and docketing of a criminal case file pursuant to the indictment gives the defendant interest and standing in all matters pertaining to the investigation and prosecution of the matter.
>
> 2. The motion to intervene is therefore moot.
>
> 3. Granting the relief requested by the defendant in the motion for relief from prior orders of the Court would require this Court to overrule the orders of Judges Stephens and Lock and staying enforcement of orders already complied with.

4. Judges Stephens and Lock had jurisdiction to enter the prior orders.

5. The prior orders of Judges Stephens and Lock are not void *ab initio*.

6. The prior orders of Judges Stephens and Lock are not the kind of orders contemplated by Rule 60 from which relief can be granted.

7. The Court lacks the authority to overrule these orders rendered by other Superior Court Judges.

8. Ruling on a motion to suppress the State's use at trial of any information contained in the produced records is premature.

. . . .

NOW, THEREFORE, the Court orders as follows.

1. All motions, orders, and other paper writings in the custody of the Clerk of Superior Court of Johnston County pertaining to the disclosure of personnel records of Jesse Craig Santifort, the delivery of records relating to Jesse Craig Santifort, and disclosure of medical records which are or may be involved in the investigation of the events leading to the indictment of Jesse Craig Santifort shall be marked with the file number of this criminal case and included in the Court file to the extent it has not already been included.

2. The State is ordered to not disclose or disseminate any non-public information in its possession as a result of the prior orders for disclosure of personnel records, for delivery of records, and for disclosure of medical records except as may be required by Chapter 15A of the General Statutes of North Carolina or further order of the Court.

3. Defendant's Motion to Intervene is denied.

4. Defendant's Motion for Relief From Order is denied.

Santifort filed a timely notice of appeal from Judge Pittman's order.[1]

1. While Santifort challenges the portions of Judge Pittman's order denying his motions to intervene and motions under Rule 60(b), his appeal does not implicate other

Analysis

I. Appellate Jurisdiction

[1] The State has moved to dismiss Santifort's appeal on the ground that it is an impermissible appeal from an interlocutory ruling in his criminal case. Therefore, we must determine whether we possess jurisdiction over this appeal.

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). The prohibition against interlocutory appeals "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted). Furthermore, "[t]here is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case." *State v. Henry*, 318 N.C. 408, 409, 348 S.E.2d 593, 593 (1986) (citation omitted).

A primary source of confusion in this appeal arises from Judge Pittman's decision to simply treat the orders of Judges Stephens and Lock as part of Santifort's criminal file. As stated above, the State's filing of the *ex parte* motions for release of Santifort's personnel files and educational records and the entry of the orders granting these motions all occurred *before* Santifort's indictment. Therefore, because no criminal file existed at the time of the *ex parte* motions and the ensuing orders, Judge Pittman's attempt to retroactively incorporate these documents into Santifort's criminal file constituted error.

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provisions of the order that dealt with various unrelated issues. Therefore, our review of Judge Pittman's order is limited solely to those portions that are the subject of Santifort's arguments.

However, Judge Pittman's handling of these documents is somewhat understandable in light of the errors that had occurred from the inception of the State's decision to seek them prior to the formal initiation of criminal proceedings against him. In order to understand this issue, it is helpful to review the differences set out in the North Carolina General Statutes between civil actions, criminal actions, and special proceedings.

N.C. Gen. Stat. § 1-1 provides that:

> Remedies in the courts of justice are divided into —
>
> (1) Actions.
> (2) Special proceedings.

N.C. Gen. Stat. § 1-1 (2015).

N.C. Gen. Stat. § 1-2 defines an "action" as "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C. Gen. Stat. § 1-2 (2015). N.C. Gen. Stat. § 1-3, in turn, provides that "[e]very other remedy is a special proceeding." N.C. Gen. Stat. § 1-3 (2015).[2]

Pursuant to N.C. Gen. Stat. § 1-4, "actions" are either civil or criminal. N.C. Gen. Stat. § 1-4 (2015). N.C. Gen. Stat. § 1-5 states that a criminal action is "prosecuted by the State as a party, against a person charged with a public offense" or "prosecuted by the State, at the instance of an individual, to prevent an apprehended crime against his person or property." N.C. Gen. Stat. § 1-5 (2015). Every other type of "action" is a civil action. *See* N.C. Gen. Stat. § 1-6 (2015). A civil action is "commenced by filing a complaint with the court" or "by the issuance of a summons." N.C. R. Civ. P. 3(a).

Here, the State's *ex parte* motions were not filed in connection with an "action." No criminal action existed because Santifort had not yet been indicted. Moreover, no civil action existed because the State did not file a complaint and no summons was issued. Accordingly, by default, the State's motions should have been treated as initiating a special proceeding. However, as Judge Pittman expressly found in his 4 November 2016 order, "[a] special proceeding was not officially initiated nor docketed."[3]

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2. Thus, a special proceeding is defined by what it is not.

3. The State does not challenge this finding in the present appeal.

Thus, it is clear that error infested the State's proceedings from the very beginning. Had a special proceeding been appropriately initiated and docketed upon the filing of the State's *ex parte* motions, the current appeal would have been from a final judgment in a special proceeding — an appeal as to which appellate jurisdiction would clearly have existed. *See State v. Leyshon*, 211 N.C. App. 511, 519-20, 710 S.E.2d 282, 289, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011) ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action *or special proceeding* may take appeal by filing notice of appeal." (citation, quotation marks, and brackets omitted and emphasis added)). Here, Judge Pittman's 4 November 2016 order denying Santifort's motions under Rules 24 and 60(b) disposed of all matters in connection with the *ex parte* orders. Therefore, we elect to treat Judge Pittman's order as a final judgment in a special proceeding and conclude that we have jurisdiction over Santifort's appeal from this order.

We note that in seeking to dismiss Santifort's appeal on the ground that appellate jurisdiction is lacking, the State, in essence, seeks to punish him for the State's own mishandling of the proceedings in this case. Indeed, the procedural manner in which Santifort sought to challenge the *ex parte* orders constituted a logical effort to make sense of the confused state of affairs that existed. Because he was not a party to the prior proceedings, Santifort properly sought leave to intervene under Rule 24. Similarly, because he sought to have the orders of Judges Stephens and Lock vacated, he invoked Rule 60(b).[4]

The State argues in the alternative that even assuming this Court possesses jurisdiction over Santifort's appeal from Judge Pittman's order, appellate jurisdiction is nevertheless lacking over his attempt to appeal from the orders of Judges Stephens and Lock because he failed to reference those orders in his notice of appeal as required by Rule 3(d) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 3(d) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken . . . ."). The State is correct that as a general proposition "[n]otice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (citation omitted).

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4. N.C. Gen. Stat. § 1-393 expressly provides that the Rules of Civil Procedure are applicable to special proceedings. N.C. Gen. Stat. § 1-393 (2015).

Nevertheless, based upon the extraordinary circumstances present in this case, we choose to exercise our discretion under Rule 21 of the North Carolina Rules of Appellate Procedure and treat Santifort's brief as a petition for *certiorari* with respect to the orders of Judges Stephens and Lock. *See In re I.S.*, 170 N.C. App. 78, 84, 611 S.E.2d 467, 471 (2005) (recognizing authority of this Court to "exercise its discretion and treat an appellant's appeal as a petition for a writ of certiorari" (citation omitted)). Accordingly, we conclude that we possess jurisdiction over this appeal in its entirety and proceed to address the merits of Santifort's arguments.

II. Motions to Intervene

[2] Santifort first argues that Judge Pittman erred in denying as moot his motions to intervene pursuant to Rule 24(a)(2) of the North Carolina Rules of Civil Procedure. "[A] party is entitled to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) in the event that he or she can demonstrate (1) an interest relating to the property or transaction, (2) practical impairment of the protection of that interest, and (3) inadequate representation of the interest by existing parties." *Bailey & Assocs., Inc. v. Wilmington Bd. Of Adjust.*, 202 N.C. App. 177, 185, 689 S.E.2d 576, 583 (2010) (citation omitted). "This Court reviews a trial court's granting or denying of a motion to intervene [as of right] on a *de novo* basis." *Id.* (citation omitted).

Here, Santifort wished to intervene in *ex parte* proceedings relating to the disclosure of his personnel and educational records. He clearly demonstrated an interest related to the transaction because the records being sought were his own. Furthermore, the very fact that the proceedings before Judges Stephens and Lock were *ex parte* such that Santifort was not notified of either the State's motions or the court's orders demonstrates that he likewise satisfied the remaining prongs of the test under Rule 24(a)(2).

In his 4 November 2016 order, Judge Pittman denied Santifort's motions to intervene on mootness grounds based on his belief that "the creation and docketing of a criminal case file . . . gives [Santifort] interest and standing in all matters pertaining to the investigation and prosecution of the matter." As noted above, however, Judge Pittman's decision to simply consolidate the *ex parte* motions and orders into Santifort's criminal file was erroneous. Therefore, Santifort's Rule 24 motions were not — as Judge Pittman concluded — moot. Accordingly, we reverse the portion of Judge Pittman's order denying Santifort's motions to intervene.

III. Rule 60(b) Motions

[3] Santifort next contends that Judge Pittman erred in denying his motions for relief pursuant to Rule 60(b)(4). Specifically, he contends that Judge Pittman should have vacated the orders previously entered by Judges Stephens and Lock because they were void *ab initio*.

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." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citation omitted). Nevertheless, Rule 60(b) "allows a trial judge to grant a party relief from that judge's or another judge's order or judgment" in certain circumstances, including when the initial order or judgment is void. *Duplin County Dep't of Soc. Servs. ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 482, 751 S.E.2d 621, 623 (2013) (citation omitted). Rule 60(b)(4) expressly provides that a trial court possesses the authority to "relieve a party . . . from a final judgment, order, or proceeding" where "[t]he judgment is void." N.C. R. Civ. P. 60(b)(4).

Our case law makes clear, however, that "[a] judgment will not be deemed void merely for an error in law, fact, or procedure. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered." *Ottway Burton, P.A. v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992) (citation omitted). Our Supreme Court has held that an order of a court is void where the court's jurisdiction was never properly invoked. *See Boseman v. Jarrell*, 364 N.C. 537, 546-47, 704 S.E.2d 494, 501 (2010) (holding that trial court erred in entering order in case where its subject matter jurisdiction had not been invoked and that order was therefore void *ab initio*).

In determining whether the jurisdiction of the trial court was actually invoked by the State's *ex parte* motions here, we find instructive our Supreme Court's decision in *In re Superior Court Order*, 315 N.C. 378, 338 S.E.2d 307 (1986) and this Court's decision in *In re Brooks*, 143 N.C. App. 601, 548 S.E.2d 748 (2001). *In Superior Court Order*, a prosecutor filed a petition in superior court seeking to compel bank officials to disclose certain confidential records of a depositor. In the petition, the prosecutor stated that he had "reason to believe that the examination of certain records . . . would be in the best interest of justice." *Superior Court Order*, 315 N.C. at 379, 338 S.E.2d at 309 (quotation

marks omitted). The trial court entered an *ex parte* order requiring that the records be disclosed. *Id.*

On appeal, the Supreme Court noted that although "no statutory provision either authoriz[ed] or prohibit[ed] orders of the type here involved, such authority exists in the inherent power of the court to act when the interests of justice so require." *Id.* at 380, 338 S.E.2d at 309 (citation omitted). Nevertheless, the Court held, certain requirements must be met prior to the issuance of an order for the production of confidential records.

> [T]he trial judge must be presented with something more than the complainant's bare allegation that it is in the best interest of justice to allow the examination of the customer's bank account records. At a minimum the State must present to the trial judge an affidavit or similar evidence setting forth facts or circumstances sufficient to show reasonable grounds to suspect that a crime has been committed, and that the records sought are likely to bear upon the investigation of that crime. With this evidence before it, the trial court can make an independent decision as to whether the interests of justice require the issuance of an order rather than relying solely upon the opinion of the prosecuting attorney.

Id. at 381, 338 S.E.2d at 310. The Court concluded that "[b]ecause no such evidence was presented to the trial judge in this case, the order directing the bank to make the records available was not properly issued." *Id.*

In *Brooks*, a district attorney filed *ex parte* petitions seeking the release of the personnel files of two police officers allegedly involved in an assault. *Brooks*, 143 N.C. App. at 602, 548 S.E.2d at 750. The petitions contained a statement that the requested documents were "necessary to a full and complete investigation . . . and would be in the best administration of justice" but "were not supported by affidavits, nor did they reference any legal authority." *Id.* (citation omitted). The trial court entered *ex parte* orders compelling the production of the officers' personnel files. *Id.* at 602-03, 548 S.E.2d at 750. Neither the State's petitions nor the trial court's orders were initially assigned docket numbers. The officers appealed the trial court's order on the grounds that "the Superior Court did not have jurisdiction or the authority to . . . authoriz[e] the disclosure of information in their personnel files." *Id.* at 606, 548 S.E.2d at 752.

The State argued on appeal that the trial court possessed the authority to enter the *ex parte* orders pursuant to N.C. Gen. Stat. § 160A-168. *Id.* As an initial matter, we noted that

> [a]ll information contained in a city employee's personnel file, other than the information made public . . ., is confidential. Personnel files of employees, former employees, or applicants for employment maintained by a city are subject to inspection and may be disclosed only as provided by section 160A-168 of the North Carolina General Statutes. Section 160A-168(c)(4) provides: By order of a court of competent jurisdiction, any person may examine such portion of an employee's personnel file as may be ordered by the court.

Id. (internal citations, quotation marks, and brackets omitted).

We recognized that "[t]he plain language of section 160A-168(c)(4) indicates that the Superior Court . . . being a court of competent jurisdiction, [is] indeed authorized to allow the inspection of . . . personnel files." *Id.* (citation omitted). We observed, however, that N.C. Gen. Stat. § 160A-168(c)(4) "does not provide for procedures allowing or directing the court to [order disclosure of personnel files]." *Id.*

This Court determined that in issuing an order compelling the disclosure of an officer's personnel file, "the Superior Court must utilize its inherent power and implement and follow procedures which effectively and practically . . . effectuate the intent of section 160A-168, that an officer's files remain confidential." *Id.* at 611, 548 S.E.2d at 755 (citation, quotation marks, and brackets omitted). We ruled that "[a]t a minimum, an *ex parte* petition submitted pursuant to section 160A-168(c)(4) should be accompanied by sworn affidavit(s) or similar evidence, including specific factual allegations detailing reasons justifying disclosure." *Id.* We further held that "the Superior Court should docket petitions submitted and orders entered pursuant to section 160A-168(c)(4) per its rules for docketing 'special proceedings.' " *Id.* We then summarized our holding as follows:

> The petitions presented to the Superior Court in the present case were simply inadequate to justify the issuance of an *ex parte* order under section 160A-168(c)(4). The petitions were unsworn, not accompanied by any affidavits or other similar evidence, and amounted to nothing more than [the district attorney's] own opinion — that the disclosure of the officers' files was in the best interest of the administration of justice. . . . We also note that there is no indication that the case was docketed as a "special proceeding" or any other type of proceeding in the

> Superior Court until the failure to assign a file number to the matter was brought to the Superior Court's attention by the officers. . . .
>
> We therefore find that the Superior Court could not make an independent determination as to whether the interests of justice require the issuance of an order under section 160A-168(c)(4). Thus, the Superior Court erred in issuing its 13 April 1999 order and failing to vacate and set aside those orders in their entirety.

Id. at 611-12, 548 S.E.2d at 755 (quotation marks omitted).

Based on the principles discussed in *Superior Court Order* and *Brooks*, we conclude that the orders entered by Judges Stephens and Lock were void *ab initio*. The State did not present affidavits or other comparable evidence in support of their motions for the release of Santifort's personnel files and educational records sufficiently demonstrating their need for the documents being sought. Nor was a special proceeding, a civil action, or a criminal action ever initiated in connection with the *ex parte* motions and orders. For these reasons, the State never took the steps necessary to invoke the superior court's jurisdiction.

Because the orders of Judges Stephens and Lock were therefore void, Judge Pittman not only possessed the authority to vacate those orders pursuant to Santifort's motions under Rule 60(b) but also committed reversible error in failing to do so. Accordingly, we reverse the portion of Judge Pittman's order denying Santifort's Rule 60(b) motions.

Conclusion

For the reasons stated above, we (1) reverse those portions of Judge Pittman's 4 November 2016 order denying Santifort's motions under Rule 24 and Rule 60(b); and (2) remand for further proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED.

Judges STROUD and HUNTER, JR. concur.

TILLETT v. TOWN OF KILL DEVIL HILLS

[257 N.C. App. 223 (2017)]

JERRY R. TILLETT, PLAINTIFF
v.
TOWN OF KILL DEVIL HILLS, A BODY POLITIC AND MUNICIPAL CORPORATION, DEFENDANT

No. COA17-433

Filed 19 December 2017

Public Records—Public Records Act—production of documents—lack of subject matter jurisdiction—failure to initiate mediation within 30 days of responsive pleading

The trial court lacked subject matter jurisdiction to enter a challenged order compelling the Town of Kill Devil Hills to produce documents under our State's Public Records Act to plaintiff judge where plaintiff did not satisfy the requirements of N.C.G.S. § 132-9(a) by his failure to initiate mediation within 30 days of the Town's filing of a responsive pleading as required by N.C.G.S. § 7A-38.3E.

Appeal by plaintiff and defendant from order entered 14 November 2016 by Judge Jeffery B. Foster in Dare County Superior Court. Heard in the Court of Appeals 18 October 2017.

Nexsen Pruet PLLC, by Norman W. Shearin, for plaintiff-appellee and cross-appellant.

Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog, Jr., for defendant-appellant and cross-appellee.

DIETZ, Judge.

Judge Jerry Tillett brought suit under our State's Public Records Act to compel the Town of Kill Devil Hills to produce documents that he contends are public records subject to disclosure under the Act. The trial court reviewed these documents *in camera*—meaning in private, outside the presence of the parties and the public. The court determined that two documents were subject to disclosure and ordered them to be produced under seal to Judge Tillett. Both parties appealed.

On appeal, the Town argues that the trial court lacked subject matter jurisdiction to enter the challenged order. We agree. The applicable section of the Public Records Act states that a litigant "may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court *shall have jurisdiction* to issue

such orders if the person has complied with G.S. 7A-38.3E." N.C. Gen. Stat. § 132-9(a) (emphasis added). As explained in more detail below, the General Assembly's use of the word "jurisdiction" demonstrates that it intended for Section 132-9(a) to impose a jurisdictional rule, rather than an ordinary procedural rule.

Judge Tillett concedes that he did not satisfy the requirements of N.C. Gen. Stat. § 132-9(a) because he failed to initiate mediation within 30 days of the Town's filing of a responsive pleading, as required by N.C. Gen. Stat. § 7A-38.3E. Accordingly, we must vacate the trial court's order for lack of subject matter jurisdiction.

Facts and Procedural History

In early 2015, Judge Jerry Tillett requested various public records from the Town of Kill Devil Hills through the provisions of our State's Public Records Act. The Town produced some records but withheld others, arguing that they fell within various exceptions to the public records laws. Judge Tillett then sued the Town to compel disclosure of the remaining, undisclosed records.

The applicable provisions of the public records laws required Judge Tillett to "initiate mediation . . . no later than 30 days from the filing of responsive pleadings with the clerk in the county where the action is filed." N.C. Gen. Stat. § 7A-38.3E(b). Judge Tillett did not initiate mandatory mediation within 30 days after the Town filed its answer.

Ultimately, after a hearing and an opportunity to review the disputed documents *in camera*, the trial court ordered the Town to produce copies of two of the challenged documents, but also ordered that the documents must remain under seal and not be shared with the public generally. Both parties timely appealed the trial court's order.

Analysis

We begin our analysis with the Town's argument that the trial court lacked subject matter jurisdiction to adjudicate this dispute. Subject matter jurisdiction is a question of law that this Court reviews *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

The Public Records Act provides that a litigant seeking to challenge the denial of access to public records "may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court *shall have jurisdiction* to issue such orders *if the person has complied with G.S. 7A-38.3E.*" N.C. Gen. Stat. § 132-9(a) (emphasis added).

Section 7A-38.3E of the General Statutes is titled "Mediation of public records disputes" and requires a party who files a civil action under the Public Records Act to "initiate mediation . . . no later than 30 days from the filing of responsive pleadings with the clerk in the county where the action is filed." N.C. Gen. Stat. § 7A-38.3E(b).

The General Assembly's use of the phrase "shall have *jurisdiction* to issue such orders" in Section 132-9(a) is crucial to our analysis. Broadly speaking, there are two types of rules governing the manner in which legal claims are pursued in court: jurisdictional rules, which affect a court's power to hear the dispute, and procedural rules, which ensure that the legal system adjudicates the claim in an orderly way. *See Dolan v. United States*, 560 U.S. 605, 610 (2010).

The distinction is important because, unlike ordinary procedural requirements, jurisdictional requirements cannot be waived or excused by the court. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). Instead, if a litigant fails to satisfy a jurisdictional requirement, the court lacks the power to adjudicate the dispute at all—rendering any action taken in the case a nullity. *State ex rel. Hanson v. Yandle*, 235 N.C. 532, 535, 70 S.E.2d 565, 568 (1952). Moreover, unlike most procedural violations, a defect in subject matter jurisdiction can be raised at any time, even for the first time on appeal. *Wood v. Guilford County*, 355 N.C. 161, 164, 558 S.E.2d 490, 493 (2002).

Ordinarily, courts might consider a mediation requirement like the one contained in N.C. Gen. Stat. § 7A-38.3E(b) to be procedural, rather than jurisdictional. *Dolan*, 560 U.S. at 610. As a result, a court could excuse noncompliance in certain circumstances—for example, by invoking equitable doctrines such as estoppel or waiver.

But courts have long recognized that a legislative body is "free to attach the conditions that go with the jurisdictional label to a rule that [courts] would prefer to call a claim-processing rule." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). This is so because it is the legislative branch—in our case, the General Assembly—that establishes the jurisdiction of trial courts over these types of claims. *See Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941); N.C. Const. Art. IV, Section 12. Simply put, even if a rule in a proceeding like this one appears to be merely procedural, courts must treat it as jurisdictional if the General Assembly has given a "clear indication that the provision was meant to carry jurisdictional consequences." *Henderson*, 562 U.S. at 429.

That is the case here. The Public Records Act states that a litigant "may apply to the appropriate division of the General Court of Justice

for an order compelling disclosure or copying, and the court *shall have jurisdiction* to issue such orders if the person has complied with G.S. 7A-38.3E." N.C. Gen. Stat. § 132-9(a) (emphasis added). Thus, the General Assembly has given the courts a "clear indication" that the mandatory mediation requirements of Section 7A-38.3E are *jurisdictional* requirements that must be satisfied for the courts to have the power to adjudicate the dispute. Among these jurisdictional requirements is Section 7A-38.3E(b), which provides that "[s]ubsequent to filing a civil action under Chapter 132 of the General Statutes, a person shall initiate mediation pursuant to this section. Such mediation shall be initiated no later than 30 days from the filing of responsive pleadings with the clerk in the county where the action is filed." N.C. Gen. Stat. § 7A-38.3E(b).

We therefore hold that, in order to confer jurisdiction upon the trial court in a Public Records Act suit, the plaintiff must initiate mediation within 30 days of the filing of the responsive pleading as required by N.C. Gen. Stat. § 7A-38.3E(b). Judge Tillett concedes that he did not initiate mediation within 30 days after the Town filed its responsive pleading. Thus, we agree with the Town that the trial court lacked jurisdiction to adjudicate this Public Records Act dispute, and we vacate the trial court's order. We note, however, that this ruling does not prevent Judge Tillett, or other parties who seek access to these records, from pursuing further Public Records Act requests and properly invoking the trial court's jurisdiction should the Town again refuse to produce the records.

Conclusion

The trial court lacked subject matter jurisdiction to enter the challenged order. That order is vacated.

VACATED.

Judges ELMORE and INMAN concur.

WALTON NORTH CAROLINA, LLC AND WALTON NC CONCORD, LP, PLAINTIFFS
v.
THE CITY OF CONCORD, NORTH CAROLINA, DEFENDANT

No. COA17-822

Filed 19 December 2017

1. Zoning—rezoning—summary judgment—prior approved preliminary plat expired—no common law vested right—expenditures not made in good faith reliance

The trial court did not err in a rezoning case by granting summary judgment in favor of defendant city where plaintiffs did not have a common law vested right to develop the pertinent property in accord with a prior approved preliminary plat. Plaintiffs were aware of the preliminary plat's expiration, and the expenditures it made were not in good faith reliance on the approved plat.

2. Zoning—rezoning—summary judgment—development agreement—construction and shared costs of water and sewer infrastructure—de facto zoning approval

The trial court did not err in a rezoning case by granting summary judgment in favor of defendant city where a development agreement between plaintiffs and the city for the construction and shared costs of water and sewer infrastructure to serve a proposed development did not act as a de facto zoning approval of a 551-dwelling subdivision. The agreement imposed and required compliance with the current zoning requirements.

3. Zoning—rezoning—summary judgment—denial not arbitrary and capricious

The trial court did not err in a rezoning case by denying granting summary judgment in favor of defendant city where the City Council's denial of plaintiffs' rezoning request was not arbitrary and capricious.

Appeal by plaintiffs from order entered 5 May 2017 by Judge Kevin M. Bridges in Cabarrus County Superior Court. Heard in the Court of Appeals 29 November 2017.

K&L Gates, LLP, by Roy H. Michaux, Jr., and Scarbrough & Scarbrough, PLLC, by James E. Scarbrough and Madeline J. Trilling, for plaintiff-appellants.

The Brough Law Firm, PLLC, by G. Nicholas Herman, and City of Concord Attorney Valerie Kolczynski, for defendant-appellee.

TYSON, Judge.

Walton North Carolina, LLC and Walton NC Concord, LP (collectively "Walton") appeal from the trial court's order denying its motion for summary judgment and granting summary judgment in favor of The City of Concord (the "City"). We affirm.

I. Background

A. History of the Property

The property at issue consists of 275.637 acres of unimproved land located on Odell School Road in Concord, North Carolina. The property was annexed into the city limits as of 30 September 2005, and was initially zoned Residential Low Density ("RL"). The RL zone allows a net density of two dwellings per acre. In 2005, Section 4.8 of the Concord Development Ordinance ("CDO") allowed for a "Cluster Development," to permit a density of more than two dwellings per acre, subject to certain conditions and limitations.

In 2005 and early 2006, the prior owner of the property sought to rezone the property from RL to Residential Medium Density ("RM-1" or "RM-2") to allow for the development of 684 homes on the property. The Concord Planning and Zoning Commission (the "Zoning Commission") denied this request on 21 February 2006.

On 18 April 2006, the Zoning Commission approved the prior owner's Preliminary Plat for the development of up to 563 dwellings through the use of the CDO's cluster development provisions. The cluster development provisions were repealed from the CDO on 12 January 2006, but the prior owner had submitted its project "for review as a 'cluster' subdivision" prior to the effective date of the repeal.

In order to pursue development under the Preliminary Plat, the developer was required to (1) submit and obtain approval for construction drawings, (2) file a final plat, and (3) obtain appropriate water and sewer infrastructure approvals prior to the stated expiration of the Preliminary Plat approval on 31 December 2013. The prior property owner entered into an agreement with the City for the construction and cost sharing of water and sewer infrastructure on 30 October 2006. In May 2007, the prior owner submitted, and the City approved, construction drawings indicating 551 dwellings, fewer than the 563 allowed under the Preliminary Plat. No final plat was ever submitted or approved.

Because of the economic collapse of 2008 and the effects thereafter, the prior owner went bankrupt, and the property was foreclosed upon on 24 August 2011.

B. Walton Purchases the Property

Prior to purchasing the property, Walton had investigated the potential economic uses of the property, as detailed in a written report dated 17 February 2012. The report included a plan for developing the property by: (1) creating a new development plan, different from the previously approved Preliminary Plat; (2) seeking rezoning of the property to allow for a density of more than two dwellings per acre; and (3) entering into a "Development Agreement" with the City for an "offsite sewer extension."

This report also expressly recognized the cluster development provisions were no longer in effect for RL zoned property, and stated "previous entitlements and approvals" had expired and "the property should be considered raw and unentitled." Walton purchased the property on 15 March 2012.

Several months later, on 12 December 2012, the City sent Walton a letter concerning the 31 December 2013 expiration of the approved Preliminary Plat, offering to provide more information if requested. Walton never responded to the City's letter nor requested any further information regarding the approved Preliminary Plat.

In 2013, Walton discussed rezoning options for the property with planning staff from the City. Walton had also spent over $200,000 on various surveys, assessments, and reports to determine how many dwellings could be placed on the property under current and proposed zoning classifications. At no point in 2013 did Walton discuss pursuing development of the property under the prior approved Preliminary Plat with the City. The Preliminary Plat expired according to the terms of the City's approval on 31 December 2013.

In 2014, Walton and the City worked upon a co-operative development agreement for the off-site sewer extensions to the property. From a meeting between Walton and the City concerning the development agreement on 22 September 2014, Walton's notes indicate its awareness of the expiration of the prior approved Preliminary Plat and the prior repeal of the cluster provisions from the CDO. The City approved its development agreement with Walton on 9 October 2014, after the required public notice and hearing.

On 21 November 2014, Walton submitted a preliminary site plan to develop 551 dwellings on the property, pursuant to the Preliminary Plat

approval granted to the prior owner. This plan more than doubled the number of dwellings allowed in the RL zone, proposing a net density of 4.5 dwellings per acre instead of the allowed two dwellings. In this submission, Walton stated it believed the property to be "zoned RL Cluster." On 2 December 2014, the City denied Walton's preliminary site plan.

C. Zoning Decisions

In order "to avoid the expense and delay of litigation," Walton then applied to and petitioned the Zoning Commission to rezone the property from RL to Residential Compact – Conditional District ("RC-CD") to allow for development of the property with 551 dwellings. In a six to one vote, the Zoning Commission approved Walton's rezoning request and preliminary subdivision plat, subject to certain conditions, on 15 September 2015, after a similar request had been denied in May.

Adjacent property owners filed an appeal to the City Council, pursuant to the CDO, on 29 September 2015. The City Council held a public hearing on 11 November 2015. Representatives from Walton spoke in favor of rezoning. Nine citizens spoke in opposition, mostly expressing concerns and objections related to traffic and congestion, storm water control and flooding problems, and adverse effects upon surrounding homes. The hearing was continued to 2 December 2015, to allow for more discussion on storm water issues.

At the continuation of the hearing, Walton and opponents of the rezoning were given equal time to speak. At the end of the hearing, the City Council voted to deny Walton's rezoning request, concluding:

> The proposed zoning amendment is not consistent with the 2015 Land Use Plan (LUP) because the proposed development of approximately two (2) dwelling units per acre will contribute to increased traffic in an already congested area, contributes more negative impacts to the public school system and potential negative impact to homes in surrounding area.
>
> The zoning amendment is not reasonable and not in the public interest because of a 25% increase in the number of homes that would be allowed if the zoning [were changed]. (Emphasis original).

Walton filed suit against the City on 28 January 2016, and sought (1) a declaratory judgment to declare Walton had a common law vested right to develop the property pursuant to the 2006 Preliminary Plat, as amended by the 21 November 2014 submittal; (2) an order finding the denial of its

rezoning petition was not supported by competent, material, clear and cogent evidence and was arbitrary and capricious, and upholding the Commission's approval; (3) specific performance by the City to perform all terms and provisions of the development agreement; and, (4) a finding that the City Council's conduct at the hearings was in violation of Walton's equal protection rights under the North Carolina Constitution.

Both parties participated in a court-ordered mediation conference on 29 June 2016. Negotiations ultimately failed, and both parties filed motions for summary judgment. In an order dated 5 May 2017, the superior court denied Walton's motion for summary judgment and granted summary judgment in favor of the City on all issues. Walton appeals.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Issues

Walton argues the trial court erred in granting the City's motion for summary judgment and denying its motion for summary judgment because: (1) Walton had a common law vested right to develop the property based on the approved 2006 Preliminary Plat; (2) the development agreement between Walton and the City approved a 551-dwelling subdivision; and, (3) the City Council's denial of Walton's rezoning request was arbitrary and capricious, and should have been reversed.

IV. Analysis

A. Standard of Review

> Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied.

In re Will of Jones, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576-77 (2008) (internal citations, quotation marks, and brackets omitted).

B. Common Law Vested Rights

[1] Walton argues it has a common law vested right to develop the property in accord with the prior approved 2006 Preliminary Plat. We disagree.

"As a general proposition the adoption of a zoning ordinance does not confer upon citizens . . . any vested rights[.]" *Browning-Ferris Indus. v. Guilford Cty. Bd. of Adjustment*, 126 N.C. App. 168, 171, 484 S.E.2d 411, 414 (1997) (citation and quotation marks omitted). However, landowners may "establish a vested right in a zoning ordinance" under the common law. *Id.* "A party claiming a common law vested right in a nonconforming use of land must show: (1) substantial expenditures; (2) in good faith reliance; (3) on valid governmental approval; (4) resulting in the party's detriment." *Kirkpatrick v. Village Council for the Village of Pinehurst*, 138 N.C. App. 79, 87, 530 S.E.2d 338, 343 (2000). The record does not support a showing of Walton's good-faith reliance on a valid governmental approval resulting in its detriment. *See id.*

It is uncontested Walton spent substantial sums prior to and after purchasing the property. The record also clearly indicates Walton did not intend to rely upon the prior approved 2006 Preliminary Plat, as Walton's pre-purchase report stated its intention to create a *new* development plan. Even if Walton argues its subsequent plans are almost identical to the prior approved Preliminary Plat, it waited nearly a year after the expiration of the 2006 Preliminary Plat to begin seeking new development approvals. *See Warner v. W & O, Inc.*, 263 N.C. 37, 43, 138 S.E.2d 782, 786-87 (1964) (holding vested rights do not protect those who wait to develop their property after an ordinance has been passed prohibiting the use).

No genuine issue of material fact exists that Walton was well aware of the Preliminary Plat's expiration, as the City provided written notice to them over one year prior to the Plat's expiration. The pre-purchase report also correctly identifies the previous repeal of the cluster development provisions in the CDO.

Walton erroneously argues the 2006 approval, which grandfathered the repealed cluster development provisions, in some way still allows those cluster provisions as common law vested rights long after its expiration. No vested rights exist where the party has prior knowledge of the existence of an ordinance prohibiting the proposed use. *Id.* at 43, 138 S.E.2d at 787.

Walton also argues it was unclear of what the expiration of the 2006 Preliminary Plat meant. The record clearly shows Walton took no

good-faith action to ascertain how the pending plat approval expiration may affect its proposed development scheme in the year between the City's notice and the Plat's expiration.

Walton concedes the expenditures in excess of $200,000 made prior to its purchase of the property "were needed regardless of the number of residential lots to be developed." Under the current RL zoning, the property can still be developed into a net two unit per acre residential subdivision, albeit with less density than allowed under the 2006 Preliminary Plat.

Walton failed to show any common law vested rights. The expenditures it made were not made in good-faith reliance on the approved 2006 Plat. Neither the expiration of the plat's approval nor the expenditures incurred are detrimental to Walton's ability to develop the property in accordance with the current RL zoning requirements or to other densities upon rezoning. *See Kirkpatrick*, 138 N.C. App. at 87, 530 S.E.2d at 343. Walton failed to show the trial court's grant of summary judgment for the City was error on this basis.

C. Development Agreement

[2] Walton argues the development agreement it entered into with the City for the construction and shared costs of water and sewer infrastructure to serve the proposed development acted as a *de facto* zoning approval of a 551-dwelling subdivision. We disagree.

Local governments are authorized to enter into development agreements with developers, subject to approval by "the governing body of a local government by ordinance." N.C. Gen. Stat. § 160A-400.22(a) (2015). This authorization "is supplemental to the powers conferred upon local governments and does not preclude or supersede rights and obligations established pursuant to other law regarding building permits, site-specific development plans, phased development plans, or *other provisions of law*." N.C. Gen. Stat. § 160A-400.20(c) (2015) (emphasis supplied). A development agreement requires:

> A description of all local development permits approved *or needed to be approved* for the development of the property together with a statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction does not relieve the developer of the necessity of complying with the law governing their permitting requirements, conditions, terms, or restrictions.

N.C. Gen. Stat. § 160A-400.25(a)(6) (2015) (emphasis supplied).

Here, the development agreement between the City and Walton recites and identifies Walton's intention to "develop the Property into a residential subdivision with approximately 551 dwelling units" and its need for "access to sanitary sewer and potable water" in order to develop the property. Paragraph 3 of the agreement unambiguously states:

> Walton shall submit to the Concord Planning and Zoning Commission a preliminary plat consistent with the purposes of this Agreement which shall at minimum depict the sizes, placements, and configurations of the lots, common open space, streets, sidewalks, and other improvements planned for the Property. The Property shall then be developed *consistent with the preliminary plat approved by the Concord Planning and Zoning Commission* and in accordance with this Agreement . . . . *Walton understands that the City's continued performance under this Agreement is contingent upon Walton receiving all necessary approvals for its preliminary plat[.]* (Emphasis supplied).

Paragraph 4 further clarifies "[t]he maximum number of dwelling units will be determined by the applicable zoning and the approved preliminary plat[.]"

The agreement also states "[t]he local ordinances applicable to the development of the Property are those in force as of the date of this Agreement," in conformity with N.C. Gen. Stat. § 160A-400.26(a). The agreement was executed on 4 October 2014, months after the expiration of the approved 2006 Preliminary Plat on 31 December 2013, and years after the repeal of cluster development provisions from the CDO in 2006.

Walton erroneously asserts this development agreement constituted approval for "approximately 551 dwelling units," while the agreement clearly imposes and requires compliance with the *current* zoning requirements. RL zoned property allows a net density of two dwellings per acre. Walton's arguments on this basis are overruled.

D. City Council's Denial

[3] Walton contends the City Council's denial of Walton's request for rezoning was arbitrary and capricious, and, as such, the approval recommendation by the Zoning Commission should be upheld. We disagree.

"Rezoning is a legislative act[.]" *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 373, 344 S.E.2d 357, 360, *disc. review denied*, 318 N.C. 417, 349 S.E.2d 600 (1986). "Ordinarily, the only limitation upon

this legislative authority is that it may not be exercised arbitrarily or capriciously." *Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 440 (1971) (citation omitted).

> It is well established that the grant or denial of a rezoning request is purely a legislative decision which will be deemed arbitrary and capricious [only] if "the record demonstrates that it had no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."

Ashby v. Town of Cary, 161 N.C. App. 499, 503, 588 S.E.2d 572, 574 (2003) (quoting *Graham v. City of Raleigh*, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981)).

"When the action of the legislative body is reviewed by the courts, the latter are not free to substitute their opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body." *Zopfi v. City of Wilmington*, 273 N.C. 430, 437, 160 S.E.2d 325, 332 (1968) (citation omitted).

At the conclusion of the second hearing before the City Council on 2 December 2015, Council members found the proposed rezoning was inconsistent with the current land use plan. They cited increased traffic in the area, a negative impact upon the public schools, and the potential negative impacts on the surrounding homes and properties. The Council also found the proposed rezoning, proposing a 25% increase in homes over the current RL zoned allowances, was unreasonable and not in the public interest. As these findings and the ultimate legislative decision to deny the rezoning request have a "plausible basis," we are not free to substitute our opinion for that of the City Council. *See id.*

Additionally, "[t]he Planning and Zoning Commission . . . ha[s] no legislative, judicial or quasi-judicial power." *In re Markham*, 259 N.C. 566, 571, 131 S.E.2d 329, 334, *cert. denied*, 375 U.S. 931, 11 L. Ed. 2d 263 (1963). Whether or not property should be rezoned is a determination reserved for "the City Council in the exercise of its purely legislative function." *Id.* at 572, 131 S.E.2d at 334. The existing RL zone on the property is presumed to be correct. The burden of proof rested on Walton to overcome that presumption. *See Rakestraw v. Town of Knightdale*, 188 N.C. App. 129, 136, 654 S.E.2d 825, 830 (2008). The recommendation by the Commission in this case was advisory. The Council's decision to deny the rezoning was not arbitrary and capricious. Walton's arguments to the contrary are without merit.

V. Conclusion

Walton had prior and actual notice, and ample time, to act upon the prior approved 2006 Preliminary Plat, which would have allowed the development of a 551-dwelling subdivision under the repealed, but grandfathered, cluster development provisions in the CDO. Walton chose to pursue a "new development" plan not related to the approved 2006 Preliminary Plat, and only attempted to revert back to the prior approved Plat after it had expired. Walton did not rely in good faith upon a valid governmental approval and cannot show a common law vested interest in developing the property under the expired 2006 Preliminary Plat. *See Kirkpatrick*, 138 N.C. App. at 87, 530 S.E.2d at 343.

We have examined the entire record and do not find any support for Walton's other assertions that the approval of the development agreement acted as a zoning approval by the City for a 551-dwelling development under the express terms and limitations of that agreement. Walton has also failed to provide any basis to show the City Council's denial of Walton's rezoning request was arbitrary and capricious.

Under *de novo* review, the trial court correctly granted summary judgment in favor of the City and denied Walton's motion for summary judgment. The trial court's order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Judges CALABRIA and DAVIS concur.

WILSON v. SUNTRUST BANK

[257 N.C. App. 237 (2017)]

JENNIFER L. WILSON, PLAINTIFF
v.
SUNTRUST BANK; SUNTRUST MORTGAGE INC.; DEUTSCHE BANK TRUST COMPANY AMERICAS; THE LAW FIRM OF HUTCHENS, SENTER & BRITTON P.A. N/K/A HUTCHENS, SENTER, KELLAM & PETTIT, P.A.; SUBSTITUTE TRUSTEE SERVICES, INC.; AND DOES/JANES 1-10 INCLUSIVE, DEFENDANTS

No. COA17-482

Filed 19 December 2017

1. Jurisdiction—motion to show cause—bare assertion—presumption of regularity

The trial court did not err in a foreclosure case by denying plaintiff's motion demanding that the trial court "show cause" that it had jurisdiction to preside over a hearing on 15 August 2016 where plaintiff's bare assertion that the trial court lacked jurisdiction was insufficient to overcome the presumption of regularity.

2. Fraud—fraud upon the court—foreclosure proceeding—dismissal with prejudice—failure to state a claim—Rule 60 motion required—intrinsic fraud—equitable relief

The trial court did not err in a foreclosure case by dismissing with prejudice plaintiff's complaint for "fraud upon the court" against defendant banks and trustee under N.C.G.S. § 1A-1, Rule 12(b)(6) (2016) for failure to state a claim upon which relief could be granted where plaintiff failed to file a motion under N.C.G.S. § 1A-1, Rule 60 seeking relief on the grounds of intrinsic fraud. Further, plaintiff's complaint could not be construed as stating a valid claim for equitable relief under N.C.G.S. § 45-21.34.

3. Appeal and Error—appealability—order entered out of county—failure to lodge objection

The trial court did not err in a foreclosure case by entering an order out of county where plaintiff did not lodge an objection as required by N.C.G.S. § 1A-1, Rule 58.

4. Appeal and Error—appealability—motion for entry of temporary restraining order—motion for preliminary injunction—dismissal of complaint—mootness

Although plaintiff contended the trial court erred in a foreclosure case by denying plaintiff's motion for entry of a temporary restraining order and a preliminary injunction, the trial court's dismissal of plaintiff's complaint rendered this issue moot.

5. Evidence—motion for entry of findings and conclusions—motion to dismiss for failure to state a claim—untimely

The trial court did not err in a foreclosure case by denying plaintiff's motion for entry of findings and conclusions where the long-established rule is that a trial court cannot make findings of fact conclusive on appeal on a motion to dismiss for failure to state a claim under N.C.G.S. § 1A-1, Rule 12(b)(6). Further, the motion filed 13 days after entry of judgment was untimely under N.C.G.S. § 1A-1, Rule 52(b), which requires the motion to be made no later than 10 days after entry of judgment.

6. Appeal and Error—preservation of issues—motion to alter or amend judgment—authority to conduct hearing in different county—failure to argue—failure to cite authority

The trial court did not err in a foreclosure case by denying plaintiff's motion asking the trial court to alter or amend its judgment, or plaintiff's challenge to the trial court's authority to conduct a hearing in a different county, where plaintiff failed to articulate a legal argument or cite authority.

7. Appeal and Error—appealability—motion for dismissal—mootness

The Court of Appeals dismissed as moot the motion filed by defendant banks for dismissal in part of plaintiff's appeal in a foreclosure case where the Court addressed the issues raised in plaintiff's appeal.

Appeal by plaintiff from orders entered by Judge Gregory R. Hayes on 29 September 2016 in Cabarrus County Superior Court and 5 December 2016 in Catawba County Superior Court. Heard in the Court of Appeals 5 October 2017.

Plaintiff-appellant Jennifer L. Wilson, pro se.

Nelson Mullins Riley & Scarborough LLP, by Ramona Farzad and Julia B. Hartley, for defendant-appellees SunTrust Bank and SunTrust Mortgage, Inc.

Hutchens Law Firm LLP, by Lacey Moore Duskin, for defendant-appellees Hutchens Law Firm LLP f/k/a Hutchens, Senter, Kellam & Pettit, P.A., f/k/a Hutchens, Senter & Britton, P.A., and Substitute Trustee Services, Inc.

Troutman Sanders LLP, by D. Kyle Deak, for defendant-appellee Deutsche Bank Trust Company Americas.

ZACHARY, Judge.

Jennifer L. Wilson (plaintiff) appeals from an order entered on 29 September 2016, that dismissed with prejudice plaintiff's claims against SunTrust Bank, SunTrust Mortgage, Inc., Hutchens Law Firm LLP,[1] Substitute Trustee Services, Inc., and Deutsche Bank Trust Company Americas (Deutsche Bank) (collectively, defendants). This order quieted title to certain real property in favor of Deutsche Bank, and denied plaintiff's motion for a temporary restraining order and preliminary injunction.[2] Plaintiff also appeals from an order entered on 5 December 2016, that denied plaintiff's motion for findings and conclusions to be added to the order of 29 September, her motion to amend or alter the order, and her objection to the trial court's holding a hearing in Catawba County.

On appeal, plaintiff argues that the trial court lacked jurisdiction to conduct a hearing on 15 August 2016, erred by entering an order out of county on 29 September 2016, and erred by dismissing her complaint and denying her motion for entry of a temporary restraining order and a preliminary injunction. We conclude that the trial court did not err by entering the 29 September 2016 order out of county, by dismissing plaintiff's complaint, or by denying plaintiff's motion asking the trial court to "show cause how this court . . . possessed jurisdiction." Because we conclude that the trial court did not err by dismissing plaintiff's complaint, we dismiss as moot plaintiff's argument regarding the denial of her motion for a temporary restraining order and preliminary injunction.

Plaintiff also argues that the trial court erred by conducting a hearing in Catawba County on 14 November 2016, by denying her motion to alter or amend the 29 September 2016 order, and by denying her motion for entry of findings of fact and conclusions of law in the order. We conclude that the trial court did not err by denying plaintiff's motion

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1. Hutchens Law Firm was formerly known as Hutchens, Senter, Kellam & Pettit, P.A., and as Hutchens, Senter & Britton, P.A. In this opinion we refer to the firm as "Hutchens Law Firm."

2. The order also included rulings on plaintiff's challenges to allowing defendants' counsel to provide representation. Plaintiff has not presented arguments on these rulings and they are deemed abandoned. N.C. R. App. P. 28(b)(6) (2016) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Accordingly, we do not address these rulings in this opinion.

for entry of findings and conclusions, plaintiff's motion asking the trial court to alter or amend its judgment, or plaintiff's challenge to the trial court's authority to conduct a hearing in Catawba County.

Factual and Procedural Background

We first note that in her brief, plaintiff recites a number of factual circumstances that are not necessary for the disposition of the issues raised on appeal. We find the following facts, which are essentially undisputed, to be relevant to our resolution of this appeal. On 18 January 2007, plaintiff borrowed $296,000 from SunTrust Mortgage, Inc. (hereafter "SunTrust Mortgage"), in order to finance the purchase of real property located on Pinecroft Court, in Harrisburg, North Carolina (hereafter, "the property"). Plaintiff signed a promissory note and a deed of trust securing the loan. In 2009, plaintiff defaulted on the terms of the loan by failing to make the required mortgage payments. In October 2009, Hutchens Law Firm filed an appointment of substitute trustee, naming Substitute Trustee Services, Inc. ("STS") as substitute trustee. On 3 November 2009, Hutchens Law Firm, as the attorney for STS, wrote to plaintiff informing her that foreclosure proceedings were being initiated.

Following a hearing, an order allowing foreclosure was entered by an Assistant Clerk of Court for Cabarrus County on 25 January 2010. The order found that SunTrust Bank was the holder of the note; that the note was in default; that plaintiff had been served with notice of the hearing; and that plaintiff had shown no valid reason why foreclosure could not proceed. The Order ruled that STS was authorized to proceed with foreclosure. Plaintiff did not appeal this order. At the foreclosure sale conducted on 15 November 2010, SunTrust Bank was the highest bidder. SunTrust Bank assigned its bid to Deutsche Bank. A Final Report of Foreclosure was filed on 9 December 2010, and on 7 February 2011, a Trustee's Deed was recorded naming Deutsche Bank as the owner of the property.

On 22 June 2016, plaintiff was served with a notice directing her to vacate the property. On 8 July 2016, plaintiff filed a verified complaint against defendants. In her complaint, plaintiff alleged that in 2007 SunTrust Mortgage had sold the note and deed of trust to another financial entity and that, in order to obtain an order allowing foreclosure, defendants later executed fraudulent documents. Plaintiff sought damages from defendants for "fraud upon the court," including rescission of foreclosure-related documents, money damages, and a declaration quieting title to the property in favor of plaintiff.

On 29 July and 1 August 2016, the defendants filed motions asking that plaintiff's complaint be dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted. On 2 August 2016, plaintiff filed an amended motion seeking a temporary restraining order (TRO) and a preliminary injunction staying the entry of an order for possession of the property or sale of the property. Plaintiff alleged that the foreclosure sale was "procured by Fraud Upon the Court" and that there was a "serious controversy" as to "the title ownership of the Subject Property[.]" On 15 August 2016, the trial court conducted a hearing on defendants' respective motions for dismissal of plaintiff's claims, together with plaintiff's motion for entry of a TRO and a preliminary injunction.

On 29 September 2016, the trial court entered an order dismissing plaintiff's complaint with prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted, denying plaintiff's motions for injunctive relief, and taxing plaintiff with the costs of the action. The order was served on plaintiff on 7 October 2016. On 12 October 2016, plaintiff filed a motion asking the trial court to enter findings of fact and conclusions of law for its order of 29 September 2016, as well as a "Motion for Order to Show Cause How this Court at the August 15, 2016 Hearing Possessed Jurisdiction." On 13 October 2016, plaintiff filed a motion asking the court to alter or amend its 29 September 2016 order.

On 31 October 2016, counsel for defendant Deutsche Bank filed a notice that a hearing would be conducted on plaintiff's motions in Catawba County on 14 November 2016. Plaintiff filed an objection to the location of the hearing on 7 November 2016. Following a hearing conducted on 14 November 2016, the trial court entered an order on 5 December 2016, in which it denied plaintiff's motion for entry of findings and conclusions, plaintiff's motion to alter or amend judgment, plaintiff's motion challenging the court's jurisdiction, and plaintiff's objection to the hearing being conducted in Catawba County. Plaintiff noted an appeal to this Court from the orders entered on 29 September and 5 December 2016.

Trial Court's Jurisdiction over the 15 August 2016 Hearing

[1] Plaintiff contends that the trial court lacked jurisdiction to conduct the hearing on 15 August 2016, on the grounds that the court failed to produce evidence of a commission properly assigning Judge Gregory R. Hayes to preside in Cabarrus County on that date. The premise of plaintiff's argument is that her filing of a motion demanding that the trial

court "show cause" demonstrating the source of its jurisdiction to preside over the hearing on 15 August 2016, unaccompanied by any evidence showing affirmatively that the court lacked jurisdiction, shifted to the court the burden of establishing the existence of jurisdiction. Plaintiff has misapprehended the law in this regard.

Plaintiff appears to contend that her allegation that the trial court lacked jurisdiction is sufficient to impose upon the court the duty and burden of proving that it had jurisdiction. However, it is long-established that there is a presumption of regularity in the proceedings of our courts:

> Where a judgment rendered by a domestic court of general or superior jurisdiction is attacked in a collateral proceeding, there is a presumption, which can only be overcome by positive proof, that it had jurisdiction both of the persons and the subject-matter, and proceeded in the due exercise of its jurisdiction. . . . Presumptions against the validity of the proceedings will not be indulged in, where the record does not affirmatively show any error or irregularity. . . . As jurisdiction is presumed, at least *prima facie*, any acts or omissions affecting the validity of the proceedings and judgment must be affirmatively shown[.]

Starnes v. Thompson, 173 N.C. 466, 467-68, 92 S.E. 259, 259-60 (1917) (emphasis added). Moreover, the party challenging the court's jurisdiction has the burden of producing evidence that the court lacked jurisdiction:

> If a court finds at any stage of the proceedings that it is without jurisdiction, it is its duty to take proper notice of the defect, and stay, quash or dismiss the suit. The Superior Court is a court of general state-wide jurisdiction. N.C. Constitution, Article IV § 2[.] Plaintiffs are entitled to call to their aid the . . . *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter. . . . "The burden is on the party asserting want of jurisdiction to show such want."

Jackson v. Bobbitt, 253 N.C. 670, 673, 117 S.E.2d 806, 807 (1961) (quoting *Dellinger v. Clark*, 234 N.C. 419, 424, 67 S.E.2d 448, 452 (1951)) (emphasis added). This principle was recently applied by our Supreme Court. In *In re N.T.*, 240 N.C. App. 33, 769 S.E.2d 658 (2015), this Court held that the trial court lacked jurisdiction over a juvenile case, stating that "[g]iven the absence of any competent evidence in the record to show that the petition was properly verified, the trial court never obtained

jurisdiction over the subject matter of the juvenile case." *N.T.*, 240 N.C. App. at 35, 36-7, 769 S.E.2d at 661. Our Supreme Court reversed:

> ". . . [W]here the trial court has acted in a matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction. . . ." Nothing else appearing, we apply "the *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter." As a result, "[t]he burden is on the party asserting want of jurisdiction to show such want." . . . [Given] the presumption of regularity that attaches to the trial court's decision to exercise jurisdiction, the Court of Appeals had no basis to conclude that the petition was not properly verified.

In re N.T., 368 N.C. 705, 707-08, 782 S.E.2d 502, 503-04 (2016) (quoting *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 557, 359 S.E.2d 792, 797 (1987) (internal quotation omitted); *Williamson v. Spivey*, 224 N.C. 311, 313, 30 S.E.2d 46, 47 (1944); and *Dellinger*, 234 N.C. at 424, 67 S.E.2d at 452).

In the present case, plaintiff has not produced any evidence tending to show that the trial judge was not duly commissioned to preside over the 15 August 2016 session of Cabarrus County Superior Court. We hold that plaintiff's bare assertion that the trial court lacked jurisdiction is insufficient to overcome the presumption of regularity, and that the trial court did not err by denying plaintiff's motion demanding that the trial court "show cause" that it had jurisdiction to preside over the hearing on 15 August 2016.

Dismissal of Plaintiff's Complaint

[2] The primary substantive argument of plaintiff's appeal is that the trial court erred by dismissing with prejudice her complaint against defendants, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2016), for failure to state a claim upon which relief can be granted. We conclude that the trial court did not err by dismissing plaintiff's complaint.

The standard "of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) (citation omitted). "When the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the

complaint must be dismissed." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001) (citation omitted). Accordingly:

> "Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." "On appeal, 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."

Freedman v. Payne, __ N.C. App. __, __, 784 S.E.2d 644, 647 (2016) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002); and *Gilmore v. Gilmore*, 229 N.C. App. 347, 350, 748 S.E.2d 42, 45 (2013)). In addition:

> "When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment." Moreover . . . "the trial court can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint. Furthermore, the trial court is not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." "When reviewing pleadings with documentary attachments on a Rule 12(b)(6) motion, the actual content of the documents controls, not the allegations contained in the pleadings[.]"

Moch v. A.M. Pappas & Assocs., LLC, __ N.C. App. __, __, 794 S.E.2d 898, 903 (2016) (quoting *Schlieper v. Johnson*, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009); *Laster v. Francis*, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009); and *Schlieper* at 265, 672 S.E.2d at 552). We will next apply this standard to our review of the allegations of plaintiff's complaint.

The factual allegations of plaintiff's complaint comprise 136 numbered paragraphs. Preliminarily, we note that plaintiff makes a number of allegations that certain evidence is inconsistent with a document to which plaintiff refers as the "Delehey Declaration." Plaintiff initiated an

action in New York State, and the Delehey Declaration was filed by Ms. Delehey, an attorney who had represented one of the parties. It contains the results of Ms. Delehey's review of documents pertaining to the foreclosure of the property. Plaintiff cites no authority, and we know of none, that suggests that this document has any legal bearing on whether plaintiff's complaint stated a claim for relief. Accordingly, we do not consider whether the documents discussed in plaintiff's complaint are consistent with the "Delehey Declaration."

Assuming, as we must during our review, that the remaining allegations of plaintiff's complaint are true, they generally tend to show the following: In 2007, SunTrust Mortgage sold plaintiff's loan to another entity. Notwithstanding this sale, in 2009, SunTrust Mortgage purported to execute an assignment of the loan, which it had not owned for two years, to SunTrust Bank, with the assignment retroactively effective as of 1 March 2007. Thereafter, defendants knowingly "perpetrated fraud upon the Clerk of the Court" by filing fraudulent and false documents whose veracity was in some way associated with the purported assignment of plaintiff's loan to SunTrust Bank. Plaintiff alleges that these fraudulent documents were submitted so that defendants could obtain the 25 January 2010 order of the clerk allowing the foreclosure to proceed. Plaintiff also alleges that the documents filed in connection with the foreclosure sale, including the Trustee's Deed recorded in February 2011, were false and fraudulent.

Plaintiff brought claims against defendants for "fraud upon the court" based upon allegations that the foreclosure on the note was obtained by means of defendants' submission of false documents. "However, the ability of a party to maintain an independent action based upon a judgment in a prior judicial proceeding that allegedly was tainted by fraud, depends upon whether the fraud at issue is extrinsic or intrinsic." *Hooks v. Eckman*, 159 N.C. App. 681, 684, 587 S.E.2d 352, 354 (2003) (citing *Stokley v. Stokley*, 30 N.C. App. 351, 354, 227 S.E.2d 131, 134 (1976); and *Fabricators, Inc. v. Industries, Inc.*, 43 N.C. App. 530, 532, 259 S.E.2d 570, 572 (1979)). In *Hooks*, this Court stated the following:

> In *Stokley*, this Court asserted that fraud should be considered extrinsic "when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been prevented from fully participating therein there has been no true adversary proceeding, and the judgment is open to attack at any time." The *Stokley* Court determined that intrinsic fraud occurs when a party (1) has proper notice of an action, (2) has not

> been prevented from full participation in the action, and (3) has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. *Id.* Specifically, intrinsic fraud describes matters that are involved in the determination of a cause on its merits. In contrast, extrinsic fraud prevents a court from making a judgment on the merits of a case.

Hooks, 159 N.C. App. at 684-85, 587 S.E.2d at 354 (quoting *Stokley*, 30 N.C. App. at 354-55, 227 S.E.2d at 134). Thus, "[i]t is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation[.]" *Horne v. Edwards*, 215 N.C. 622, 627, 3 S.E.2d 1, 4 (1939).

The proper procedure in such a situation is to file a motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. "When the alleged fraud complained of is intrinsic then it can only be the subject of a motion under Rule 60(b)(3)." *Hooks*, 159 N.C. App. at 685, 587 S.E.2d at 354. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2016) provides in relevant part that:

> (b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) Fraud (whether heretofore denominated intrinsic or extrinsic)[.] . . . The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

"The effect of the *Stokley* decision is that whenever the alleged fraud is intrinsic it can only be the subject of a motion under Rule 60(b)(3), and then, of course, it is barred after one year following the judgment." *Textile Fabricators, Inc. v. C.R.C. Industries, Inc.*, 43 N.C. App. 530, 532, 259 S.E.2d 570, 572 (1979). In the present case, the factual allegations of plaintiff's complaint allege intrinsic fraud, which is not a claim or cause of action that may be the basis of an independent action, such as that filed by plaintiff. In addition, it is undisputed that plaintiff did not file a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 seeking relief on the grounds of intrinsic fraud. We conclude that the court did not err by ruling that plaintiff's complaint based on "fraud upon the court" failed to state a claim upon which relief can be granted.

We have also considered whether the allegations of plaintiff's complaint state a claim for relief under a theory other than intrinsic fraud. Assuming, *arguendo*, that plaintiff's complaint could be construed to adequately state a claim for fraud, we conclude that plaintiff's claim would be barred by the applicable statute of limitations. N.C. Gen. Stat. § 1-52(b)(9) (2016) establishes a three year statute of limitations for "relief on the ground of fraud or mistake" and specifies that "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." "For purposes of N.C.G.S. § 1-52(9), 'discovery' means either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence under the circumstances." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (internal quotation omitted).

In the present case, there is no dispute that plaintiff discovered or should have discovered the alleged fraud by, at the latest, October 2010. Plaintiff has attached to her complaint documents establishing, *inter alia*, that on 18 October 2010, she executed a verified statement alleging fraudulent actions on the part of defendants similar to the allegations of her complaint, and that on 27 October 2010, she filed a complaint with the North Carolina Commissioner of Banks alleging that SunTrust Bank had filed fraudulent documents in connection with the foreclosure. Moreover, at the hearing on 15 August 2016, plaintiff informed the court that there "has been ongoing litigation regarding this foreclosure and subject property in the federal courts since November 10th of 2010, before the trustee sales took place on November 15th 2010, and before the trustee's deed was recorded on the public record in February of 2011." Plaintiff's complaint was not filed until 8 July 2016, which is well outside the applicable statute of limitations. As a result, plaintiff's complaint does not state a valid claim for fraud.

We further conclude that plaintiff's complaint cannot be construed as stating a valid claim for equitable relief pursuant to N.C. Gen. Stat. § 45-21.34 (2016), which allows a party to seek equitable relief enjoining a foreclosure sale "prior to the time that the rights of the parties to the sale or resale becom[e] fixed pursuant to G.S. 45-21.29A[.]" N.C. Gen. Stat. § 45-21.29A (2016) in turn provides that if "an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed." N.C. Gen. Stat. § 45-21.27(a) (2016) states that the deposit required in order to file an upset bid "shall be filed with the clerk of the superior court, with whom the report of the sale or the last notice of upset bid was filed by the close of normal business hours on the tenth day after

the filing of the report of the sale or the last notice of upset bid" and that "[w]hen an upset bid is not filed following a sale, resale, or prior upset bid within the time specified, the rights of the parties to the sale or resale become fixed."

In the present case, the parties' rights were fixed by, at the latest, 11 February 2011, when the Trustee's Deed was filed. It is undisputed that plaintiff did not file a motion seeking to enjoin the foreclosure within ten days of the parties' rights becoming fixed. Moreover, at the 15 August 2016 hearing, plaintiff complained to the trial court that "[t]he attorneys here are misrepresenting that I'm trying to get some type of preliminary relief under Chapter 45. That is totally and patently false." We conclude that plaintiff's complaint cannot be construed as stating a valid claim for relief pursuant to N.C. Gen. Stat. § 45-21.34.

For the reasons discussed above, we conclude that plaintiff's complaint fails to state a recognized claim for relief. Therefore, we hold that the trial court did not err by dismissing plaintiff's complaint with prejudice, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

Entry of Order out of County

[3] We next consider plaintiff's argument that the order entered by the trial court on 29 September 2016 was void, on the grounds that the order was signed "outside the geographical boundaries of Cabarrus County[.]" Plaintiff contends that in order to be valid, the 29 September 2016 order had to "be signed in the County wherein the August 15, 2016 hearing took place." This argument lacks merit.

In support of her position, plaintiff cites *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 446 S.E.2d 289 (1994). However, *Capital Outdoor* held that:

> We believe the correct rule to be . . . [that] Rule 6(c) permits a judge to sign an order out of term [which we interpret to mean both out of the session and out of the trial judge's assigned term] and out of district without the consent of the parties so long as the hearing to which the order relates was held in term and in district.

Capital Outdoor, 337 N.C. at 158, 446 S.E.2d at 294-95 (internal quotation omitted).

Furthermore, N.C. Gen. Stat. § 1A-1, Rule 58 (2016) provides in relevant part that "consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given

unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard." Plaintiff does not contend that she lodged such an objection during the 15 August 2016 hearing, and our review of the transcript does not reveal an objection. We conclude that this argument lacks merit.

Denial of Plaintiff's Motion for Injunctive Relief

[4] Plaintiff argues that in its order of 29 September 2016, the trial court erred by denying her motion for entry of a temporary restraining order and a preliminary injunction. We conclude that our holding that the trial court did not err by dismissing plaintiff's complaint has rendered moot the propriety of the trial court's ruling on plaintiff's motion for temporary injunctive relief.

"The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits. . . . Its impact is temporary and lasts no longer than the pendency of the action." *State v. School*, 299 N.C. 351, 357-58, 261 S.E.2d 908, 913 (1980). Similarly, "[a] temporary restraining order 'is only an ancillary remedy for the purpose of preserving the status quo or restoring a status wrongfully disturbed pending the final determination of the action.' " *Beau Rivage Homeowners Ass'n v. Billy Earl, L.L.C.*, 163 N.C. App. 325, 329, 593 S.E.2d 120, 123 (2004) (quoting *Hutchins v. Stanton*, 23 N.C. App. 467, 469, 209 S.E.2d 348, 349 (1974)).

An issue is moot "when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Black's Law Dictionary 1008 (6th ed. 1990). Courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (internal quotation omitted). We have upheld the trial court's dismissal of plaintiff's complaint and, as a result, a determination of whether the trial court should have granted interim relief prior to dismissing the complaint would have no effect on the outcome of the case. We conclude that plaintiff's challenge to the trial court's denial of her motion for entry of a temporary restraining order and a preliminary injunction is mooted by the ultimate dismissal of her complaint and, accordingly, we do not address this issue.

Plaintiff's Motion for Findings and Conclusions

[5] On 12 October 2016, plaintiff filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 52 (2016) asking the trial court to enter findings and conclusions in its 29 September 2016 order. On appeal, plaintiff argues that the court erred by denying this motion in its order of 5 December 2016. We conclude that the trial court did not err by denying plaintiff's motion.

It is long-established that "a trial court cannot make 'findings of fact' conclusive on appeal on a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979). Moreover, N.C. Gen. Stat. § 1A-1, Rule 52(b) provides in relevant part that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." In this case, the order was entered on 29 September 2016, and plaintiff did not file her motion until 12 October 2016, thirteen days after entry of judgment. Accordingly, the trial court did not err by denying her motion as untimely.

Remaining Issues

[6] We next address the two remaining issues raised in plaintiff's appeal. Plaintiff argues that the trial court "was absent authority" to conduct a hearing in Catawba County on 14 November 2016, on the grounds that this hearing was not held during the session of court and in the county where the hearing of 15 August 2016 was conducted. Plaintiff has failed to articulate a legal argument or to cite authority for the proposition that the trial judge was required to wait until he was once again assigned to Cabarrus County in order to rule on the issues raised by plaintiff's motions. *See Andrews v. Peters*, 89 N.C. App. 315, 317-18, 365 S.E.2d 709, 711 (1988) (where this Court directed the entry of additional findings on remand, trial court did not have to wait until reassigned to the county in which the original order was entered before complying with this Court's mandate).

Plaintiff also argues that the trial court erred by denying her motion to alter or amend its order of 29 September 2016. Plaintiff's motion argued that the trial court lacked jurisdiction to conduct the hearing on 15 August 2016, and that the court erred by failing to enter findings and conclusions in its 29 September 2016 order and in the substantive rulings made in that order. These issues have been adequately addressed elsewhere in this opinion. Accordingly, we dismiss this argument.

Motion to Dismiss Plaintiff's Appeal in Part

[7] On 21 July 2017, defendants SunTrust Mortgage and SunTrust Bank filed a motion asking this Court to dismiss plaintiff's complaint in part. We have elected to address, as appropriate, the issues raised by plaintiff on appeal. Accordingly, defendants' motion is dismissed as moot.

Conclusion

For the reasons discussed above, we conclude that the trial court did not err by entering the 29 September 2016 order out of county, by dismissing plaintiff's complaint, or by denying plaintiff's motion asking the trial court to "show cause" why the court had jurisdiction. Because we conclude that the trial court did not err by dismissing plaintiff's complaint, we dismiss as moot plaintiff's argument regarding the denial of her motion for a temporary restraining order and preliminary injunction. We further conclude that the trial court did not err by denying plaintiff's motion for entry of findings and conclusions, plaintiff's motion asking the trial court to alter or amend its judgment, or plaintiff's challenge to the trial court's authority to conduct a hearing in Catawba County. In that we have addressed the issues raised in plaintiff's appeal, we dismiss as moot the motion filed by defendants SunTrust Bank and SunTrust Mortgage for dismissal in part of plaintiff's appeal.

AFFIRMED IN PART, DISMISSED AS MOOT IN PART.

Judges DAVIS and BE/RGER concur.

WLAE, LLC, Plaintiff
v.
ROBERT L. EDWARDS a/k/a ROBBIE EDWARDS and
WOLF ARBIN WEINHOLD, Defendants

No. COA17-154

Filed 19 December 2017

1. Appeal and Error—interlocutory orders and appeals—dismissal orders—right to bring appeal after final judgment

Both 17 June and 31 August 2016 dismissal orders were properly before the Court of Appeals for review in an action related to timbering activities that had occurred on property belonging to a corporate entity in the process of being dissolved where plaintiff corporation was a limited partner, and not the acquiring corporation, at the time the suit was filed. Plaintiff's first appeal was from an interlocutory order and it was within plaintiff's right to bring this appeal following entry of a final judgment.

2. Corporations—dissolution—limited partner—subject matter jurisdiction—standing—timbering activities on property of corporation in process of dissolving—dispute over ownership rights—assignments

The trial court did not err by concluding that it did not have subject matter jurisdiction in an action related to timbering activities that had occurred on property belonging to a corporate entity in the process of being dissolved, where plaintiff corporation lacked standing at the time its complaint was filed. Pursuant to Florida law, applied as required by N.C.G.S. § 59-901, plaintiff had no authority as a limited partner to transfer any asset or interest via a 2013 assignment.

3. Pleadings—amendment of complaint not allowed—real party in interest—lack of subject matter jurisdiction—nullity

In an action related to timbering activities that had occurred on property belonging to a corporate entity in the process of being dissolved, the trial court did not err by failing to allow plaintiff corporation the opportunity to amend its complaint to add the real party in interest (the corporation in the process of being dissolved) where the trial court did not have subject matter jurisdiction over the proceeding at the time of filing. Any attempt to order substitution of a party would have been a nullity.

Appeal by plaintiff from orders entered 17 June 2016 and 31 August 2016 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 23 August 2017.

Craig Law Firm, PLLC, by Sam B. Craig, and James, McElroy & Diehl, P.A., by Preston O. Odom, III, for plaintiff-appellant.

Prince, Youngblood & Massagee, PLLC, by Sharon B. Alexander, for defendant-appellee Edwards.

F.B. Jackson and Associates Law Firm, PLLC, by Frank B. Jackson and Angela S. Beeker, for defendant-appellee Weinhold.

ELMORE, Judge.

Plaintiff WLAE, LLC, appeals from two dismissal orders, one each of which was entered in favor of defendants Robert L. Edwards and Wolf Arbin Weinhold, and both of which were entered pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. Because plaintiff lacked

standing at the time its complaint was filed, the trial court correctly determined that it did not have subject matter jurisdiction over the proceeding. Accordingly, we affirm the dismissal orders of the trial court.

I. Background

The series of events culminating in this appeal were set in motion more than 20 years ago with the filing of a bankruptcy petition in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division. Upon filing for Chapter 7 bankruptcy in June 1994, defendant Weinhold scheduled as an asset his 80 percent limited partnership interest in a Florida limited partnership known as Wolf's Lair, Ltd. At all relevant times, Wolf's Lair owned approximately 1,400 acres of land in Henderson County, North Carolina (the "property").

In June 1996, the bankruptcy trustee sold defendant Weinhold's 80 percent limited partnership interest in Wolf's Lair to Carolina Preservation Partners, Inc. (CPP), a corporation wholly owned by Mr. Douglas Smith. The bankruptcy case was then closed from June 1998 until October 2000, when creditors moved to reopen it based on a conveyance by defendant Weinhold's brother of a 20 percent general partnership interest in Wolf's Lair to defendant Weinhold shortly after the case was closed. As a result of these events, the trustee filed an adversary proceeding in November 2001 against defendant Weinhold, CPP, and Smith, in which she alleged the 20 percent general partnership interest in Wolf's Lair belonged to the bankruptcy estate and sought to rescind the sale of the 80 percent limited partnership interest to CPP.

Nearly eleven years later, on 21 February 2012, the trustee, CPP, and Smith executed a settlement agreement within the adversary proceeding that attempted to resolve all issues regarding ownership of Wolf's Lair (the "2012 agreement"). The 2012 agreement reserved to the trustee her claim against defendant Weinhold regarding the 20 percent general partnership interest in Wolf's Lair, and it provided for the creation of WLAE, LLC, as an "acquiring entity" to be formed jointly by the trustee and Smith. The 2012 agreement provided further details as follows:

> Trustee, Smith and CPP shall quitclaim to [WLAE] all of Trustee's, Smith/CPP's right, title and interest in and to the Property and Wolfs' Lair [sic], excepting and expressly reserving to Trustee, however, Trustee's claims against Weinhold as set forth in the [adversary proceeding] Complaint. [WLAE] shall be a limited liability entity established by CPP, and at the time of Trustee's and CPP/Smith's quitclaims, Trustee and CPP shall enter into a limited

> liability operating agreement . . . for [WLAE] which shall provide that CPP shall be an 80% managing member, and the Trustee shall be a 20% non-managing member . . . . Trustee makes no representation, warranty or covenant as to the condition of title to the Property or as to the Property's physical condition, and the quitclaim of her interest shall be "as-is, where-is." [WLAE] shall assume all responsibility for the management and control of the Property.

Paragraph 11 of the 2012 agreement is also particularly significant and references the fact that the state of Florida administratively dissolved Wolf's Lair in 2000.

> Trustee shall retain all right, title and interest in and to the claims she asserted against Weinhold in the [adversary proceeding] Complaint, including, without limitation, Trustee's rights in Weinhold's purported 20% general partnership interest in Wolfs' Lair [sic] and/or any derivative interest in the Property, including any 20% tenant in common interest that Weinhold may have as a result of the dissolution of Wolf's Lair . . . .

Pursuant to the 2012 agreement, the trustee executed an assignment of her 80 percent limited partnership interest in Wolf's Lair from the trustee to the acquiring entity, WLAE, on 2 March 2012 (the "2012 assignment"). The 2012 assignment, like the 2012 agreement, specifically reserved to the trustee her claim against defendant Weinhold to the 20 percent general partnership interest in Wolf's Lair, stating:

> The undersigned . . . Trustee . . . ("Assignor"), does hereby grant, sell, transfer, assign and convey unto WLAE, LLC, a Delaware limited liability company, all of Assignor's right, title, interest, claim and demand, if any, in and to WOLF'S LAIR, LTD., a Florida limited partnership, excepting and expressly reserving to Assignor, however, Assignor's claims against Wolf Arbin Weinhold as set forth in the [adversary proceeding] Complaint . . . .

On 6 March 2012, the bankruptcy court issued an order confirming final adjudication of the adversary proceeding, approving the trustee's 2012 agreement with CPP and Smith, and acknowledging a verbal agreement between the trustee and defendant Weinhold regarding the 20 percent general partnership interest in Wolf's Lair. The said verbal agreement was announced in open court on 2 March 2012, with defendant Weinhold conceding that the 20 percent general partnership interest

belonged to the trustee and had become the property of the bankruptcy estate during the initial phase of the bankruptcy proceeding.

Despite court approval of the 2012 agreement, the trustee, CPP, and Smith continued to be entangled in a dispute from March 2012 to September 2013 regarding the subsequent valuation and transfer of the trustee's 20 percent general partnership interest in Wolf's Lair to the acquiring entity, WLAE. On 23 September 2013, following several motions and orders to enforce the 2012 agreement, Smith executed an assignment of "any and all suits, actions, charges, claims, and choses of action arising from or related to the [North Carolina property]" from Wolf's Lair to WLAE (the "2013 assignment"), with WLAE being described as the "owner of all the partnership interests in Wolf's Lair, Ltd." The 2013 assignment was signed by Smith as manager of WLAE.

On 3 March 2014, the trustee, CPP, and Smith participated in a mediation conference resulting in a settlement agreement (the "2014 agreement") in which CPP and Smith agreed to pay the trustee $400,000.00 for her 20 percent general partnership interest in Wolf's Lair as well as her 20 percent interest in WLAE, the latter of which she had formed with Smith pursuant to the 2012 agreement. Four days after the mediation conference, on 7 March 2014, plaintiff WLAE instituted this action against defendant Weinhold as well as defendant Edwards, who operates a timber purchasing and harvesting business in North Carolina. In its complaint, plaintiff asserted eight claims for relief, all related to timbering activities that had occurred between 2009 and 2011 on the property belonging to Wolf's Lair. Plaintiff specifically alleged that at some point prior to April 2009, defendants "Weinhold and Edwards entered into an agreement by which Edwards would remove and sell some of the timber on the Property and give Weinhold a portion . . . of the sales proceeds."

Because the damage occurred to its property, Wolf's Lair solely owned the right to pursue a claim for compensation for the alleged damages. *See Woodard v. Marshall*, 14 N.C. App. 67, 68 69, 187 S.E.2d 430, 431 (1972) ("[w]here the plaintiff claims damages for unlawful cutting of timber, he is claiming permanent damages to the freehold, or damages to the ownership interest, and his right to recover depends upon his establishing his title to the described lands[.]"). Accordingly, plaintiff's only potential interest in this claim is based on the series of agreements and assignments discussed herein. Plaintiff thus filed a copy of the 2013 assignment along with its complaint, purportedly to show that "Plaintiff WLAE is successor in interest to rights and claims of Wolf's Lair related to matters affecting the Property through an assignment of rights, a copy of which is attached hereto as Exhibit A, and incorporated herein

by reference." Like the 2013 assignment, plaintiff's verified complaint was signed by Smith as manager of WLAE, but with WLAE now being described as the "General Partner of Wolf's Lair, Ltd." Notably, Wolf's Lair was not a party to the 2012 agreement or the subsequent assignments, and the only debtor in the bankruptcy proceeding was defendant Weinhold in his individual capacity.

On 26 May 2016, defendant Weinhold moved to dismiss plaintiff's claims for lack of standing pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2015). In his motion to dismiss, defendant Weinhold essentially argued that neither the 2012 settlement agreement or the subsequent assignments had transferred ownership of the property, or authority to act in this litigation, from Wolf's Lair to WLAE; thus, the trial court had no subject matter jurisdiction over the proceeding. Defendant Edwards likewise moved to dismiss the action for lack of standing on 5 June 2016.

Pursuant to Rule 12(b)(1), the trial court granted defendant Weinhold's motion to dismiss by order entered 17 June 2016, and granted defendant Edwards' motion to dismiss by order entered 31 August 2016. The court found that the trustee and Smith had resolved their remaining issues regarding ownership of Wolf's Lair pursuant to the 2014 agreement with a "Quitclaim Assignment of Interest" from the trustee to Smith executed on 30 June 2014 (the "2014 assignment"). The 2014 assignment was executed more than three months after the filing of the complaint and more than nine months after Smith had declared WLAE to be the "owner of all the partnership interests in Wolf's Lair" in the 2013 assignment. Based on its findings, the court made the following conclusions of law:

> 1. WLAE, LLC, did not acquire the Trustee's general partner interest in Wolf's Lair, Ltd., at any time prior to March 7, 2014.
>
> 2. As of September 23, 2013, the date of the Assignment, WLAE, LLC, did not own the general partner interest in Wolf's Lair, Ltd.
>
> 3. The September 23, 2013, assignment from Wolf's Lair, Ltd., to WLAE, LLC, was not valid.
>
> 4. As of March 7, 2014, the date of the filing of this action pursuant to the Assignment, WLAE, LLC, did not have standing to file this lawsuit.
>
> 5. Because WLAE, LLC, did not have standing to file this action, this Court does not have jurisdiction over the subject matter of this action.

On 15 July 2016, plaintiff filed notice of appeal of the 17 June 2016 dismissal order granted in favor of defendant Weinhold, and that appeal was docketed on 7 November 2016 as no. 16-1129. On 30 September 2016, plaintiff commenced this appeal of both the 17 June and 31 August 2016 dismissal orders. Plaintiff's second appeal was docketed on 10 February 2017 as no. 17-154 and is addressed herein, while this Court dismissed appeal no. 16-1129 on 14 February 2017 pursuant to motions filed by both plaintiff and defendant Weinhold.

II. Discussion

Plaintiff contends that the trial court erred by dismissing its claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). Plaintiff asserts that WLAE was the real party in interest when the action commenced, and it argues in the alternative that the purported real party in interest, Wolf's Lair, subsequently ratified the action pursuant to N.C. Gen. Stat. § 1A-1, Rule 17(a) (2015). Plaintiff also contends that Rule 17(a) precludes dismissal under these circumstances because the trial court had a duty to afford plaintiff the opportunity to substitute the real party in interest prior to dismissing the action. We disagree with each of plaintiff's arguments.

[1] As a preliminary matter, we note that defendant Weinhold argues the 17 June 2016 dismissal order was previously appealed to this Court and dismissed with prejudice. This is not so. In appeal no. 16-1129, the Court did not specifically grant or deny defendant Weinhold's motion to dismiss with prejudice, ruling simply: "Appeal dismissed." This is due to the fact that unlike our trial courts, the Court of Appeals does not label its dismissals as being issued with or without prejudice. Rather, an appellant whose appeal has been dismissed may appeal the matter again if that is within his right (e.g., if his first appeal was from an interlocutory order) or he may petition this Court for discretionary review by writ of certiorari. *See Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, 175 N.C. App. 339, 623 S.E.2d 334, 337 (2006) (holding that withdrawal of prior appeal from an interlocutory order did not waive the right to appeal therefrom after entry of a final judgment); *see also* N.C. R. App. P. 3, 21, 37 (addressing appeals from superior court orders in civil cases generally, the extraordinary writ of certiorari, and motions filed in appellate courts, respectively).

Here, the 31 August 2016 dismissal order granted in favor of defendant Edwards constitutes the final judgment of the trial court for purposes of appellate review. *See, e.g., Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (distinguishing between appeals

taken from interlocutory rulings versus final judgments). Thus, because plaintiff's first appeal was from an interlocutory order (i.e., the 17 June 2016 dismissal order granted in favor of defendant Weinhold), it is within plaintiff's right to bring this appeal following the entry of a final judgment. We therefore hold that both the 17 June and 31 August 2016 dismissal orders are properly before this Court for review.

A. Rule 12(b)(1), Subject Matter Jurisdiction, and Standing

[2] Rule 12 of the Rules of Civil Procedure provides that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2015). "We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction *de novo* and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007).

"Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss." *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (citations omitted). Standing refers to "a party's right to have a court decide the merits of a dispute." *Teague v. Bayer AG*, 195 N.C. App. 18, 23, 671 S.E.2d 550, 554 (2009). To have standing to bring a claim, one must be a "real party in interest," which typically means the person or entity against whom the actions complained of were taken. *See Finks v. Middleton*, ___ N.C. App. ___, ___, 795 S.E.2d 789, 795 (2016); N.C. Gen. Stat. § 1-57 (2015).

"If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006). "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial." *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978). Rather, the issue of jurisdiction is assessed as of the time of the filing of a complaint, and the subsequent proceedings of a court without subject matter jurisdiction are a nullity. *See Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009); *see also Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964).

Here, plaintiff alleges that the property damage constituting the basis of its complaint began in April 2009 and continued into 2011. Plaintiff relies on the 2012 settlement agreement between the trustee, CPP, and Smith, as well as the 2012 and 2013 assignments executed by the trustee and Smith, to vest plaintiff with the right to pursue such claims. Plaintiff argues that

> In effect, the Trustee delegated to WLAE through the Settlement Agreement and the 2 March 2012 Quitclaim Assignment the responsibility to manage all affairs of Wolfs' Lair [sic] vis-à-vis the Property and associated Timber Rights. . . . WLAE validly did so by, for example, executing the Assignment of claims in September 2013, . . . even if WLAE held only the 80% limited partnership interest in Wolfs' Lair [sic] at that time.

Thus, while plaintiff acknowledges that it was only a limited partner at the time, its argument would have us ignore the fact that ownership of Wolf's Lair was still in dispute when the 2013 assignment was executed and remained in dispute for several months thereafter.

The interpretation of assignments is undertaken based on contract law, and the clear and unambiguous terms of the 2012 assignment contain no conveyance of any claim for damages or any other asset owned by Wolf's Lair. *See Martin v. Ray Lackey Enterprises, Inc.*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990). In both the 2012 agreement and assignment, the trustee's claim to the 20 percent general partnership interest in Wolf's Lair as against defendant Weinhold was specifically reserved to the trustee and not transferred to WLAE. As to the 2013 assignment attached to the complaint and upon which plaintiff primarily relies, the trial court concluded the assignment was not valid. This is because WLAE was not the "owner of all the partnership interests in Wolf's Lair" as stated in the 2013 assignment, and it is clear from the record that ownership of Wolf's Lair was still in dispute for several months after the 2013 assignment was executed. Thus, at the time of the 2013 assignment, plaintiff was at most a limited partner of Wolf's Lair.

Pursuant to Florida law, applied here as required by N.C. Gen. Stat. § 59-901 (2015), plaintiff had no authority as a limited partner to transfer any asset or interest in Wolf's Lair via the 2013 assignment. *See* Fla. Stat. Ann. § 620.1302(1) (2017) ("A limited partner does not have the right or the power as a limited partner to act for or bind the limited partnership."). As a result, Wolf's Lair–as the entity whose property had been damaged–continued to own the right to pursue an action for compensation for such damage, while the authority to act for or control Wolf's Lair continued to be the subject of dispute.

For the reasons stated above, we hold that plaintiff lacked standing at the time its complaint was filed. The trial court thus correctly determined that it lacked subject matter jurisdiction over the proceeding and properly dismissed the action pursuant to defendants' Rule 12(b)(1) motions to dismiss.

B. Rule 17(a), Ratification, and Substitution

[3] Plaintiff's arguments regarding ratification and substitution pursuant to Rule 17(a), both of which are made in the alternative, are not persuasive. Rule 17(a) provides in relevant part:

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

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

Plaintiff did not file a motion pursuant to Rule 17(a) at any time. Despite this, plaintiff contends for the first time on appeal that the trial court should have allowed plaintiff the opportunity to amend its complaint to add the real party in interest (i.e., Wolf's Lair). However, because the trial court did not have subject matter jurisdiction over this proceeding at the time of filing, the court did not have the authority to order such substitution of party, and any attempt to do so would have been a nullity. *See, e.g.*, *Coderre v. Futrell*, 224 N.C. App. 454, 457, 736 S.E.2d 784, 787 (2012) (holding that the proceedings of a court without jurisdiction of the subject matter are a nullity). Likewise, an action determined to be a nullity at the time of filing cannot be cured by subsequent ratification because no valid action exists for the real party in interest to ratify. *See, e.g.*, *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (holding that parties cannot by consent, waiver, or otherwise confer subject matter jurisdiction of an action over which the court does not have jurisdiction). We therefore hold that the trial court correctly declined to invoke Rule 17(a) *sua sponte*, which could only have resulted in a failed attempt to breathe life into an action that was a nullity at its commencement.

III. Conclusion

The orders of the trial court are hereby:

AFFIRMED.

Judges STROUD and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 DECEMBER 2017)

BALL v. COGDILL No. 17-409	Jackson (16CVD413)	No Error
BERNARD v. DeBLANCO No. 17-659	Mecklenburg (16CVD15122)	Affirmed
FISHER v. UNITED CONT'L HOLDINGS, INC. No. 16-1210	N.C. Industrial Commission (029712)	Affirmed
FULLER v. FULLER No. 17-430	Mecklenburg (10CVD8391)	Affirmed
IN RE MEDLIN No. 17-784	Wake (16SPC8154)	Affirmed
IN RE T.S.P. No. 17-653	Granville (16SPC156)	Vacated and Remanded
JENKINS v. THOMAS No. 17-224	Hertford (16CVS46)	Reversed and remanded.
MILLS v. DAVIS No. 16-737	Forsyth (12CVD3312)	Vacated in part and remanded
OWEN v. DAVIS No. 17-143	Wake (14CVD9151)	Affirmed in Part; Vacated in Part; and Reversed.
PAIR v. CHARLOTTE-MECKLENBURG HOSP. AUTH. No. 17-586	Mecklenburg (16CVS12490)	Affirmed
STATE v. BAYSE No. 17-528	Lenoir (11CRS53057-58)	Affirmed
STATE v. BLAKENEY No. 17-395	Mecklenburg (14CRS248578)	No Error
STATE v. BONEY No. 17-549	Duplin (15CRS51942-43)	No Error
STATE v. BORSELLO No. 17-40	Lincoln (15CRS1168) (15CRS53713)	No Error
STATE v. BROOKS No. 17-279	Robeson (11CRS57549)	Affirmed in part and Vacated in part.

STATE v. CHANCELLOR No. 16-993	Forsyth (13CRS62582)	Dismissed
STATE v. DIXON No. 17-25	Mecklenburg (12CRS249810-11)	Vacated and Remanded for New Trial
STATE v. FIGUEROA No. 17-363	Mecklenburg (14CRS246125)	No Error
STATE v. FLOYD No. 17-613	Wake (09CRS210668)	Dismissed
STATE v. FOX No. 17-355	Guilford (15CRS24627) (15CRS24659) (15CRS87681) (15CRS87743-44) (15CRS87759) (15CRS87761-62) (15CRS87849) (15CRS87851) (15CRS87852) (15CRS87853) (15CRS87860) (15CRS88113-16) (15CRS88118-21) (15CRS88221) (15CRS88254) (15CRS88274) (15CRS89612)	Appeal Dismissed; Sentence Vacated and Remanded.
STATE v. LANE No. 17-451	Alleghany (14CRS50314-15)	No Plain Error
STATE v. LANE No. 17-435	Mecklenburg (16CRS19088) (16CRS205961-62)	No Error in Part; Remanded in Part for Correction of Clerical Error.
STATE v. LEISTRA No. 17-187	Cherokee (15CRS470) (16CRS10)	Vacated
STATE v. MARSHALL No. 17-749	Hyde (16CRS85)	Affirmed
STATE v. MATTHEWS No. 17-349	Guilford (15CRS24301) (15CRS68639)	No Error

STATE v. MAYES No. 17-621	Mitchell (16CRS50031)	No Error
STATE v. MITCHELL No. 17-369	Wake (15CRS225756) (15CRS225761)	Affirmed
STATE v. PERRY No. 17-223	Nash (14CRS53698-99)	No Error
STATE v. SHIELDS No. 17-69	Mecklenburg (15CRS218348-50)	New trial.
WARNER v. WARNER No. 17-421	Dare (13CVD648)	Affirmed

CROWELL v. CROWELL

[257 N.C. App. 264 (2018)]

ANDREA KIRBY CROWELL, PLAINTIFF
v.
WILLIAM WORRELL CROWELL, DEFENDANT

No. COA17-164

Filed 2 January 2018

1. Divorce—equitable distribution—real property—necessary parties

The trial court did not err in an equitable distribution action by entering an order for plaintiff to sell real property owned by a corporation that was not a party to the action where the corporation was wholly owned by plaintiff and had been created to own real estate purchased by plaintiff with her separate funds. The trial court was not distributing the property as part of the marital estate but considering it in distributing the estate, especially plaintiff's ability to pay a distributive award.

2. Divorce—equitable distribution—third party—not joined in action—money judgment

The trial court erred in an equitable distribution action by entering an alternative money judgment against plaintiff's son, who was not a party to the action. The trial court correctly concluded that the transfer was for the purpose of defrauding creditors.

3. Divorce—equitable distribution—sale of property by third party—equity

The trial court erred in an equitable distribution action by entering an alternative order that plaintiff's son (who had received real property from plaintiff in a fraudulent transfer and who was not a party to the action) pay to defendant most of the equity he gained from the transfer. The trial court is only permitted to distribute marital and divisible property; an equitable distribution order is not the place to hold a third party responsible for a debt.

4. Divorce—equitable distribution—corporate debt—corporations not parties to action

The trial court did not err in an equitable distribution action by distributing the debts of private corporations without joining the corporations. The trial court distributed certain marital debts to defendant and provided a mechanism for payment. The person who held defendant's power of attorney took on the task of selling real

estate in Mexico that was distributed to defendant, with administrative costs to be repaid. Although plaintiff challenged distributions to defendant's various companies because defendant misappropriated funds, competent evidence in the record supported the trial court's classification of the debts.

5. Divorce—equitable distribution—distributive award—findings

The trial court did not abuse its discretion by ordering plaintiff to pay a distributive award where the trial court did not specifically make a finding which stated that an equitable distribution of the marital property in-kind would be impractical, but the many findings, especially those concerning the non-liquid character of the parties' assets, were sufficient to permit appropriate appellate review.

6. Divorce—equitable distribution—liquidation of separate property

The trial court did not abuse its discretion in an equitable distribution action by ordering plaintiff to liquidate separate property to pay a distributive award where the trial court was considering the separate property in distributing the marital estate, not distributing it.

Judge MURPHY concurring in part and dissenting in part.

Appeal by plaintiff from judgment entered 15 August 2016 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 3 October 2017.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for plaintiff-appellant.

Hamilton Stephens Steele + Martin, PLLC, by Amy E. Simpson, for defendant-appellee.

BRYANT, Judge.

Where the trial court had jurisdiction to order plaintiff to sell her separate property to satisfy a distributive award, order that the transfer of a deed from plaintiff to a third-party relative be avoided, and distribute marital debts owed by the parties and where the trial court made sufficient findings of fact to justify its distributive award, we affirm. However, where the trial court's award included an alternative money judgment against a non-party, we vacate that portion of the judgment.

Plaintiff Andrea Crowell and defendant William Crowell were married on 11 July 1998. They were legally separated on 3 September 2013 and divorced in April 2015. No children were born of the marriage.

Prior to the parties' marriage, defendant was president and shareholder of several corporations: Inwood Properties, Inc. ("Inwood Properties"); Inwood Land LLC ("Inwood Land"); Inwood Homes; Inwood Realty Corp.; St. Vrain Valley Associates LP ("St. Vrain"); Owl's Head Ranch, LLC; and WWC Valley. In March 2011, Elizabeth Temple, defendant's daughter from a previous marriage, was named president of the companies. At the time of trial, the companies were owned and controlled by defendant, Temple, and defendant's sons (also from a previous marriage), with Temple and defendant's sons holding "the same amount of shares."[1]

After the parties married, they developed a pattern of living beyond their means. As a result, defendant began to take salaries from his various companies which were not justified by their revenues, plaintiff and defendant began liquidating defendant's separate property, and plaintiff and defendant took out loans against both parties' separate property.

At the time of separation, the marital debt which had been incurred to fund the parties' marital lifestyle was significant. Plaintiff and defendant owed money to almost every company in which defendant maintained an ownership interest, including (1) $422,368.00 to Inwood Properties; (2) $258,737.00 to Inwood Land; and (3) $143,285.00 to St. Vrain. The primary marital asset, the marital residence, was sold in 2014 after the parties' separation for $1,075,000.00, which sale produced $230,657.00 in net proceeds. From these proceeds, plaintiff received a total interim distribution of $144,794.00 and defendant received $85,863.00.

At the time of separation, the trial court found that plaintiff's separate property included two pieces of real property—14212 Stewart's Bend Lane and 14228 Stewart's Bend Lane[2] —located in Charlotte, North Carolina. On or about 30 May or 1 June 2015, plaintiff transferred 14228 Stewart's Bend Lane to her son, Gentry Kirby. At that time, the property had an equity of $100,000.00, and Kirby assumed the mortgage.

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1. Defendant owned "a total of 25 percent [of Inwood Properties] between a trust and individually[.]"

2. The ownership of both properties is disputed on appeal. The trial court found that plaintiff owned both properties as her separate property, but on appeal, plaintiff contends both properties were acquired at some point by CKE, plaintiff's corporation of which she is the sole owner/member.

On 17 February 2014, plaintiff filed a complaint against defendant for equitable distribution, alimony, and post-separation support. Defendant filed an answer and included a counterclaim for equitable distribution. The case came on for trial before the Honorable Christy T. Mann in Mecklenburg County District Court from 6 to 8 July 2016. At the time of trial, defendant was seventy-six years old and suffered from memory loss and dementia, and he had also been diagnosed with Alzheimer's disease. Defendant did not appear at trial, but his daughter, Temple, who is her father's power of attorney, testified about matters and facts related to defendant's assets, debts, income, and expenses. Plaintiff appeared *pro se*. On 15 August 2016, the trial court entered its equitable distribution judgment and alimony order. Plaintiff appeals.

On appeal, plaintiff contends that the trial court committed reversible error by (I) entering a judgment affecting title to real property without joining all necessary parties to the action; (II) entering monetary judgments against a third-party without joining the third-party to the action; (III & IV) classifying and distributing the debts of private corporations to a husband and wife without joining the corporations as parties to the action; (V) creating a distributive award without finding that the statutory presumption of an in-kind distribution has been rebutted; and (VI) ordering the liquidation of separate property to satisfy a distributive award.

In equitable distribution cases, "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." *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (quoting Shear v. Stevens Bldg. Co., 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)).

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (internal citations omitted). "A trial court's findings of fact in an equitable distribution case are conclusive if supported by any competent evidence." *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 419, 588 S.E.2d

517, 521 (2003) (citing *Mrozek v. Mrozek*, 129 N.C. App. 43, 48, 496 S.E.2d 836, 840 (1998)).

"[E]quitable distribution is a three-step process; the trial court must (1) 'determine what is marital [and divisible] property'; (2) 'find the net value of the property'; and (3) 'make an equitable distribution of that property.' " *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (second alteration in original) (quoting *Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350 (1988)).

I

[1] Plaintiff first argues that the trial court erred in entering a judgment affecting title to real property—14212 Stewart's Bend Lane—without joining all necessary parties to the action. Plaintiff contends that because CKE Properties, Inc. was the lawful owner of 14212 Stewart's Bend Lane on the date of separation ("DOS"), the Mecklenburg County District Court lacked jurisdiction to enter its order affecting said property, and therefore, its valuation and distribution constitutes reversible error. We disagree.

In an equitable distribution action, the trial court has authority to distribute "presently owned" real and personal property acquired during the marriage and before the date of separation. N.C. Gen. Stat. § 50-20(b)(1) (2015).

"[W]hen a third party holds legal title to property which is claimed to be *marital* property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property." *Upchurch v. Upchurch*, 122 N.C. App. 172, 176, 468 S.E.2d 61, 63–64 (1996) (emphasis added) (citations omitted). *Separate* property, on the other hand, is to be considered by the trial court in making its distribution of *marital* property. *See Young v. Gum*, 185 N.C. App. 642, 648, 649 S.E.2d 469, 474 (2007) (citation omitted) (noting that the trial court is required to "consider the separate property in making a distribution of the marital property").

In the instant case, the trial court found as fact that this property was plaintiff's separate property: "On the DOS, Plaintiff/Wife owned a house and lot located at 14212 Stewart's Bend Lane, Charlotte, NC 28277 ("14212 Stewart's Bend"). 14212 Stewart's Bend is Wife's separate property, as stipulated by the parties on the FPTO [(Final Pretrial Order)]. **(FPTO Property Item 11)**." In the distribution portion of its order, the trial court ordered plaintiff to do as follows:

> b) . . . ***14212 Stewart's Bend:*** Within thirty (30) days of the date of the execution of this Judgment/Order Plaintiff/Wife shall sign a listing agreement with a realtor selected by Defendant/Husband and will take all efforts to sell 14212 Stewart's Bend for fair market value. Plaintiff/Wife will cooperate with price reductions and repair requests recommended by the real estate agent and will accept any unconditional offer made within 2% of the then asking price. All of the net proceeds shall be paid to Defendant/Husband.

Plaintiff contends that the trial court did not have jurisdiction to enter a judgment affecting 14212 Stewart's Bend Lane because it was not owned by her, but by another legal entity, CKE. In so doing, plaintiff relies on this Court's opinion in *Nicks v. Nicks*, 241 N.C. App. 487, 774 S.E.2d 365, (2015).

In *Nicks*, a husband and wife, prior to their separation, implemented an estate plan consisting of a trust and three LLCs, which eventually became a single-member LLC, "Entrust." *Id.* at 491, 774 S.E.2d at 370. The husband and wife were the only beneficiaries of the trust, and the husband managed the LLC and had the right to decide whether to make distributions of profits and assets from the trust. *Id.* at 491–92, 774 S.E.2d at 370. In the trial court's findings of fact, it determined that Entrust was marital property and ordered that its assets be distributed to the husband, but that the husband pay the wife a distributive award. *Id.* at 493–94, 774 S.E.2d at 371. On appeal, the husband argued the trial court erred in distributing Entrust to him because neither Entrust, the LLC, nor the trust itself were owned by either of the parties on the date of separation; rather, the trust, not the husband, owned a 100% interest in Entrust. *Id.* at 494–95, 774 S.E.2d at 372.

This Court agreed with the husband's argument, concluding as follows:

> [T]he Trust—which holds legal title to Entrust—was never named as a party to this action. We therefore hold that the trial court lacked jurisdiction *to order equitable distribution of Entrust. See, e.g.*, *Upchurch*, 122 N.C. App. at 176, 468 S.E.2d at 64 ("Otherwise the trial court would not have jurisdiction to enter an order affecting the title to that property.") (citation omitted).

Id. at 496, 774 S.E.2d at 373 (emphasis added). In other words, because the party—the Trust—which held legal title to the LLC—Entrust—was

not named as a party to the action in *Nicks*, the trial court lacked jurisdiction to distribute that property which an unnamed party held legal title to. *Id.*; *see also Dechkovskaia v. Dechkhovskaia*, 232 N.C. App. 350, 352–54, 754 S.E.2d 831, 834–35 (2014) (holding the trial court had no authority to classify and distribute houses which were titled in the name of the parties' minor child without joining the minor child as a party to the action).

Plaintiff's argument in reliance on *Nicks* ignores the fact that the trial court did not classify 14212 Stewart's Bend Lane as *marital* property and distribute it as such. *See Upchurch*, 122 N.C. App. at 176, 468 S.E.2d at 63–64 ("[W]hen a third party holds legal title to property which is claimed to be *marital* property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property." (emphasis added) (citations omitted)). Rather, it considered the separate property of plaintiff—CKE and its assets, including 14212 Stewart's Bend Lane—in making its distribution of the marital property, namely, in ordering plaintiff to pay a distributive award to defendant. *See Young*, 185 N.C. App. at 648, 649 S.E.2d at 474 (noting that the trial court is required to "consider the separate property in making a distribution of the marital property").

Even if it is true that there is evidence in the record to indicate that as of the DOS, CKE was the legal owner of 14212 Stewart's Bend Lane,[3] the trial court's classification of this property as plaintiff's separate property does not constitute reversible error where it was not *distributing* the property as part of the *marital* estate. *See Upchurch*, 122 N.C. App. at 176, 468 S.E.2d at 63–64. *Cf. Geoghagan v. Geoghagan*, ___ N.C. App. ___, ___, 803 S.E.2d 172, 175–76 (2017) (vacating an equitable distribution order where the trial court ordered third-party LLCs "to refrain from taking certain actions without joining them as necessary parties to the proceedings"). Rather, the trial court was considering plaintiff's *separate* property in distributing the marital estate, specifically considering plaintiff's ability to pay a distributive award to defendant. As the "100% Owner" of CKE, which was formed in 2002 and whose "[o]nly purpose . . . is to own the real estate she purchased through a 1031 exchange using her separate funds," the trial court was allowed to consider CKE's assets, including 14212 Stewart's Bend Lane, in ordering plaintiff to sell the property in order to pay the distributive award. Defendant's argument is overruled.

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3. The supplement to the record purports to show that on 25 September 2003, 14212 Stewart's Bend Lane was transferred from CKE to plaintiff for "zero amount," and on 12 November 2003, the property was granted from plaintiff back to CKE.

II

[2] Next, plaintiff contends the trial court erred by entering monetary judgments against a third-party, namely, plaintiff's son, Gentry Kirby, without joining him to the action. Plaintiff contends that because Kirby was the lawful owner of 14228 Stewart's Bend Lane on the DOS, the trial court lacked jurisdiction to enter a judgment affecting title to 14228 Stewart's Bend Lane or to enter an alternative money judgment against Kirby because defendant did not assert a claim against him in this action. We agree that the trial court erred in entering an alternative money judgment against Kirby.

Defendant contends that although the trial judge did not expressly state in her ruling that she was applying the factors to be considered in analyzing a transfer contended to be voidable under the Uniform Fraudulent Transfer Act, N.C. Gen. Stat. §§ 39-23.1 (2013) *et seq.*,[4] it is nonetheless clear that the facts in this case fall within the statute and the result is that plaintiff's transfer was fraudulent and thus, voidable. Defendant also argues that Kirby was not required to be made a party to this action in order for the trial court's remedies to be applied because Kirby did not take the property in good faith or for a reasonably equivalent value. *Cf.* N.C.G.S. § 39-23.8(a) (2013) ("A transfer or obligation is not voidable under G.S. 39-23.4(a)(1) against a person that took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.").

The Uniform Fraudulent Transfer Act was designed to prevent fraudulent transfers and allow a creditor to cancel a transfer even after it has been made. *See generally id.* §§ 39-23.1 *et seq.* Specifically, N.C. Gen. Stat. § 39-23.4(a)(1) establishes as fraudulent any transfer of property that is made with the intent to hinder, delay, or defraud a creditor. *Id.* § 39-23.4(a)(1). A "creditor" is defined broadly as "a person who has a claim." N.C.G.S. § 39-23.1(4); *see* Note, Benjamin M. Ellis, *Protecting the Right to Marital Property: Ensuring a Full Equitable Distribution Award with Fraudulent Conveyance Law*, 30 Cardozo L. Rev. 1709, 1712 (2009) (proposing that "a spouse should be considered a creditor—and thus have recourse to fraudulent conveyance law—for the limited purpose of setting aside conveyances that would otherwise prevent the spouse from receiving a full equitable distribution award"). The

4. Plaintiff transferred 14228 Stewart's Bend Lane to Kirby on or about 30 May or 1 June 2015. The version of the Uniform Fraudulent Transfer Act which is currently in effect—the Uniform Voidable Transfer Act—did not become effective until 1 October 2015. *See* N.C. Sess. Laws 2015-23, § 1, eff. Oct. 1, 2015. Since then, N.C.G.S. §§ 39-23.1 *et seq.* have been amended again. *See* N.C. Sess. Laws 2017-204, § 3.3(a)–(b), eff. Aug. 3, 2017.

remedies available to a creditor include "[a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;" "[a]n attachment . . . against the asset transferred"; or "[a]ny other relief the circumstances may require." N.C.G.S. § 39-23.7(1), (2), (3)c.

A conveyance will be deemed fraudulent and thus void in either of the following instances:

> If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee . . . .
>
> . . . .
>
> . . . If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the *grantor*, participated in by the *grantee* or of which he he [sic] has notice, it is void.

Norman Owen Trucking, Inc. v. Morkoski, 131 N.C. App. 168, 173, 506 S.E.2d 267, 271 (1998) (citation omitted) (quoting *Aman v. Walker*, 165 N.C. 224, 227, 81 S.E. 162, 164 (1914)).

> In determining intent [of the grantor] under subdivision (a)(1) of this section, consideration may be given, among other factors, to whether:
>
> (1) The transfer or obligation was to an insider[5];
>
> . . . .
>
> (3) The transfer or obligation was disclosed or concealed;
>
> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> . . . .
>
> (12) The debtor made the transfer or incurred the obligation without receiving a reasonable equivalent value in exchange for the transfer or obligation . . . .

N.C.G.S. § 39-23.4(b).

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5. " 'Insider' includes: a. If the debtor is an individual, 1. *A relative of the debtor* . . . ." N.C.G.S. § 39-23.1(7)a. (emphasis added).

At trial, plaintiff, who appeared *pro se*,[6] argued as follows:

> May 30, 2015 I gifted [14228 Stewart's Bend Lane] to [Kirby]. I was going to give it to him anyway. . . . I had discussed gifting it earlier. But I gifted it now because it was the time to do it, and they will tell you it was because I did not want to sell it and split the money. I couldn't have ever sold this this fast, nor did I feel the necessity to kick my family out.

Evidence in the record also suggests that defendant was not made privy to this transfer until after it was accomplished.

The trial court found as follows regarding the transfer of 14228 Stewart's Bend Lane to Kirby:

> 74. In 2015, Defendant/Husband asked Plaintiff/Wife to sell 14228 Stewart's Bend so as to eliminate the marital debt and distribute the net proceeds between them. Plaintiff/Wife refused.
>
> 75. Shortly thereafter, Plaintiff/Wife "gifted" the home to her son Gentry Kirby ("Mr. Kirby"), who was well aware of this divorce proceedings [sic] and the contentions of the parties about the distribution and payment of real property and debts. At the time of the gift, 14228 Stewarts Bend [sic] was worth $390,000 resulting in a $100,000 "gift" of equity to Mr. Kirby.
>
> 76. The Court finds that this transfer/gift of valuable real property by Plaintiff/Wife to Mr. Kirby constitutes a fraudulent transfer to defraud creditors, that Mr. Kirby was not a good faith purchaser for value (in an arms' length transaction) and that the home and/or the equity contained therein is within this Court to consider in determining the equitable distribution of the property and/or the distributive award that Plaintiff/Wife may be required to pay. *Nytco Leasing, Inc. v. Southern Motels, Inc.*, 40 N.C.App. 120, 252 S.E.2d 826 (1979); *McCanless v. Flinchum*, 89 N.C. 373 (1883) (when property is sold to a family member for less than reasonable value and the grantor is unable to pay his debts, the close family relationship is strong evidence of

6. Plaintiff was represented from 2013 through June 2015. She paid her attorney $227,993.00 for his representation in this case, but her attorney withdrew in June 2015.

> fraudulent intent). Mr. Kirby does not need to be a party to this lawsuit in order for this Court to consider this property and the disposition thereof as part of this litigation.

The trial court ordered plaintiff as follows:

> 198. . . . The Court finds [plaintiff] has the ability to pay the distributive award only as follows:
>
> . . . .
>
> c) ***14228 Stewart's Bend:*** Plaintiff/Wife can obtain a deed to this house back from Mr. Kirby, sell the property and distribute the net proceeds to Defendant/Husband or she can have Mr. Kirby pay to Defendant/Husband $90,000 which represents the majority of equity he gained during the fraudulent "gift/transfer" to him of this property.
>
> . . . .
>
> 6. . . . . Plaintiff/Wife shall pay Defendant/Husband as follows:
>
> . . . .
>
> c) ***14228 Stewart's Bend:*** Within sixty (60) days of the date of the execution of this Judgment/Order Plaintiff/Wife shall sign a listing agreement with a realtor selected by Defendant/Husband and will take all efforts to sell this home for fair market value; *OR Mr. Kirby will pay to Defendant/Husband $90,000 which represents the majority of the equity he gained during the fraudulent "gift/transfer" to him of this property.*

(Emphasis added).

In the instant case, the record indicates evidence of the following statutory factors in the transaction between plaintiff and Kirby: (1) the transfer of property to an insider, her son, *see id.* § 39-23.4(b)(1); (2) the transfer was concealed from defendant, *see id.* § 39-23.4(b)(3); (3) the property was gifted to Kirby on 30 May 2015, after 17 February 2014, when plaintiff filed her complaint, and also after 29 April 2014, when defendant filed his answer and counterclaim for equitable distribution, *see id.* § 39-23.4(4); and (4) plaintiff made the transfer without receiving

a reasonable equivalent value in exchange—the transfer to her son was a "gift," *see id.* § 39-23.4(12). Accordingly, the trial court correctly concluded that the transfer from plaintiff to Kirby "constitute[d] a fraudulent transfer to defraud creditors, [and] that Mr. Kirby was not a good faith purchaser for value . . . ." Thus, the trial court also had jurisdiction to order that the transfer of the deed from plaintiff to Kirby be avoided.

[3] However, with regard to the trial court's alternative order that "Mr. Kirby pay to Defendant/Husband $90,000 which represents the majority of equity he gained during the fraudulent 'gift/transfer' to him of th[e] [14228 Stewart's Bend] property[,]"we agree with plaintiff that the trial court lacked jurisdiction to enter such an order against Kirby, a non-party to this action.

"Pursuant to the Equitable Distribution Act, the trial court is only permitted to distribute marital and divisible property." *Mugno v. Mugno*, 205 N.C. App. 273, 277, 695 S.E.2d 495, 498 (2010) (citations omitted). "An equitable distribution order is not the proper means to hold . . . a third party[] responsible for a debt owed . . . ." *Id.* (holding that the trial court erred by ordering the husband's corporation, a third party, to pay funds to the wife in an equitable distribution action where the corporation was determined to be separate property). Accordingly, we hold the trial court erred by ordering, even in the alternative, Kirby, a third party, to pay funds to defendant. Therefore, we vacate in part paragraph 6 of the equitable distribution order so that it reads as follows:

> 6. . . . Plaintiff/Wife shall pay Defendant/Husband as follows:
>
> . . . .
>
> c) **14228 Stewart's Bend:** Within sixty (60) days of the date of the execution of this Judgment/Order Plaintiff/Wife shall sign a listing agreement with a realtor selected by Defendant/Husband and will take all efforts to sell this home for fair market value; ~~OR Mr. Kirby will pay to Defendant/Husband $90,000 which represents the majority of equity he gained during the fraudulent "gift/transfer" to him of this property.~~

III & IV

[4] Plaintiff next argues the trial court erred by distributing the debts of private corporations to a husband and wife without joining the corporations as parties to the action. Specifically, plaintiff claims the trial court could not enter a judgment in favor of Temple, Inwood Properties, Inwood Land, or St. Vrain because these entities were not parties to this case. We disagree.

As a threshold matter, the trial court did not "enter a money judgment in favor of Elizabeth Temple"; rather, it distributed certain marital debts to defendant, *see infra*, and provided for a mechanism to ensure those marital debts would get paid:

> 38. In the event there is any cost or expense associated with the sale [of the Constitution Lot, a lot located in Ajiic, Mexico and classified as marital property], Plaintiff/Wife shall be responsible for the cost or expense. In the event that there are any net proceeds from the sale, *the entirety of the net proceeds will be distributed to Defendant/ Husband which funds will first be paid to Ms. Temple to satisfy Defendant/ Husband's debt to Ms. Temple if it has not yet been paid.* If the debt to Ms. Temple has already been satisfied, or there are additional net proceeds from the sale above the amount needed to satisfy the debt to Ms. Temple, the remaining net proceeds shall be paid directly to any company to which Defendant/Husband still owns [sic] a liability (as provided hereinafter).

Notably, plaintiff's argument ignores the trial court's previous two findings of fact, which indicate that Temple, as defendant's power of attorney, testified at trial that she would "take on [the] task" of selling the Constitution Lot (a marital property located in Mexico and distributed to defendant for the purpose of selling it) on behalf of defendant. The Court further ordered that Temple was authorized "to contract with real estate agents, notaries, and the like in Mexico to accomplish the sale of the Constitution Lot at fair market value," and it is these administrative costs which the trial court was presumably contemplating in Finding of Fact No. 38 when it referred to any debts defendant might need to repay to Temple. Plaintiff's argument on this point is overruled.

Plaintiff also challenges distributions to defendant's various companies. Plaintiff argues that the trial court was without jurisdiction to enter a judgment in favor of the various companies and/or that the trial court was without authority to classify and distribute debt as marital debt,

when plaintiff claims defendant alone misappropriated those funds. We disagree.

"[F]or the purpose of an equitable distribution, a marital debt is defined as a debt incurred during the marriage *for the joint benefit of the parties*." *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987) (emphasis added) (citation omitted).

With regard to these debts—which plaintiff contends are not marital or divisible property—the trial court found as fact the following:

> 13. After Ms. Temple took over as President of Inwood Properties and the remaining Companies, she . . . reviewed the books of the companies and determined that *Defendant/Husband and Plaintiff/Wife were borrowing money from the Companies* to the detriment of the Companies themselves and to the other shareholders. After realizing that the Companies could no longer afford to pay Defendant/Husband the distributions and salary he was enjoying or keep loaning Defendant/Husband and Plaintiff/Wife money to afford their personal expenses they arranged for the parties to pay the Companies back the debts that had been accumulated for their own personal benefit.
>
> 14. The Companies continued to loan money to the parties in the short run, but it is clear that the intent was for these loans to be repaid and the steady stream of money to be paid to the parties or for their personal expenses was to be cut off.
>
> 15. The loan amounts are outlined *infra*, but each of these loans were made during the parties' marriage and *most of the money can be traced through deposits directly into the parties' personal joint bank account*, to pay off personal credit cards, to purchase real estate in their personal name, and to expenses that had to be theirs personally.
>
> 16. Plaintiff/Wife argued that this was not the case and if it was she wasn't aware of the loans or that the money was being paid to Defendant/Husband (and her) in the form of a loan that was to be paid back.
>
> 17. *The Court does not believe Plaintiff/Wife's position is credible. This position of doubt is fostered by the fact that Plaintiff/Wife participated in securing loans in her*

> *individual names [sic] and in Defendant/Husband's name (secured by her real property).*
>
> . . . .
>
> 19. *The Court's concerns about Plaintiff/Wife's credibility impacts [sic] all remaining issues in this case.*

(Emphasis added).

"As fact finder, the trial court is the judge of the credibility of the witnesses who testify. The trial court determines what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom." *Cornelius v. Helms*, 120 N.C. App. 172, 175, 461 S.E.2d 338, 340 (1995) (citing *Gen. Specialties Co., Inc. v. Nello L. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979)). Accordingly, where this Court defers to the trial court's finding that plaintiff's testimony was not credible, and where competent evidence in the record supports the trial court's classification of these debts as marital property, *see Miller v. Miller*, 97 N.C. App. 77, 81, 387 S.E.2d 181, 184–85 (1990) (citation omitted) (noting that findings are binding on appellate courts when supported by competent evidence in equitable distribution proceedings), the trial court did not err in distributing the marital debt. The following evidence in the record supports the trial court's classifications of these debts, secured by the following properties and/or companies, as marital property.

1. The Strand Debt ($376,900.00).

At trial, Temple testified as follows: "December 2006, a line of credit was taken out in [plaintiff's] name on a company asset called 1300 The Strand. The loan amount was $377,000. The proceeds – the total proceeds are deposited into Inwood's account, and then *$109,990 is deposited into the marital account in a loan form . . . .*" (Emphasis added).

2. The Ranch Debts ($82,919.00, $92,927.00, $70,026.00, and $198,768.00).

Temple testified as follows regarding the loans secured by The Ranch property: (1) "[I]n 2002 [defendant] . . . gets a loan against [the] ranch, which was previously completely debt free, for $205,000. And as you can see, $79,290.46 of those proceeds *are directly transferred to the marital account.*" (Emphasis added). (2) "Another loan is taken out against the ranch for [$]250,000, and of these – and pretty much the entire proceeds are deposited directly into Inwood's account. And then shortly after, two deposits totaling [$]151,080 *are deposited into the marital account.*" (Emphasis added). (3) "In May 2005 another loan is taken against [the]

. . . ranch for $200,000, and it's actually an equity maximizer account, so it can be drawn on whenever they want, and it's drawn up to -- *$130,000 of draws occurred in 2005*." (Emphasis added). (4) "[L]ater in 2012 a part of the loan that was taken out on the ranch property back in 2005 was classified as [defendant's], as loan -- money loaned to [defendant] and [plaintiff] because that amount from those loans *was actually deposited into their marital account*." (Emphasis added).

3. Inwood Properties Debt ($422,368.00).

Temple read defendant's contentions into the record regarding the Inwood Property loan as follows:

> A. (Reads.) "*Throughout the marriage husband and wife borrowed money from Inwood Properties for their personal expenses.* This was money husband was not entitled to as the officer or shareholder of the company, and as of the date of separation this was the total. After the date of separation husband sold his stock in Inwood Properties to satisfy this debt in part and will have to pay the tax consequences of approximately $80,000 due to the stock repurchase.
>
> Q. And what is the amount that husband contends is due as of September 3, 2013?
>
> . . . .
>
> A. . . . $422,368.

(Emphasis added).

4. Inwood Land Debt ($258,737.00).

Temple testified about the Inwood Land Debt as follows:

> Q. . . . And what did Inwood Land do and how was it that [defendant] was able to draw money from the Inwood Land accounts?
>
> A. Inwood Land is our operating company in Charlotte. It was created as a North Carolina LLC so that we could operate our office.
>
> Q. Okay.
>
> A. . . . [M]oney is deposited monthly into Inwood Land's account and then we run the operating expenses for the

> Charlotte office out of that, and if there was excess money it, was borrowed. *[Defendant] later borrowed it from Inwood Land and deposited it directly into the marital account.*
>
> Q. Okay. And according to the QuickBooks records that amount was -- well, read that into the record.
>
> A. That amount at date of separate [sic] is $258,737.

(Emphasis added).

5. St. Vrain Debt ($143,285.00).

Temple also testified as follows regarding the debt secured by the St. Vrain company:

> Q. . . . [D]id [defendant] also borrow money from [St. Vrain] throughout the years?
>
> A. Yes. . . . [I]t starts in 2003 with a direct transfer to [plaintiff's] personal account for $3500. And then this continues in various forms. And then it's sometimes paid back, but it carries a significant balance until December 2011 . . . .
>
> . . . .
>
> Q. . . . And what was the amount that was owed to St. Vrain on date of separation?
>
> A. $143,285.

Lastly, with regard to all of the debts accrued by plaintiff and defendant and secured against various separately-owned companies and properties, Temple testified as follows:

> Q. . . . In 2011, when you started having discussions with [plaintiff] and [defendant] did you explain to her, . . . that [defendant] was borrowing from this company to this company to this company to this company to pay their living expenses?
>
> A. Yes, I believe we all talked about it in terms of robbing Peter to pay Paul.
>
> Q. And was there -- did she ever dispute or say well, at that point well, when did that -- he's a shareholder, he can take what he wants to take, that's his business, not mine?
>
> A. No.

As the foregoing testimony and other examples from the record demonstrate, the trial court was not, as plaintiff contends, "classif[ying] and distribut[ing] the debts of private corporations." Rather, competent evidence in the record shows that the trial court was properly classifying and distributing marital debt: the trial court found that defendant took advantage of his position as a stockholder in various companies to borrow money which was used for the purpose of funding his and plaintiff's extravagant lifestyle. Indeed, most of the loan proceeds can be traced to deposits made directly into the parties' personal bank accounts. Accordingly, the trial court had authority and jurisdiction to distribute to the parties the debts owed to the companies as marital debt. Plaintiff's argument is overruled.

V

[5] Plaintiff argues the trial court erred by creating a distributive award without finding that the statutory presumption of an in-kind distribution had been rebutted. Specifically, plaintiff contends that it failed to make findings of fact to justify a distributive award. We disagree.

"[I]t shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable." N.C.G.S. § 50-20(e). "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." *Id.* Therefore, "in equitable distribution cases, if the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination." *Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004) (citing *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999)). "In order to rebut the presumption of an in-kind distribution, *the equitable distribution judgment must contain a finding, supported by evidence in the record, that an in-kind distribution would be impractical.*" *Wirth v. Wirth*, 193 N.C. App. 657, 669, 668 S.E.2d 603, 611 (2008) (emphasis added) (citations omitted).

In the instant case, the trial court concluded that "[i]n order to accomplish the equitable distribution Plaintiff/Wife is required to pay a distributive award of Eight Hundred Twenty Four Thousand Two Hundred Ninety Four Dollars and no/100 ($824,294)." This conclusion was preceded by extensive findings of fact regarding distributional factors required to be considered per N.C. Gen. Stat. § 50-20(c), which indicate and detail the reasoning behind the trial court's conclusion—albeit an inferred one—that an in-kind distribution would be "impractical":

(1) The income, property, and liabilities of each party at the time the division of property is to become effective. Neither party is employed. Plaintiff/Wife receives social security, a pension, and she lives with her daughter (who could and should assist in the sharing of her living expenses). Defendant/Husband receives social security, a salary of $60,000 (as compensation for his service as Chairman of the Board), income from one trust, and one oil royalty. *As a result of this equitable distribution Defendant/Husband will have more debt than property and Plaintiff/Wife will have to liquidate her property to pay the distributive award.*

. . . .

(3) The duration of the marriage and the age and physical and mental health of both parties. The parties were married for 15 years and were in their fifties when they married. Defendant/Husband is in his mid-seventies[,] has suffered a serious heart attack[,] and now suffers from Alzheimer's disease. He will not be in a condition to seek outside employment again in his life and the likelihood of his needing increased medical attention in the coming years is good. Plaintiff/Wife is in her mid-seventies and in good health. She is not working now but that is by choice. She is taking classes to become a Guardian Ad Litem.

. . . .

(5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property. Plaintiff/Wife has a small separate retirement plan. Defendant/Husband may receive distributions as a result of his shared ownership in a number of Companies.

. . . .

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage. Defendant/Husband contributed time, money and resources to Plaintiff/Wife's separately owned real estate.

(9) The liquid or nonliquid character of all marital property and divisible property. *Neither party has any liquid marital property left. Plaintiff/Wife spent her liquid assets on her attorney in this case.*

. . . .

> (11) The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor. *Defendant/Husband is going to owe substantial taxes as a result of the stock he sold to pay down marital debt.* Plaintiff/Wife paid taxes as a result of investment assets she liquidated after the date of separation.
>
> (12) Any other factor which the court finds to be just and proper. *There was no choice but to distribute all debts to Defendant/Husband in [t]his case which results in a heavy burden he may never be able to pay before his death and a distributive award owed by Plaintiff/Wife that she may never be able to pay before her death.*

(Emphasis added).

While the trial court did not specifically make a finding which stated that an equitable distribution of the marital property in-kind would be impractical, *see id.*, the trial court's many findings of fact, especially those regarding the non-liquid character of the parties' assets, are sufficient to permit appropriate appellate review of this issue, *see Plummer v. Plummer*, 198 N.C. App. 538, 543, 680 S.E.2d 746, 750 (2009) ("[T]he degree of specificity required in a court order pertaining to equitable distribution cannot be established with scientific precision. However, the court's findings of fact must be 'sufficiently specific to allow appellate review.' " (alteration in original) (internal citation omitted) (quoting *Rosario v. Rosario*, 139 N.C. App. 258, 267, 533 S.E.2d 274, 279 (2000)). Because the trial court's findings of fact are "sufficiently specific to allow appellate review," *see Rosario*, 139 N.C. App. at 267, 533 S.E.2d at 279 (citation omitted), we conclude that they support its distributive award, and the trial court did not abuse its discretion in ordering plaintiff to pay a distributive award of $824,294.00. Plaintiff's argument is overruled.

VI

[6] Lastly, plaintiff argues the trial court erred in ordering the liquidation of separate property to satisfy the court's distributive award.

Specifically, plaintiff argues the "trial court has no authority to distribute separate property[.]" As this is a mischaracterization of what the trial court did, we disagree.

Generally, "[f]ollowing classification, property classified as marital is distributed by the trial court, *while separate property remains unaffected*." *McLean v. McLean*, 323 N.C. 543, 545, 374 S.E.2d 376, 378 (1988) (emphasis added) (citing *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 232 (1987)). As stated in Section I, *supra*, in ordering the liquidation of plaintiff's separate property, it was not distributing that property, but rather "considering" it in making its other distributions, particularly the distribution of the majority of the marital debt to defendant and ordering plaintiff to pay a distributive award. *See Young*, 185 N.C. App. at 648, 649 S.E.2d at 474 (noting that the trial court is required to "consider the separate property in making a distribution of the marital property").

"The trial court is required to make findings as to whether the defendant has sufficient liquid assets from which he can make the distributive award payment." *Urciolo*, 166 N.C. App. at 507, 601 S.E.2d at 908 (citing *Embler v. Embler*, 159 N.C. App. 186, 188–89, 582 S.E.2d 628, 630 (2003)). In the instant case the trial court did just that, and in concluding that plaintiff is "required to pay a distributive award of [$824,294.00]" to defendant, the trial court found as follows:

> [Plaintiff] [does not have] the means and ability to pay this amount in full. *The Court finds that she has the ability to pay the distributive award only as follows:*
>
> . . . .
>
> b) ***14512 Myer's Mill & 14212 Stewart's Bend:*** Plaintiff/Wife shall be entitled to keep 14512 Myer's Mill so that she may continue to reside there. Plaintiff/Wife will sell 14212 Stewart's Bend and pay the net proceeds to Defendant/Husband.
>
> c) ***14228 Stewart's Bend:*** Plaintiff/Wife can obtain a deed to this house back from Mr. Kirby, sell the property and distribute the net proceeds to Defendant/Husband or she can have Mr. Kirby pay to Defendant/Husband $90,000 which represents the majority of equity he gained during the fraudulent "gift/transfer" to him of this property.

(Emphasis added).

Accordingly, where the trial court was properly considering—not distributing—plaintiff's separate property in distributing the marital estate, specifically considering plaintiff's ability to pay a distributive award to defendant, the trial court did not abuse its discretion in ordering plaintiff to liquidate separate property in order to pay the distributive award. Defendant's argument is overruled.

The equitable distribution judgment and order is

AFFIRMED IN PART; VACATED IN PART.

Judge ARROWOOD concurs.

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

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

I concur in the portions of the Majority's opinion concluding: (1) Gentry Kirby ("Kirby") was a necessary party for the alternate money judgment entered against him; (2) the trial court properly distributed certain marital debts to Defendant; and (3) the trial court made proper findings for a distributive award. However, I respectfully dissent in regard to the Majority's determination that neither CKE Properties, Inc. ("CKE") nor Kirby were otherwise necessary parties.[1]

"A 'necessary party' is a party that 'is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without its presence as a party.' " *Geoghagan v. Geoghagan*, ___ N.C. App. ___, ____, 803 S.E.2d 172, ___ (2017) (quoting *Booker v. Everhart*, 294 N.C. 146, 156, 240 S.E.2d 360, 365-66 (1978)). "This Court has also described a necessary party as 'one whose interest will be directly affected by the outcome of the litigation.'" *Id.* at ___, 803 S.E.2d at ___ (quoting *Begley v. Emp't Sec. Comm.*, 50 N.C. App. 432, 438, 274 S.E.2d 370, 375 (1981)).

We recently addressed necessary parties in an equitable distribution action in *Geoghagan*. ___ N.C. App. ___, 803 S.E.2d 172. In that case, plaintiff and defendant owned an incorporated business, which was the sole member of four limited liability companies (subsidiary LLCs). *Id.*

1. Although the Majority concluded Kirby was a necessary party in regard to the alternate money judgment entered against him, the Majority concluded Kirby was not a necessary party in regard to the transfer of deed for his property at 14228 Stewart's Bend.

at ___, 803 S.E.2d at ___. Plaintiff "acted as the manager of each of the subsidiary LLCs of which [the corporation] was a member." *Id.* at ____, 803 S.E.2d at ___. The trial court distributed all of the shares of the corporation to plaintiff and ordered plaintiff to pay a distributive award. *Id.* at ___, 803 S.E.2d at ___. Additionally:

> [a]s the court had distributed [the corporation] to [p]laintiff, it ordered [p]laintiff to make "good faith efforts to substitute himself for [defendant] as guarantor of all debts and obligations of [the corporation]," and further ordered [p]laintiff to "indemnify [defendant], and hold her harmless, from all liability relating to" a bank loan made to [the corporation], all [of the corporation's] leases, all agreements between [the corporation] and its various vendors, and all other debts and liabilities of [the corporation].

Id. at ___, 803 S.E.2d at ___. The trial court further ordered the corporation to not pay plaintiff any salary, bonuses, or other compensation above a sum certain until plaintiff paid the distributive award. *Id.* at ___, 803 S.E.2d at ___.

On appeal, plaintiff argued the corporation and subsidiary LLCs were necessary parties. *Id.* at ___, 803 S.E.2d at ___. This Court stated "[w]hile couched in terms suggesting the equitable distribution order was directed at [p]laintiff, the trial court clearly restricted the ability of [the corporation] and the subsidiary LLCs to act." *Id.* at ___, 803 S.E.2d at ___. Accordingly, we held the corporation and subsidiary LLCs were necessary parties and vacated and remanded the order. *Id.* at ___, 803 S.E.2d at ___.

The Majority concludes the trial court did not distribute the property at 14212 Stewart's Bend and 14228 Stewart's Bend as part of the marital estate and, instead, merely considered the separate property in distributing the marital estate. I disagree. Instead of considering the separate property, the trial court improperly restricted the abilities and rights of CKE and Kirby. Pursuant to the equitable distribution judgment and order, CKE must list the property at 14212 Stewart's Bend and pay proceeds to Defendant. Additionally, Kirby must transfer title of 14228 Stewart's Bend to Plaintiff, although the trial court determined this property was Plaintiff's separate property. While, initially, the trial court seemingly only considered the 14228 Stewart's Bend property as part of the distributive award, the trial court concluded by ordering Plaintiff to list the property and take all efforts to sell the home for fair market value. Based on these orders, CKE's and Kirby's "interest[s] will

be directly affected by the outcome[.]" *Begley*, 50 N.C. App. at 438, 274 S.E.2d at 375 (citation omitted).

While I agree *Nicks v. Nicks*, 241 N.C. App. 487, 774 S.E.2d 365 (2015) and *Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 754 S.E.2d 831 (2014) govern when the trial court distributes property owned by a third party as marital property, and that is not the distribution issue at hand here, nonetheless, the trial court entered an equitable distribution judgment and order affecting the rights and interests of parties not joined in the action.

This error is exemplified by the Majority's analysis of the transfers to CKE and Kirby under Chapter 39, Article 3a of the North Carolina General Statutes, the Uniform Fraudulent Transfer Act, ("UFTA") (now the Uniform Voidable Transactions Act). The Majority goes to great length to illustrate that the transfers fall within the UFTA, and I agree with the analysis contained therein, but the Majority does not cite a single case where a transfer was rescinded without the transferee being a party to the litigation. By requiring non-parties to act and effectively rescind the transfers, the trial court has permanently barred CKE and Kirby from raising any defenses or protections they may have under N.C.G.S. §§ 39-23.8 (2015) or 39-23.9(3) (2015). More troubling is the fact that if CKE or Kirby had been properly joined, they could have exercised their rights to a jury trial in accordance with Article I, § 25 of the North Carolina Constitution. N.C. Const. art. I, § 25.

CKE and Kirby are necessary parties to this action, and as in *Geoghagan*, the trial court lacked the power to require their action or affect their rights without first being joined as parties. The trial court's error is compounded by the fact that it prevents non-parties from raising defenses and protections under the UFTA or exercising their constitutional rights to a jury trial. Accordingly, I would vacate and remand the trial court's order for further proceedings that do not require the actions of or affect the rights of non-parties, or for joinder of the necessary parties.

COUNTY OF DURHAM, BY AND THROUGH DURHAM DSS, EX REL: SELEMA ALSTON CARETAKER SHARON Y. BREWER MOTHER, PLAINTIFFS

v.

OMEGA HODGES, DEFENDANT

No. COA17-71

Filed 2 January 2018

1. Appeal and Error—conditional petition for writ of certiorari—civil contempt—trial court divested of jurisdiction

The Court of Appeals granted defendant's conditional petition for writ of certiorari in a civil contempt case to vacate a 17 June 2016 order where the trial court was divested of jurisdiction before the order was entered based on defendant timely appealing from the trial court's 14 June 2016 order.

2. Contempt—civil contempt—child support—sufficiency of findings of fact—ability to work—reasonable measures

The trial court erred in a civil contempt case by entering a 14 June 2016 order that contained no findings of fact or other substantive content showing that defendant father had the ability or could take reasonable measures to work to pay child support, despite the undisputed evidence from both of his physicians that his medical condition made him incapable of gainful employment.

Appeal by defendant from orders entered 14 June 2016 and 17 June 2016 by Judge Fred Battaglia in District Court, Durham County. Heard in the Court of Appeals 16 May 2017.

Office of the County Attorney, by Senior Assistant County Attorney Geri Ruzage, for plaintiffs-appellees.

Reece & Reece, by Mary McCullers Reece, for defendant-appellant.

STROUD, Judge.

Defendant Omega Hodges ("defendant") appeals from the trial court's civil contempt commitment order entered 14 June 2016 and petitions for certiorari as to the trial court's order entered 17 June 2016. On appeal, defendant argues that the trial court erred by finding that he had the ability to comply with the child support order and purge condition because the trial court's findings were not supported by competent evidence. Because defendant timely appealed from the trial court's

14 June 2016 order, the trial court was divested of jurisdiction to enter the 17 June 2016 order. Thus, for reasons explained in more detail below, we vacate the 17 June 2016 order and reverse the 14 June 2016 order.

I. Facts

Defendant entered into a voluntary child support order in 1987. On 23 November 2015, the Durham County Child Support Enforcement Office filed a motion for order to show cause on behalf of plaintiff Selema Alston[1]. The motion noted that defendant was in arrears of $7246.88 and that the last payment was received in July 2014. An order to appear and show cause was subsequently signed that same date, 23 November 2015.

On 25 February 2016, a hearing was held, and the trial court inquired into defendant's current employment and medical conditions that may interfere with his ability to obtain and maintain employment. Defendant testified that he was currently unemployed and that he had last held employment in June 2014 at Church's Chicken, but it ended because of his disability. Defendant presented a letter dated for the previous day, 24 February 2016, from his primary care physician, Dr. Kristin Ito, describing defendant's medical issues. Defendant's counsel asked for a continuance in order to obtain a subpoena for Dr. Ito in order to verify the contents of the letter. The trial court granted the request.

The hearing resumed on 14 June 2016. The transcript of that hearing has not been provided on appeal because the recordings were found to have no discernible audio, but a reconstruction of the testimony presented at that hearing is in the record. The reconstruction states the following:

> **Reconstruction of testimony presented 14 June 2016:**
>
> Dr. Eugenia Zimmerman practiced at Triangle [Orthopedic] Associates. She testified by telephone.
>
> Dr. Zimmerman evaluated [defendant's] condition on 31 October 2014. [Defendant] presented with shoulder pain, degeneration of the cervical intervertebral disc, and cervical myelopathy. He had no feeling in his hands and was unable to hold things or stand up for prolonged

1. Plaintiff Sharon Brewer is the child's biological mother, and plaintiff Selema Alston was the child's caretaker. The child resided with both plaintiff Brewer and plaintiff Alston during her minority. Durham County filed motions on behalf of both women throughout this case, and we collectively refer to all of these parties as "plaintiffs" throughout this opinion for ease of reading.

periods of time. As of the time of the visit, [defendant's] condition prevented him from maintaining gainful employment. When asked to consider whether [defendant] could hold a position such as greeter at Walmart if Walmart were willing to accommodate his medical condition, Dr. Zimmerman testified that the requirement of standing for extended periods of time would likely pose a problem. Surgery might have slowed the worsening of the condition, but could not have alleviated the problem. [Defendant] did not have medical insurance at the time of his visit.

Dr. Kristin Ito had a general medical practice at Lincoln Community Health Center. She evaluated [defendant] on 24 February 2016. Dr. Ito also testified by telephone.

Dr. Ito testified that her 24 February 2016 letter and notes were based largely on Dr. Zimmerman's previous diagnosis. When she saw [defendant], his condition had worsened. [Defendant] was in constant pain and took numerous medications that interfered with his ability to function. He was not able to maintain gainful employment.

[Defendant] testified that he did not have feeling in his hands, that he had trouble standing, and that his medications made it hard for him to function. His last job had been at Church's Chicken in 2014. He had been able to work there for only five hours per week because of his medical condition. He was terminated from Church's and had not been able to perform even basic janitorial services since that time. [Defendant] had little education and had never held any type of work other than janitorial. He had applied for jobs, but had not been offered employment anywhere.

[Defendant] lived with his parents. He had no income. He did not smoke or drink and relied on friends to drive him to appointments and court. He "could not remember" the last time he had any money. [Defendant] lived on food stamps and got his clothes from a local clothing closet. Only in 2016, he had gotten back on Medicaid and begun seeking medical treatment again.

Dr. Ito's letter, dated 24 February 2016, notes that she saw defendant on that date as a follow up for his chronic neck, back, and shoulder

pain. She explained his prior diagnosis through Triangle Orthopedics and noted that their evaluation found his issues were likely to progress and concluded that defendant "is not able to maintain gainful employment as a result of this disability." Dr. Ito referred defendant back to the orthopedic doctor for further treatment.

DSS presented no evidence other than the records of defendant's missed support payments.

On 14 June 2016, the same day as the hearing, the trial court signed and filed a "Commitment Order for Civil Contempt Child Support," directing the sheriff to take defendant into custody immediately and "remain in custody until he/she purges himself/herself of contempt by paying into the office of the Clerk of Superior Court" the sum of $1,000.00. This order is a form order, AOC-CV-603, Rev. 3/03. None of the boxes on the form are checked. The court order upon which contempt was based is not identified. All additions to the form are handwritten. The only blanks filled in are the county, Durham; the court file number; the defendant's name; the date; the trial judge's signature; and "Purge $1000.00 or serve 90 days" which appears in the section of the form for "additional findings." There are no findings of fact. The portion of the form at the bottom sets a hearing date for review on 19 July 2016.

Defendant filed a motion to stay execution of judgment on 15 June 2016, alleging that a "written order" had not yet been filed regarding the 14 June 2016 hearing and arguing that defendant had no ability to comply with the judgment because he is "unemployed, on food stamps and other public assistance, without support from any friends or family (with the exception that his parents allow him to live with them rent free), and with a substantial disability that inhibits his ability to obtain and maintain employment." But defendant's counsel must have been aware that some sort of written order had been filed, since he also filed a notice of appeal on 15 June 2016 which specifically identified the 14 June 2016 order. Most likely he was aware the trial court intended to enter another order with detailed findings of fact and conclusions of law. Since we have no transcript of the hearing or rendition of the order, we have no way of knowing exactly what happened. In any event, defendant's motion to stay alleged that no "written order" had been entered, but in fact, a "written order" had been signed and filed on 14 June 2016. The trial court denied the motion to stay that same day.

As noted above, defendant subsequently filed a notice of appeal on 15 June 2016 "from the final judgment of the Honorable Fred Battaglia, District Court Judge, entered on June 14, 2016 in the District Court of

Durham County, which held defendant in contempt for failure to pay child support." The trial court entered a more detailed written order on contempt two days later, on 17 June 2016. In the 17 June 2016 order, the trial court concluded that defendant "does not have just cause for failing to complying [sic] with the prior Court orders and should be held in contempt of court." Defendant was found to be in contempt of court and the trial court ordered that he be "committed to the Durham County Jail for a term not less than 90 days and may be released upon a payment of $1,000.00 purge to be released to child support if paid."[2] An appellate entry was file stamped on 17 June 2016, and the trial court noted that defendant gave notice of appeal to this Court. On 26 January 2017, defendant filed a conditional petition for writ of certiorari asking this Court to permit review of the 17 June 2016 order. As explained in more detail below, we grant defendant's petition only to vacate the 17 June 2016 order because the trial court was divested of jurisdiction before it was entered.

II. Discussion

Generally, on appeal defendant contends that the trial court erred by finding that defendant had the ability to work, despite the undisputed evidence from both of his physicians that his medical condition made him incapable of gainful employment. Defendant also challenges the trial court's findings that defendant had access to funds from undefined family or friends, despite the absence of any evidence to support this finding. Defendant contends the trial court erred by finding that since defendant resides with his parents rent-free, this creates "in-kind" income that is available for him to pay his child support and purge payment, despite his lack of income or assets.

DSS does not substantively refute defendant's arguments on appeal, other than to note that the trial court is the judge of the weight and credibility of the evidence -- which is generally correct, if there is any evidence.

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2. We also note that the 17 June order is not consistent with the 14 June order which directed that defendant remain in custody *until* he purged contempt by paying $1,000.00. This would be the typical purge condition allowed by N.C. Gen. Stat. § 5A-21 (2015) and N.C. Gen. Stat. § 5A-22 (2015). The 17 June 2016 order directs that defendant both serve a minimum sentence of 90 days and pay $1,000.00 to purge his contempt. In other words, even if defendant paid $1,000.00 immediately, the order as written directs that he "be *committed to the Durham County Jail for a term not less than 90 days* and may be released upon a payment of $1,000.00 purge[.]" (Emphasis added). A fixed term of imprisonment is an appropriate sanction for criminal contempt, but not civil contempt. Even if he paid immediately, he would still remain in jail for 90 days. But since we reverse the first order and vacate the second, we will not address this further but simply note the inconsistency.

In its second order, entered 17 June 2016, the trial court made detailed findings of fact. But since we must vacate the order, we will not address it in depth. Furthermore, before addressing any substantive arguments further, we must clarify the underlying procedural issues related to defendant's notice of appeal and the two written orders ultimately entered in this case: the 14 June 2016 form order and the later, more detailed 17 June 2016 order.

a. Appeal of the 17 June 2016 Order

[1] As noted above, defendant filed a notice of appeal on 15 June 2016 from the trial court's Civil Commitment order entered on 14 June 2016, but the trial court also filed another order, based upon the same motion and hearing, with detailed findings and conclusions of law, on 17 June 2016. Although both parties' briefs treat the initial 14 June 2016 order as an oral rendition of the ruling and the 17 June 2016 order as the written order, we cannot ignore the fact that the 14 June 2016 order was written and entered. Rule 58 of the North Carolina Rules of Civil Procedure states: "[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. R. Civ. P. 58. The 14 June 2016 order has no language to indicate the trial court anticipated entry of another more detailed order, despite the absence of any findings of fact; on its face, it is a final order which addresses the only issue presented, which was whether defendant was in civil contempt of the prior child support order. " 'A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.' " *Bradley v. Bradley*, __ N.C. App. __, __, 806 S.E.2d 58, 61 (2017) (quoting *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007)).

Since the 14 June 2016 order was "entered," defendant's notice of appeal filed on 15 June 2016 divested the trial court of jurisdiction.

> Whether a trial court had jurisdiction to enter an order is a question of law that we review *de novo*. An appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*.
>
> . . . .
>
> The power of a trial court to enter an order or take further action in a case following the filing of a notice of appeal by a party is enumerated in N.C. Gen. Stat. § 1-294, which states in relevant part: When an appeal is perfected as provided by this Article it stays all further proceedings

> in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.
>
> According to well-established North Carolina law, once an appeal is perfected, the lower court is divested of jurisdiction. An appeal is not perfected until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction.

Ponder v. Ponder, __ N.C. App. __, __, 786 S.E.2d 44, 47 (2016), *appeal dismissed and disc. review denied*, __ N.C. __, 797 S.E.2d 290 (2017) (citations and quotation marks omitted).

The 17 June 2016 order is void because the trial court lacked jurisdiction to enter it once defendant appealed the 14 June 2016 order. Defendant perfected his appeal by docketing it with this Court, and this perfection relates back to 15 June 2016. *See France v. France*, 209 N.C. App. 406, 410-11, 705 S.E.2d 399, 404 (2011) ("Plaintiff appealed Judge Culler's first order on 13 November 2009. . . . Judge Culler's second order was entered on 18 December 2009, following a hearing that was held 11 December 2009. Plaintiff's appeal of Judge Culler's first order on 13 November 2009 divested the trial court of jurisdiction in the matter and jurisdiction transferred to this Court. Thus, Judge Culler's second order is a nullity because the trial court was without jurisdiction to hear the matter on 11 December 2009. . . . We therefore must vacate Judge Culler's second order." (Citations omitted)). Similarly, here, the trial court entered a written order on 14 June 2016. Although the order is clearly lacking substantive content, it is a written order that was signed and entered, as the file stamp indicates. And despite its lack of content, the order authorized the Durham County Sheriff to take immediate custody of defendant. We cannot overlook the 14 June 2016 order, as the parties' briefs do, and treat it as an oral rendition. Accordingly, we must vacate the 17 June 2016 order as void.

b. 14 June 2016 Order

[2] Although the briefs primarily address the 17 June 2016 order, since it was the only order with any substantive content, defendant timely appealed from the 14 June 2016 order. On appeal, defendant argues that the trial court erred in entering a contempt order and by finding that he

had the ability to comply with the child support order and the purge condition. Defendant argues that this ultimate finding was not supported by competent evidence.

> We review orders for contempt to determine if the findings of fact support the conclusions of law: The standard of review we follow in a contempt proceeding is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.

Spears v. Spears, __ N.C. App. __, __, 784 S.E.2d 485, 494 (2016) (citation and quotation marks omitted); *see also Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) ("The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. North Carolina's appellate courts are deferential to the trial courts in reviewing their findings of fact." (Citations and quotation marks omitted)).

Under N.C. Gen. Stat. § 5A-21(a) (2015):

> Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

In this case, defendant argues that the trial court erred in finding that he had the present ability to comply with the child support order and that his noncompliance with the order was willful. The 14 June 2016 order has no findings of fact other than the ultimate finding of fact, which is part of the form language as follows: "[T]he party has sufficient means and ability to comply or take reasonable measures to comply."

The trial court need not find detailed evidentiary facts but an order must have sufficient findings to support its conclusions of law and decretal. "There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts." *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951). While a trial court need not make findings as to all of the evidence, it must make the required ultimate findings, and there must be evidence to support such findings. *See, e.g.*, *In re H.J.A.*, 223 N.C. App. 413, 416, 735 S.E.2d 359, 362 (2012) ("Moreover, when a trial court is required to make findings of fact, it must make the findings of fact specially. The trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law. The findings must be the specific ultimate facts sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." (Citations, quotation marks, and brackets omitted)); *Townson v. Townson*, 26 N.C. App. 75, 76, 214 S.E.2d 444, 445 (1975) ("[T]he trial court is required only to find the ultimate facts and need not include evidentiary or subsidiary facts required to procure the ultimate facts.").

As noted above, there was no evidence to support the pre-printed ultimate finding of fact on the form order. If there were any dispute in the evidence, it would be appropriate for us to remand to the trial court for entry of an order with additional findings of fact to clarify its rationale for the ultimate finding and conclusions of law.[3] But we have carefully reviewed the record and the substantive issues raised on appeal, and we have determined that there is simply no evidence to support the required ultimate finding.

> Proceedings for civil contempt can be initiated in three different ways: (1) by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt; (2) by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt; or (3) by motion of an aggrieved party giving notice to the

3. Although the trial court had no jurisdiction to enter the 17 June 2016 order, that order is helpful in our review since it shows what findings of fact the trial court intended to make in support of its order of contempt.

> alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. Under the first two methods for initiating a show cause proceeding, the burden of proof is on the alleged contemnor. However, when an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, because there has not been a judicial finding of probable cause.

Moss v. Moss, 222 N.C. App. 75, 77, 730 S.E.2d 203, 204-05 (2012) (citations, quotation marks, and brackets omitted).

In the present case, the trial court entered an order to show cause, which shifted the burden of proof to defendant to show cause as to why he should not be held in contempt of court. *See*, *e.g.*, *Gordon v. Gordon*, 233 N.C. App. 477, 480, 757 S.E.2d 351, 353 (2014) ("A show cause order in a civil contempt proceeding which is based on a sworn affidavit and a finding of probable cause by a judicial official shifts the burden of proof to the defendant to show why he should not be held in contempt. Here, there was a show cause order with a judicial finding of probable cause. Therefore, the burden was on plaintiff to show why he should not be held in contempt." (Citations and quotation marks omitted)). "The party alleged to be delinquent has the burden of proving either that he lacked the means to pay or that his failure to pay was not willful." *Shumaker v. Shumaker*, 137 N.C. App. 72, 76, 527 S.E.2d 55, 57 (2000).

And despite the fact that the burden to show cause shifts to the defendant, our case law indicates that the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt. *See*, *e.g. Carter v. Hill*, 186 N.C. App. 464, 466, 650 S.E.2d 843, 844 (2007) ("[T]he court also erred by failing to make appropriate findings of fact to support the entry of a civil contempt order. . . . Failure to comply with an order of the court is civil contempt only when the noncompliance is willful and the person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order. Findings of fact on these particular elements are conspicuously absent from the trial court's contempt order in this case." (Citations, quotation marks, and brackets omitted)); *Frank v. Glanville*, 45 N.C. App. 313, 316, 262 S.E.2d 677, 679 (1980) ("It is not clear from the record in this case that defendant has the ability to comply with the

contempt order, ever had the ability, or will ever be able to take reasonable measures that would enable him to comply. For that reason and because no finding of fact detailing defendant's ability to comply with the contempt order was made, this case is reversed and remanded[.]").

Here, although the trial court issued an order to show cause on 25 November 2015, defendant met his burden to show cause as to why he should not be held in contempt, presenting evidence from two treating physicians that he is physically incapable of gainful employment. DSS presented no evidence and did not refute defendant's evidence at all. The trial court, in its 17 June 2016 order, found that there was no evidence that defendant is temporary or permanently disabled, but that is not the standard for ability to pay in this context. The question is whether defendant currently, at the time of the hearing, had ability "to comply with the order or is able to take reasonable measures that would enable the person to comply with the order." N.C. Gen. Stat. § 5A-21(a)(3). All of the evidence showed that defendant was at all relevant times physically incapable of employment. Aside from the medical evidence, the reconstructed evidence from the hearing showed that

> [Defendant] had little education and had never held any type of work other than janitorial. He had applied for jobs, but had not been offered employment anywhere.
>
> [Defendant] lived with his parents. He had no income. He did not smoke or drink and relied on friends to drive him to appointments and court. He "could not remember" the last time he had any money. [Defendant] lived on food stamps and got his clothes from a local clothing closet. Only in 2016, he had gotten back on Medicaid and begun seeking medical treatment again.

Since there is no evidence to support the required findings of fact, we need not remand for additional findings of fact. Instead, we reverse the 14 June 2016 order, which contained no findings of fact or other substantive content.

In conclusion, we note that it appears the trial court simply wanted to ensure that defendant could be immediately placed into custody at the conclusion of the 14 June 2016 hearing and used the form order to accomplish this result. The 17 June 2016 order is a detailed order with many findings of fact which took more time to prepare. We understand the trial court's dilemma. Since District Court judges in North Carolina have no staff to assist them in preparation of orders despite the urgent need for many orders each day, our judges have to find ways to get the

work done. But we caution judges and counsel that a written, signed, and filed document which claims to be an order is an order, so it must include the elements required of an order. If that order resolves all disputed issues as to all parties, it is a final and appealable order. In some instances, a trial court may be able to enter a temporary order or to make it clear that the trial court's initial order is not a final order, and if that is the trial court's intent, it should be stated clearly in the temporary order. But here, we are bound by the record before us. Accordingly, we hold that the trial court's ultimate finding in the 14 June 2016 order that defendant "has sufficient means and ability to comply or take reasonable measures to comply" with the order is not supported by its other findings of fact, since there are none, nor is there any evidence to support the ultimate finding. The order's conclusion of law -- that defendant was, therefore, in civil contempt -- is likewise unsupported by the findings of fact.

III. Conclusion

For the reasons stated above, we vacate the 17 June 2016 order and reverse the 14 June 2016 order.

VACATED AND REVERSED.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF J.B.

No. COA17-400

Filed 2 January 2018

1. Juveniles—delinquency—injury to personal property—motion to dismiss—sufficiency of evidence—school—entity capable of owning property

The trial court did not err in a juvenile delinquency case by denying a juvenile's motion to dismiss an injury to personal property charge where the juvenile conceded the fact that a school was an entity capable of owning property and the State presented evidence that the school in fact owned the damaged property.

2. Sentencing—juveniles—Level 2 offender—intermittent confinement—mandatory dispositional alternatives

The trial court erred as a matter of law in a juvenile delinquency case arising from injury to personal property by sentencing a juvenile to ten days of detention under N.C.G.S. § 7B-2506(12). While the trial court may require the juvenile to serve as many as five days of intermittent confinement, it must provide at least one of the mandatory dispositional alternatives found in N.C.G.S. §§ 7B-2506(13)-(23).

Judge DILLON concurring in part and dissenting in part.

Appeal by juvenile from orders entered 16 August 2016 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 16 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

Geeta N. Kapur, for juvenile-appellant.

CALABRIA, Judge.

Where the juvenile conceded the fact that the school was an entity capable of owning property, and the State presented evidence that the school in fact owned the damaged property, the trial court did not err in denying the juvenile's motion to dismiss. Where the 10-day detention to which the trial court sentenced the juvenile, as a Level 2 offender, was for a period of confinement beyond the limits of the statute pursuant to which the juvenile was sentenced, the trial court erred in its sentence. Further, where the trial court failed to sentence the juvenile, as a Level 2 offender, to an intermediate disposition as mandated by N.C. Gen. Stat. § 7B-2508(d), the trial court erred in violation of a statutory mandate. We affirm in part, but remand for resentencing.

I. Factual and Procedural Background

On 24 March 2016, J.B. ("the juvenile")[1], a twelve-year-old student, was in a classroom in Lincoln Heights Academy in Charlotte, North Carolina. During the class, the juvenile became upset and agitated, and pushed a number of things including, *inter alia*, a computer and Hewlett Packer printer from the teacher's desk onto the floor. The computer was not damaged but the printer was damaged, and eventually replaced.

1. This pseudonym is used to protect the privacy of the juvenile and for ease of reading.

On 3 June 2016, a juvenile petition for delinquency was filed, alleging that the juvenile had committed the offense of injury to personal property by "damag[ing] a printer and computer after pushing it off the teachers [sic] desk[.]" During the subsequent proceeding, at the close of the State's evidence, the juvenile moved to dismiss the petition. This motion was denied. The juvenile presented no evidence.

On 16 August 2016, the juvenile was found liable for a class 2 misdemeanor, injury to personal property, and adjudicated delinquent. The trial court considered the juvenile's prior misdemeanor adjudications, and that same day, entered a disposition order, sentencing the juvenile as a Level 2 offender and ordering the juvenile to serve 10 days' detention in the custody of the Sheriff of Mecklenburg County.

From the adjudication and disposition orders, the juvenile appeals.

II. Motion to Dismiss

[1] In his first argument, the juvenile contends that the trial court erred in denying his motion to dismiss. 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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Id.* at 378-79, 526 S.E.2d at 455.

B. Analysis

At trial, the State presented only one witness, Star Kelly ("Kelly"), a "teacher-assistant" at Lincoln Heights Academy, who was present in the classroom during the juvenile's outburst. At the close of the State's evidence, the juvenile moved to dismiss. Specifically, the motion to dismiss alleged that (1) there was no evidence presented that the damage caused by the juvenile exceeded $200, and (2) there was no evidence that the owner of the property was the Charlotte-Mecklenburg Board of Education.

In response to the juvenile's motion, the State first noted that "the value of the damage that was allegedly done here, that is not actually an element of the offense." The State next noted, with respect to ownership of the printer:

> [W]hat we do have is a witness who testified in her six years at Lincoln Heights. She has knowledge that these printers are provided to the teachers. There's one in every single classroom. She testified that while it was not hers, she spoke – I'm sorry, let me back up -- she testified that this was not hers; that it belonged to CMS and is provided to each teacher for every classroom, and that when this printer was damaged, she was provided a second one from someone at Lincoln Heights for CMS.
>
> So I think it's sufficiently clear, Your Honor, as an employee of CMS that this printer belongs to that school, and we have produced sufficient evidence to surpass the motion to dismiss stage.

The trial court then denied the motion to dismiss.

On appeal, the juvenile contends that this was error. Specifically, the juvenile argues that the petition failed to allege that the school was an entity capable of owning property, and that the evidence at trial did not prove who owned the damaged printer.

First, the juvenile contends that the petition failed to allege that the school was an entity capable of owning property.

> "To be sufficient, an indictment for larceny must allege the owner or person in lawful possession of the stolen property." *State v. Downing*, 313 N.C. 164, 166, 326 S.E.2d 256, 258 (1985). If the entity named in the indictment is not a person, it must be alleged "that the victim was a legal entity capable of owning property[.]" *State v. Woody*, 132 N.C. App. 788, 790, 513 S.E.2d 801, 803 (1999). "An indictment that insufficiently alleges the identity of the victim is fatally defective and cannot support conviction of either a misdemeanor or a felony." *Id.*

State v. Phillips, 162 N.C. App. 719, 720-21, 592 S.E.2d 272, 273 (2004).

The juvenile contends that the petition in the instant case identified the owner of the damaged property as "Charlotte Mecklenburg Board of Education[.]" The juvenile contends that, pursuant to statute, the owner

should instead have been identified as "The Charlotte-Mecklenburg County Board of Education," and that the failure to identify the Board as such was fatal to the action. *See* N.C. Gen. Stat. § 115C-40 (2015).

Unfortunately, the juvenile has already acknowledged that the Board of Education was properly identified as a corporate body that can own property. At trial, during the motion to dismiss, counsel made the following observation:

> Secondly, the petition alleges that the owner of the property was the Charlotte-Mecklenburg Board of Education. That is a body corporate under North Carolina Education statutes. *So, therefore, it is an entity capable of owning property.*

(Emphasis added.) Counsel later observed:

> One of the elements of damage to property is that the State has to appropriately allege the corporate body or natural person that can own the property. *They correctly alleged that here, . . .*

(Emphasis added.) It is clear, then, that the juvenile has already acknowledged that the Board was correctly identified as a body capable of owning property.

Nor did the juvenile actually dispute this point at trial. The argument with respect to the motion to dismiss concerned (1) the value of the damage, and (2) the fact that there was no proof that the Board of Education owned the damaged property. At trial, the juvenile failed to raise an argument that the Board was not an entity capable of owning property, and in fact readily conceded the point. A contention not raised at the trial court may not generally be raised for the first time on appeal. *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, . . ."). Since the juvenile did not raise this argument at trial, and in fact conceded the point, we hold that this argument is not properly before us.

Next, the juvenile contends that the State presented insufficient evidence as to the identity of the owner of the damaged property. As the State noted, however, Kelly testified that the printer was owned by the school. She said that "Ms. Lucie, [the] secretary downstairs" brought the printer to her. She said that computers and printers are "supplied by the school."

The juvenile contends that the State should have presented more concrete evidence of the school's ownership of the printer. However,

that is an argument that goes to the weight and credibility of the evidence. On our review, we are instead required to "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. Viewing the evidence in the light most favorable to the State, it is clear that the school supplied computers and printers to the teachers, and that those computers and printers were therefore the property of the school, and by extension the Board of Education. Accordingly, giving the State the benefit of all reasonable inferences, we hold that the State presented evidence that the school owned the damaged property. The trial court did not err in denying the juvenile's motion to dismiss.

III. Sentencing

[2] In his second argument, the juvenile contends that the trial court erred in sentencing him to 10 days' confinement. We agree in part.

A. Standard of Review

"On appeal, we will not disturb a trial court's ruling regarding a juvenile's disposition absent an abuse of discretion, which occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.B.*, 172 N.C. App. 747, 751, 616 S.E.2d 385, 387, *aff'd per curiam*, 360 N.C. 165, 622 S.E.2d 495 (2005) (citation and quotation marks omitted).

"Issues of statutory construction are questions of law, reviewed *de novo* on appeal. Under a *de novo* review, the Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Coakley*, 238 N.C. App. 480, 492, 767 S.E.2d 418, 426 (2014) (citation and quotation marks omitted).

B. Analysis

The trial court found the juvenile to be a Level 2 offender, and sentenced him to 10 days in the custody of the Sheriff of Mecklenburg County. On appeal, the juvenile contends that this was an error of law, in that a statutory mandate limited the juvenile's detention. Specifically, the juvenile cites N.C. Gen. Stat. § 7B-2506(12) (2015), which states that "[c]onfinement shall be limited to not more than five 24-hour periods, the timing of which is determined by the court in its discretion." The juvenile contends that this statutory limit was exceeded by the trial court, and that this constituted an error of law.

We hold that the juvenile is correct in part. The disposition authorized by N.C. Gen. Stat. § 7B-2506(12) is explicit, and the 10-day disposition

imposed by the trial court exceeds the five days authorized by that subsection. We note, however, that N.C. Gen. Stat. § 7B-2506, which lists dispositional alternatives for delinquent juveniles, specifically provides that its sentencing alternatives must be used "in accordance with the dispositional structure set forth in G.S. 7B-2508[.]" N.C. Gen. Stat. § 7B-2506. Pursuant to the language of N.C. Gen. Stat. § 7B-2506, these two provisions must be read together.

The offense at issue, destruction of personal property, was classified as "minor." The juvenile's history of delinquency was classified as "high."[2] Pursuant to N.C. Gen. Stat. § 7B-2508(f) (2015), the juvenile could only be sentenced to a Level 2 disposition. N.C. Gen. Stat. § 7B-2508 further provides that, where a juvenile is subject to a Level 2 disposition, the trial court may order "any of the dispositional alternatives contained in subdivisions (1) through (23) of G.S. 7B-2506, *but shall provide for at least one* of the intermediate dispositions authorized in subdivisions (13) through (23) of G.S. 7B-2506." N.C. Gen. Stat. § 7B-2508(d) (emphasis added).

As the State acknowledges, the trial court used an outdated preprinted disposition order form. The form used did not include a dispositional option citing N.C. Gen. Stat. § 7B-2506(20), which authorizes a confinement period of up to fourteen days. The court checked a box stating "Intermittent Confinement [N.C.G.S. § 7B-2506(12)]," and added the handwritten notation "10 days detention." Notwithstanding the fact that the ten-day detention exceeds the intermittent confinement authorized by N.C. Gen. Stat. § 7B-2506(12), the trial court was required to order another (or an additional) disposition. Namely, the trial court was required to impose at least one of the dispositional alternatives found in N.C. Gen. Stat. §§ 7B-2506(13)-(23). Its failure to do so constituted a violation of the statutory mandate of N.C. Gen. Stat. § 7B-2508(d), and was reversible error. *See In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300 (2005) (holding that "[t]he use of the word 'shall' by our Legislature has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error").

Accordingly, the trial court erred as a matter of law in sentencing the juvenile to ten days of detention pursuant to N.C. Gen. Stat. § 7B-2506(12), and we remand for resentencing. On remand, while the

2. While the trial court's juvenile disposition order lists the juvenile's delinquency history as "low," the delinquency history worksheet, which tabulates the juvenile's prior history points, correctly notes that his history is "high." We hold that the trial court's juvenile disposition order, which lists the juvenile's history as "low," constituted a mere clerical error, and rely on the worksheet, which is correctly supported.

trial court may require that the juvenile serve as many as five days of intermittent confinement under N.C. Gen. Stat. § 7B-2506(12), it must provide at least one of the mandatory dispositional alternatives found in N.C. Gen. Stat. §§ 7B-2506(13)-(23), and explicitly identify the statutory basis or bases for the sentence imposed.

AFFIRMED IN PART, REMANDED IN PART.

Chief Judge McGEE concurs.

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

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

I concur in the majority's conclusion to reject the juvenile's argument concerning the proof of ownership of the property which was allegedly damaged by the juvenile.

With respect to the juvenile's argument concerning the State's failure *to plead* in the petition that the owner was an entity capable of owning property, I recognize that for purposes of an indictment, such a mistake could be raised for the first time on appeal. However, I conclude that the owner's capability of owning property does not need have been pleaded with the same specificity as in an indictment. *See State v. Jones*, ___ N.C. App. ___, ___, 805 S.E.2d 701, 705 (2017) (holding that a citation for a misdemeanor need not plead each element with the same specificity as required for an indictment).

I dissent, however, from the majority's conclusion that the matter needs to be remanded for resentencing. Here, the trial court sentenced the juvenile to an intermittent confinement. Under Section 7B-2506 of the North Carolina General Statutes, a confinement of up to 5 days is considered a level 1 disposition under subsection (12), and a confinement of up to 14 days is considered a level 2 disposition under subsection (20). N.C. Gen. Stat. § 7B-2506 (2015).

Here, as the majority points out, the trial court properly determined that the juvenile was a level 2 offender. I conclude that the trial court in the present case acted properly in sentencing the juvenile to a level 2 disposition by sentencing the juvenile to 10 days of intermittent confinement.

The "error" cited by the majority is, in reality, simply clerical. Specifically, the version of the pre-printed AOC judgment form used by

the trial court contains only one place where the judge can select an intermittent confinement as a disposition:

> Intermittent Confinement. [N.C.G.S. 7B-2506(12).] The juvenile be confined on an intermittent basis in an approved detention facility as follows: _____.

Here, the trial judge checked the box and wrote in "10 days detention," an appropriate level 2 disposition for a level 2 offender under G.S. 7B-2506(20). The "error," though, is that the form cites to subsection (12), which provides for the level 1 intermittent confinement disposition. The pre-printed form does not expressly cite to subsection (20) of G.S. 7B-2506.

I conclude that the trial judge's intent to sentence the juvenile to a 10-day confinement, an appropriate disposition for a level 2 offender, is clear: the judge wrote in "10 days detention." Of course, it would be better if the pre-printed form cited to both G.S. 7B-2506(12) and to G.S. 7B-2506(20). My vote is to affirm the order of the trial court but remand that matter to fix the clerical error to delete the reference to subsection (12) of G.S. 7B-2506 on the pre-printed form.

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iPAYMENT, INC., Plaintiff
v.
KELLY M. GRAINGER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF GEORGE GREGORY GRAINGER, WEAKLEY GETWAWAYS, LLC, 1ST AMERICARD, INC., JESSICA GRAINGER, and UNIVERSAL FINANCE & LEASING CORPORATION, Defendants

No. COA16-908

Filed 2 January 2018

1. Appeal and Error—interlocutory orders and appeals—motion to compel arbitration—substantial right

An order denying a motion to compel arbitration affects a substantial right and is therefore immediately appealable.

2. Arbitration and Mediation—motion to compel arbitration of counterclaims—waiver—short time period—limited discovery

The trial court erred in a fraudulent transfer case, arising from an asset purchase agreement case governed by New York law and a split funding agreement between the parties, by concluding that

plaintiff company waived its motion to compel arbitration of counterclaims brought by defendant finance and leasing corporation by litigating and pursuing limited discovery related to that claim. Further, the motion was only two months after defendant filed its counterclaims.

Appeal by Plaintiff from an order entered 25 August 2016 by Judge Theodore S. Royster, Jr., in Union County Superior Court. Heard in the Court of Appeals 8 February 2017.

Rayburn Cooper & Durham, P.A., by Ross R. Fulton and Tory Ian Summey, for Plaintiff-Appellant.

Koehler & Associates, by Stephen D. Koehler, for Defendants-Appellees.

INMAN, Judge.

iPayment Inc. ("Plaintiff") appeals from an order denying its motion to compel arbitration of counterclaims brought against Plaintiff by Universal Finance and Leasing Corp. ("Universal"). Plaintiff argues that the trial court erred in finding that Plaintiff waived its right to compel arbitration on Universal's counterclaims. After careful review, we reverse the trial court's order.

Factual and Procedural Background

This appeal arises from a dispute between Plaintiff and 1st Americard, Inc. ("Americard") involving an Asset Purchase Agreement, governed by New York law, which resulted in an arbitration award (the "Arbitration Award") of $2,350,264.74 in favor Plaintiff.

The parties are in the business of processing bankcard payments for retail merchants. Their rights and duties are governed by interconnecting agreements, specifically an Asset Purchase Agreement between Plaintiff and Americard and a separate Split Funding Agreement between Plaintiff and Universal.

Kelly M. Grainger ("Kelly") is the President and sole shareholder of Americard. Jessica Grainger ("Jessica"), daughter of Kelly, was initially an employee of Americard before becoming an employee of Universal following the death of her father George Gregory Grainger.[1] At all

1. George Gregory Grainger, spouse of Kelly, was the Chief Executive Officer of Americard and passed away on 24 April 2015. George Grainger was a party to the original arbitration which gave rise to the Arbitration Award.

relevant times, Kelly and Jessica were citizens and residents of Union County, North Carolina. Kelly and Jessica were also the sole officers and employees of Universal. Weakley Getaways, LLC ("Weakley") is a corporation based in Panama City Beach, Florida, owned and operated by Cathy Baker, Kelly Grainger's sister, and Cathy's husband, Gordon H. Weakley.

On 28 June 2013, Plaintiff and Americard executed an Asset Purchase Agreement, whereby Plaintiff agreed to purchase rights to Americard's existing merchant accounts in exchange for $4,867,852.32. Plaintiff and Americard also executed a Sub-Independent Sales Organization agreement ("Sub-ISO"), whereby Americard agreed to submit all new merchant applications for payment processing services exclusively to Plaintiff during the "Initial Term" and to use its best efforts to obtain new merchants. The Asset Purchase Agreement included the following arbitration clause and choice of law provision:

> BINDING ARBITRATION. EXCEPT AS PROVIDED IN SECTION 5.2(C) HEREOF, ANY DISPUTE OR CLAIM BETWEEN THE PARTIES ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT SHALL BE FULLY AND FINALLY RESOLVED BY BINDING ARBITRATION IN THE CITY OF NEW YORK, NEW YORK COUNTY IN ACCORDANCE WITH THE COMMERCIAL ARBITRATION RULES AND PRACTICES OF THE AMERICAN ARBITRATION ASSOCIATION ("AAA") FROM TIME TO TIME IN FORCE AND EFFECT.
>
> . . .
>
> GOVERNING LAW. THIS AGREEMENT SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REGARD TO ANY JURISDICTION'S PRINCIPLES OF CONFLICT OF LAWS.

A month after executing the Asset Purchase Agreement, on 25 July 2013, Plaintiff and Universal executed a Split Funding Agreement providing that Universal would advance funds to merchants serviced by Plaintiff in exchange for Plaintiff's remittal of certain funds related to those accounts. Similar to the Asset Purchase Agreement, the Split Funding Agreement included the following mandatory arbitration clause (the "Arbitration Clause") and choice of law provision (the "Choice of Law Provision"):

> BINDING ARBITRATION. EXCEPT FOR ANY ACTION FOR INJUNCTIVE RELIEF WITH RESPECT TO THE ENFORCEMENT OF ANY PARTY'S RIGHTS UNDER SECTION 11 OR 12 HEREOF, ANY DISPUTE OR CLAIM BETWEEN THE PARTIES ARISING OUT OF OR RELATED TO THIS AGREEMENT SHALL BE FULLY AND FINALLY RESOLVED BY BINDING ARBITRATION IN THE CITY AND COUNTY OF NEW YORK IN ACCORDANCE WITH THE COMMERCIAL ARBITRATION RULES AND PRACTICES OF THE AMERICAN ARBITRATION ASSOCIATION ("AAA") FROM TIME TO TIME IN FORCE AND EFFECT.
>
> . . .
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> GOVERNING LAW. THIS AGREEMENT SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO ANY JURISDICTION'S PRINCIPLES OF CONFLICT OF LAWS.

Within a year after purchasing Americard's merchant accounts, Plaintiff brought an arbitration action in New York against Americard, Kelly, and George Grainger alleging that they made misrepresentations to Plaintiff and breached the Asset Purchase Agreement and associated agreements, excluding the Split Funding Agreement. In February 2015, Plaintiff obtained the Arbitration Award finding Americard, Kelly, and Jessica jointly and severally liable to Plaintiff for $2,350,264.74. Plaintiff then filed a motion to confirm the arbitration award in the United States District Court for the Southern District of New York.

On 25 August 2015, while Plaintiff's motion to confirm the arbitration award was pending, Plaintiff filed a verified complaint in Union County Superior Court alleging that immediately after the arbitration award was entered, Kelly and George Grainger entered into a scheme to fraudulently transfer their assets to Weakley in an attempt to avoid Plaintiff's eventual judgment from the Arbitration Award. On 18 September 2015, Plaintiff amended its original complaint to include Kelly in her capacity as the administrator of the estate of George Gregory Grainger. On 26 October 2015, Plaintiff filed its second amended verified complaint (the "Second Amended Complaint"), which named Jessica, Americard, and Universal as additional defendants in the action. Plaintiff asserted two claims against Universal as a transferee of fraudulent transfers from the other Defendants, alleging "[u]pon information and belief, Universal

Finance is the recipient of some or all of those fraudulently transferred assets from the Graingers or 1st AmeriCard or their proceeds." The Second Amended Complaint alleged no conduct by or on behalf of Universal other than receiving fraudulent transfers.

Plaintiff began pursuing discovery in the fraudulent transfer litigation on 24 September 2015 by propounding to Kelly interrogatories, requests for production of documents, and requests for admissions. On 1 October 2015, prior to adding Americard and Universal as defendants in the action, Plaintiff issued a subpoena to a third-party accountant for all documents relating to Americard, Universal, or Kelly and George Grainger "for the period from January 1, 2013 through the present, including, but not limited to, tax returns, financial statements, work papers, bank account records, and all correspondence (including emails, letters, and text messages)." Later in October 2015, but prior to naming Americard and Universal as defendants in the action, Plaintiff issued subpoenas to five banks seeking additional documents and information relating to specific accounts and transactions involving Kelly, George Grainger, Americard, and Universal.

In December 2015, after asserting claims against Americard, Universal, and Jessica, Plaintiff served on Americard and Jessica a set of interrogatories, requests for production of documents, and requests for admissions, and served interrogatories and requests for production of documents on Universal.

On 29 December 2015, Defendants filed a joint answer to Plaintiff's Second Amended Complaint and counterclaims by Universal against Plaintiff for breach of contract, defamation, tortious interference with contract and/or prospective advantage, and unfair and deceptive trade practices and unfair methods of competition. All of the counterclaims related to the Split Funding Agreement.

On 26 and 27 January 2016, Plaintiff took depositions of Kelly and Jessica. Plaintiff's counsel specified before questioning Kelly about Universal's counterclaims: "iPayment is reserving all rights to argue that counterclaim 1 [breach of the Split Funding Agreement] is subject to arbitration under its contract and as [sic] they're participating in discovery without waiving any of those rights to those arguments." Plaintiff's counsel went on to ask Kelly a series of questions, including, *inter alia*: "What false statements—false and misleading statements has iPayment made about [Universal]?" and "[w]hat false and misleading statements has iPayment made about the officers of Universal Finance & Leasing?" Plaintiff's counsel also inquired about the internal operations of

Universal, communications between several merchants and Universal, and the structure of the Split Funding Agreement.

On 24 February 2016, Plaintiff filed a motion to dismiss Universal's counterclaims arising from the Split Funding Agreement or, in the alternative, to stay the litigation and compel arbitration of the counterclaims ("Motion to Compel").

The Motion to Compel came on for hearing on 4 April 2016. Universal asserted that Plaintiff waived its right to compel arbitration of Universal's counterclaims under the Split Funding Agreement because of Plaintiff's participation in this litigation, including Plaintiff's pursuit of discovery.

On 25 April 2016, the trial court entered an order denying Plaintiff's Motion to Compel. The trial court held that "[t]he conduct of the Plaintiff in this action was clearly inconsistent with the arbitration provision contained in the Split Funding Agreement and manifests Plaintiff's election to submit to the jurisdiction of this forum."

Plaintiff filed its notice of appeal on 9 May 2016.

Appellate Jurisdiction

[1] An order denying a motion to compel arbitration is interlocutory. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, our courts have long held that an order denying a motion to compel arbitration affects a substantial right which might be lost if the appeal is delayed, and therefore is immediately appealable. *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991). Accordingly, we hold this appeal is properly before us.

Analysis

I. Choice of Law

The trial court concluded, and the parties do not dispute, that New York law governs the Arbitration Clause, as provided in the Split Funding Agreement. A choice of law provision agreed upon by parties is "generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental public policy of the state or otherwise applicable law." *Torres v. McClain*, 140 N.C. App. 238, 241, 535 S.E.2d 623, 625 (2000) (citations omitted). When the parties entered into the Split Funding Agreement, Plaintiff's principle place of business was New York, so there was a reasonable basis for the choice of law provision.

Additionally, applying New York law will not violate any fundamental public policy of the State of North Carolina. *See Behr v. Behr*, 46 N.C. App. 694, 696-97, 266 S.E.2d 393, 395 (1980) (applying New York law to the interpretation of a separation agreement).

II. Waiver of Right to Arbitration

Universal does not dispute that the Arbitration Clause in the Split Funding Agreement applies to its counterclaims. Rather, Universal asserts that Plaintiff waived its right to compel arbitration of the counterclaims by engaging in litigation and by obtaining discovery beyond that allowed by the rules of arbitration. Universal's contention relies on the presupposition that Plaintiff's fraudulent transfer claims against Universal, asserted in the Second Amended Complaint, were also subject to the Arbitration Clause. We disagree with this presupposition and hold that Plaintiff did not waive its arbitration rights by litigating and pursuing discovery related to that claim.

The trial court, in determining that Plaintiff acted in a manner inconsistent with its right to arbitrate and prejudiced Universal, considered discovery that Plaintiff pursued prior to Universal's filing of its counterclaims. Because we disagree with the premise upon which Universal's argument lies—*i.e.*, that Plaintiff's claims asserted in the Second Amended Complaint against Universal invoked the Arbitration Clause in the Split Funding Agreement—and conclude that Universal failed to present competent evidence that Plaintiff acted inconsistently with its right to compel arbitration or that Universal was prejudiced by Plaintiff's actions prior to the assertion of its right to compel, we reverse the trial court's order.

A. Standard of Review

Our precedent reflects a protracted dispute, and divergence of decisions, regarding the standard of review applicable to a trial court's denial of a motion to compel arbitration on the basis that a party waived this contractual right.[2]

The seminal decision, *Cyclone Roofing Co., Inc. v. David M. LaFave Co., Inc.*, 312 N.C. 224, 321 S.E.2d 872 (1984), explains that arbitration

2. In *Elliott v. KB Home North Carolina, Inc.*, 231 N.C. App. 332, 752 S.E.2d 694 (2013), this Court highlighted the divergence between what our courts state is the standard of review and what our courts apply in their analyses. 321 N.C. App. at 337-38 n. 1, 752 S.E.2d at 698 n. 1 ("We acknowledge that this Court has also treated a determination of waiver as a conclusion of law, sometimes in the same opinion stating that it is a finding of fact." (citations omitted)).

is a contractual right, which may be waived. The misperception about whether this is a question of fact or law arises from the North Carolina Supreme Court's plain statement in *Cyclone*: "Waiver of a contractual right to arbitration is a question of fact." *Id.* at 229, 321 S.E.2d at 876 (citations omitted). Following this language, several decisions have treated the issue as one of pure fact. *See, e.g.*, *Elliott*, 231 N.C. App. at 332, 752 S.E.2d at 694. However, close examination of the Supreme Court's own interpretation of *Cyclone* and the question of whether waiver is an issue of law or fact, along with later decisions' treatment of the issue, lead us to conclude that whether a party has waived the contractual right to arbitration is actually a mixed question of law and fact. This conclusion affects the applicable standard of review of the trial court's determination that Plaintiff waived its arbitration rights.

In *Servomation Corp. v. Hickory Const. Co.*, 316 N.C. 543, 544-45, 342 S.E.2d 853, 854 (1986), the North Carolina Supreme Court explained:

> The leading case on arbitration in North Carolina, *Cyclone Roofing Co. v. Lafave Co.*, 312 N.C. 224, 321 S.E.2d 872, teaches that arbitration is a contractual right which may be waived. However, the mere filing of a complaint or answer does not result in waiver of arbitration absent evidence showing prejudice to the adverse party.
>
> A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration.
>
> There is a strong public policy favoring the settlement of disputes by arbitration, and doubts concerning the scope of arbitrable issues will be resolved in favor of the party seeking arbitration.
>
> We note holdings from other jurisdictions, consistent with *Cyclone*, to the effect that a party waives arbitration when it engages in conduct inconsistent with arbitration which results in prejudice to the party opposing arbitration. *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985); *ATSA of California, Inc. v. Continental Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983).
>
> *Applying these rules of law to the facts of [the] instant case* we initially observe that there has been no long

> trial. Further there is no evidence that [the] plaintiff has lost helpful evidence or taken steps in litigation to its detriment.

316 N.C. at 544-45, 342 S.E.2d at 854 (emphasis added). *Servomation* explicitly holds that the determination of whether a party has waived its right requires the application of "rules of law." *Id.* at 545, 342 S.E.2d at 854.

Whether an issue is one of fact or law turns on whether its determination requires the application of legal principles.

> The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, *see Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985), or the application of legal principles, *see Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982), is more properly classified as a conclusion of law. Any determination reached through "logical reasoning from the evidentiary facts" is more properly classified a finding of fact. *Quick*, 305 N.C. at 452, 290 S.E.2d at 657-58 (quoting *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951)).

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997).

Some prior decisions by this Court have perpetuated confusion regarding the appropriate standard of review regarding waiver of the right to arbitrate. In *Prime South Homes*, despite stating that waiver is a question of fact, we reviewed *de novo* the trial court's conclusion that the plaintiff waived his right to arbitration. 102 N.C. App. at 258-59, 401 S.E.2d at 825.

We interpret *Cyclone*'s reference to waiver as a question of fact to apply to the question of whether a party has in fact engaged in a particular action. But we follow *Servomation*, and the manner in which this issue has been addressed in other decisions, and conclude that the question of whether those actions, once found as fact by the trial court, amount to waiver of the right to arbitrate a dispute is a question of law subject to *de novo* review. *Servomation*, 316 N.C. at 545, 342 S.E.2d at 854 ("Applying these *rules of law* to the facts of [the] instant case . . . ." (emphasis added)); *see also Moose v. Versailles Condominium Ass'n*, 171 N.C. App. 377, 382, 614 S.E.2d 418, 422 (holding that we review whether a trial court's findings of fact "support its conclusions of law

that a party has waived its right to compel arbitration"). This interpretation is consistent with the holdings in *Cyclone* and *Servomation* and resolves the inconsistency in our jurisprudence.

Accordingly, we first review whether the trial court's findings of fact are supported by competent evidence, and then examine *de novo* whether those findings taken together support the legal conclusion that Plaintiff waived its right to compel arbitration. As required by the parties' Choice of Law Provision, we apply New York law with regard to the substantive legal issue of what actions amount to waiver of the right to compel.

B. Discussion

[2] The primary question before us is whether Plaintiff's actions prior to seeking arbitration of Universal's counterclaims waived Plaintiff's contractual right to compel arbitration. We note that there is a split in New York law as to when the Federal Arbitration Act ("FAA") applies and whether the standard for demonstrating waiver under the FAA differs from New York's standard—specifically, whether demonstration of prejudice is a requisite for the conclusion of waiver. *Compare Gramercy Advisors LLC v. J.A. Green Dev. Corp.*, No. 650166/2014, 2015 WL 1623789 *1, *6 (N.Y. Sup. Ct. Aug. 13, 2015), *aff'd*, 23 N.Y.S.3d 38, 134 A.D.3d 652 (2015) (noting that "the court need not determine whether New York or [the FAA] waiver standards govern, as the court holds that there is no material difference in the standards") *and All Metro Health Care Services, Inc. v. Edwards*, 884 N.Y.S.2d 648, 653 n.3 (2009) ("It is noted that New York law and the FAA apply different standards of wavier. Under the FAA, a wavier will not be inferred without prejudice to the opposing party as a result of the delay. New York cases do not condition a finding of waiver on prejudice to the opposing party but find a waiver based on the degree of participation." (internal citations omitted)). However, we do not need to settle this split in the present case. As discussed below, Universal has failed to demonstrate both that Plaintiff acted inconsistent with its right to compel arbitration and that Universal was prejudiced, and therefore the trial court's denial of Plaintiff's Motion to Compel is erroneous.

Both New York and Federal law impose a strong policy favoring arbitration. *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2nd Cir. 1995). Generally, "any doubts concerning whether there has been a waiver are resolved in favor of arbitration." *Id.* at 25 (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L.Ed.2d 765 (1983)). This policy has led to the decree

that "waiver of arbitration is not to be lightly inferred." *Id.* at 25 (internal quotation marks and citations omitted). "Whether or not there has been a waiver is decided in the context of the case, with a healthy regard for the policy of promoting arbitration." *Id.* at 25 (citation omitted).

When reviewing whether a party has waived the right to compel arbitration, courts look to (1) "the amount of litigation (usually exchanges of pleadings and discovery)," (2) "the time elapsed from the commencement of litigation to the request for arbitration," and (3) "the proof of prejudice[.]" *Leadertex*, 67 F.3d at 25; *see also Cusimano v. Schnurr*, 26 N.Y.3d 391, 400, 44 N.E.3d 212, 218, 23 N.Y.S.3d 137, 143 (2015).

1. Amount of Litigation

This case presents a unique legal issue. In reviewing the trial court's findings relating to the amount of litigation inconsistent with Plaintiff's arbitration rights, we must decide whether Plaintiff's claims in its Second Amended Complaint asserted against Universal—as the transferee of fraudulent transfers—arose out of or related to the Split Funding Agreement. How we decide this issue will determine whether Plaintiff's discovery efforts relating to the claims in the Second Amended Complaint were inconsistent with its right to compel arbitration. We conclude that, based on the pleadings, Plaintiff's initial claims against Universal bore no relation to the Split Funding Agreement, and therefore we will consider only the litigation and discovery pursued by Plaintiff following, and directly related to, Universal's counterclaims.

Plaintiff's claims against Universal assert only that Universal was a recipient of certain fraudulent transfers by the other defendants. These claims are entirely independent of any claim against Universal for other conduct, including conduct related to the Split Funding Agreement. Universal filed its counterclaims against Plaintiff on 29 December 2015, alleging breach of contract, defamation, tortious interference with contract and/or prospective advantage, and unfair and deceptive trade practices, all relating to the Split Funding Agreement. Plaintiff filed its first response to Universal's counterclaims—a motion to dismiss, or, in the alternative, to stay and compel arbitration—on 24 February 2016. Plaintiff served no additional discovery requests on Universal after the counterclaims were filed. We are unpersuaded that Plaintiff's claims in its Second Amended Complaint are inextricably interwoven with Universal's counterclaims.

In January 2016, within a month after the counterclaims were filed, Plaintiff took the depositions of Kelly and Jessica. The trial court's finding that Kelly and Jessica were the "sole employees and officers" of

Universal is unchallenged and binding on appeal. However, the pleadings reveal that Plaintiff sued Kelly and Jessica in their individual capacities and not as employees, officers, or agents of Universal. A close examination of the deposition transcripts also shows that Plaintiff's questions relating to Universal's counterclaims were limited, and that counsel for Plaintiff stated, prior to questioning witnesses, "iPayment is reserving all rights to argue that counterclaim 1 is subject to arbitration under its contract and as [sic] they're participating in discovery without waiving any of those rights to those arguments." Keeping in mind the strong public policy favoring arbitration, we hold that the trial court's conclusion that Plaintiff acted inconsistent with its right to compel arbitration is unsupported by its findings of fact.

2. Time Elapsed From the Commencement of the Litigation

Given the particular facts and the nature of Plaintiff's claims in this case, the relevant period of litigation prior to the request for arbitration began not with the filing of the lawsuit, but with the filing of Universal's counterclaims. Plaintiff moved to compel arbitration within two months after Universal filed its counterclaims. This two-month period falls far short of periods that other courts have deemed insufficient to establish waiver of arbitration rights. *See*, *e.g.*, *Brownstone Inv. Grp.*, *LLC v. Levey*, 514 F. Supp. 2d 536, 540 (S.D.N.Y. 2007) (holding that a "delay of more than ten months in seeking arbitration is insufficient by itself to support a finding of waiver"). Accordingly, we are unpersuaded that this amount of time would support the conclusion that Plaintiff waived its right to compel arbitration based on delay.

3. Prejudice

Plaintiff's limited participation in the litigation has not prejudiced Universal by allowing Plaintiff to take advantage of discovery not permitted under the rules of arbitration. The Arbitration Clause in the Split Funding Agreement limits discovery to: "twenty-five (25) interrogatories and twenty-five (25) document requests per side, and no more than two (2) depositions per side; and [] the discovery period to three (3) months . . . ." The period between Universal's filing of its counterclaims and Plaintiff's filing of its Motion to Compel was two months, well within the permissible timeframe for discovery allowed by the Arbitration Clause. Moreover, Plaintiff's depositions of Kelly and Jessica did not exceed the scope of discovery allowed by the Arbitration Clause.

We also note that Plaintiff's initial response to the counterclaims was to assert its right to compel arbitration of those claims. Beyond Plaintiff's Motion to Compel the counterclaims, Plaintiff engaged in no

motion practice related to the merits of the counterclaims. *See Kramer v. Hammond*, 943 F.2d 176, 179 (2nd Cir. 1991) (holding that the defendant's substantial engagement in motion practice including a motion for summary judgment, amounted to prejudice to the plaintiff and established waiver of the right to compel arbitration).

We hold that Universal has failed to demonstrate any prejudice caused by the limited discovery taken prior to Plaintiff's Motion to Compel. Considering the record in light of the strong public policy favoring arbitration, we conclude that Plaintiff did not waive its right to compel arbitration.

Conclusion

For the foregoing reasons, we reverse the trial court's denial of Plaintiff's Motion to Compel Arbitration and remand this matter to the trial court to enter an order compelling arbitration of Universal's counterclaims.

REVERSED AND REMANDED.

Judges CALABRIA and DILLON concur.

RAYMOND CLIFTON PARKER, PLAINTIFF
v.
MICHAEL DESHERBININ AND WIFE, ELIZABETH DESHERBININ, DEFENDANTS

No. COA17-377-2

Filed 2 January 2018

1. Declaratory Judgments—identification of boundary line—location of fence—adverse possession

The trial court erred in an action involving a dispute over a property line by making a finding of fact that plaintiff constructed a fence along what he believed to be the northern-boundary line of his property where the overwhelming non-contradicted evidence indicated he constructed a fence within the boundary of his property.

2. Adverse Possession—findings of fact—sufficiency of evidence—open and continuous possession

The trial court erred in an action involving a dispute over a property line by making a finding of fact that a disputed area could not be

mowed because it was so overgrown and there was nothing visible to indicate anyone was in possession of or maintaining the disputed area. Defendants conceded that competent evidence was presented of plaintiff's open and continuous possession of that portion of the disputed area up to the location of plaintiff's chain link fence.

3. Adverse Possession—color of title—conclusions of law—sufficiency of evidence—chain link fence—lappage

The trial court erred in an action involving a dispute over a property line by making a conclusion of law that plaintiff had not established adverse possession by color of title of a disputed area south of a chain link fence where the uncontradicted evidence showed plaintiff's actual, open, notorious, exclusive, continuous and hostile occupation and possession. Further, a dispute between property owners where their respective titles purport to grant ownership to and over an overlapping area does not require the adverse claimant to show actual possession of the entire area under lappage.

4. Declaratory Judgments—identification of boundary line—adverse possession—premature dismissal of negligence and nuisance claims

The trial court erred in an action involving a dispute over a property line by dismissing plaintiff's amended claims for negligence and nuisance with prejudice based on defendants' purported violation of a county's 15-foot setback requirement where the true boundary line between the parties' properties had not yet been determined.

Appeal by plaintiff from judgment entered 22 September 2016 and from order entered 1 December 2016 by Judge Mary Ann Tally in New Hanover County Superior Court. Heard originally in the Court of Appeals 26 September 2017, and published opinion filed 17 October 2017. A petition for rehearing was filed 20 November 2017 and allowed on 6 December 2017. Pursuant to the petition for rehearing, the matter was reheard in the Court of Appeals. This opinion supersedes the 17 October 2017 opinion previously filed in this matter.

Hodges, Coxe, Potter, & Phillips, LLP, by Bradley A. Coxe, for Plaintiff-Appellant.

H. Kenneth Stephens, II for Defendant-Appellees.

TYSON, Judge.

Raymond Clifton Parker ("Appellant") appeals from denial of a directed verdict made at the close of Appellant's evidence and renewed at the close of all evidence dated 29 August 2016, from a judgment entered on 22 September 2016 in favor of Michael and Elizabeth DeSherbinin (collectively "Appellees"), and from an order dated 1 December 2016, denying Appellant's motion for judgment notwithstanding the verdict, to amend the judgment and for a new trial. For the following reasons, we affirm in part, reverse in part the trial court's judgment, vacate in part, and remand for further findings of fact.

I. Background

Appellant and Appellees own adjoining tracts of real property located in New Hanover County, adjacent to the Intracoastal Waterway. Appellant acquired his property, located at 19 Bridge Rd., from himself as trustee of the Grace Pittman Trust by a general warranty deed dated 21 December 1983. The deed was recorded on 16 January 1984 in Book 1243, at Page 769, in the New Hanover County Registry.

The Appellees acquired their property, a vacant lot, located at 1450 Edgewater Club Rd., by a warranty deed from John Anderson Overton and Holland Ann Overton, dated 16 December 2013 and recorded 17 December 2013 at Book 5788, at Page 1866, in the New Hanover County Registry. Appellees purchased their property with the intent to build a residence. The Appellees hired a surveyor, Marc Glenn, to survey the property and prepare a plat.

Glenn's survey (the "Glenn survey") fixed the boundary between Appellant's and Appellees' properties to be approximately 5 feet south of the line established in a survey completed in 1982 by surveyor George Losak (the "Losak survey") and recorded at Map Book 21, at Page 63, in the New Hanover County Registry. The Glenn survey shows a chain link fence installed by Appellant to the north of the boundary line between the parties' properties. The Glenn survey failed to reference the prior recorded Losak surveys or show any overlaps in the surveyed boundary lines.

In the Spring of 2014, Appellant and Appellees met regarding the boundary line between their properties. Appellant informed Appellees of an existing issue regarding the location of the boundary line. Appellees were also made aware, by their seller, prior to their purchase, that a dispute existed over the boundary line of the two properties. Appellees' attorney closed on the property as shown in the Glenn survey, certified title thereto and obtained title insurance thereon.

Appellees filed for a building permit for the residence they intended to construct at 1450 Edgewater Club Rd. Appellees attached a copy of the Glenn survey to their building permit application. Appellant complained and shared the recorded Losak survey with the New Hanover County planning and zoning office, prior to the issuance of the Appellees' building permit being issued, but to no avail.

Appellees continued to build their residence based on their belief the Glenn survey correctly showed the boundary. Appellant commissioned yet another survey from Charles Riggs, a registered licensed surveyor (the "Riggs survey"), while Appellees' house was under construction.

Appellant filed an initial complaint on 23 June 2015 and an amended complaint on 7 January 2016. Appellant asserted claims for negligence, nuisance, declaratory judgment to identify the boundary line, adverse possession under color of title, and adverse possession under twenty years of continuous possession. On 4 March 2016, Appellees filed an answer denying Appellant's claims and a counterclaim seeking a declaratory judgment to identify and establish the boundary line based upon their Glenn survey.

On 29 August 2016, the case came to trial. The parties agreed to waive trial by jury. Appellant moved for a directed verdict at the close of his evidence and renewed again at the close of all evidence. These motions were denied.

Among the findings of fact made by the trial court are the following:

> 7. The Plaintiff's and Defendants' properties adjoin each other with the Defendants' property lying adjacent to and to the north of Plaintiff's property.
>
> 8. A map of Edgewater Subdivision recorded in Map Book 2, at Page 113, is the original map of Edgewater Subdivision (herein "Edgewater Map") and created said subdivision.
>
> 9. Plaintiff's and Defendants' properties are portions of Lots 4 and Lot 5 as shown on the map of Edgewater Subdivision, as recorded in Map Book 2, at Page 113, of the New Hanover County Registry.
>
> 10. The Defendants engaged James B. Blanchard, PLS, a licensed registered land surveyor to perform a survey of the parties properties in February, 2016 to establish the dividing line between Lots 4 and 5 of Edgewater

Subdivision as shown on Map Book 2, at Page 113, of the New Hanover County Registry and then to establish the boundary-line between the property of the parties.

11. At the trial of this matter, Defendants presented the testimony of Mr. Blanchard who was tendered to and accepted by the Court without objection by Plaintiff as an expert witness in land surveying.

12. That none of the original monuments shown on the Edgewater Map could be located by Mr. Blanchard.

13. Mr. Blanchard established the dividing line between Lots 4 and 5 of Edgewater Subdivision as follows:

a. By determining the northern line of Edgewater Subdivision by determining the southern line of Avenel Subdivision, the adjoining property to the north of Edgewater, as shown on a map recorded in Map Book 31, at Page 36 (herein "Avenel Map") and a map recorded in Map Book 7, at Page 14, both in the New Hanover County Registry.

b. That concrete monuments evidencing the southern line of Avenel and the northern line of Edgewater are shown on the Avenel Map and were located by Mr. Blanchard.

c. Mr. Blanchard established a line southwardly and perpendicular to the northern line of Edgewater Subdivision and along the eastern right of way of Final Landing Lane, as shown on the Edgewater Map, for the distance shown on the Edgewater Subdivision Map required to reach the dividing line between Lots 4 and 5 all as shown on the Edgewater Map.

d. Mr. Blanchard located the northern line of the tract adjoining Edgewater Subdivision on the south, i.e. the southern line of Edgewater Subdivision, as shown on a map recorded in Map Book 11, at Page 17, of the New Hanover County Registry.

e. Mr. Blanchard found monuments confirming his determination of the southern line of Edgewater Subdivision as shown on the original Edgewater Map.

f. That the Edgewater Map showed a fence running along the northern line of Edgewater Subdivision and that Mr. Blanchard, during the performance of his field work,

located remnants of a wire fence running along the line which he determined to be the northern line of Edgewater.

14. The Defendants introduced a map by Mr. Blanchard dated July 9, 2016 (Defendants' Exhibit 21, herein the "Blanchard Map"), showing the findings of his survey and illustrating his testimony and opinions as to the location of the boundary-line between Lots 4 and 5 of Edgewater Subdivision, as well as the boundary-line between the Defendants' tract to the north described in Deed Book 5788, at Page 1866, of the New Hanover County Registry, and Plaintiff's tract to the south described in Deed Book 1243, at Page 769, of the New Hanover County Registry.

15. George Losak, registered land surveyor, prepared a map for "The William Lyon Company" dated December 30, 1982, recorded in February 10, 1983 and in Map Book 21, at Page 63, of the New Hanover County Registry (the "Losak Survey") showing or purporting to show the property later purchased by Plaintiff.

16. In August 1983, Mr. Losak prepared a second map of the property for "The Grace Pittman Trust" which was recorded on September 7, 1983 in Map Book 22, at Page 20, of the New Hanover County Registry. The purpose of this map was to correct errors contained in the Losak Survey.

17. Plaintiff's deed dated December 21, 1983 and recorded on January 16, 1984 referred to the Losak Survey, recorded in Map Book 21, at Page 63, of the New Hanover County Registry.

18. The Losak Survey referred to hereinabove depicts pipes and monuments which Mr. Losak ignored in determining the boundary-line between the subject properties.

19. The Court finds Mr. Blanchard's testimony to be credible and correct as to the location of the boundary-line between the Plaintiff's and Defendants' properties.

20. The true location of the boundary-line between Plaintiff's property and Defendants' property is shown on the Blanchard Map dated July 9, 2016 which describes the dividing line between the parties' properties as follows:

. . . .

21. Defendants purchased their property, also known as 1450 Edgewater Club Road, in December of 2013.

22. At the time the Defendants purchased their property the Plaintiff and Defendants' predecessor in title were engaged in a dispute with regard to the boundary-line between the parties' tracts.

. . . .

24. The Defendants hired Polaris Surveying, LLC and Marc Glenn, PLS to survey the property and prepare a boundary survey, a site plan, and topographical survey.

25. Marc Glenn determined the boundary-line to be as shown on his map recorded in Map Book 58, at Page 363, of the New Hanover County Registry, which is substantially where Mr. Blanchard locates the boundary-line.

. . . .

30. After closing on their property the Defendants had a chance meeting with the Plaintiff on site on or about April or May of 2014 while they were meeting with a contractor during the design phase of their home.

31. During this chance meeting Plaintiff raised the boundary-line issue and told Defendants about the Losak Survey and the monuments Losak found, but he did not show any of the monuments to the Defendants nor did he point them out.

32. In October 2014, after hiring several surveyors and attempting to hire several other surveyors Plaintiff hired Charles Riggs to survey his property and to confirm the description contained on the Losak Surveys.

33. At the time Plaintiff hired Mr. Riggs the Defendants house was approximately forty percent (40%) complete.

34. Charles Riggs provided the Plaintiff with a survey reflecting his findings on January 30, 2015.

35. The Defendants first saw the Riggs Survey in 2015 when their house was approximately seventy percent (70%) complete.

36. The New Hanover County zoning ordinance requires a minimum side set back of fifteen feet (15') for structures built on Defendants' property.

37. In 1985, the Plaintiff constructed a fence along what he believed to be the northern-boundary line of his property and the southern boundary-line of Defendants' property. This area is hereto referred to [as] the "Disputed Area".

38. After 2005, Plaintiff would occasionally reach through the fence or lean over the fence to trim vines growing on the property to the north of the 39. The [D]isputed [A]rea could not be mowed because it was so overgrown. There was nothing visible to indicate anyone was in possession of or maintaining the Disputed Area.

The trial court also made the following relevant conclusions of law:

2. Plaintiff's and Defendants' chains of title and vesting deeds both establish that the dividing line between the property, i.e. their common boundary, is the dividing line between tracts 4 and 5 of Edgewater Subdivision as shown on the map of said subdivision recorded in Map Book 2, at Page 113, of the New Hanover County Registry or can only be determined by locating the line between Lots 4 and 5 of Edgewater Subdivision.

3. That the true boundary-line between Plaintiff and Defendants is as shown on the Blanchard Map referred to in the findings of fact and further more particularly described as follows:

. . . .

4. That the Defendants were not negligent in purchasing their property or in proceeding with the construction of their residence on their property.

5. That the construction and location of Defendants' home does not violate the fifteen foot (15') minimum side set back requirement of the New Hanover County zoning ordinance.

6. That the actions of the Defendants did not constitute a substantial interference with the Plaintiff's use of his property and were not unreasonable and therefore do not constitute a nuisance.

> 7. That Plaintiff's possession, if any, of any portion of the [D]isputed [A]rea was not open, notorious, or continuous and therefore [does] not constitute adverse possession either with or without color of title.

On 22 September 2016, the trial court found in favor of Appellees on all of Appellant's claims and entered judgment. Appellant filed a motion for judgment notwithstanding the verdict, a motion to amend the judgment, and a motion for a new trial which were all denied by the trial court on 1 December 2016. Appellant timely filed an amended notice of appeal on 30 December 2016.

II. Statement of Jurisdiction

Jurisdiction lies in this Court from a final judgment of the superior court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Standard of Review

Where trial is other than by jury, "[t]he trial judge acts as both judge and jury and considers and weighs all the competent evidence before him. If different inferences may be drawn from the evidence, the trial judge determines which inferences shall be drawn and which shall be rejected." *In re Estate of Trogdon*, 330 N.C. 143, 147-48, 409 S.E.2d 897, 900 (1991) (emphasis and citation omitted).

> In a bench trial in which the superior court sits without a jury, the standard of review 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 are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Hanson v. Legasus of North Carolina, LLC, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010) (citation omitted).

IV. Analysis

Appellant argues several of the trial court's findings of fact are unsupported by competent evidence, and several of the trial court's conclusions of law are not supported and improper in light of the relevant findings of facts and law. We address the disputed findings of fact and conclusions of law in turn.

A. Finding of Fact 37

[1] Appellant argues no competent evidence supports the trial court's finding of fact 37 that "in 1985, the [Appellant] constructed a fence *along what he believed to be the northern-boundary line of his property* and the southern boundary-line of [Appellees'] property." (Emphasis supplied.). Appellees do not contest Appellant's assertion and testimony that the chain link fence was not placed on what Appellant considered to be the boundary line of the subject properties.

After reviewing the record and stipulations of counsel at oral argument, we hold that no evidence supports the trial court's finding of fact 37 that "Appellant constructed a fence along what he believed to be the northern-boundary line of his property." The overwhelming, non-contradicted evidence indicates Appellant constructed a fence within the boundary of his property as purportedly established by the Losak survey.

Appellant testified at trial that when he purchased the property at 19 Bridge Rd., a low fence referred to as the "neighbor's fence" was inside the boundary line on the Losak survey. The Losak survey indicates the "neighbor's fence" was one to five feet south of the boundary line purportedly established by the Losak survey.

Appellant testified that sometime in 1984 or 1985, he constructed a chain link fence adjacent to the "neighbor's fence" as indicated on the Losak survey. Appellant stated he did not put the chain link fence on what he believed to be the property line, because dogwood trees and vegetation existed along the purported property line. Appellant stated he wanted enough space to remain between the purported property line and the chain link fence to prevent the neighbors from damaging the fence.

Appellant additionally testified the chain link fence had not been moved since it was constructed in 1984 or 1985. Appellant submitted a photograph labeled Plaintiff's Exhibit 25.20 which showed the chain link fence as it was located in the mid-1980's and in the present day.

Appellant's expert, Charles Riggs, produced a survey which shows the Losak survey line claimed by Appellant and the Blanchard survey line claimed by Appellees, and determined by the trial court to be the boundary line. The Riggs survey indicates the chain link fence was located between the disputed survey lines.

Also submitted into evidence was a 5 December 2013 email from Holly Overton, Appellees' predecessor-in-title to 1450 Edgewater Club Rd., to Nicole Valentine, the buyer's agent for Appellees, which discusses the

location of the chain link fence. In her email, Ms. Overton mentioned the Losak survey line and the Blanchard survey line and stated the chain link fence "is located in the middle of the two property lines mapped."

As Appellant accurately argues, no testimony or other evidence supports the trial court's finding of fact 37 that "in 1985, the [Appellant] constructed a fence along what he believed to be the northern-boundary line of his property and the southern boundary-line of [Appellees'] property." Appellees' only argument against Appellant on this point is that because "Appellant never located the chain link fence on the ground it is impossible to locate the fence with any more precision."

However, counsel agree the chain link fence is "known and visible" and is in the same location it was in when Appellant first built it in 1984 or 1985. Furthermore, no evidence was presented at trial to contradict the location of the chain link fence as surveyed by Appellant's surveyor, Riggs.

No competent evidence supports the trial court's finding of fact 37.

B. Finding of Fact 39

[2] Appellant argues insufficient evidence supports the trial court's finding of fact 39: "The [D]isputed [A]rea could not be mowed because it was so overgrown. There was nothing visible to indicate anyone was in possession of or maintaining the Disputed Area." Appellees concede competent evidence was presented of Appellant's open and continuous possession of that portion of the Disputed Area up to the location of Appellant's chain link fence.

Appellant produced photographs, admitted into evidence, which tend to show the condition of the property as maintained by Appellant since he first acquired it in 1983. Appellant's unchallenged photographs depict a maintained and cleared lawn, with storage and buildings established along the fence line.

An email from Holly Overton, the Appellees' predecessor-in-title to 1450 Edgewater Club Rd., to Nicole Valentine, the Appellees' agent, stated Appellant would trim bushes along the chain link fence in the Disputed Area and store his equipment. Appellees presented no evidence to dispute Appellant's continued maintenance of the property in the portion of the Disputed Area south of the chain link fence.

The trial court's finding of fact 39 is not supported by competent evidence, to the extent it expresses the Disputed Area "could not be mowed because it was so overgrown. There was nothing visible to indicate anyone was in possession of or maintaining the Disputed Area."

C. Conclusion of Law 7

[3] Appellant argues the trial court's conclusion of law 7 is in error based upon the law of adverse possession and the unsupported findings of fact that he did not use, maintain, and possess the Disputed Area on his property's side of the chain link fence.

Conclusion of law 7 states: "That Plaintiff's possession, if any, of any portion of the [D]isputed [A]rea was not open, notorious, or continuous and therefore [does] not constitute adverse possession either with or without color of title."

1. Adverse Possession for Twenty Years

In North Carolina, "[t]o acquire title to land by adverse possession, the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period[.]" *Jones v. Miles*, 189 N.C. App. 289, 292, 658 S.E.2d 23, 26 (2008) (citation and quotation marks omitted); *Federal Paper Board Co. v. Hartsfield*, 87 N.C. App. 667, 671, 362 S.E.2d 169, 171 (1987) (holding that "[t]itle to land may be acquired by adverse possession when there is actual, open, notorious, exclusive, continuous and hostile occupation and possession of the land of another under claim of right or color of title for the entire period required by the statute.") (internal quotation marks and citation omitted).

Adverse possession of privately owned property without color of title must be maintained for twenty years in order for the claimant to acquire title to the land. N.C. Gen. Stat. § 1-40 (2015).

Presuming, *arguendo*, the trial court was correct in determining the Blanchard survey line was the correct boundary line between the parties' properties of Lots 4 and 5, uncontradicted evidence proves Appellant's actual occupation and continuous use of the property on the southern half of the Disputed Area since he acquired 19 Bridge Rd. in the early 1980s.

Appellant's installation of the chain link fence and his admitted maintenance of the area around and inside it since he established the fence in 1984 or 1985 shows his actual, open, notorious, exclusive and hostile use of property located on the south side of the chain link fence in the Disputed Area to support his claim for adverse possession under the requisite twenty year possession period. *See Blue v. Brown*, 178 N.C. 334, 337, 100 S.E. 518, 519 (1919) (holding a fence, maintained for many years, a hedgerow and possession for 30 or 40 years justified verdict for adverse possession); *Brittain v. Correll*, 77 N.C. App. 572, 575, 335

S.E.2d 513, 515 (1985) (holding a fence and other outbuildings showed claimants were asserting exclusive right over the disputed property); *Snover v. Grabenstein*, 106 N.C. App. 453, 459, 417 S.E.2d 284, 287 (1992) (holding that fence in place for more than fifty years such that the possession exercised by parties on either side of it was open, notorious and continuous so as to constitute adverse possession).

Appellees presented no evidence that they, or their predecessors-in-title, disputed or gave permission to Appellant to erect his chain link fence in the Disputed Area, until they sent a letter to Appellant in 2014, more than thirty years after Appellant built the fence. Appellees presented no evidence that anyone, other than Appellant, claimed, used, or maintained the area on the south side of the chain link fence after Appellant acquired 19 Bridge Rd. in 1983.

The uncontradicted evidence shows Appellant's actual, open, notorious, exclusive, continuous and hostile occupation and possession of the area on the south side of the chain link fence within the Disputed Area for the statutory period. *See Federal Paper Board*, 87 N.C. App. at 671, 362 S.E.2d at 171.

Appellees' counsel conceded at oral argument before this Court that Appellant's uncontradicted evidence established adverse possession to the portion of the Disputed Area on the south side of the chain link fence. The trial court erred, as a matter of law, in concluding Appellant had not established adverse possession to the south side of the Disputed Area bounded by the chain link fence.

2. Color of Title

Appellant argues he is entitled to the entire Disputed Area on the north and south side of the chain link fence through adverse possession under color of title.

Appellant asserts the deed under which he acquired title to 19 Bridge Rd. establishes color of title so that he is entitled to the area of property located north of the chain link fence in the Disputed Area by adverse possession under color of title. By statute, when the claimant's possession is maintained under an instrument that constitutes "color of title," the prescriptive period is reduced from twenty to seven years. N.C. Gen. Stat. § 1-38(a) (2015).

Appellees argue Appellant's adverse possession under color of title claim fails, as a matter of law, because the Losak survey referenced in Appellant's deed stated an incorrect boundary line.

Our Supreme Court has held:

> A deed offered as color of title is such only for the land designated and described in it. *Norman v. Williams*, 241 N.C. 732, 86 S.E.2d 593; *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E.2d 673; *Barfield v. Hill*, 163 N.C. 262, 79 S.E. 677. "A deed cannot be color of title to land in general, but must attach to some particular tract." *Barker v. Southern Railway*, 125 N.C. 596, 34 S.E. 701. To constitute color of title a deed must contain a description identifying the land or referring to something that will identify it with certainty. *Carrow v. Davis*, 248 N.C. 740, 105 S.E.2d 60; *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759.
>
> . . . .
>
> When a party introduces a deed in evidence which he intends to use as color of title, he must, in order to give legal efficacy to his possession, prove that the boundaries described in the deed cover the land in dispute. *Smith v. Fite*, 92 N.C. 319. *He must not only offer the deed upon which he relies for color of title, he must by proof fit the description in the deed to the land it covers-in accordance with appropriate law relating to course and distance, and natural objects and other monuments called for in the deed. Wachovia Bank & Trust Co. v. Miller*, 243 N.C. 1, 89 S.E.2d 765; *Skipper v. Yow*, 238 N.C. 659, 78 S.E.2d 600; *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692; *Locklear v. Oxendine*, *supra*; *Smith v. Benson*, 227 N.C. 56, 40 S.E.2d 451.

McDaris v. "T" Corp., 265 N.C. 298, 300-01, 144 S.E.2d 59, 61 (1965) (emphasis supplied).

A plaintiff's burden at trial is also well established:

> [I[n order to present a prima facie case [of adverse possession], [a plaintiff] must . . . show that the disputed tract lies within the boundaries of their property. *See Cutts v. Casey*, 271 N.C. 165, 167, 155 S.E.2d 519, 521 (1967); *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E.2d 562, 563 (1959). *Plaintiffs thus bear the burden of establishing the on-the-ground location of the boundary lines which they claim. Virginia Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 391, 343 S.E.2d 188, 194, *disc. review denied*,

> 317 N.C. 715, 347 S.E.2d 457 (1986). If they introduce deeds into evidence as proof of title, they must "locate the land by fitting the description in the deeds to the earth's surface." *Andrews v. Bruton*, 242 N.C. 93, 96, 86 S.E.2d 786, 788 (1955).

Chappell v. Donnelly, 113 N.C. App. 626, 629, 439 S.E.2d 802, 805 (1994) (emphasis supplied).

The evidence shows Appellant acquired title to 19 Bridge Rd. pursuant to a recorded deed in 1983. Appellant's deed contains a metes-and-bounds description, and refers and incorporates into the deed the recorded survey prepared by George Losak. *See Collins v. Land Co.*, 128 N.C. 563, 565, 39 S.E. 21, 22 (1901) ("[A] map or plat, referred to in a deed, becomes a part of the deed as if it were written therein[.]").

The trial court's conclusion of law 7 is not supported by the trial court's findings of fact and is in error as a matter of law, to the extent it states Appellant has not established adverse possession of the Disputed Area south of the chain link fence. *See Hanson*, 205 N.C. App. at 299, 695 S.E.2d at 499. There remain unresolved factual issues of whether the metes-and-bounds description contained in Appellant's deed and the incorporated reference to the Losak survey accurately describe the extent of Appellant's property.

Even though the trial court found the Blanchard survey accurately shows the true boundary line between the Appellant and Appellees' properties, the court made no findings regarding whether Appellant had shown the on-the-ground boundary lines described in his deed and depicted in the Losak survey referenced therein. To determine whether Appellant has adversely possessed the remaining portion of the Disputed Area under color of title, it is necessary for the trial court to make findings of fact regarding whether Appellant can fit the description of the deed and survey under which he claims color of title to the portion of the Disputed Area north of his chain link fence. *See Andrews*, 242 N.C. at 96, 86 S.E.2d at 788.

We reverse and remand this matter to the trial court to determine whether the deed and survey under which Appellant acquired title sufficiently describes the remaining portion of the Disputed Area.

3. Lappage

Appellant argues this case involves an issue regarding the parties presenting overlapping claims of ownership to the Disputed Area, known as a "lappage."

In a case of "lappage," a dispute between property owners where their respective titles purport to grant ownership to and over an overlapping area, the adverse claimant is not required to show actual possession of the entire area under lappage:

> It is thoroughly established law that when a person having color of title to a particular tract of land, which the written instrument, that is color of title, describes *by known and visible lines and boundaries*, enters into and adversely holds a part of such tract under the authority ostensibly given him by such instrument asserting ownership of the whole, *his ensuing possession is not limited to the portion of the tract as to which there has been an entry or actual possession, but is commensurate with the limits of the tract to which the instrument purports to give him title*, provided that at the inception, and during the continuance of the possession, there has been no adverse possession of the tract in whole or in part by another: and in this State such possession, if exclusive, open, continuous and adverse for seven consecutive years, the title being out of the State, will ripen into an unimpeachable title to the whole, provided there has been and is no adverse possession of the tract in whole or in part during such seven consecutive years by another.

Wachovia Bank & Tr. Co. v. Miller, 243 N.C. 1, 6, 89 S.E.2d 765, 769 (1955) (emphasis supplied) (citations omitted).

If on remand, the trial court determines the Appellant's metes-and-bounds deed description and incorporated reference to the Losak survey contained in Appellant's deed can be located upon the ground and is sufficient to establish Appellant possessed color of title to the remaining Disputed Area, Appellant will be entitled to quiet title to the entirety of the Disputed Area, based on his undisputed adverse possession for twenty years of that portion of the Disputed Area south of the chain link fence. *See id.*

D. Nuisance and Negligence Claims

[4] Appellant asserted claims for negligence and nuisance in his amended complaint based on Appellees' purported violation of New Hanover County's 15 foot setback requirement. Appellees presented evidence that they filed their building permit application and site plan in reliance upon their surveyor's plat and closing attorney's opinion of title, which did not indicate any encroachments into the

setback area. Appellees have made no improvements located upon Appellant's property.

The true boundary line between the parties' properties has not yet been determined. Because this material factual issue has not been resolved, those portions of the trial court's judgment dismissing Appellant's negligence and nuisance claims with prejudice were premature and must be vacated.

V. Conclusion

A review of the record evidence and the testimony presented at trial and stipulations of counsel on appeal shows some of the findings of fact made by the trial court are not supported by any competent, substantial evidence. The trial court's conclusion that Appellant was not entitled to the portion on the south side of the chain link fence within the Disputed Area by virtue of adverse possession for twenty years is error as a matter of law.

Unresolved factual issues remain regarding whether Appellant's deed and the recorded Losak survey referenced and incorporated therein provide color of title to the entirety of the Disputed Area, requiring remand to the trial court for further findings of fact. Conclusion of law 7 is reversed and the matter remanded to the trial court to make additional findings of fact and conclusions of law with regard to Appellant's claim of adverse possession by color of title, and to enter judgment accordingly. The trial court's dismissal of Appellant's negligence and nuisance claims with prejudice is vacated.

We remand this case with instructions to the trial court to enter judgment to quiet title and award Appellant ownership to the portion of the Disputed Area on the south side of Appellant's chain link fence. If the physical location of the chain link fence is not otherwise sufficiently located, the trial court is to direct James Blanchard, P.L.S. or another licensed surveyor, to physically locate, fit and describe the location of Appellant's chain link fence. The expense of said survey shall be taxed as court costs.

On remand, Appellant bears the burden of establishing that the boundaries described in his deed and the incorporated Losak survey, through which he acquired title to 19 Beach Rd., describe the portion of the Disputed Area north of the chain link fence. *See McDaris*, 265 N.C. at 300-01, 144 S.E.2d at 61.

If the trial court finds and concludes that Appellant meets this burden, the trial court is to also enter judgment quieting title and awarding

Appellant ownership of that portion of the Disputed Area north of the chain link fence and to the entire Disputed Area. *See Wachovia Bank*, 243 N.C. at 6, 89 S.E.2d at 769.

The decision of the trial court is affirmed in part, reversed in part, vacated in part, and the case is remanded for further findings as noted herein. *It is so ordered.*

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

Judges BRYANT and INMAN concur.

KRISTA RAGSDALE, GUARDIAN AD LITEM FOR ALEC SEEBURGER, PLAINTIFF
v.
DR. JOHN M. WHITLEY AND CUMBERLAND COUNTY HOSPITAL SYSTEM, INC., D/B/A CAPE FEAR VALLEY HEALTH SYSTEM, DEFENDANTS

No. COA17-860

Filed 2 January 2018

Medical Malpractice—summary judgment—disability—incompetency—statute of limitations

The trial court erred in a medical malpractice case by granting summary judgment in favor of defendant doctor and county hospital system where plaintiff's guardian ad litem forecasted sufficient evidence to create a genuine issue of material fact as to whether plaintiff was incompetent at the time the statute of limitations under N.C.G.S. § 1-15(c) and § 1-17(b) expired, thus tolling the statute. Further, plaintiff presented evidence that his action was instituted within the permissible period after the accrual of the cause of action.

Appeal by plaintiff from order entered 16 May 2017 by Judge Beecher R. Gray in Cumberland County Superior Court. Heard in the Court of Appeals 29 November 2017.

Coy E. Brewer, Jr. and Allen W. Rogers for plaintiff-appellant.

Parker Poe Adams & Bernstein LLP, by Michael J. Crook and Patrick M. Meacham, for defendant-appellees.

ARROWOOD, Judge.

Krista Ragsdale ("Krista"), guardian ad litem for Alec Seeburger ("Alec"), ("plaintiff") appeals from an order granting summary judgment in favor of Dr. John Whitley ("Dr. Whitley") and Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Health System ("defendants"). For the reasons stated herein, we reverse the order of the trial court and remand for further proceedings.

I. Background

On 20 May 2015, Alec filed a complaint for medical malpractice against Dr. Whitley and Cape Fear Valley Neurosurgery d/b/a Cape Fear Valley Health System Specialty Group, LLC f/k/a Cape Fear Valley Health System, Inc. On 12 November 2015, Alec voluntarily dismissed the complaint pursuant to Rule 41 of the North Carolina Rules of Civil Procedure.

On 7 December 2015, plaintiff was appointed as guardian ad litem ("GAL") for Alec. In an order filed 31 December 2015, the trial court stated that "[i]t appears to the Court from [Krista's] affidavit and the statement from his treating physician that Alec [] is incapable of conducting his own affairs and is entitled to the appointment of a Guardian ad Litem."

On 31 December 2015, plaintiff refiled the complaint against defendants. On 5 April 2016, plaintiff filed an amended complaint. Plaintiff alleged as follows: Alec was born on 19 January 1996 and was until his eighteenth birthday on 19 January 2014, "a minor and was then, continuously has been and is presently under a disability preventing him from initiating this civil action for medical malpractice and professional negligence by the Defendants in this case." Plaintiff alleged that her claim was filed within the applicable statute of repose in that the last act giving rise to the cause of action occurred on 12 February 2012, when defendants' negligent treatment of Alec was discovered. In February of 2011, Alec began experiencing peripheral vision difficulties and was later diagnosed with having a large pituitary adenoma. A blood test to determine prolactin levels of the large pituitary adenoma could determine whether it should be treated surgically or medically. Plaintiff alleged that Dr. Whitley, Alec's neurosurgeon, when evaluating the need for and extent of brain surgery, and while treating Alec after surgery, negligently failed to assess the nature of the adenoma by failing to order a blood test to determine whether the pituitary adenoma could be treated medically instead of surgically.

Alec underwent surgery with Dr. Whitley on 6 March 2011. The surgery resulted in substantial swelling of Alec's brain, proximately causing a severe stroke and "severe, permanent, and debilitating neurological damage in addition to the severe, permanent, and debilitating neurological damage previously caused by the extensive and invasive brain surgery performed by Defendant Whitley." Plaintiff further alleged that surgery was unnecessary and inappropriate because Alec had a prolactinoma which should have been treated medically rather than surgically. Dr. Whitley's failure to order a blood test was a departure from the required or expected standard of care. Dr. Whitley continued to treat Alec until or about 12 February 2012, during which time Alec "experienced great pain and suffering, inability to see or walk and substantial neurological deficits."

Plaintiff alleged that in February of 2012, Alec began receiving medical services from Dr. Gerald Grant ("Dr. Grant"). Dr. Grant ordered a blood test which established that Alec's "tumor was a prolactinoma which was treatable medically." Plaintiff alleged that Dr. Whitley's surgery and the delay in beginning appropriate medical treatment of the tumor had proximately caused "severe and permanent neurological and physiological damage" to Alec.

On 6 May 2016, defendants filed an answer to the amended complaint. On 27 February 2017, defendants also filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

In a 16 May 2017 order, the trial court granted defendants' motion for summary judgment and recited the basis of its determination:

> IT APPEARING TO THE COURT that this is a medical malpractice action pursuant to N.C.G.S. § 90-21.12 and that the statute of limitations for this matter was governed by N.C.G.S. § 1-15(c) and § 1-17(b);
>
> . . . that [Alec] was born on January 19, 1996;
>
> . . . that the events giving rise to the Plaintiff's Complaint occurred on or about March 7, 2011;
>
> . . . that the Plaintiff was 18 years old as of January 19, 2014, and 19 years old as of January 19, 2015;
>
> . . . that [Alec] filed the initial Complaint in his own name without the appointment of a guardian ad litem on May 20, 2015; the initial Complaint contained no allegations

or representations that Plaintiff was incompetent, and that paragraph 10 of the initial Complaint stated, "This claim for relief is filed within the applicable Statute of Limitations because [Alec] until January 19, 2014 was a minor and the three year statute of limitations began running on that date." Therefore, it appears to the Court that the initial Complaint was filed after the expiration of the applicable statute of limitations, and while the injured Plaintiff was under no judicially recognizable disability, nor incompetent.

. . . that Plaintiff voluntarily dismissed his Complaint without prejudice on November 12, 2015. At no time prior to the dismissal of the Complaint did the Plaintiff allege or represent to the Court that the Plaintiff was not competent.

. . . that the Plaintiff re-filed a Complaint on December 31, 2015, after the appointment of a guardian ad litem, and that, for the first time, Plaintiff alleged in the re-filed Complaint that he was under a disability. The Plaintiff never was adjudicated incompetent pursuant to the purposes and intent of N.C.G.S. Chapter 35A;

. . . that a judicial determination of the Plaintiff's competency was never made pursuant to N.C.G.S. Chapter 35A and the Plaintiff failed to demonstrate or otherwise meet its burden of proof with regard to Plaintiff's competency at the time of the filing of the original Complaint, at the time of the re-filing of the Complaint, and as of the time of the hearing on Defendant's Motion for Summary Judgment;

. . . that the current action, like the initial Complaint, was filed after the expiration of the applicable statute of limitations, that the injured Plaintiff never has been adjudicated incompetent for the purposes of N.C.G.S. Chapter 35A, and that therefore there is no genuine issue of material fact as to whether the statute of limitations is a bar to the injured Plaintiff's claims.

On 5 June 2017, plaintiff filed timely notice of appeal.

II. Discussion

On appeal, plaintiff argues that the trial court erred in granting summary judgment in favor of defendants. Specifically, plaintiff contends that the trial court erred by determining that an adjudication of

incompetency pursuant to Chapter 35A of the North Carolina General Statutes was necessary to toll the statute of limitations. In addition, plaintiff contends that there was a genuine issue of material fact as to whether Alec had been incompetent since his eighteenth birthday until 7 December 2015, the date his GAL was appointed. We agree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Intern., Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citation omitted).

In this appeal, we must first determine whether the trial court erred by determining that plaintiff must have obtained an adjudication of incompetency under Chapter 35A in order for the applicable statute of limitations to be tolled.

"Questions of statutory interpretation are questions of law[.] . . . The primary objective of statutory interpretation is to give effect to the intent of the legislature. The plain language of a statute is the primary indicator of legislative intent." *First Bank v. S & R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014) (internal citations omitted).

> 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. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

Diaz v. Division of Social Services, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (internal citations omitted).

The statute of limitations for "a cause of action for malpractice arising out of the performance of or failure to perform professional services" is three years from the date the action accrued. The limitations period begins to accrue at "the time of the occurrence of the last act of the defendant giving rise to the cause of action[.]" N.C. Gen. Stat. § 1-15(c) (2015). Actions on behalf of minors for malpractice are subject to N.C.

Gen. Stat. § 1-15(c)'s limitations periods, "except that if those time limitations expire before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years." N.C. Gen. Stat. § 1-17(b) (2015). However, N.C. Gen. Stat. § 1-17(a) provides, in pertinent part, that a "person entitled to commence an action who is under a disability at the time the cause of action accrued may bring his or her action within the time limited in this Subchapter, after the disability is removed[.]" N.C. Gen. Stat. § 1-17(a). For the purposes of N.C. Gen. Stat. § 1-17(a), "a person is under a disability if the person . . . is incompetent as defined in G.S. 35A-1101(7) or (8)." N.C. Gen. Stat. § 1-17(a)(3). N.C. Gen. Stat. § 35A-1101(7) provides that an "[i]ncompetent adult"

> means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101(7) (2015).

Although the trial court found and defendants contend that Alec must have been adjudicated incompetent pursuant to Chapter 35A of our General Statutes in order for the statute of limitations to be tolled, we are not persuaded. We find the language of N.C. Gen. Stat. § 1-17(a) to be clear. If a person meets the statutory definition of an "incompetent adult" under N.C. Gen. Stat. § 35A-1101(7), the applicable statute of limitations is tolled until the disability is removed. The General Assembly made no finding that an adjudication of incompetency under Chapter 35A was required in order to toll the statute of limitations. If that had been their intent, they could have easily explicitly stated such. "When the language of the statute is clear, such as the language in this case, we are required to give the statute its logical application." *Osborne by Williams v. Annie Penn Memorial Hosp., Inc.*, 95 N.C. App. 96, 102, 381 S.E.2d 794, 797 (citation omitted), *disc. review denied*, 325 N.C. 547, 385 S.E.2d 500 (1989).

Moreover, we find our holding in *Fox v. Health Force, Inc.*, 143 N.C. App. 501, 547 S.E.2d 83, *cert. denied*, 354 N.C. 216, 553 S.E.2d 912 (2001), to be persuasive. In *Fox*, Gail Howard suffered from multiple sclerosis but was a "lively individual, able to do almost everything except walk and feed herself." *Id.* at 502, 547 S.E.2d at 84. The plaintiff, Gail Howard's guardian ad litem, alleged that on 20 October 1993, the defendants'

negligent conduct proximately caused Gail Howard to suffer permanent brain damage and that Gail Howard had been in a "permanent vegetative state[]" ever since. *Id.* The plaintiff filed suit against the defendants and her claims were dismissed due to various deficiencies in pleading, deficiencies in service and process, and failure to have a guardian ad litem appointed. *Id.* at 503-504, 547 S.E.2d at 85-86. The plaintiff eventually obtained new counsel, Gail Howard was properly adjudicated legally incompetent, and Gail Howard was appointed a legal guardian and guardian ad litem. *Id.* at 504, 547 S.E.2d at 85. The plaintiff filed a Rule 60 Motion for Relief on 8 December 1998, moving for relief from the orders of dismissal and penalties as to the previously filed complaints, arguing that the orders were "voidable due to extraordinary circumstances." *Id.* The trial court granted the plaintiff's Rule 60(b)(6) motion, giving the plaintiff relief from all dismissals, costs, and fee orders entered in the previous cases. *Id.* at 504, 547 S.E.2d at 86. The trial court also concluded that Gail Howard's claims began to run no earlier than 28 September 1998, the date she was adjudicated incompetent and her mother was appointed as her legal guardian, and the defendants appealed. *Id.* at 504-505, 547 S.E.2d at 86. On appeal, the defendants argued that the trial court erred by granting the plaintiff's Rule 60(b)(6) motion. *Id.* at 505, 547 S.E.2d at 86. Our Court ruled as follows:

> Because Gail was not yet adjudicated incompetent, although in fact she clearly was, the statute of limitations was tolled. N.C. Gen. Stat. § 1-17(a)(3) (2000). Once her guardian was appointed to represent her interests, the limitation period began to run from the time of the appointment. N.C. Gen. Stat. § 97-50 (2000); *Jefferys v. Tolin*, 90 N.C. App. 233, 368 S.E.2d 201 (1988). Thus, the trial court correctly designated 28 September 1998 as the first day of the limitation period.

Id. at 507, 547 S.E.2d at 87.

The Court's holding in *Fox* stands for the proposition that an adjudication of incompetency is not required for the tolling of the statute of limitations. As a result, we find that the trial court erred by determining that an adjudication of incompetency pursuant to Chapter 35A was required for the statute of limitations to be tolled in the present case.

Next, we must determine whether, viewing the evidence in the light most favorable to plaintiff, there was a genuine issue of material fact as to whether Alec had been an incompetent adult since his eighteenth birthday until the date his GAL was appointed.

> Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the statute of limitations is properly pleaded, and the facts with reference to it are not in conflict, it becomes a matter of law, and summary judgment is appropriate. . . . Once a defendant has properly pleaded the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action.

Soderland v. Kuch, 143 N.C. App. 361, 366, 546 S.E.2d 632, 636 (internal citations and quotation marks omitted), *disc. review denied*, 353 N.C. 729, 551 S.E.2d 438 (2001).

Here, defendants contends that the statute of limitations expired either when Alec turned nineteen years old on 19 January 2015 or absent tolling, at the latest 12 February 2015, three years after the last act of defendants. However, plaintiff argues that Alec's disability began at the time of surgery and continued until a GAL was appointed on 7 December 2015. In support of this issue, plaintiff submitted seven affidavits from the following: Dr. Ruston Stoltz ("Dr. Stoltz"), a primary care physician; Dr. Jeffrey Gray ("Dr. Gray"), a neuropsychologist; Kelly Lonnberg, the GAL's attorney; Jake Warrum, an attorney; Nancy Edwards, Alec's schoolteacher; the GAL; and Alec.

Dr. Stoltz stated that as a result of Alec's stroke and other disabilities, Alec's mental and physical status fluctuates, Alec is blind in both eyes, the right side of Alec's body has been adversely affected, and Alec has slowed cognition and delayed concentration. Dr. Stoltz stated that as of November 2015 and the period since that time, it was his opinion that as a result of his existing disabilities, Alec lacked "sufficient capacity to manage his own affairs and that he needs the assistance of his mother and/or others to assist him in managing his business and medical conditions, and/or to communicate important decisions on his behalf." Dr. Gray stated that he had seen Alec on 26 August 2015 and 29 September 2015 and Alec "continued to present with a pattern of mild neurocognitive compromise[]" and that "[v]erbal problem solving" was also an issue. The GAL's attorney stated that after Alec's brain surgery and stroke, his "physical limitations were obvious," he "spoke and moved slowly and laboriously[,]" he "struggled in many areas[,]" and he had "slowed cognitive processing . . . mak[ing] it impossible for him to support himself, live independently or handle his own complicated medical care or his own finances." Jake Warrum stated that he was familiar with

Alec's conditions and his point of contact was always through Alec's mother. Nancy Edwards stated that Alec needed "intensive assistance to achieve academic and non-academic tasks[]" and that "his mental frustration and physical disabilities severely limited his ability[]" to perform well. Plaintiff stated that Alec's stroke and surgery debilitated him mentally and physically and that he was not capable of handling his own affairs. Finally, Alec stated in his affidavit that ever since the surgery and stroke, he had difficulty thinking and focusing, did not trust himself in dealing with business matters, and did not understand his present legal case.

Defendants submitted the affidavit of Dr. George Corvin ("Dr. Corvin"), a general and forensic psychiatrist. Dr. Corvin reviewed Alec's medical, vocational rehabilitation, occupational rehabilitation, education, and other personal records, as well as the deposition transcripts of Alec and his mother, and opined to a reasonable degree of medical certainty that Alec had "been a competent adult continuously since his eighteenth (18) birthday on January 19, 2014." Dr. Corvin also stated that Alec was "currently a competent adult" and capable of managing his personal affairs and making decisions about his person, property, and family.

We believe there is evidence from which a fact finder could determine that Alec was competent when the statute of limitation expired; however, viewing all the evidence in the light most favorable to plaintiff, we find that plaintiff has forecasted sufficient evidence to create a genuine issue of material fact as to whether Alec was incompetent at the time the statute of limitation expired, tolling the statute. Plaintiff has presented evidence from which a fact finder could determine that plaintiff's action was instituted within the permissible period after the accrual of the cause of action. Accordingly, there is a genuine issue of material fact and the trial court erred by granting summary judgment in favor of defendants. The 16 May 2017 order of the trial court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

Judges STROUD and ZACHARY concur.

STATE v. HENDRICKSEN

[257 N.C. App. 345 (2018)]

STATE OF NORTH CAROLINA
v.
ERIC J. HENDRICKSEN, DEFENDANT

No. COA16-1019

Filed 2 January 2018

Sentencing—robbery with dangerous weapon—possession of stolen goods—not same conduct or property—rejection of remedies

The trial court did not err by sentencing defendant for robbery with a dangerous weapon after he had already been punished for possession of stolen goods for possessing two lottery tickets obtained in the course of the same robbery, where the robbery of money and hundreds of additional lottery tickets was not the subject of the previous trial and where the previous offense was neither for the same conduct nor for the same property. Further, the State's proposed remedies that defendant rejected would have prevented defendant from facing any possibility of being punished twice for any of the same conduct.

Appeal by defendant from judgment entered 26 January 2016 by Judge Kendra D. Hill in Superior Court, Johnston County. Heard in the Court of Appeals 18 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant-appellant.

STROUD, Judge.

Defendant, Eric Hendricksen ("defendant") appeals from his conviction of robbery with a dangerous weapon. On appeal, defendant argues that the trial court erred by imposing punishment for robbery with a dangerous weapon where he had previously pled guilty to two counts of misdemeanor possession of stolen goods and the stolen goods were obtained in the robbery. We find no error in the trial court's judgment.

I. Background

The evidence showed that on the night of 28 July 2014, a masked man armed with a gun, later identified as defendant, entered the I-40

Supergas gas station and convenience store in Johnston County, North Carolina. Defendant demanded money from the clerk behind the counter, Sunny Kapoor. When Mr. Kapoor informed defendant that the cash register was locked and had to be opened up, defendant jumped over the counter with a bag in one hand and a gun in the other, demanding the money from the register. Mr. Kapoor opened the register and defendant took the money from the register. Defendant took approximately $1,900.00 in cash from the register. After taking the money, defendant then demanded lottery tickets. The lottery ticket dispensers were locked, and defendant forced Mr. Kapoor to open them at gunpoint. Defendant then stuffed lottery tickets into his bag. After defendant had taken the cash and lottery tickets, he told Mr. Kapoor to get down and he left the store. Once outside of the store, defendant fired his gun. After the robbery, defendant went to an acquaintance's home and said he had "just done a job and had a pocket full of money."

On 30 July and 31 July 2014, defendant traveled to locations in Harnett County where he attempted to cash out lottery tickets he acquired from the robbery. Detective Rodney Byrd of the Johnston County Sherriff's Office was lead investigator of the 28 July 2014 armed robbery of the I-40 Supergas in Benson. Detective Byrd called the North Carolina Education Lottery to provide information of the theft so the system could track the stolen lottery tickets. On 30 July 2014, Detective Byrd received a call from the North Carolina Lottery informing him that a flagged lottery ticket had been cashed at a Wilco Hess store in Harnett County. On the way to investigate that report, Detective Byrd received another call from the North Carolina Lottery informing him there had been an attempt to cash a second flagged lottery ticket at a Kangaroo store, also in Harnett County.

During his investigation, Detective Byrd obtained a search warrant for defendant's residence. In the search of the residence, Detective Byrd found incriminating evidence, and he seized clothing and a gun based upon his observation of the surveillance footage from the Supergas on the night of the robbery.

On 3 September 2014, arrest warrants were issued for defendant in both Johnston and Harnett counties. Defendant was charged in Johnston County for robbery with a dangerous weapon and second degree kidnapping and in Harnett County with five counts of misdemeanor possession of stolen goods, four counts of felony attempted obtaining property by false pretenses, and one count of felony obtaining property by false pretenses. On 2 December 2014, a Johnston County grand jury returned

a true bill on an indictment of defendant for robbery with a dangerous weapon and second degree kidnapping.

On 17 March 2015, defendant pled guilty in Harnett County to two counts of misdemeanor possession of stolen goods, and Harnett County dismissed the attempted obtaining property by false pretenses charge. The stolen goods identified in the Harnett County case were two lottery tickets.

Defendant was tried on the Johnston County charges in Johnston County Superior Court on 19 January 2016. At the close of the State's evidence, defendant moved to dismiss the charges, and the trial court granted the dismissal of the charge of second degree kidnapping. Defendant renewed his motion to dismiss the robbery charge at the close of all the evidence, but the trial court once again denied his request. The jury ultimately returned a verdict of guilty on robbery with a dangerous weapon.

Defendant once again raised issues relating to the charge of robbery with a dangerous weapon during sentencing on the grounds that he had previously been punished for misdemeanor possession of stolen goods in Harnett County several months earlier. After defendant presented evidence at the sentencing hearing to support his argument he should not sustain multiple punishments, the Court overruled defendant's argument and imposed an active sentence for robbery with a dangerous weapon of 70 to 96 months imprisonment with credit on the judgment given for 101 days spent in confinement. Defendant timely appealed to this Court.

II. Analysis

Defendant's sole argument on appeal is that the trial court erred by imposing punishment for robbery with a dangerous weapon after defendant had previously been punished for possession of stolen goods, where the stolen goods were obtained in the course of that same robbery. Whether multiple punishments were imposed contrary to legislative intent presents a question of law, reviewed *de novo* by this Court. *State v. Khan*, 366 N.C. 448, 453, 738 S.E.2d 167, 171 (2013); *State v. Moses*, 205 N.C. App. 629, 638-40, 698 S.E.2d 688, 695-97 (2010).

Defendant contends the legislature did not intend to punish a defendant twice for robbery and possession of stolen goods acquired by that robbery. Defendant maintains that he is protected from multiple punishments based on legislative intent, rather than the Double Jeopardy Clause of the Fifth Amendment. On appeal, defendant relies heavily on cases that are based upon the Double Jeopardy Clause. Defendant justifies using cases that rely on Double Jeopardy by citing to our Supreme

Court's explanation that Double Jeopardy and legislative intent in this context are essentially the same principles:

> The argument advanced by defendant has been presented under various titles: double jeopardy, lesser-included offense, an element of the offense, multiple punishment for the same offense, merged offenses, etc. The defendant and the State have briefed and argued the issue as one of "double jeopardy." We choose to avoid any lengthy discussion of the appropriate title, as it is the principle of law rather than the characterization of the issue that is important.

State v. Gardner, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986); *see also Ohio v. Johnson*, 467 U.S. 493, 499, 81 L. Ed. 2d 425, 433, 104 S. Ct. 2536, 2541 (1984) ("the question under the Double Jeopardy Clause whether punishments are multiple is essentially one of legislative intent") (citation and quotation marks omitted)). We will follow the reasoning of our Supreme Court in *Gardner* and focus on the "principle of law" instead of the exact "characterization of the issue[.]" *See Gardner*, 315 N.C. at 451, 340 S.E.2d at 707.

The United States Supreme Court described in *Blockburger v. United States* the test for determining whether certain activities constitute two offenses or one: "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309, 52 S. Ct. 180, 182 (1932). "North Carolina has followed the United States Supreme Court's 'same elements' test from *Blockburger*." *State v. Sparks*, 182 N.C. App. 45, 47, 641 S.E.2d 339, 341 (2007), *aff'd*, 362 N.C. 182, 657 S.E.2d 655 (2008).

> The Fifth Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, protects against double jeopardy, which includes multiple punishments for the same offense. The test of double jeopardy, or former jeopardy, is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. Hence, the plea of former jeopardy, to be good, must be grounded on the "same offense" both in law and in fact, and it is not sufficient that the two offenses

> grew out of the same transaction. If evidence in support of the facts alleged in the second indictment would be sufficient to sustain a conviction under the first indictment, jeopardy attaches, otherwise not. However, if proof of an additional fact is required in the one prosecution, which is not required in the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same, and the plea of former jeopardy cannot be sustained[.]

State v. Hall, 203 N.C. App. 712, 716-17, 692 S.E.2d 446, 450 (2010) (citations, quotation marks, and brackets omitted).

At issue in this case is whether the legislature intended the offenses of robbery with a dangerous weapon and possession of stolen goods to be separate and distinct offenses, and whether after looking at the facts of this case the Johnston County robbery charge is separate and distinct from the possession of stolen property offense he pled guilty to in Harnett County.

A. Possession of Stolen Goods vs. Robbery

The essential elements of possession of stolen goods are: "(1) possession of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose." *State v. Davis*, 302 N.C. 370, 373, 275 S.E.2d 491, 493 (1981). The key elements of robbery with a dangerous weapon are governed by N.C. Gen. Stat. § 14-87(a) (2015), and this Court has held "that the essential elements of the crime of robbery with a dangerous weapon are: (1) the unlawful taking *or attempted taking* of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim." *State v. Van Trusell*, 170 N.C. App. 33, 37, 612 S.E.2d 195, 198 (2005) (citation and quotation marks omitted).

Defendant relies upon *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982), *overruled in part on other grounds*, *State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010), to illustrate when our Supreme Court has considered the legislative intent behind the enactment of the statute criminalizing possession of stolen goods. The Supreme Court noted in *Perry* that prior to the enactment of N.C. Gen. Stat. § 14-71.1 in 1977, mere possession of stolen property was not a crime. *Perry*, 305 N.C. at 235, 287 S.E.2d at 816. But known dealers in stolen goods were going unprosecuted in many cases, as it was difficult to prove possession

recent enough after larceny to raise the presumption that the dealer stole the property. *Id.* In response, our legislature enacted the statute addressing possession of stolen goods laws. *Id.* The *Perry* Court held:

> [H]aving determined that the crimes of larceny, receiving, and possession of stolen property are separate and distinct offenses, but having concluded that the Legislature did not intend to punish an individual for receiving or possession of the same goods that he stole, we hold that, though a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses.

Id. at 236-37, 287 S.E.2d at 817. Had our legislature disagreed with *Perry*, it would have acted based upon that opposition. But "[i]n the nearly thirty years since *Perry* was decided, the Legislature has made no substantive changes to N.C. Gen. Stat. § 14-71.1 that would indicate its disfavor with the *Perry* Court's interpretation of that statute." *Moses*, 205 N.C. App. at 640, 698 S.E.2d at 696. As stated in *Perry*, the legislature created the statutory offense of possession of stolen goods as a substitute for the common law offense of larceny in those situations in which the State could not furnish sufficient evidence that the defendant stole the property. *Perry*, 305 N.C. at 235, 287 S.E.2d at 816. Considering the historical background of this statute, "we conclude that the Legislature also did not intend to subject a defendant to multiple punishments for both robbery and the possession of stolen goods that were the proceeds of the same robbery." *Moses*, 205 N.C. App. at 640, 698 S.E.2d at 696.

Under some factual circumstances, had defendant pled guilty to more than two counts of misdemeanor possession of stolen goods, defendant's judgment would be vacated for robbery with a dangerous weapon. But the facts here are quite different from those in the cases cited by defendant, since defendant only pled guilty to two counts of misdemeanor possession of stolen goods and is appealing robbery of money and hundreds of additional lottery tickets which were not the subject of the previous trial. Principles of legislative intent only apply to proscribe punishment for possession during the course of the same conduct, and where the property is the "same property." *Perry*, 305 N.C. at 234, 287 S.E.2d at 816. That is not the case here.

B. Dissimilar offenses

The offense for which defendant pled guilty at his previous trial in another county is neither for the same conduct nor for the same property. Rather, the possession to which defendant pled guilty was solely

related to his attempt at cashing in two lottery tickets a few days after the robbery in Johnston County and was adjudicated in a separate trial in another county, with different facts and evidence.

Even though defendant is arguing that the lottery tickets he attempted to cash in the next county over were the same lottery tickets he obtained during the commission of the robbery with a dangerous weapon, it is still permissible for a defendant to be convicted and punished for multiple -- thus different -- possessions of the same illegal item. Offenses of possession separate in time and locale can support separate convictions and punishments. *See State v. Rozier*, 69 N.C. App. 38, 54-55, 316 S.E.2d 893, 904 (1984) ("Other jurisdictions which have considered the question appear to have adopted the rule that the possession offenses must be separate in time and space to warrant separate convictions. Whether particular circumstances of possession constitute a single criminal act or several is a determination of a factual nature to be made by the trial court. North Carolina effectively follows the same rule by investing the trial court with discretion to quash duplicitous indictments. . . . The circumstances of each case will determine whether separate offenses may be properly charged.").

Here, each offense dealt with a different crime and specifically a different possession of the two tickets. *See State v. Alston*, 323 N.C. 614, 616, 374 S.E.2d 247, 249 (1988) (the defendant's possession of a firearm during an armed robbery was a different offense than his earlier possession and was not collaterally estopped.). The facts to support each possession during each crime, on different days and different locations, were different, and the evidence sufficient to show these crimes were committed was not identical. *See State v. Crump*, 178 N.C. App. 717, 722, 632 S.E.2d 233, 236 (2006) (each new violation of the statute for possession of a firearm by a felon constitutes a new offense); *State v. Cumber*, 32 N.C. App. 329, 337, 232 S.E.2d 291, 297 (1977) (citations omitted) ("[D]ouble jeopardy is not violated merely because the same evidence is relevant to show both crimes."). The burden is on the defendant to show continuous possession in such circumstances. Here, defendant did not show such evidence, either at the hearing outside the presence of the jury, or in front of the jury.

And even if defendant pled guilty to possessing two of the tickets he may have stolen during the robbery with a dangerous weapon two days prior, the armed robbery and items stolen included a substantial amount of additional different property. Defendant here was charged with robbery with a dangerous weapon in which he "unlawfully, willfully, and feloniously did steal, take, and carry away another's personal property,

US currency, approximately $1900, and Lottery tickets from Nita, LLC d/b/a I-40 Supergas when Sunny Kapoor was present." The jury heard testimony from Mr. Kapoor that on the night of the robbery, an armed masked man, later found to be defendant, entered the I-40 Supergas and "demand[ed] the *money*." (Emphasis added). Mr. Kapoor further testified that he told defendant the register was locked and had to be opened, and that defendant jumped over the counter and kept demanding the money from the drawer. The jury heard that defendant took approximately $1,900.00 in cash from the register at the I-40 Supergas on the night of the robbery.

Regarding the lottery tickets, the jury heard testimony of a witness from the North Carolina Education Lottery, Mr. Pekrul, about how many tickets were stolen from the I-40 Supergas during the commission of the robbery. Mr. Pekrul testified that after adding the tickets up several times, "it's in the neighborhood of eight hundred or so[.]" The jury's verdict was reached after having heard evidence that included all of the items defendant stole on the night of the robbery at gunpoint. Those items were identified as approximately $1,900.00 in cash and approximately 800 lottery tickets. Even assuming defendant could not be punished for possession of lottery tickets 1 and 2 after pleading guilty to their possession in the previous trial, nothing prohibits his subsequent punishment for robbery with a dangerous weapon where he stole money and lottery tickets 3 through 800. For defendant's argument to prevail, he would need to show that the legislature intended an outcome in which a guilty plea on misdemeanor possession of two stolen lottery tickets would prohibit punishment for a conviction of robbery with a dangerous weapon where the defendant stole $1,900.00 in cash and 800 separate lottery tickets. This result is not supported by this Court's prior opinions or our Supreme Court in *Perry* or *Moses*. Defendant has failed to meet his burden in proving that he was punished twice for the exact same property, conduct, or offense.

C. Defendant's opposition towards other remedies

Assuming the two tickets were the exact same and *only* property stolen during the armed robbery, defendant still cannot be heard to complain because he repeatedly opposed other remedies. Ordinarily, a defendant cannot claim prejudice resulting from his own conduct. N.C. Gen. Stat. § 15A-1443(c) (2015) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."); *see also State v. Gay*, 334 N.C. 467, 485, 434 S.E.2d 840, 850 (1993) ("A defendant may not complain of prejudice resulting from her

own conduct. Such invited error does not merit relief." (Citations, quotation marks, and brackets omitted)).

The State made several attempts to rectify any complaint or ambiguity by seeking several other remedies. First, the State attempted to avoid the mention at trial of the two lottery tickets that resulted in defendant's guilty plea to possession in Harnett County, and the prosecutor stated that she would proceed on the other items defendant stole during the robbery. Defendant opposed that offer. Second, the State offered to amend the indictment so the mention of the two Harnett County lottery tickets would be omitted. That would mean defendant would be tried only for the cash and other lottery tickets he stole during the robbery. Again, defendant opposed this alternative remedy. Finally, the State sought to have a special verdict sheet to reflect that defendant stole $1,900.00 in cash and the lottery tickets other than the two to which he pled guilty in Harnett County. Once again, defendant opposed this proposal and his counsel stated: "I think he is either guilty of armed robbery or not guilty." Each of these proposed remedies would have prevented defendant from facing the possibility of being punished twice for any of the same conduct. Yet, defendant opposed each offer by the State. Accordingly, we hold that the trial court did not err by imposing punishment for the offense of robbery with a dangerous weapon in this case.

IV. Conclusion

For the reasons stated above, we find no error in the trial court's judgment.

NO ERROR.

Judges BRYANT and DAVIS concur.

STATE OF NORTH CAROLINA
v.
ANGELA MARIE RANKIN

No. COA17-396

Filed 2 January 2018

1. Appeal and Error—deficient notice of appeal—failure to state court—writ of certiorari denied as moot

The Court of Appeals had jurisdiction in a felony littering of hazardous waste case even though defendant's notice of appeal did not explicitly state that she was appealing the trial court's judgment to the Court of Appeals as required by North Carolina Rule of Appellate Procedure 4(b) where the proper court could be inferred. Further, the State did not suggest that it was misled due to the deficiency, and thus defendant's petition for writ of certiorari to correct the error was denied as moot.

2. Indictment and Information—felony littering of hazardous waste—failure to include essential element—trash in place other than waste receptacle

An indictment for felony littering of hazardous waste was facially invalid where it failed to contain an essential element of the crime, that defendant disposed of trash in any place other than a waste receptacle (as provided for in subsection (a)(2)). *State v. Hinkle*, 189 N.C. App. 762 (2008), stood for the proposition that subsection (a)(2) was an essential element of N.C.G.S. § 14-399.

Judge BERGER dissenting in separate opinion.

Appeal by defendant from judgment entered 7 July 2016 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 19 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Bircher, for the State.

Sarah Holladay for defendant-appellant.

DAVIS, Judge.

In this appeal, we must determine whether the defendant's indictment for felony littering of hazardous waste was facially valid. Because we conclude that her indictment failed to contain an essential element of the crime for which she was charged, we vacate her conviction.

Factual and Procedural Background

The State presented evidence tending to establish the following facts: On 27 April 2014, Angela Marie Rankin ("Defendant") was searching for scrap metal to sell. She noticed a metal tank containing fuel oil near a residential driveway on North Elam Avenue in Greensboro, North Carolina. Upon attempting to move the tank, Defendant realized some amount of "home heating fuel" was contained inside of it. She drained the contents of the tank onto the ground so that the tank "wouldn't be as heavy."

The metal tank was reported stolen to the City of Greensboro Police Department. The Division of Public Health of the Guilford County Department of Health and Human Services also received a report of "a fuel release that impacted a waterway and soil and roadway inside the Guilford County limits." Upon investigation, it was discovered that the heating oil from the metal tank was the cause of the contamination in the area, and the oil was deemed "a hazardous substance for disposal . . . ."

On 21 July 2014, Defendant was indicted for felony littering of hazardous waste, misdemeanor larceny, and misdemeanor conspiracy to commit larceny. On 5 July 2016, a jury trial was held in Guilford County Superior Court before the Honorable Michael D. Duncan. Defendant moved to dismiss all charges at the close of the evidence, and the trial court dismissed the conspiracy charge.

On 6 July 2016, the jury found Defendant guilty of felony littering of hazardous waste and not guilty of misdemeanor larceny. On 7 July 2016, the trial court sentenced Defendant to 5 to 15 months imprisonment but suspended the sentence and placed her on supervised probation for 18 months. Defendant filed a timely notice of appeal.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must determine whether we possess jurisdiction over this appeal. Defendant's notice of appeal did not explicitly state that she was appealing the trial court's judgment to this Court as required by Rule 4(b) of the North Carolina Rules of Appellate Procedure.

Defendant has filed a petition for a writ of *certiorari* in the event we find her notice of appeal was insufficient to confer jurisdiction upon this Court based on her failure to expressly state that her appeal was to this Court as required by Rule 4(b).

Because this Court is the only court possessing jurisdiction to hear her appeal, it can be fairly inferred that Defendant intended to appeal to this Court. *See State v. Sitosky*, 238 N.C. App. 558, 560, 767 S.E.2d 623, 624-25 (2014), *disc. review denied*, 368 N.C. 237, 768 S.E.2d 847 (2015) (holding that appellate jurisdiction existed over defendant's appeal despite her failure to designate court to which appeal was being taken in notice of appeal). Moreover, the State has not suggested that it was misled due to this deficiency in her notice of appeal.

Thus, Defendant's failure to designate this Court in her notice of appeal does not warrant dismissal of this appeal. *See State v. Ragland*, 226 N.C. App. 547, 553, 739 S.E.2d 616, 620 (denying defendant's petition for *certiorari* where "defendant's failure to serve the notice of appeal and his mistake in failing to name this Court in his notice of appeal [did] not warrant dismissal"), *disc. review denied*, 367 N.C. 220, 747 S.E.2d 548 (2013). Accordingly, we deny Defendant's petition for writ of *certiorari* as moot and proceed to consider the merits of her appeal.

II. Validity of Indictment

[2] Our Supreme Court has made clear that "[a]n indictment must allege all the essential elements of the offense endeavored to be charged . . . ." *State v. Spivey*, 368 N.C. 739, 742, 782 S.E.2d 872, 874 (2016) (citation and quotation marks omitted). However, an indictment is not required to reference exceptions to the offense. *State v. Mather*, 221 N.C. App. 593, 598, 728 S.E.2d 430, 434 (2012).

N.C. Gen. Stat. § 14-399(a) states, in pertinent part, as follows:

> (a) No person, including any firm, organization, private corporation, or governing body, agents or employees of any municipal corporation shall intentionally or recklessly throw, scatter, spill or place or intentionally or recklessly cause to be blown, scattered, spilled, thrown or placed or otherwise dispose of any litter upon any public property or private property not owned by the person within this State or in the waters of this State including any public highway, public park, lake, river, ocean, beach, campground, forestland, recreational area, trailer park, highway, road, street or alley *except*:

(1) When the property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and the person is authorized to use the property for this purpose; or

(2) Into a litter receptacle in a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of the private or public property or waters.

N.C. Gen. Stat. § 14-399(a) (2015) (emphasis added).

Defendant's indictment alleged, in relevant part, the following:

> The jurors for the State upon their oath present that on . . . the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did intentionally and recklessly spill and dispose of litter on property not owned by the defendant, the property owned and controlled by the City of Greensboro and not into a litter receptacle as defined in General Statute 14-399(A)(2). The litter discarded was hazardous waste.

The State does not dispute the fact that the indictment failed to allege that Defendant had not discarded litter on property "designated by the State or political subdivision thereof for the disposal of garbage and refuse[ ] and . . . [was] authorized to use the property for this purpose" as set out in N.C. Gen. Stat. § 14-399(a)(1).[1] Thus, the sole issue in this appeal is whether subsection (a)(1) is an essential element under § 14-399(a) or, alternatively, it is merely an exception.

In *State v. Connor*, 142 N.C. 700, 55 S.E. 787 (1906), our Supreme Court explained the difference between an essential element to an offense (which must be alleged in the indictment) and an exception to the offense (which need not be alleged).

> It is well established that when a statute creates a substantive criminal offense, *the description of the same being complete and definite*, and by subsequent clause, either in the same or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be

1. Defendant's indictment did, however, make specific reference to subsection (a)(2).

> negatived in the indictment, nor is proof required to be made in the first instance on the part of the prosecution.
>
> In such circumstance, a defendant charged with the crime, who seeks protection by reason of the exception, has the burden of proving that he comes within the same.
>
> . . . .
>
> The test here suggested, however, is not universally sufficient, and a careful examination of the principle will disclose that *the rule and its application depends not so much on the placing of the qualifying words, or whether they are preceded by the terms, "provided" or "except"; but rather on the nature, meaning and purpose of the words themselves.*
>
> *And if these words, though in the form of a proviso or an exception, are in fact, and by correct interpretation, but a part of the definition and description of the offense, they must be negatived in the bill of indictment.*
>
> . . . .
>
> We find in the acts of our Legislature two kinds of provisos—the one in the nature of an exception, which withdraws the case provided for from the operation of the act, the other adding a qualification, whereby a case is brought within that operation. Where the proviso is of the first kind it is not necessary in an indictment, or other charge, founded upon the act, to negative the proviso; but if the case is within the proviso it is left to the defendant to show that fact by way of defense. But in a proviso of the latter description the indictment must bring the case within the proviso. *For, in reality, that which is provided for, in what is called a proviso to the act, is part of the enactment itself.*

Id. at 701-03, 55 S.E. at 788-89 (internal citations and quotation marks omitted).

Over the past century since *Connor* was decided, our Supreme Court has consistently held that an indictment must include all the essential elements of the offense charged against the defendant. *See, e.g.*, *State v. Brice*, __ N.C. __, __, __ S.E.2d __, __, slip op. at 9 (filed November 3, 2017) (No. 244PA16) ("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. Murrell*, __ N.C. __, __, 804 S.E.2d 504, 508 (2017) ("In order to satisfy the relevant statutory requirements, including the provision of adequate notice, 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. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986) ("An indictment that does not accurately and clearly allege all of the elements of the offense is inadequate to support a conviction."); *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969) ("The warrant or indictment must charge all the essential elements of the alleged criminal offense. Nothing in G.S. 15-153 or in G.S. 15-155 dispenses with the requirement that the essential elements of the offense must be charged." (internal citation omitted)); *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953) ("The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged."); *State v. Johnson*, 188 N.C. 591, 593, 125 S.E. 183, 184 (1924) ("Even under a statute containing a proviso or an exception if the terms of the proviso are but a part of the description of the offense itself, they must be negatived in the indictment or warrant, and as a general rule, such negative averments must be proved by the prosecution.").[2]

The offense of littering under N.C. Gen. Stat. § 14-399(a) is not a "complete and definite" crime absent consideration of subsections (a)(1) and (a)(2). *Connor*, 142 N.C. at 701, 55 S.E. at 788. Under § 14-399(a), the crime of littering is premised upon a defendant's act of disposing of or discarding trash in any place *other than* a waste receptacle (as provided for in subsection (a)(2)) or on property designated by the city or state for the disposal of garbage and refuse (as provided for in subsection (a)(1)). The text of the statutory language in § 14-399(a) prior to the word "except" does not state a crime when that language is read in isolation. Rather, subsections (a)(1) and (a)(2) are inseparably intertwined with the language preceding them.

In *State v. Hinkle*, 189 N.C. App. 762, 659 S.E.2d 34 (2008), this Court expressly addressed the issue of whether subsection (a)(2) constituted an essential element — rather than merely an exception — under

2. While the dissent cites several cases for the proposition that an indictment need not mirror the precise language contained in the statute, *see*, *e.g.*, *State v. Simpson*, 235 N.C. App. 398, 400-01, 763 S.E.2d 1, 3 (2014), that principle does not obviate the requirement that every essential element of the crime be alleged therein.

§ 14-399(a). The defendants in *Hinkle* were employees of the People for the Ethical Treatment of Animals and were tasked with the euthanasia of unwanted animals in the Bertie County animal shelter. They subsequently placed several dead animals in heavy duty trash bags, which they deposited in a private dumpster behind a grocery store. Law enforcement officers observed the defendants placing the trash bags in the dumpster and arrested them. The defendants were charged with multiple counts of cruelty to animals and with littering but were only convicted of the offense of littering under N.C. Gen. Stat. § 14-399(a). *Id.* at 763-65, 659 S.E.2d at 35-36.

On appeal, the defendants argued that the trial court had erred by denying their motion to dismiss the littering charge because the State failed to prove that the dumpster in question was not a "litter receptacle" as described by § 14-399(a)(2). *Id.* at 768, 659 S.E.2d at 37. The State, conversely, argued that it did not bear the burden of proving the inapplicability of § 14-399(a)(2) because this subsection was "not a part of the statutory definition of littering and instead [wa]s an exception to the crime of littering." *Id.* at 768, 659 S.E.2d at 38 (quotation marks omitted). This Court discussed the difference between essential elements of a criminal offense and exceptions to the offense.

> [W]e reiterate that there are no magic words for creating an exception to an offense. Neither is placement of a phrase controlling. The determinative factor is the nature of the language in question. Is it part of the definition of the crime or does it withdraw a class from the crime?

Id. at 769, 659 S.E.2d at 38 (internal citations and quotation marks omitted).

We then examined the language of § 14-399(a) and determined that subsection (a)(2) was, in fact, an essential element of the offense of littering. In so holding, we stated as follows:

> Therefore, we examine the nature of the littering statute's language and ask whether "[i]nto a litter receptacle" is part of the definition of the crime or whether it withdraws a class from the crime. It is clear that "[i]nto a littering receptacle" is part of the definition of the crime. If we read section (a) up to the word "except," then section (a) does not describe the complete crime of littering. Without the "except . . . [i]nto a litter receptacle" language, placing a broken rubber band into a trash can at our Court would

> be littering. Likewise, throwing a spent coffee cup into a trash can at the mall would be littering. Such a reading of the statute is inconsistent with both the plain language of the statute and common sense. *Essential to the crime of littering is that the litter be placed somewhere other than a litter receptacle.*

Id. (emphasis added). We concluded that "the trial court erred by denying defendants' motion to dismiss the littering charge because the State failed to present substantial evidence that the dumpster was not a litter receptacle." *Id.*

Thus, *Hinkle* stands for the proposition that subsection (a)(2) is an essential element of N.C. Gen. Stat. § 14-399(a). Because subsections (a)(1) and (a)(2) serve identical purposes in this statute, it would be illogical to suggest that one is an essential element but the other is not.

The dissent incorrectly characterizes the conclusion in *Hinkle* that subsection (a)(2) is an essential element of N.C. Gen. Stat. § 14-399(a) as "obiter dictum." Our Supreme Court has defined obiter dictum as "[l]anguage in an opinion not necessary to the decision . . . ." *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (citations omitted). Based on that definition, this Court's determination in *Hinkle* that subsection (a)(2) constitutes an essential element of this offense is clearly not dicta. To the contrary, it forms the *holding* of the case, and we are therefore bound by it. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37 ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)).

Moreover, in addition to the fact that we are bound to follow our prior decision in *Hinkle*, we believe that the analysis set forth therein is consistent with the applicable case law in North Carolina on this subject. We find our prior decisions in *State v. Trimble*, 44 N.C. App. 659, 262 S.E.2d 299 (1980) and *State v. Brown*, 56 N.C. App. 228, 287 S.E.2d 421 (1982) to be instructive on the issue of differentiating between essential elements and exceptions under a statute. Each of these cases provide clear examples of statutory provisions that — unlike in the present case — simply carve out an *exception* to a crime that was fully defined elsewhere in the statute.

In *Trimble*, the defendant was convicted under N.C. Gen. Stat. § 14-401, which stated as follows:

> § 14-401. *Putting poisonous foodstuffs, etc., in certain public places, prohibited* — It shall be unlawful for any person, firm or corporation to put or place any strychnine, other poisonous compounds or ground glass on any beef or other foodstuffs of any kind in any public square, street, lane, alley or on any lot in any village, town or city or on any public road, open field, woods or yard in the country. Any person, firm or corporation who violates the provisions of this section shall be liable in damages to the person injured thereby and also shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. *This section shall not apply to the poisoning of insects or worms for the purpose of protecting crops or gardens by spraying plants, crops or trees nor to poisons used in rat extermination.*

Id. at 664, 262 S.E.2d at 302 (citation and quotation marks omitted).

The defendant argued that his indictment was defective because it failed to include an assertion that his actions did not fall under the exception for "protecting crops or gardens by spraying plants, crops or trees [or] poisons used in rat extermination." *Id.* (emphasis omitted). On appeal, we held that "the insect control and rat extermination exception" was not an essential element of the crime. *Id.* at 666, 262 S.E.2d at 303-04.

In *Brown*, the defendant was convicted of the crime of larceny by an employee. *Brown*, 56 N.C. App. at 229, 287 S.E.2d at 423. N.C. Gen. Stat. § 14-74, the statute under which the defendant was charged, provided as follows:

> If any servant or other employee, to whom any money, goods or other chattels . . . by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods, or other chattels . . . with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; . . . the servant so offending shall be punished as a Class H felon: *Provided, that nothing contained in this section shall extend to . . . servants within the age of 16 years.*

Id. at 229, 287 S.E.2d at 422-23 (citation and quotation marks omitted and emphasis added).

The defendant argued on appeal that his indictment was defective because it failed to allege that he was over the age of 16. *Id.* at 230, 287 S.E.2d at 423. In rejecting his argument, this Court held as follows:

> Upon examining G.S. 14-74, we conclude that the phrase in question withdraws a class of defendants from the crime of larceny by an employee. *The language before the phrase completely and definitely defines the offense. Servants within 16 years of age are excepted from that definition. Because the phrase creates an exception to G.S. 14-74, we hold that age is not an essential element which the indictment must allege and the State initially prove.*

Id. at 230-31, 287 S.E.2d at 423 (emphasis omitted and added).

Trimble and *Brown* each provide examples of statutes that state "complete and definite" crimes before then listing exceptions to those crimes. In *Trimble*, N.C. Gen. Stat. § 14-401 criminalized the placement of poison or ground glass on "beef or other foodstuffs" — a prohibition that clearly articulated a crime capable of being committed in a wide variety of ways wholly unrelated to the use of poison to exterminate rats, insects, or worms. In *Brown*, N.C. Gen. Stat. § 14-74 made it a crime for an employee to steal from his employer property that had been entrusted to him. The crime described was capable of ready application to employees of all ages, but the statute carved out an exception for persons sixteen years of age or younger.

Thus, it is clear that the statutory provisions at issue in *Trimble* and *Brown* were merely exceptions to crimes rather than essential elements of crimes. It is equally apparent that the converse is true here. By enacting § 14-399(a), the General Assembly was not attempting to prohibit individuals from disposing of trash outside of their own property. Instead, it sought to make such disposal illegal only in places *other than* (1) a waste receptacle; or (2) a city or county dump.[3] Simply put, the crime of littering does not occur until litter is placed where it ought not be.

Any characterization of the text of § 14-399(a) prior to the word "except" as stating a "complete and definite" crime would lead to absurd

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3. The dissent cites *State v. Hales*, 256 N.C. 27, 122 S.E.2d 768 (1961), for the proposition that "it is within the power of the Legislature to declare an act criminal . . . ." *Id.* at 30, 122 S.E.2d at 771 (citation omitted). But the dissent fails to mention our Supreme Court's statement in that same opinion that "the act of the Legislature declaring what shall constitute a crime must have some substantial relation to the ends sought to be accomplished." *Id.* at 30, 122 S.E.2d at 770 (citation omitted).

results. In addition to the examples discussed above from our decision in *Hinkle*, under such an interpretation of the statute a trash collector disposing of waste in a city dump could be charged with littering and then have the burden of showing that his actions fell within an "exception" to the littering statute. It strains credulity to suggest that such outcomes were intended by the General Assembly in enacting § 14-399(a). *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 141 (1990) ("A statute is presumed not to have been intended to produce absurd consequences, but rather to have the most reasonable operation that its language permits."); *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) ("[T]he Court will, whenever possible, interpret a statute so as to avoid absurd consequences.").

Thus, Defendant's indictment was defective due to its failure to contain an essential element of the offense of littering. Accordingly, her conviction must be vacated.

Conclusion

For the reasons stated above, we vacate Defendant's conviction.

VACATED.

Judge ZACHARY concurs.

Judge BERGER dissents in a separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent.

"A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine [her] guilt or innocence, and to give authority to the court to render a valid judgment." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (citations and internal quotation marks omitted), *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). "The purpose of an indictment is to inform a party so that [she] may learn with reasonable certainty the nature of the crime of which [she] is accused." *State v. Simpson*, 235 N.C. App. 398, 400, 763 S.E.2d 1, 3 (2014) (citation, quotation marks, brackets, and ellipses omitted).

An indictment "is sufficient in form for all intents and purposes if it expresses the charge against the defendant in a plain, intelligible, and

explicit manner." N.C. Gen. Stat. § 15-153 (2015). "An indictment must contain '[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation.' " *State v. Rodriguez*, 192 N.C. App. 178, 183, 664 S.E.2d 654, 658 (2008) (quoting N.C. Gen. Stat. § 15A-924(a)(5) (2007)). The purpose of this requirement is:

> (1) 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) (citations omitted).

"The general rule in this State . . . is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." *Simpson*, 235 N.C. App. at 400-01, 763 S.E.2d at 3 (citation and quotation marks omitted).

To determine whether this indictment is sufficient, we must examine N.C. Gen. Stat. § 14-399 and the law that distinguishes between elements of an offense and exceptions to that offense. It is well established that each essential element must be alleged in an indictment. While "the State bears the burden of production and persuasion as to each element of a crime, 'exceptions' to crimes are not considered elements for this purpose and are instead considered to be affirmative defenses." *State v. Hinkle*, 189 N.C. App. 762, 768, 659 S.E.2d 34, 38 (2008). A statutory exception that withdraws a certain case, or class of cases, from its provisions need not be included in an indictment for that indictment to be valid. *State v. Connor*, 142 N.C. 700, 701, 55 S.E. 787, 788 (1906).

Here, Defendant was charged under Subsection (e) of N.C. Gen. Stat. § 14-399, which elevates the crime of littering to a Class I felony if the litter disposed of is hazardous waste. The crime of littering is defined, in relevant part, as follows:

> (a) No person . . . shall intentionally or recklessly throw, scatter, spill or place or intentionally or recklessly cause to be blown, scattered, spilled, thrown or

> placed or otherwise dispose of any litter upon any public property or private property not owned by the person within this State . . . including any public highway . . . *except*:
>
> (1) *When the property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and the person is authorized to use the property for this purpose*; or
>
> (2) Into a litter receptacle in a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of the private or public property or waters.

N.C. Gen. Stat. § 14-399(a) (2015) (emphasis added).

The indictment filed against Defendant for her alleged violation of Subsection (e) stated:

> The jurors for the State upon their oath present that on or the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did intentionally and recklessly spill and dispose of litter on property not owned by the defendant, the property owned and controlled by the City of Greensboro and not into a litter receptacle as defined in General Statute 14-399([a])(2). The litter discarded was hazardous waste.

It is clear from the language of the indictment that it contained no allegation of whether the hazardous waste was disposed of on property "designated by the State or political subdivision thereof for the disposal of garbage or refuse" or whether Defendant was "authorized to use the property for this purpose." *See* G.S. § 14-399(a)(1). If Section 14-399(a)(1) is an essential element, then the State was required to allege that Defendant was not excluded from criminal liability because she either disposed of the waste in a place not designated for such disposal or did dispose of the waste on such designated property but was not authorized to do so. The indictment alleged neither.

In determining whether Subsection (a)(1) is an element or an exception, we must ask, "[i]s it part of the definition of the crime or does it withdraw a class from the crime?" *State v. Brown*, 56 N.C. App. 228, 230, 287 S.E.2d 421, 423 (1982). This Court, in *State v. Hinkle*, 189 N.C. App. at 769, 659 S.E.2d at 38, stated that the " 'except . . . [i]nto a litter

receptacle' " language in Section 14-399(a)(2) was an essential element. The *Hinkle* Court reasoned that, without this language,

> placing a broken rubber band into a trash can at our Court would be littering. Likewise, throwing a spent coffee cup into a trash can at the mall would be littering. Such a reading of the statute is inconsistent with both the plain language of the statute and common sense.[1]

Id.

However, we are not bound by the language in *Hinkle* stating that Subsection (a)(2) is an element rather than an exception.[2] In *Hinkle*, the defendants were appealing the denial of a motion to dismiss a littering charge because the evidence tended to show that the defendants had disposed of dead animals in a dumpster. *Id.* at 765-66, 659 S.E.2d at 36. The *Hinkle* defendants had argued on appeal that a dumpster was a "litter receptacle," and, because they had put their litter in a litter receptacle, Subsection (a)(2) excepted them from criminal liability. *Id.* "The State countered that because the dumpster was a private receptacle, defendants littered by placing dead animals into the dumpster." *Id.* at 766, 659 S.E.2d at 36. *Hinkle* turned on whether a dumpster was a litter receptacle, and this Court held that it was. *Id.* at 767, 659 S.E.2d at 37. The general expressions that followed were where the *Hinkle* Court considered whether Subsection (a)(2) was an essential element, and which party should bear the burden of proof, but neither of these considerations were necessary to the decision of the question involved.

"If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted). "We presume that the use of a word in a statute is not superfluous and must be accorded [its plain] meaning, if

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1. It is unquestionable that "[i]t is within the power of the Legislature to declare an act criminal." *State v. Hales*, 256 N.C. 27, 30, 122 S.E.2d 768, 771 (1961). *See also Mitchell v. Financing Authority*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968) (noting that "so long as an act is not [constitutionally] forbidden, the wisdom of the enactment is exclusively a legislative decision").

2. "Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby. As our Supreme Court has explained, general expressions in every opinion are to be taken in connection with the case in which those expressions are used; if they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision." *State v. Breathette*, 202 N.C. App. 697, 701, 690 S.E.2d 1, 4 (citations, internal quotation marks, and brackets omitted), *disc. review denied*, 364 N.C. 242, 698 S.E.2d 656 (2010).

possible." *State v. Moraitis*, 141 N.C. App. 538, 541, 540 S.E.2d 756, 757-58 (2000). "Where a term used in a statute has obtained long-standing legal significance, we presume that the legislature intended that significance to attach to the use of the term, absent an indication to the contrary." *Id.* at 541, 540 S.E.2d at 758. We "are without power to interpolate, or superimpose, provisions and limitations not contained" within the language of the statute. *State v. Wainwright*, 240 N.C. App. 77, 81, 770 S.E.2d 99, 103 (2015) (citation and quotation marks omitted). "A statute that is clear on its face must be enforced as written." *Moraitis*, 141 N.C. App. at 541, 540 S.E.2d at 757.

Our legislature is given "considerable latitude in defining elements of a crime and in specifying defenses to that crime." *State v. Trimble*, 44 N.C. App. 659, 665-66, 262 S.E.2d 299, 303 (1980) (citation omitted). Furthermore, "to litter" means "to scatter about carelessly,"[3] and this is essentially what Section 14-399(a), up to the word "except," criminalizes. Subsection (a)(1) merely states that when one litters on property "designated by the State or political subdivision thereof for the disposal of garbage and refuse, and the person is authorized to use the property for this purpose," then that person is excepted from criminal liability.[4]

This Court considered this same question in *State v. Trimble* and applied the following standard in determining whether an exception to a criminal statute should be regarded as an essential element or as an affirmative defense:

> [W]here, as in the instant case, the General Assembly has left open the question of whether a factor is to be an element of the crime or a defense thereto, it is more substantively reasonable to ask what would be a "fair" allocation of the burden of proof, in light of due process and practical considerations, and then assign as "elements" and "defenses" accordingly, rather than to mechanically hold that a criminal liability factor is an element without regard to the implications in respect to the burden of proof.

Trimble, 44 N.C. App. at 666, 262 S.E.2d at 303. This Court concluded the statutory exception it examined was neither an element nor a defense,

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3. *Litter*, *Webster's New World College Dictionary* (5th ed. 2014).

4. The legal commentary *North Carolina Crimes: A Guidebook on the Elements of Crime* classified N.C. Gen. Stat. § 14-399 (a)(1) and (2) both as exceptions, not elements, until *Hinkle* called that into question. Jessica Smith, N.C. Inst. Of Gov't, *North Carolina Crimes: A Guidebook on the Elements of Crime* 404 (6th ed. 2007).

but found that it was a "hybrid" factor. *Id.* It held that for an exception such as this, "the State has no initial burden of producing evidence to show that defendant's actions do not fall within the exception." *Id.* at 666, 262 S.E.2d at 303-04. "[H]owever, once the defendant, in a non-frivolous manner, puts forth evidence to show that his conduct is within this exception, the burden of persuading the trier of fact that the exception does not apply falls upon the State." *Id.* at 666, 262 S.E.2d at 304. The *Trimble* Court concluded that "it follows from this reasoning that an indictment or warrant for an arrest need not set forth a charge that defendant's conduct is not within the exception to the statute." *Id.* (citation omitted).

Trimble is analogous to the case *sub judice*. In applying the standard used in *Trimble*, we must conclude that Section 14-399(a)(1) is a "hybrid factor" or affirmative defense, not an essential element. Consequently, the fair allocation of the burden of proof must fall to Defendant. The State had no initial burden to prove that Defendant had not disposed of the oil on property designated for the disposal of garbage and refuse, or whether Defendant was not authorized to do so. Following the reasoning in *Trimble*, if Defendant were able, in a non-frivolous manner, to put forth evidence that shows she disposed of the oil on property designated for such disposal, and that she was authorized to do so, then the State would bear the burden of persuading the trier of fact that the exception does not apply.

The State was not required to allege whether the property on which Defendant disposed of the oil was designated for such disposal or whether Defendant was authorized. The indictment clearly identified the offense charged, protected Defendant from double jeopardy, enabled Defendant to prepare for trial, and enabled the court to pronounce sentence. Therefore, the indictment charging Defendant with littering of hazardous waste was sufficient to give the trial court jurisdiction over her case, and I would find no error.

STATE v. THOMPSON

[257 N.C. App. 370 (2018)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
JERRY GIOVANI THOMPSON, DEFENDANT

No. COA17-477

Filed 2 January 2018

1. Search and Seizure—motion to suppress—drugs—sufficiency of evidence—findings of fact—return of driver's license

The trial court's order in a drug case denying defendant's suppression motion was vacated based on its failure to include findings of fact on the question of whether the law enforcement officers returned defendant's driver's license after examining it or instead retained it.

2. Drugs—felony possession of marijuana—inconsistent transcript of plea and judgment

A transcript of plea and a judgment for felony possession of marijuana were inconsistent and were remanded for correction of the discrepancy.

Judge BERGER dissenting.

Appeal by defendant from judgment entered 3 January 2017 by Judge William R. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, for the State.

Robinson, Bradshaw & Hinson, P.A., by Erik R. Zimmerman, for defendant-appellant.

ZACHARY, Judge.

Jerry Thompson (defendant) appeals from the judgment sentencing him for convictions of felony possession of marijuana, possession with intent to sell or deliver marijuana, possession of drug paraphernalia, and possession of a firearm by a convicted felon. On appeal, defendant argues that the trial court erred by denying his motion seeking the suppression of evidence, and that the judgment sentencing him for felony possession of marijuana should be vacated on the grounds that he did

not plead guilty to that offense. After review of defendant's arguments, in light of the record and the applicable law, we conclude that the factual findings in the order denying defendant's suppression motion did not resolve a pivotal disputed issue of fact, requiring us to vacate the judgment and remand for further findings. We further conclude that the judgment entered against defendant and the written transcript of plea, both of which were signed by the trial judge, are inconsistent, and we remand for resolution of this discrepancy.

Factual and Procedural Summary

On 10 April 2015, law enforcement officers executed a search warrant for an apartment on Basin Street, in Charlotte, North Carolina. When the officers arrived at the apartment, defendant was sitting in his car in front of the residence. Two officers approached defendant in order to prevent any interference with the execution of the search warrant, and remained near defendant while the apartment was being searched. During this time, defendant was asked to provide identification, which he did. Defendant also consented to a search of his person, which did not reveal contraband. At some point, another officer came out of the apartment and asked defendant for permission to search his car, and upon searching the trunk of defendant's car, found marijuana and a firearm. Defendant was arrested on charges of possession of drug paraphernalia, possession with the intent to sell or deliver marijuana, and possession of a firearm by a convicted felon.

On 28 March 2016, defendant was indicted for possession of drug paraphernalia, possession with the intent to sell or deliver marijuana, felony possession of marijuana, maintaining a vehicle for the purpose of keeping or selling controlled substances, and possession of a firearm by a convicted felon. On 4 October 2016, defendant filed a motion seeking suppression of the evidence seized at the time of his arrest, on the grounds that the evidence was seized pursuant to an illegal search and seizure that violated his rights under the Fourth Amendment to the United States Constitution.

The charges against defendant came on for trial beginning on 3 January 2017. A hearing was conducted prior to trial on defendant's motion to suppress. The evidence adduced at the hearing tended to show the following: Sergeant Michael Sullivan of the Charlotte-Mecklenburg Police Department testified that on 10 April 2015, he led a group of officers in the execution of a search warrant for the Basin Street apartment. The target of the search warrant was a woman. When the officers arrived, Sergeant Sullivan saw a person seated in the front seat of an automobile parked in front of the apartment building. Sergeant Sullivan

approached the car, in order to make sure that the individual in the passenger seat was not the woman named in the search warrant, and to ensure that the person did not interfere with the execution of the search warrant. Defendant, who was the person sitting in the car, told Sergeant Sullivan that he did not live in the apartment, but that his girlfriend did.

Sergeant Sullivan remained near defendant's car and informed defendant that the officers were executing a drug-related search warrant in his girlfriend's apartment. At the officer's request, defendant consented to a search of his person, which did not reveal the presence of contraband. Sergeant Sullivan then asked defendant for his identification, before "hand[ing] him off" ' to Officer Justin Price, giving Officer Price defendant's license, and going inside to supervise the search. Sergeant Sullivan left defendant with Officers Price and Blackwell, and had no further contact with defendant. Officer Price, however, testified that when he came outside, defendant was already in custody.

Officer Michael Blackwell testified that he and Sergeant Sullivan remained with defendant during the search, and explained to defendant why the officers were there. Defendant told Officer Blackwell that the woman named in the search warrant was his girlfriend. After eight to ten minutes, Officer Hefner came outside and asked for permission to search defendant's car. Defendant consented to the search. Marijuana and a firearm were found in the trunk of the car. On cross-examination, Officer Blackwell testified that eight to twelve officers were present, that he and Sergeant Sullivan had approached defendant to ensure that no one interfered with their execution of the search warrant, and that both officers were armed and in uniform. Officer Mark Hefner testified that during the search, he "received information that the defendant was the supplier of the drugs." Accordingly, he obtained defendant's consent to search his car.

Defendant testified that he was 61 years old and worked for the Red Cross. On 10 April 2015, he drove to the Basin Street apartment to visit his girlfriend, who was the person named in the search warrant. He was "taken aback" when a number of law enforcement officers arrived wearing "SWAT attire" and went inside. Officer Blackwell approached him and told him that he could not leave, and took his keys and wallet. Defendant waited for twenty or thirty minutes with the officers, before Officer Hefner came out of the apartment. Defendant denied giving the officers permission to search his car.

Following the presentation of evidence and the arguments of counsel, the trial court orally denied defendant's motion to suppress.

Defendant then pleaded guilty, pursuant to a plea bargain with the State, to possession of drug paraphernalia, possession with the intent to sell or deliver marijuana, and possession of a firearm by a convicted felon.[1] Under the terms of the plea agreement, the State would dismiss the charge of maintaining a vehicle for keeping or selling controlled substances, and defendant would receive a consolidated sentence for the remaining offenses. Defendant pleaded guilty while preserving his right to appeal the denial of his motion to suppress. The trial court sentenced defendant to a term of 13 to 25 months' imprisonment, suspended the sentence, and placed defendant on 24 months' supervised probation. On 5 January 2017, the trial court entered a written order denying defendant's suppression motion. Defendant gave notice of appeal to this Court.

Standard of Review

Defendant argues on appeal that the trial court erred by denying his suppression motion. "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). "This Court reviews conclusions of law stemming from the denial of a motion to suppress *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." *State v. Borders*, 236 N.C. App. 149, 157, 762 S.E.2d 490, 498-99 (2014).

Motion to Suppress

Legal Principles

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. "The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Article I, Section 20 of the North Carolina Constitution provides similar protection against unreasonable seizures. N.C. Const. art. I, § 20." *State v. Campbell*, 359 N.C. 644, 659, 617 S.E.2d 1, 11 (2005) (citing *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994)). However, not all interactions between citizens and law enforcement officers fall within the ambit of the Fourth Amendment:

1. As discussed elsewhere in this opinion, there is a dispute as to whether defendant also pleaded guilty to felony possession of marijuana.

> U.S. Supreme Court holdings carve out . . . three tiers of police encounters: communication between the police and citizens involving no coercion or detention and therefore outside the compass of the Fourth Amendment, brief 'seizures' that must be supported by reasonable suspicion, and full-scale arrests that must be supported by probable cause.

State v. Sugg, 61 N.C. App. 106, 108, 300 S.E.2d 248, 250 (1983) (citing *United States v. Berry*, 670 F. 2d 583 (5th Cir. 1982)).

Accordingly, a law enforcement officer does not require any suspicion of criminal activity to engage in a consensual interaction with a citizen, and in such a situation the protections of the Fourth Amendment are not implicated:

> Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. . . . Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.

Florida v. Bostick, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991) (internal quotations omitted).

It is long-established that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980). As a result, "an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *INS v. Delgado*, 466 U.S. 210, 215, 80 L. Ed. 2d 247, 255 (1984) (quoting *Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509).

Discussion

[1] In its order denying defendant's suppression motion, the trial court concluded that, at the time defendant was asked for consent to search his car, he "was neither seized nor in custody." On appeal, defendant

argues that this conclusion was erroneous, and was not supported by the evidence adduced at the hearing. We conclude that the trial court's order failed to resolve disputed issues of fact that are central to our ability to conduct a meaningful appellate review.

As noted above, "the United States Supreme Court has long held that the Fourth Amendment permits a police officer to conduct a brief investigatory stop of an individual based on reasonable suspicion that the individual is engaged in criminal activity." *State v. Jackson*, 368 N.C. 75, 77, 772 S.E.2d 847, 849 (2015) (citing *Terry v. Ohio*, 392 U.S. 1, 30-31, 20 L. Ed. 2d 889, 911 (1968)). Reasonable suspicion requires "specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by [the officer's] experience and training." *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (citation omitted).

Because the trial court concluded that defendant had not been seized, it did not address the issue of whether reasonable suspicion could have supported a seizure of defendant. However, it is undisputed that the law enforcement officers' interactions with defendant were not based upon suspicion of criminal activity. Officer Sullivan testified that defendant was not named in the search warrant and that he approached defendant to "make sure that [he] wasn't the target of the search warrant, and that [he] didn't interfere with the search warrant since [he was] in such close proximity to where we were going." Defendant consented to show Officer Sullivan his driver's license and to be searched, neither of which revealed anything suspicious. Similarly, Officer Blackwell agreed that "the purpose of [his] making contact [with defendant] was to ensure that he would not interfere with the execution of the search warrant." The State did not elicit testimony at the hearing suggesting that the officers suspected defendant of engaging in criminal behavior, and does not argue on appeal that reasonable suspicion existed to detain defendant. We have carefully reviewed the transcript and conclude that there was no evidence that the law enforcement officers approached defendant based on a reasonable suspicion of criminal activity. Therefore, if defendant was seized by law enforcement officers, the seizure was a violation of defendant's rights under the Fourth Amendment, and would require suppression of the evidence found in his trunk. *See, e.g.*, *Bostick*, 501 U.S. at 433-34, 115 L. Ed. 2d at 398:

> The sole issue presented for our review is whether a police encounter on a bus of the type described above necessarily constitutes a "seizure" within the meaning of the Fourth Amendment. The State concedes, and we accept

> for purposes of this decision, that the officers lacked the reasonable suspicion required to justify a seizure and that, if a seizure took place, the drugs found in Bostick's suitcase must be suppressed as tainted fruit.

As discussed above, a criminal defendant has been subjected to a seizure by police "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554, 64 L. Ed. 2d at 509. "[T]he *Mendenhall* test does not take into account a defendant's subjective impressions of an encounter with police officers, but instead asks whether the police officers' actions would have led a 'reasonable person' to believe that he was not free to leave the scene." *State v. Isenhour*, 194 N.C. App. 539, 543, 670 S.E.2d 264, 268 (2008) (citing *Mendenhall*). In determining whether a defendant was seized, "[r]elevant circumstances include, but are not limited to, the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification, or property, the location of the encounter, and whether the officer blocked the individual's path." *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 827 (2009).

In this case, the trial court's findings generally established the following:

> 1. An unspecified number of law enforcement officers executed a search warrant for an apartment on Basin Street, in Charlotte.
>
> 2. The search was conducted during daylight hours.
>
> 3. When the law enforcement officers arrived, defendant was seated in his car in front of the apartment building.
>
> 4. While other officers conducted the search, Officers Sullivan and Blackwell approached defendant. The officers were armed and in uniform, but their weapons were not drawn.
>
> 5. The officers approached defendant for two reasons: (1) to make sure that the person in the car was not the target of the search or a resident of the apartment, and (2) to ensure that the person in the car did not interfere with the search.
>
> 6. Officer Sullivan told defendant why the officers were at the apartment. Officer Sullivan did not tell defendant that he had to remain at the scene.

7. At some point "within the first ten minutes of their encounter" and after "the residence was secured," Officer Sullivan asked defendant for his identification.

8. Officer Sullivan also asked defendant for permission to search his person. Defendant consented to the search, which did not reveal any contraband.

9. After an unspecified period of time, Officer Price joined the group with defendant. Officer Sullivan gave Officer Price defendant's identification and left.

10. After an unspecified period of time, Officer Hefner came outside and asked defendant for permission to search his car. Defendant consented to the search, during which marijuana and a firearm were found in the trunk.

11. During the time that the officers were with defendant, he was not told that he could not leave.

Most of these findings are generally undisputed by the parties, such as the finding that the officers did not draw their weapons. The trial court's findings that defendant was never told that he had to remain at the scene, and that defendant consented to the search of his car were the subject of conflicting testimony; however, it is appropriate for the court to resolve inconsistencies and weigh the credibility of conflicting testimony in making its findings.

In arguing that he was seized, defendant places great emphasis upon his contention that the law enforcement officers retained his driver's license during the encounter. Defendant cites several cases, including *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009), in which this Court stated, in analyzing whether the defendant had been seized, that "a reasonable person under the circumstances would certainly not believe he was free to leave without his driver's license and registration[.]" We find this argument persuasive. Indeed, we have not found any cases holding that a defendant whose identification or driver's license was held by the police without reasonable suspicion of criminal activity was nonetheless "free to leave." Moreover, it would defy common sense to interpret "free to leave" as meaning "free to leave and break the law by driving without a license," or "free to leave your car by the side of the road and proceed on foot."

We also note that a recent opinion of this Court reached the same conclusion. In *State v. Parker*, 2017 N.C. App. LEXIS *940, the defendant appealed from the denial of his motion to suppress evidence seized at the time of his arrest. The record showed that two law enforcement officers

initially detained defendant and another person who were engaged in a verbal dispute which the officers feared would escalate into a physical fight. The officers separated the two people, checked defendant's driver's license, and determined that he was not subject to any outstanding warrants. While retaining possession of defendant's driver's license, the officer obtained defendant's consent to a search, which revealed the presence of narcotics. On appeal, the defendant argued that "when [the law enforcement officer] failed to return defendant's identification after finding no outstanding warrants and after the initial reason for the detention was satisfied, [and] he instead requested defendant's consent to search, the seizure was unlawful, and defendant's consent was not voluntarily given." This Court agreed, and held that "[a]bsent a reasonable and articulable suspicion to justify further delay, retaining defendant's driver's license beyond the point of satisfying the purpose of the initial detention -- de-escalating the conflict, checking defendant's identification, and verifying [that] he had no outstanding warrants -- was unreasonable."

In its appellate brief, the State does not dispute the crucial significance of whether the officers kept defendant's license. Nor does the State cite any cases in which, although law enforcement officers confiscated the defendant's license without reasonable suspicion of criminal activity, it was nonetheless held that the defendant had not been seized. The State instead argues that the trial court's findings of fact fail to establish whether the officers retained defendant's license or returned it to him after examination. We agree with this contention.

Witnesses at the hearing on defendant's suppression motion gave conflicting testimony with regard to the circumstances under which law enforcement officers took possession of defendant's driver's license and the time frame in which the relevant events occurred. Sergeant Sullivan testified that he and Officer Blackwell approached defendant upon arrival at the apartment, and that after the apartment was secured, he asked to see defendant's identification and searched his person.

> SERGEANT SULLIVAN: I asked him for his ID. About the time I was asking him for his ID, I was — I went — I handed him off. I think I handed him off to Officer Price, and I went inside to supervise the search warrant[.] . . .
>
> PROSECUTOR: How long would you say you had been with the defendant at this point, when you first approached him?

> SERGEANT SULLIVAN: I was probably with him three minutes, you know, less than five.
>
> PROSECUTOR: And you stated that you gave the ID that the defendant handed to you to Officer Price, and then you went into the house?
>
> SERGEANT SULLIVAN: That's right.

However, Officer Price testified that when he came outside after completing the search of the apartment, defendant was already in custody. Officer Blackwell, who was not asked about the confiscation of defendant's identification, testified that he and Sergeant Sullivan spent eight to ten minutes with defendant before Officer Hefner came outside and obtained defendant's permission to search his car. Officer Hefner testified that he did not recall how long he was inside the apartment, but that it usually took at least two hours to search a residence. Defendant testified that when he was searched, the officers took his keys and wallet, and that when Officer Blackwell ordered defendant not to leave, he had possession of defendant's wallet and keys. Defendant also testified that he stood outside with the officers for twenty or thirty minutes before Officer Hefner came outside. Thus, defendant testified that the officers retained his license, but the officers did not testify about this issue. Assuming that the law enforcement officers kept defendant's identification, the testimony is conflicting as to whether defendant's car was searched before, immediately after, ten minutes after, or a half-hour after defendant gave his license to Officer Sullivan.

Counsel for defendant and the State offered contrasting interpretations of the testimony in their arguments to the trial court:

> MS. WALLWORK [Defense Counsel]: I will cut to the chase. That's what varies in Sergeant Sullivan's confiscation of Mr. Thompson's identification. That's what [*United States v.*] *Black* is about, that officers in *Black* attempted to make a voluntary contact. They took the identification of Nathaniel Black in that case and pinned it to their vest and continued on their way. The court in *Black* said that renders it a seizure. In this case we heard from Sergeant —
>
> . . .
>
> MS. WALLWORK: We know from Officer Blackwell's testimony that that period of time, in the light most favorable to the State, was eight to ten minutes. That he was with Mr.

> Thompson outside the home while apparently Sergeant Sullivan had already gone back inside and Officer Price has Mr. Thompson's ID. So there's an eight to ten minute delay here. I would argue to the Court that that is a seizure, and that that seizure is without reasonable suspicion.

In response, the prosecutor challenged defense counsel's interpretation of the testimony:

> MS. HINSON [Prosecutor]: Yes, Your Honor. Your Honor, I would argue that that point wasn't made as clear as Ms. Wallwork seems to assert it to the Court. Sergeant Sullivan did testify that he retrieved the defendant's identification and handed it to Officer Price. But when Officer Price testified, he said the first time he approached that scene and/or encountered the defendant was after he was in the residence and conducted the search. He at no point testified that he was handed a license, that he went inside for eight to ten minutes, and then came back out. And Sergeant Sullivan never testified that at any point he took a license, went inside for eight to ten minutes, and then came back out. . . . So I would argue, Your Honor, that the evidence does not say that the defendant's license was seized for that period of time. We know that it was taken by Sergeant Sullivan, and we know that at some point Officer Price ran his information, but that eight to ten minutes is to me a leap.

In its order, the "judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2016). "[T]he general rule is that [the trial court] should make findings of fact to show the bases of [its] ruling. If there is a material conflict in the evidence on *voir dire*, he *must* do so in order to resolve the conflict." *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980) (emphasis in original) (citation omitted). " 'Findings and conclusions are required in order that there may be a meaningful appellate review of the decision' on a motion to suppress." *State v. Salinas*, 366 N.C. 119, 124, 729 S.E.2d 63, 66 (2012) (quoting *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984)). Remand is required if the trial court's order fails to resolve critical issues of fact:

> [W]hen the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the

> trial court. Remand is necessary because it is the trial court that "is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred."

Salinas, 366 N.C. at 124, 729 S.E.2d at 67 (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (1982)).

In this case, the trial court's findings of fact do not resolve the question of whether the law enforcement officers returned defendant's license after examining it, or instead retained it, or the issue of the sequence of events and the time frame in which they occurred. Given that the officers conceded that their interaction with defendant was not based upon suspicion of criminal activity, a finding that officers kept defendant's identification would likely support the legal conclusion that he had been seized. A citizen " 'may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *State v. Farmer*, 333 N.C. 172, 186-87, 424 S.E.2d 120, 128-29 (1993) (quoting *Florida v. Royer*, 460 U.S. 491, 497-98, 75 L. Ed. 2d 229, 236 (1983)). Because the court's findings of fact fail to resolve material issues, we vacate the judgment entered against defendant, and remand for the trial court to enter findings of fact that resolve all material factual disputes.

Judgment Entered Against Defendant

[2] Defendant also argues that the judgment entered against him for felony possession of marijuana must be vacated on the grounds that he did not plead guilty to this offense. It is undisputed that defendant was indicted on charges of possession of drug paraphernalia, possession with the intent to sell or deliver marijuana, felony possession of marijuana, maintaining a vehicle for the purpose of keeping or selling controlled substances, and possession of a firearm by a convicted felon. It is also agreed by the parties that, pursuant to a plea arrangement, the State dropped the charge of maintaining a vehicle for the purpose of keeping or selling controlled substances, and that defendant pleaded guilty to the charges of possession of drug paraphernalia, possession with the intent to sell or deliver marijuana, and possession of a firearm by a convicted felon. However, upon review of the record documents and the transcript, we note several inconsistencies in the treatment of the charge of felony possession of marijuana.

During the hearing on the plea arrangement, the prosecutor stated that defendant was charged with four offenses, including felony possession of marijuana, and defendant's counsel stated that she was authorized to enter a plea of guilty to the offenses, subject to defendant's reservation of the right to appeal the denial of his suppression motion. In its colloquy with defendant, the court first enumerated the offenses to which defendant was pleading guilty, and included felony possession of marijuana. However, the court then asked defendant if he was prepared to enter a plea of guilty to "those three charges" and, when the court orally pronounced judgment, it did not include felony possession of marijuana in the recitation of the charges to which defendant was pleading guilty.

Of greater significance than the inconsistencies among the oral statements of the parties is the fact that the written documents signed by the trial court are not consistent. The written transcript of plea states that defendant is pleading guilty to the three offenses about which there is no dispute, and does not state that defendant is pleading guilty to felony possession of marijuana.[2] However, the judgment entered against defendant includes felony possession of marijuana as a charge for which judgment is entered. We conclude that the record is inconsistent and unclear as to whether defendant pleaded guilty to felony possession of marijuana.

The State argues that defendant is not entitled to review of the issue of whether the judgment sentenced him for an offense of which he was not convicted. The State characterizes defendant's argument as a challenge to the trial court's compliance with N.C. Gen. Stat. § 15A-1022 (2016), which requires a court to make certain inquiries of a defendant before accepting a plea of guilty. The defendant is not, however, arguing that the trial court failed to conduct the requisite colloquy. Moreover, we easily conclude that if, as is posited by defendant, he was sentenced for an offense of which he was not convicted, it is in the interest of preserving the integrity of our judicial system to address this matter. We choose to treat defendant's appeal as a petition for issuance of a writ of certiorari, in order to reach this issue.

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2. The Notice of Dismissal recites that the State is dismissing the charge of maintaining a vehicle in exchange for defendant's agreement to plead guilty to the other four offenses, including felony possession of marijuana. However, this document was not filed until the day after judgment was entered against defendant. Moreover, it is not signed by the trial court.

On appeal, defendant stresses that he "is not seeking to withdraw his guilty plea" or to change his sentence, but simply wants the "misstatement in the judgment" corrected. In essence, defendant characterizes this as a clerical error. The State directs our attention to the parts of the record that tend to support the conclusion that defendant pleaded guilty to felony possession of marijuana. We conclude that, on the basis of the record as presently constituted, it is not possible to determine whether judgment was properly entered on the charge of felony possession of marijuana. As the judgment must be vacated and this matter remanded, we direct the court to take the necessary steps to resolve the discrepancy between the transcript of plea and the written judgment.

Conclusion

For the reasons discussed above, we conclude that the trial court's order denying defendant's suppression motion failed to include findings of fact resolving significant disputed issues of fact. As a result, we must vacate the judgment against defendant and remand for entry of additional findings. We further conclude that the transcript of plea and the judgment are inconsistent and remand for correction of this discrepancy.

VACATED AND REMANDED.

Judge DAVIS concurs.

Judge BERGER dissents with separate opinion.

BERGER, Judge, dissenting in separate opinion.

Because Defendant was never seized by Charlotte-Mecklenburg Police Department ("CMPD") officers within the meaning of the Fourth Amendment, I would affirm the trial court's denial of the motion to suppress, and respectfully dissent.

The North Carolina Supreme Court has stated that law enforcement officers "may approach individuals in public to ask them questions and even request consent to search their belongings, so long as a reasonable person would understand that he or she could refuse to cooperate. . . . Such encounters are considered consensual and no reasonable suspicion is necessary." *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 585-86 (1994) (citations omitted). Only when the encounter ceases to be consensual are Fourth Amendment concerns implicated. *State v. Garcia*, 197 N.C. App. 522, 528, 677 S.E.2d 555, 559 (2009). The initial

inquiry is "whether under the totality of the circumstances a reasonable person would feel that he was not free to . . . terminate the encounter." *Brooks*, 337 N.C. at 142, 446 S.E.2d at 586 (citations omitted).[1]

The following findings of fact by the trial court were supported by competent evidence in the record and transcript, and, therefore, these findings are conclusively binding on appeal, *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982):

> (1) CMPD officers were "going to execute a search warrant at 404 Basin Street, an apartment."
>
> (2) Before arriving at the location, the officers were advised that an individual in a Volvo "was parked in front of the residence."
>
> (3) Sergeant Sullivan went to the Volvo while his team executed the search warrant "because of its proximity to the apartment to be searched."
>
> (4) Sergeant Sullivan approached the Volvo to make sure the target of the search warrant was not in the vehicle, and "to assure that [the] person did not interfere with the execution of the search warrant."
>
> (5) Defendant was the occupant of the Volvo, and when asked by Sergeant Sullivan if he lived at 404 Basin Street, "he replied 'No' but . . . that his girlfriend did."
>
> (6) Although in uniform and armed, officers did not have their weapons drawn.
>
> (7) Sergeant Sullivan and Defendant stood next to each other as Defendant was advised that a search warrant was being executed at his girlfriend's apartment.
>
> (8) Sergeant Sullivan "did not tell the Defendant that he had to remain at the scene."

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1. This case brings to mind a famous scene from Star Wars. In the first movie, *Episode IV, A New Hope*, Obi-Wan Kenobi, Luke Skywalker, R2-D2, and C-3PO arrive in Mos Eisley and are greeted by Stormtroopers. A Stormtrooper asks Skywalker for identification, and with a wave of his hand, Kenobi uses a Jedi mind trick to avoid Imperial authorities. Kenobi asserts that the Stormtrooper does not need to see Skywalker's identification and that he can go about his business because "these aren't the droids [Stormtroopers] are looking for." Unfortunately for Defendant, he consented to this encounter with the authorities, and these were the drugs that officers were looking for.

(9) Within ten minutes of his initial contact with Defendant, Sergeant Sullivan asked Defendant for identification and for consent to search his person. Defendant consented to the search of his person, which revealed no weapons or contraband.

(10) Sergeant Sullivan provided Defendant's identification to another officer.

(11) "*[A]fter* [the apartment] had been secured," Officer Hefner left the residence to speak with Defendant because he had "received information that the Defendant was the supplier of the drugs *that were being searched for* inside the residence."[2] (Emphasis added).

(12) Officer Hefner asked for and received consent to search Defendant's vehicle.

(13) Defendant assisted CMPD officers with the search of his Volvo.

(14) "Defendant's encounter with the police . . . was voluntary and consensual."

(15) Defendant "was never told nor was it intimated by word or *deed* that he was not free to leave at any point." (Emphasis added).

Defendant's behavior was not indicative of an involuntary encounter with CMPD officers. It was permissible for Sergeant Sullivan to approach Defendant in a public area at any time to ask questions. Sergeant Sullivan did just that: he engaged Defendant to explain why CMPD officers were present on the scene, determine if he was the target of the search warrant, and prevent interference. The two stood outside Defendant's vehicle while officers gained entry to the apartment. Defendant was never told he could not leave the scene, never placed in handcuffs, and never restrained. Defendant was not required to cooperate or even speak with Sergeant Sullivan. Competent evidence also showed that Defendant was calm and never asked if he could leave the scene.[3]

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2. An active search of the apartment was taking place when Officer Hefner made contact with Defendant.

3. From the findings of fact, it appears the trial court gave Defendant's testimony little to no weight. The trial court asked defense counsel during her argument if the factual questions to be resolved were a matter of "credibility," and the trial court's findings are consistent with the officers' testimony.

Sergeant Sullivan asked for Defendant's identification and "if he would allow" Sergeant Sullivan to search his person for drugs and weapons. Defendant provided his identification and consented to the search even though he was not required to do so. There is no evidence that Sergeant Sullivan or any other CMPD officer used force or intimidation to obtain the identification or consent to search.

After the residence was secured, and while execution of the search warrant was taking place, Sergeant Sullivan gave Defendant's identification to another officer and went into the residence. Defendant did not request his identification be returned, nor did he request to go about his business.

Shortly thereafter, Officer Hefner approached Defendant and obtained consent to search the vehicle. Defendant assisted Officer Hefner in the search. Defendant's interaction with CMPD officers was relatively brief under the circumstances. Officer Blackwell, who assisted with Defendant at the scene, estimated that the time from Sergeant Sullivan's initial contact with Defendant until Defendant consented to search of his vehicle was approximately eight to ten minutes.

The majority focuses on the location of Defendant's identification as the sole reason to vacate Defendant's conviction. We are required, however, to look at more than one fact. Under the totality of the circumstances, a reasonable person would have felt free to decline the officers' requests and terminate this encounter at any point up to the discovery of more than 85 grams of marijuana, $4,195.77 in cash, and a firearm in the trunk of the vehicle.

The trial court's findings support the conclusion that Defendant's encounter with CMPD officers was "voluntary and consensual." No additional findings regarding Defendant's identification, or any other matter, are necessary to support that conclusion.

Moreover, even if we assume that Defendant was seized as Defendant argues and the majority finds, the search of the vehicle was still valid. The majority cites *State v. Jackson*, 199 N.C. App. 236, 241-42, 681 S.E.2d 492, 496 (2009), and *State v. Parker*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, COA17-108, 2017 WL 5145987, *6 (2017), for the proposition that retaining a defendant's identification "beyond the point of satisfying the purpose of the initial detention" is unreasonable. *Parker*, 2017 WL 5145987, at *6. While this may be a correct statement of the law under the facts of those cases, the initial purpose of the detention under our facts had not been satisfied.

The trial court found that CMPD officers approached Defendant because of his "proximity to the apartment to be searched[,]" to make sure the target of the search was not in the vehicle, and to prevent that person from interfering with execution of the search warrant. Defendant was parked in front of the residence, and in close proximity to the area in which the officers would be executing the search warrant. While speaking with Defendant, officers determined that he did in fact have a connection to the residence to be searched because his girlfriend was the target of the search warrant. There is no evidence that Defendant was detained by CMPD officers beyond the point of satisfying their initial purpose to prevent interference with execution of the search warrant.

In addition, individuals with a "connection to the residence to be searched" may be detained within the "immediate vicinity of the premises to be searched." *Bailey v. U.S.*, 568 U.S. 186, 197, 201, 185 L. Ed. 2d 19, 31, 33-34 (2013) (factors to consider in determining what constitutes "immediate vicinity" include, but are not limited to, the "lawful limits of the premises" to be searched, the individual was "within the line of sight" of the property to be searched, the ability to re-enter the property, and "other relevant factors"). "An officer's authority to detain incident to a search is categorical; it does not depend on the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Muehler v. Mena*, 544 U.S. 93, 98, 161 L. Ed. 2d 299, 307 (2005) (citation and internal quotation marks omitted).

Defendant here was in the immediate vicinity of the apartment to be searched, and CMPD officers determined that Defendant did in fact have a connection with the apartment. While in close proximity to the apartment, Defendant certainly had the ability to disrupt or otherwise interfere with the officers as they conducted the search. CMPD officers had the authority to detain Defendant incident to the search.

For these reasons, I would affirm the denial of Defendant's motion to suppress.

As to Defendant's second issue concerning his conviction for felony possession of marijuana, Defendant has requested that the judgment entered against him be corrected to accurately reflect the offenses for which he pleaded guilty. Neither the plea transcript nor the colloquy between the trial court and Defendant reference the possession of marijuana charge that is set forth on the judgment. Judgment should simply be arrested as to that charge, or the matter should be remanded for correction of the clerical error.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JANUARY 2018)

BOST v. HELLER No. 16-1176	Iredell (14CVS779)	Affirmed
HANKINS v. HANKINS No. 17-186	Rowan (10CVD2646)	Affirmed in part; Reversed in part; and Remanded in part.
IN RE A.L.M. No. 17-547	Guilford (15JT136) (15JT232)	Affirmed
IN RE C.P. No. 17-639	Orange (15JA63)	Reversed in part, vacated in part, and remanded
IN RE I.D.B. No. 17-780	Cleveland (15JT121)	Affirmed
IN RE J.H.S. No. 17-628	Guilford (05JT75) (14JT244)	Affirmed
IN RE L.C.J. No. 17-552	Bladen (16JT37-38)	Reversed and Remanded
IN RE L.D. No. 17-575	Lee (15JT27)	Affirmed
KEELS v. FRAZIER No. 16-978	Mecklenburg (16CVS1692)	Affirmed
STATE v. BAKER No. 17-563	Cabarrus (15CRS53678) (15CRS53679) (16CRS2)	No Error
STATE v. BOYLES No. 17-348	Wake (15CRS220320-21)	No Error
STATE v. FRIDAY No. 17-343	Guilford (15CRS93010-11)	Affirmed
STATE v. HILL No. 17-529	Forsyth (15CRS58406) (15CRS7065)	Judgment Arrested; Remanded for Resentencing.

STATE v. HORTON No. 17-460	Mecklenburg (14CRS14752) (14CRS212746)	No Error
STATE v. LIVERMAN No. 17-394	Wake (14CRS218566)	No Error
STATE v. MOORE No. 17-183	Wake (15CRS216616-17) (15CRS4405)	Affirmed
STATE v. NORWOOD No. 17-301	Mecklenburg (14CRS201474)	No error in part, remanded in part
STATE v. POTTER No. 17-677	Pamlico (12CRS50411) (14CRS50013-14) (14CRS51) (15CRS45)	Vacated and remanded for a new trial
STATE v. REEVES No. 17-305	Madison (14CRS50528)	No Error
STATE v. SMITH No. 17-153	Mecklenburg (14CRS236145) (14CRS236148-52)	No Plain Error
STATE v. SMITH No. 17-172	Alamance (13CRS54383) (13CRS54384)	Affirmed
STATE v. SMITH No. 17-496	Johnston (13CRS50932-33)	Affirmed
STATE v. STACKS No. 17-770	Forsyth (15CRS55852)	No Error
STATE v. STEPHENS-MADDOX No. 17-542	Rowan (15CRS55498)	No Plain Error.
STATE v. THOMAS No. 17-313	Gaston (12CRS55132-33) (12CRS55137) (15CRS1303)	No error in part; Remanded for resentencing in part
STATE v. WADDELL No. 17-681	Johnston (16CRS1342) (16CRS52589)	No Error

STATE v. YOUNG No. 17-712	Wayne (15CRS4049) (15CRS4085-86) (15CRS4097) (15CRS54431)	No Error
TERRY v. HARRIS TEETER SUPERMARKETS, INC. No. 17-491	N.C. Industrial Commission (15-720512) (15-757100)	Affirmed
TURNAGE v. CUNNINGHAM No. 17-222	Greene (14CVS301)	Affirmed

ADAMS CREEK ASSOCIATES, PLAINTIFF
v.
MELVIN DAVIS & LICURTIS REELS, DEFENDANTS

No. COA16-1080

Filed 16 January 2018

1. Contempt—civil contempt—failure to remove structures and equipment from property—failure to cease trespassing—findings of fact not required

The trial court did not err by denying defendant brothers' motions for release from conditional incarceration for civil contempt for failing to comply with court orders requiring them to remove their structures and equipment from plaintiff Adams Creek Associates' property, and to cease trespassing upon it. These acts did not require defendants to pay a monetary judgment, thus allowing them to remain in prison without further hearing under N.C.G.S. § 5A-21(b). Under these circumstances, the trial court was not required to make findings on defendants' alleged inability to comply with the contempt order.

2. Contempt—civil contempt—continued incarceration—performance of affirmative acts

The trial court did not err by denying defendant brothers' motions for release from conditional incarceration for civil contempt for failing to comply with court orders requiring them to remove their structures and equipment from plaintiff Adams Creek Associates' property and to cease trespassing upon it where their continued incarceration was not punitive and defendants could be released by performing the affirmative acts required by the court.

Judge STROUD dissenting.

Appeal by defendants from order entered 13 June 2016 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 6 September 2017.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr. and L. Lamar Armstrong, III, for plaintiff-appellee.

Hairston Lane, P.A., by James E. Hairston, Jr., for defendant-appellants.

ELMORE, Judge.

Brothers, Melvis Davis and Licurtis Reels (defendants), appeal from an order denying their motions for release from conditional incarceration for civil contempt. Defendants have been previously before this Court twice, unsuccessfully disputing an adjudication that Adams Creek Associates (plaintiff), not defendants, are the rightful owners of 13.25 acres of property along Adams Creek in Carteret County, and have unsuccessfully challenged two orders entered in 2006 and 2011 finding them in contempt of court. *See Adams Creek Assocs. v. Davis*, 186 N.C. App. 512, 652 S.E.2d 677 (2007), *writ denied*, *disc. rev. denied*, *temp. stay dissolved*, *appeal dismissed*, 362 N.C. 354, 662 S.E.2d 900 (2008) ("*Adams Creek I*"); *Adams Creek Assocs. v. Davis*, 227 N.C. App. 457, 459, 746 S.E.2d 1, 3, *disc. rev. denied*, 367 N.C. 234, 748 S.E.2d 322 (2013) ("*Adams Creek II*"). Defendants have been imprisoned for civil contempt since March 2011, after entry of the second contempt order, for failing to comply with court orders requiring them to remove their structures and equipment from Adams Creek Associates' property, and to cease trespassing upon it. In its 2011 contempt order, the superior court afforded defendants the opportunity to purge their contempt by (1) removing their structures and equipment from the property, and (2) attesting in writing to never again trespass. In this appeal, defendants challenge a 2016 order denying their motions for custodial release.

In 2016, defendants moved for custodial release on the grounds that they were financially unable to comply with the contempt order and that their continued incarceration has become punitive and violates due process. But at the hearing on their motions, defendants testified that even if they were financially able to comply with the property-removal purge condition, they would not do so, and defendants again refused to comply with the attestation purge condition. Defendants' counsel also argued that because defendants were unable to comply with the order, their continued imprisonment has become a punitive contempt sanction. The trial court denied the motions. In its order, the trial court acknowledged that defendants presented evidence regarding their financial situation and the costs associated with removing the structures and equipment from the property, but refused to make findings on the matter in light of defendants' refusals to comply with either purge condition. The trial court also concluded that continued incarceration has not become punitive because defendants wield the power to purge their contempt but have recalcitrantly refused.

On appeal, defendants contend the trial court erred by (1) failing to consider their alleged inability to comply with the contempt order, (2) failing to consider whether the purpose of the underlying order could still be served by defendants' continued incarceration, and (3) improperly concluding that their continued incarceration has not become a punitive criminal contempt. Because defendants were already ordered to be indefinitely committed until they purged their civil contempt when they filed their motions for release, the only issue properly before the trial court was whether defendants were subject to custodial release. Because defendants willfully refused to perform the attestation and admitted they would not perform the property-removal purge condition, even if they could, defendants failed to prove they purged their contempt or satisfy their burden of producing evidence to support their alleged inability-to-comply defense. We hold the trial court did not err in refusing to make futile findings on their alleged inability to comply with the prior order due to defendants' outright refusals to purge their contempt. Additionally, because the character of relief ordered by the contempt order was incarceration until compliance, and defendants were afforded the opportunity to avoid imprisonment by performing affirmative acts, we hold that the trial court properly concluded their continued incarceration has not become punitive. Accordingly, we affirm.

I. Background

The litigation relevant to this appeal started in 1982, when Shedrick Reels filed a trespass action against defendant Melvin Davis and Gertrude Reels, the mother of defendant Licurtis Reels. *See Adams Creek I*, 186 N.C. App. at 516, 652 S.E.2d at 680. In 1984, the trial court entered a summary judgment order adjudicating Shedrick to be the owner of the property and ordering Davis and Reels' mother not to trespass. *See Adams Creek II*, 227 N.C. App. at 459, 746 S.E.2d at 3. In 1985, Davis was held in contempt and incarcerated for his refusal to comply with that order, but he was released upon satisfying the purge condition of executing a document acknowledging the property belonged to Shedrick and agreeing not to trespass. *Id.* In 1985, Shedrick sold the property to Adams Creek Development, which then conveyed the property to plaintiff, Adams Creek Associates, in 1986. *Id.* at 459–60, 746 S.E.2d at 3.

In 2002, plaintiff filed an action against defendants Davis and Reels, alleging they continued to claim an interest in the property and to trespass upon it. *Id.* at 460, 746 S.E.2d at 3–4. In 2004, the trial court entered a partial summary judgment order in plaintiff's favor, enjoining defendants from further trespassing and ordering them to remove their

structures and equipment from the property ("2004 Summary Judgment Order"). *Id.* After defendants refused to comply, plaintiff moved to hold them in contempt. *Id.* After a show cause hearing, the trial court entered an order on 10 August 2006 finding defendants in civil contempt for failing to comply with the 2004 Summary Judgment Order, and in criminal contempt for testifying under oath that they did not intend to obey future orders to stay off the property ("2006 Contempt Order"). *Adams Creek I*, 512 N.C. App. at 520, 652 S.E.2d at 683.

In 2006, defendants appealed the 2006 Contempt Order. *Id.* Defendants argued they were improperly found to be in both civil and criminal contempt for the same behavior. *Id.* at 526–27, 652 S.E.2d at 686–87. We disagreed and held that the trial court properly found defendants to be in both civil and criminal contempt for different acts. *Id.* at 527, 652 S.E.2d at 687 ("[D]efendants were found in civil contempt for failing to comply with the court's 2004 order, and were found in criminal contempt for their testimony threatening to disobey future orders of the court."). Defendants also attempted to challenge the 2004 Summary Judgment Order, but because their appeal from that order was not properly before us, we refused to address their challenges. *Id.* at 523, 652 S.E.2d at 684.

In January 2011, plaintiff filed another motion to hold defendants in contempt for continuing to occupy the property and refusing to comply with court orders directing them not to trespass. *Adams Creek II*, 227 N.C. App. at 461, 746 S.E.2d at 4. After a hearing, the trial court entered an order on 31 March 2011 finding defendants in civil contempt for failing to comply with prior court orders, and ordering that defendants be incarcerated until they purged their contempt, *see id.*, by (1) presenting evidence they removed their structures and equipment from the property, and (2) attesting in writing to never again trespass ("2011 Contempt Order"). Defendants have remained incarcerated since March 2011.

In 2012, defendants appealed, among other orders, the 2011 Contempt Order and the 2004 Summary Judgment Order. *See Adams Creek II*, 227 N.C. App. at 462, 746 S.E.2d at 5. On appeal, defendants raised several challenges to the 2004 Summary Judgment Order that awarded plaintiff title to the property, and we affirmed that order. *Id.* at 462–67, 746 S.E.2d at 5–8. Defendants also challenged the 2011 Contempt Order on the basis that "it relied on the erroneous conclusion that Adams Creek is the rightful owner of the Waterfront Property." *Id.* at 470, 746 S.E.2d at 10 (footnote omitted). We ascertained that the actual issue presented was whether defendants were improperly found in civil contempt in 2011 for failing to comply with the 2004 Summary Judgment Order, *id.* at

470, 746 S.E.2d at 10, and concluded that "[b]ased on the evidence presented, the trial court properly found that defendants were able to comply with the 2004 Summary Judgment Order" and "[h]ence, defendants' noncompliance was willful." *Id.* at 471, 746 S.E.2d at 11. Accordingly, having affirmed the 2004 Summary Judgment Order and having determined that defendants remained in noncompliance with that order, we affirmed the 2011 Contempt Order. *Id.*

On 1 June 2015, after having been incarcerated for four and a half years, defendants petitioned our Supreme Court for a writ of *habeas corpus* for their custodial release, which was denied three days later on 4 June 2015. *See Davis v. Buck*, ___ N.C. ___, 772 S.E.2d 707 (2015).

On 4 May 2016, defendants filed the instant motions in the cause, seeking custodial release based upon their alleged inability to comply with the 2011 Contempt Order, and on the basis that their continued incarceration has become punitive and violates their due process rights. After a hearing at which defendants again refused to perform the attestation purge condition and admitted they would refuse to comply with the property-removal purge condition even if they were able, the trial court entered an order on 13 June 2016 denying their motions. Defendants now appeal from this 2016 order and have been in prison since entry of the 2011 Contempt Order.

II. Analysis

On appeal, defendants contend the trial court erred in denying their motions for custodial release by (1) failing to consider their alleged inability to comply with the 2011 Contempt Order, (2) failing to consider whether the purpose of the 2004 Summary Judgment Order could still be served by compliance, and (3) improperly concluding that their continued incarceration has not become punitive.

A. Review Standard

"The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Gandhi v. Gandhi*, ___ N.C. App. ___, ___, 779 S.E.2d 185, 188 (2015) (citation and quotation marks omitted). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Id.* (citations and quotation marks omitted). Legal conclusions are reviewed *de novo*. *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009) (citation omitted).

B. Alleged Statutory Errors

[1] Defendants first contend the trial court erred by denying their motions for release on the ground that it failed adequately to consider their alleged inability to comply with the 2011 Contempt Order and, additionally, by failing to consider whether the purpose of the underlying order may still be served by compliance. Defendants' arguments miss the mark.

N.C. Gen. Stat. § 5A-21(a) (2015) provides in pertinent part:

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is *able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order*.

(Emphasis added.) "A person who is found in civil contempt may be imprisoned as long as the civil contempt continues, subject to . . . limitations" inapplicable here. N.C. Gen. Stat. § 5A-21(b) (2015) (emphasis added).

"The purpose of civil contempt is not to punish but to coerce the defendant to comply with a court order." *Spears v. Spears*, ___ N.C. App. ___, ___, 784 S.E.2d 485, 494–95 (2016) (citation and quotation marks omitted). Thus, generally, before a trial court may impose punishment for civil contempt, it must determine that a defendant "ha[s] the present ability to comply, or the present ability to take reasonable measure that would enable him [or her] to comply, with the order." *Id.* at ___, 784 S.E.2d at 494 (citation and quotation marks omitted). However, "if a person is found in civil contempt for failure . . . to comply with a court order to perform an act that does not require the payment of a monetary judgment, *the person may be imprisoned as long as the civil contempt continues without further hearing*." N.C. Gen. Stat. § 5A-21(b) (emphasis added).

In the 2011 Contempt Order, defendants were ordered to be confined indefinitely until they purged their contempt by (1) "presenting

evidence . . . that [certain structures they own have] been removed completely from the property," and (2) "confirm[ing] in writing [their] agreement to never again go onto the property." Because these acts do not require defendants to pay a monetary judgment, they may be subject to remain in prison "without further hearing." N.C. Gen. Stat. § 5A-21(b). Since defendants were already serving an indefinite, conditional prison sentence for civil contempt at the time their motions for release were filed, the trial court was not adjudicating an initial or continuing contempt, and thus had no inherent statutory obligation to consider any of N.C. Gen. Stat. § 5A-21(a)'s enumerations; rather, the issue for the trial court, which is the subject of our review, is whether defendants satisfied their burden of showing they were subject to release.

N.C. Gen. Stat. § 5A-22(a) (2015) provides that "[a] person imprisoned for civil contempt must be released when his civil contempt no longer continues." Upon an incarcerated contemnor's motion, "the court must determine if he is subject to release and, on an affirmative determination, order his release." N.C. Gen. Stat. § 5A-22(b) (2015). Absent a showing that a contemnor purged their contempt, he or she may move for release based upon "a *present* inability to comply with the order . . . ." *United States v. Rylander*, 460 U.S. 752, 757, 103 S. Ct. 1548, 1552, 75 L. Ed. 2d 521 (1983) (citations omitted); *Turner v. Rogers*, 564 U.S. 431, 442, 131 S. Ct. 2507, 2516, 180 L. Ed. 2d 452 (2011) ("A court may not impose punishment in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." (citation and internal quotation marks omitted)). But "[i]t is settled, . . . that in raising this defense, the [contemnor] has a burden of production." *Rylander*, 460 U.S. at 757, 103 S. Ct. at 1552 (citations omitted). It follows that a contemnor cannot satisfy this burden by testifying that, even if they could comply with the order, they would not. Such a showing would vitiate the inability-to-comply defense.

Here, defendants alleged in their motions that they were financially unable to comply with the 2011 Contempt Order. However, at the hearing, defendants readily admitted that they would not perform the property-removal purge condition, even if they could. This relevant exchange occurred between defendant Davis and opposing counsel:

> Q. *Regardless of how many orders exist or what judges tell you to do, you will never get off that land or move what you have on the land, will you?*
>
> A. *No, sir.*

> Q. *It's not that you can't do it, it's that you won't do it, right?*
>
> . . . .
>
> A. I-- we have been on that land all our days and that is where-- that is where I am at.
>
> . . . .
>
> Q. *So you simply refuse to do it?* Whether you can do it or not it doesn't matter to you, you just won't do it?
>
> A. They come there, they blew up the boat, sunk my boat, come and set my house on fire.
>
> THE COURT: Sir, you need to answer his question, not just start talking about things you want to talk about. *The question is, it's not a matter of whether you can't but whether you will.* That is his question.
>
> A. *I will not.*
>
> . . . .
>
> Q. *You will not do it?*
>
> A. *No.*

(Emphasis added.) This relevant exchange occurred between defendant Reels and opposing counsel:

> Q. So whether or not you have equipment, whether or not you have somebody that can use it, whether or not your mother will let you move it on her land, all of that doesn't matter because *you simply are not going to move it ever, are you?*
>
> A. *No, sir*, I don't-- I don't have the financial to move it because it's mine.
>
> Q. *What if you had the money?* What if you had social security disability, would you use that money to move it?
>
> . . . .
>
> A. *No, sir.*
>
> . . . .
>
> Q. Why not?

A. Because it's mine.

Q. *So this idea that you don't have money to move it, if you had money you still wouldn't use it to move it, would you?*

A. *No, sir.*

(Emphasis added.)

In its order denying defendants' motions, the trial court made the following unchallenged, and thus binding, factual findings:

> 16. Defendants' counsel called both defendants to the stand to testify about their lack of income since they have been in jail, the heavy equipment and its condition, and their health but asked no questions about the defendants' willingness to "never again go upon the property."
>
> 17. On cross examination, both defendants confirmed they had testified under oath at least five times in the past decades of litigation (in court and in deposition).
>
> 18. Both defendants confirmed that in their prior testimony they said on every occasion that it was not they couldn't comply with the Contempt Order, it was they wouldn't comply.
>
> 19. Both defendants again confirmed that they would not stay off the property and interjected their continued commitment to their ownership of the property despite the decades of legal rulings to the contrary.
>
> 20. Both defendants testified that they did not care how many judges told them to stay off the property, they would not do so.
>
> 21. Both defendants testified that if they had the money to remove structures as required by the Contempt Order, they would not do so.
>
> 22. Other evidence was presented on other factual issues concerning the defendants' financial condition, the heavy equipment still owned by Melvin Davis and its condition, the expense of moving the structures off of the property, the defendants' health, and other issues.
>
> 23. The Court makes no finding as to these matters because defendants' failure to sign the necessary written

> document pledging to not again go upon the property, and their avowed insistence to the contrary they would indeed go back on the property, is dipositive on the controlling issue as to whether defendants have purged or are even willing to purge their contempt.

As reflected by the trial transcript and these findings, the trial court considered defendant's alleged inability defense but determined that making correlative findings would be futile in light of their outright refusals to purge their contempt. Since the purge condition acts did not require defendants to pay a monetary judgment, defendants may be imprisoned "without further hearing." And because the hearing was not an initial or continuing adjudication of contempt, the trial court had no obligation under N.C. Gen. Stat. § 5A-21(a) to make findings regarding defendants' ability to comply with the contempt order. Expenses inherent in removing structures and equipment is certainly relevant in determining whether defendants here can comply with the property-removal purge condition. But based on their refusals to perform the attestation purge act, and their admissions that they would refuse to perform the property-removal purge act even if they were able, defendants effectively vitiated their inability defense. Under these circumstances, we hold the trial court did not err in refusing to make findings on defendants' alleged inability to comply with the contempt order.

Defendants also make a bare assertion that the trial court erred by failing to find that "the purpose of the order, or prior orders . . . , are served by the Defendants' continued incarceration." As concluded above, the hearing before the trial court was not an initial or continuing contempt adjudication, and therefore the trial court was under no statutory obligation to reconsider N.C. Gen. Stat. § 5A-21(a)(2) ("The purpose of the order may still be served by compliance with the order[.]"). Further, defendants argument misses the point. The relevant consideration is not whether the purpose of an order can be served by continuing to punish a contemnor, but whether its purpose can still be served by compliance. The record reveals that defendants have not removed their structures from plaintiff's property and thus the purpose of the 2004 Summary Judgment Order could still be served by compliance. *See, e.g.*, *Plasman v. Decca Furniture (USA), Inc.*, ___ N.C. App. ___, ___, 800 S.E.2d 761, 773 (2017) ("Our review of the record reveals that the [contemnors] have yet to return the diverted funds. We need say little more than that the purpose of the [underlying order]—to enforce compliance with the injunction's terms, including the requirement that funds

diverted from Bolier's bank accounts be returned to Decca USA—could still be served by compliance with the [underlying order]").

C. Nature of Contempt

[2] Defendants next contend the court erred by denying their motions for release on the ground that it erroneously concluded that their continued incarceration is not punitive. We disagree.

As an initial matter, we reject defendant's argument that the "2004 [Summary Judgment] Order, and subsequently, [the] 2011 [Contempt Order] . . . are abjectly unreasonable under the circumstances and clearly punitive." In *Adams Creek II*, defendants appealed, and this Court upheld, both the 2004 Summary Judgment Order, 227 N.C. App. at 467, 746 S.E.2d at 8, and the 2011 Contempt Order, *id.* at 472, 746 S.E.2d at 11. Thus, the reasonableness of those orders, or whether the 2011 Contempt Order imposed a civil contempt sanction, is the law of the case and is unreviewable. *See Plasman*, ___ N.C. App. at ___, S.E.2d at 775 (rejecting a similar collateral attack on an underlying order in the context of an appeal from a contempt order); *see also Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) ("An erroneous order may be remedied by appeal; it may not be attacked collaterally." (citation omitted)).

Defendants further contend that the trial court's "ruling, [denying their motions] wherein no consideration was given the current financial nor health conditions of defendants, . . . can only be characterized as punitive." We disagree.

"The paradigmatic coercive, civil contempt sanction, . . . involves confining a contemnor indefinitely until he complies with an affirmative command[,]" *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828, 114 S. Ct. 2552, 2557, 129 L. Ed. 2d 642 (1994) (citations omitted), and incarceration for a fixed term similarly "is coercive when the contemnor is given the option of earlier release if he complies." *Id.* at 828, 114 S. Ct. at 2558 (citation omitted). This is because "the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus carries the keys of his prison in his own pocket." *Id.* (citations and internal quotation marks omitted).

"[C]onclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from 'the subject intent of a State's laws and its courts,' but 'from an examination of the character of the relief itself[.]" *Id.* at 828, 114 S. Ct. at 2557 (quoting *Hicks v. Feoick*, 485 U.S. 624, 636, 108 S. Ct. 1423, 1431–32, 99 L. Ed. 2d. 721 (1988)); *see*

also Bishop v. Bishop, 90 N.C. App. 499, 505, 369 S.E.2d 106, 109 (1988) (adopting the *Hicks* Court's bright-line rule test: "[W]hile it is true that underlying 'punitive' as opposed to 'remedial and coercive' purposes distinguish criminal from civil contempt orders, those respective purposes should be drawn from an examination of the character of the actual relief ordered by the court."). "If the relief is imprisonment, it is coercive and thus civil if the contemnor may avoid or terminate his imprisonment by performing some act required by the court (such as agreeing to comply with the original order)." *Bishop*, 90 N.C. App. at 505, 369 S.E.2d at 109 (citing *Hicks*, 485 U.S. at 632, 108 S. Ct. at 1429).

Here, because the relief is imprisonment, and defendants may be released by performing affirmative acts required by the court, it is coercive and thus civil. The trial court's unchallenged findings addressing these matters support its conclusion that "[c]ontinuation of defendants' incarceration under the Contempt Order is not punitive." We overrule defendants' challenge to this issue.

III. Conclusion

Defendants have raised no meritorious argument with respect to any finding or conclusion in the trial court's order. Defendants were entitled to move the trial court "to determine if [they were] subject to release[,]" N.C. Gen. Stat. § 5A-22(b), but failed to produce sufficient evidence to support their alleged inability-to-comply defense. The court did not err by refusing to make findings on defendants' alleged inability to comply in light of their outright refusals to comply, even if they could. The trial court's unchallenged findings support its conclusion that defendants' continued incarceration is not punitive. Since defendants failed to demonstrate they were subject to release, the trial court properly denied their motions. We affirm.

AFFIRMED.

Judge TYSON concurs.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

Because I believe that the trial court and the majority opinion have conflated two separate requirements of N.C. Gen. Stat. §§ 5A-22 (2015) and 5A-21(a) (2015), I dissent. Willfulness and ability are two different things, and the trial court erred by not considering ability.

The majority has set out the long procedural history of this case well and I will not repeat it.

Defendants sought release under N.C. Gen. Stat. § 5A-22(a), which provides:

> (a) A person imprisoned for civil contempt must be released when his *civil contempt no longer continues*. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. Upon finding compliance with the specifications, the sheriff or other officer having custody may release the person without a further order from the court.

(Emphasis added).

Defendants have previously been held in civil contempt, but the question under N.C. Gen. Stat. § 5A-22 requires the trial court to consider whether a contemnor could still be held in civil contempt as of the time of his motion for release, since he must be released "when his civil contempt no longer continues." N.C. Gen. Stat. § 5A-22(a). We must then refer to N.C. Gen. Stat. § 5A-21(a) for the definition of "civil contempt" and to determine if the civil contempt *continues*:

> (a) Failure to comply with an order of a court is a *continuing civil contempt* as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; *and*
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

(Emphasis added).

Here, the order remains in force and the purpose of the order may still be served by compliance. The defendants' dispute addresses subsections (2a) and (3), which are two separate and independent requirements, and the trial court must address both. The trial court, and the majority opinion, conflate these two subsections. Under N.C. Gen. Stat. § 5A-21(a), the trial court must find *both* that "[t]he noncompliance by the person to whom the order is directed is willful;" *and* "[t]he person to

whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order." N.C. Gen. Stat. § 5A-21(a)(2a),(3).

Defendants' noncompliance is willful under N.C. Gen. Stat. § 5A-21(a)(2a). They stubbornly refuse to recognize that the land is not theirs, and they refuse to perform the one part of the order they have the ability to perform: signing a piece of paper with their promise not to go on the land. But to be in continuing civil contempt, defendants must also be "able to comply with the order" or "able to take reasonable measures that would enable" them to comply with the order. N.C. Gen. Stat. § 5A-21(a)(3). Logically, they must be able to comply with *all* of the provisions of the order, or they cannot comply with the order. Being able to comply with a part of the order -- signing a promise not to go on the land -- is not the same as ability to comply with the entire order. Nor would the primary purpose of the order be served by this symbolic act, since the primary purpose of the order is to make the defendants remove the structures on the land.

But the trial court erred by failing even to consider defendants' evidence of their inability to comply with the order. The trial court specifically found it would not make findings regarding defendants' inability to comply only because defendants stated their intent not to comply:

> 22. Other evidence was presented on other factual issues concerning the defendants' financial condition, the heavy equipment still owned by Melvin Davis and its condition, the expense of moving the structures off of the property, the defendants' health, and other issues.
>
> 23. The Court *makes no findings as to these matters* because defendants' failure to sign the necessary written document pledging to not again go upon the property, and their avowed insistence to the contrary that they would indeed go back on the property, is dispositive on the controlling issue as to whether defendants have purged or are even willing to purge their contempt.

(Emphasis added).

The fact that defendants are obstinate and foolish does not absolve the trial court of its responsibility to consider that defendants may be obstinate, foolish, *and* unable to comply with the order. I will not recite defendants' evidence in detail, but it shows generally that although defendants once had the ability to demolish the structures on

the property themselves, since they had the equipment to do this work, their ability to do the work themselves is gone. The equipment has been sitting idle since they were imprisoned in 2011 and the equipment was at one point submerged under water during a storm. Defendants also presented evidence that the demolition of the structures would cost approximately $46,000.00. Plaintiff does not dispute this cost. Defendant Davis presented evidence that his only income is from social security. He had about $100.00 in a bank account in 2011; he has no other savings or retirement accounts. He was 69 years old at the time of the hearing and had suffered a back injury while in jail when he fell down the stairs. Defendant Reels presented evidence he has no income, no bank account, no retirement account, and has had no income since 2011. He was 59 years old at the time of the hearing and had been diagnosed with diabetes. He has no medical insurance and has received medical treatment in jail. Their financial situation has not improved with incarceration since 2011. There is absolutely no reason to believe that their ability to do the demolition themselves will improve with time or that their financial circumstances will improve with continued incarceration.

In most contempt cases, the contemnor claims he is willing to perform, but unable; in such case, the trial court "must first make a finding of a defendant's present ability to comply with an order before concluding that a defendant is in civil contempt of an order." *Oakley v. Oakley*, 165 N.C. App. 859, 864, 599 S.E.2d 925, 929 (2004). At other times, the contemnor refuses to perform, but he is clearly able to perform. *See*, *e.g.*, *Farr v. Pitchess*, 409 U.S. 1243, 1243, 34 L. Ed. 2d 655, 657, 93 S. Ct. 593, 593 (1973) (reporter who refused to disclose the names of his sources was found to be in civil contempt). The scenario before us in this case is a rare situation in which the contemnors maintain their unwillingness to perform, and they are in fact *unable* to perform, even if they wanted to. Perhaps this reference is obscure, but the defendants are essentially in the position of the Black Knight in the movie "Monty Python and the Holy Grail."[1] The Black Knight insists that "None shall pass" through the path in the forest which he guards; the defendants insist the same as to the land they claim. King Arthur -- who had the legal authority as king to order the Black Knight to let him pass -- seeks to pass through the forest, but the Black Knight refuses to comply with his order. King Arthur and the Black Knight then engage in a sword fight. Even after King Arthur has cut off both of the Black Knight's arms and legs, he still insists that he will continue to fight and that no one may pass -- although

1. *Monty Python and the Holy Grail* (Michael White Prods. 1975).

he cannot do anything. King Arthur simply says, "We'll call it a draw," and continues on his way, leaving the Black Knight with no one to listen to his protests.

Here, the trial court and the plaintiff should follow King Arthur's wise lead and leave defendants behind. If defendants do not have the ability to perform, or to take reasonable measures to perform, and there is no reason to believe that they ever will have the ability to perform, they should not remain incarcerated forever for "continuing civil contempt" under N.C. Gen. Stat. §§ 5A-21(a) and 5A-22. The United States Supreme Court has noted that if compliance is factually impossible, there is no reason for civil contempt:

> While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising this defense, the defendant has a burden of production.

U.S. v. Rylander, 460 U.S. 752, 757, 75 L.Ed.2d 521, 528, 103 S. Ct. 1548, 1552 (1983) (citations omitted).

Defendants met their burden of producing evidence of their inability to perform and their inability to take reasonable measures to perform; their evidence was uncontroverted. The trial court simply refused to make findings of fact based upon their evidence. Based upon the standard used by the trial court and the majority opinion, assuming defendants continue to state their refusal to give up their land, no matter what evidence they produce of their abject poverty and inability to perform, they will remain imprisoned for the rest of their lives. But the trial court is required by N.C. Gen. Stat. § 5A-21(a)(3) to make findings of fact regarding defendants' actual ability to comply or to take reasonable measure to comply, and the trial court failed to make these findings. I would therefore reverse and remand to the trial court for it to make findings of fact as to defendants' actual ability to perform all of the purge conditions of the 2011 Contempt Order, as well as any conclusions of law supported by those findings of fact.

This is a dissent, and the trial court may choose to ignore it completely. But this case will no doubt be considered again by the trial court in the future. I would encourage the trial court to consider some different method of dealing with this situation, preferably one which will not

continue to waste hundreds of thousands of dollars in public funds and occupy space in the Carteret County jail.

Besides the trial court's error in failing to consider the evidence of defendants' inability to comply with the order, I must note the futility of this case and the tremendous cost it has imposed, and will continue to impose, on the taxpayers of North Carolina -- and particularly Carteret County. Indeed, this is one reason why a contemnor's *ability* to comply is crucial to continuing incarceration indefinitely for civil contempt; if the contemnor has no ability to comply, public funds and resources are wasted seeking to accomplish an impossibility. And since the majority has approved the trial court's refusal to consider defendants' ability to comply, the costs will only continue to increase indefinitely. According to defendant's motion, the cost of housing each inmate in the Carteret County Jail is about $60.00 per day, or $21,900.00 per year, and any costs for defendants' medical care are not included in this amount. Both defendants suffer from conditions which require medical care. Defendants have been taking up space in jail since 2011 -- space sorely needed for actual criminals. Defendants' costs will most likely continue to increase, due to their ages and medical conditions. This simple property dispute has been transformed into a state-funded enforcement action for the benefit of the plaintiff. Plaintiff has incurred attorney fees for this matter for years, and I cannot fathom why plaintiff does not simply bulldoze the structures remaining on the property and proceed with whatever plans for development it may have. This would be far cheaper and more productive that continuing to insist that two destitute and stubborn men do something they are not capable of doing. Defendants will *never* have the ability or inclination to do the demolition for Plaintiff. If defendants are released from jail and enter the property -- and they probably will -- I have full confidence that Carteret County's law enforcement can handle the situation. Defendants may end up in jail again after they are arrested for trespassing. But at least defendants' inability to pay for the removal of structures from the property will be irrelevant in their criminal prosecution. And the penalty for trespassing is not life imprisonment.

I therefore respectfully dissent and would reverse and remand for the trial court to make findings of fact and conclusions of law as dictated by N.C. Gen. Stat. § 5A-21.

BERRY v. BERRY

[257 N.C. App. 408 (2018)]

JOHN EDWARD BERRY, PLAINTIFF
v.
ASHLEIGH ANDREWS BERRY, DEFENDANT

No. COA17-700

Filed 16 January 2018

1. Child Custody and Support—child custody modification—sufficiency of findings of fact—parents fit and proper for assigned roles—best interests of children

The trial court did not abuse its discretion in a child custody modification case by including findings of fact regarding the parties' custodial roles and the best interests of the children. Substantial evidence supported the findings.

2. Child Custody and Support—child custody modification—uncontested findings of fact—conclusions of law—trial court determination of weight and credibility

The trial court did not abuse its discretion in a child custody modification case by making its 170 uncontested findings of fact and factually supported conclusions of law. The trial court determines the weight and credibility that should be given to all evidence that is presented during trial.

3. Appeal and Error—preservation of issues—failure to cite case law or authority

The Court of Appeals declined to address defendant father's arguments on appeal—that the trial court erred by denying his Rule 52(b) motion, by requiring him to undergo a sexual abuse assessment and follow recommended treatment, and by requiring him to install software to block "inappropriate and harmful material" on his electronic devices—because his arguments on appeal were not supported by case law or other authority as required by N.C. Rule of Appellate Procedure 28.

Appeal by plaintiff from order entered 23 February 2017 by Judge Lee F. Teague in Pitt County District Court. Heard in the Court of Appeals 13 December 2017.

Ward and Smith, P.A., by John M. Martin, for plaintiff-appellant.

Van Der Have Family Law, by Leslie G. Van Der Have, for defendant-appellee.

TYSON, Judge.

John Berry ("Plaintiff" or "Mr. Berry") appeals from an order assigning primary physical custody of his two children to their mother, Ashleigh Berry ("Defendant" or "Ms. Berry"). Plaintiff has failed to show the trial court abused its discretion in assigning Defendant primary physical custody. We affirm the trial court's order.

I. Background

Mr. Berry and Ms. Berry were married 22 October 2005. They are parents of two children, C.B., born in 2008, and H.B, born in 2011. The parties separated on 28 January 2012. Mr. Berry filed a complaint on 31 January 2012, which sought temporary and permanent custody, and a motion for an *ex parte* temporary custody order to "maintain[] the status quo living arrangements" of the children throughout the hearing process. Ms. Berry had removed the children from the marital home and taken them to her parents' home. The motion for *ex parte* temporary custody was heard on 3 February 2012, and a temporary custody order was entered on 7 March 2012. The court granted temporary physical custody of the children to Ms. Berry, and secondary physical custody and unsupervised daytime visitation to Mr. Berry.

On 21 May 2012, C.B. allegedly told Ms. Berry his father had "put an x-ray in his hiney." Ms. Berry took C.B. to the pediatrician, who found no physical indication of any abuse. Ms. Berry filed a report with Pitt County Department of Social Services ("DSS") on 25 May 2012, and DSS determined her allegations did not justify further investigation.

At the temporary custody hearing on 29 May 2012, Ms. Berry presented her concerns about Mr. Berry sleeping with or staying in the same room as the children, presented allegations about Mr. Berry's pornography usage, and re-asserted her allegations concerning C.B.'s "x-ray incident." The temporary order for child custody and child support was read aloud in court and entered on 24 October 2012. This order maintained the previous custody arrangements, allowed Mr. Berry overnight visitation, but specifically decreed neither parent should sleep in the same room as the children.

Mr. and Ms. Berry continued negotiations for permanent custody throughout 2012 and into 2013. A judgment granting absolute divorce between Mr. Berry and Ms. Berry was entered on 25 April 2013.

Mr. Berry met his current wife, Jodie Berry ("Jodie") in January 2013. Ms. Berry became upset after Jodie was included in some of the children's activities. Custody negotiations stalled at the end of July 2013.

Ms. Berry alleged she witnessed an incident of "sexualized behavior" between the children in the bathtub on 31 July 2013. She stated the children told her it was something "Daddy likes for them to do." On 1 August 2013, Ms. Berry met with Julie Gill of Tedi Bear Children's Advocacy Center ("TBCAC"). Ms. Gill reported their conversations to DSS on 2 August 2013, and DSS accepted the report for immediate investigation. The investigator interviewed C.B., Mr. Berry, and Ms. Berry on 2 August 2013.

The DSS investigator scheduled forensic interviews and medical examinations for the children at TBCAC on 6 August 2013. Neither the interviews nor the exams revealed any inappropriate sexual contact or evidence of sexual abuse. TBCAC recommended DSS approve a Child and Family Evaluation ("CFE").

The CFE was conducted between 13 September 2013 and 12 October 2013. After extensive interviews, the CFE concluded:

> (a) [C.B.] was tremendously inconsistent in his versions of events including the "x-ray allegations";
>
> . . .
>
> (c) [a]lthough Ms. Berry had expressed concerns about Mr. Berry's level of attachment to [C.B.] and his prior use of pornography, Mr. Berry's level of attachment to [C.B.] was not extraordinary given the high conflict custody matter and his prior use of pornography was within normal limits;
>
> . . .
>
> (e) Ms. Berry demonstrated significant issues of control during the CFE process.

The CFE recommended:

> (a) [t]he children should be placed in therapy immediately;
>
> (b) [t]he parents no longer question the children regarding any allegations;
>
> (c) [b]oth parents attend and receive training in effective co-parenting/cooperative co-parenting from an expert and that the expert/coordinator continue to provide training; and,
>
> (d) [a] custody evaluation should be conducted.

After receiving the CFE, DSS determined the abuse allegations could not be substantiated. In a letter dated 21 October 2013, DSS informed Mr. Berry and Ms. Berry of their determination, and recommended

co-parenting training for both parents, a custody evaluation, and therapy for the children.

Mr. Berry contacted Ms. Berry by email on 28 October 2013, stating his agreement with DSS' recommendations, but Ms. Berry only agreed to place C.B. in therapy. Ms. Berry met with Brooke Bleau on 25 November 2013, to seek therapy for C.B.. Mr. Berry acquiesced, and C.B. began bi-weekly sessions with Ms. Bleau on 4 December 2013. Mr. Berry and Jodie, his current wife, became engaged in late December 2013.

On 3 January 2014, Ms. Bleau recommended Dr. Anne Mauldin as a parenting coordinator for Mr. Berry and Ms. Berry. Mr. Berry met with Dr. Mauldin on 16 January 2014, and Dr. Mauldin conducted a phone interview with Ms. Berry on 17 January 2014. Ms. Berry indicated that if she and Mr. Berry could not agree on parenting decisions, then she would make the decisions. Mr. Berry filed a motion to appoint a parenting coordinator and a motion for a custody evaluation on 21 January 2014.

Ms. Berry voluntarily agreed to engage in limited parenting coordination. After two months, Dr. Mauldin indicated the parties had not reached an agreement about Mr. Berry's upcoming wedding weekend, but remained open to further sessions, if either party identified co-parenting issues.

Ms. Berry did not raise any allegations of sexual abuse with Ms. Bleau from point of intake until 4 February 2014. At that session, and every session thereafter, Ms. Berry expressed concerns about alleged inappropriate sexual contact between C.B. and Mr. Berry during Mr. Berry's custodial visits. Ms. Bleau informed Ms. Berry on 27 March 2014 that she would not make a report to DSS absent a complaint from C.B. At the next weekly session, C.B. told Ms. Bleau his father had touched his private parts. On 23 April 2014, Ms. Bleau initiated contact with DSS concerning the allegations of sexual abuse. No report was filed due to lack of information.

Mr. Berry's motions for a parenting coordinator and a custody evaluation were heard on 15 May 2014. Ms. Bleau testified that in her opinion, C.B. felt safe and stable in Mr. Berry's home, and he did not exhibit any indicators attributable to abuse. The trial court found "it was unlikely that either child was being sexually abused by Mr. Berry." The trial court allowed the motion for custody evaluation, but left the existing custody order in place.

On 21 May 2014, Ms. Berry expressed her dissatisfaction with Ms. Bleau. Ms. Berry continued to raise concerns of inappropriate sexual

contact occurring during visits with Mr. Berry. C.B. told Ms. Bleau his father was "no longer touching his butt, just touching his peepee." Ms. Bleau made a report to DSS on 17 July 2014. DSS indicated it would not accept the report on 22 July 2014.

Ms. Berry sent a letter to Ms. Bleau on 6 August 2014, discontinuing therapy services. Ms. Berry did not find or agree to another therapist for C.B.

On 21 November 2014, the court appointed Dr. Cynthia Sortisio to conduct the custody evaluation. Dr. Sortisio conducted home visits with both Mr. Berry and Ms. Berry on 13 March 2015, after which Ms. Berry complained hers was "not fair."

After H.B. allegedly told Ms. Berry that his father had put his finger into his rectum, Ms. Berry had a conference with her therapist and attorney on 26 March 2015. Ms. Berry's therapist filed a report with DSS. DSS accepted this report for investigation. The DSS social worker conducted unannounced interviews with H.B. and C.B. at their schools.

In his interview, C.B. stated "his mother makes him tell lies and things that are not true about his father." H.B. also denied his father ever touching his butt, putting his finger in his butt, or doing anything "bad" to him.

Dr. Sortisio concluded her custody evaluation on 20 December 2015, while the DSS investigation was ongoing. Her evaluation concluded: (1) both parents needed the assistance of a parenting coordinator; (2) the children should be placed in therapy; (3) neither parent should initiate or discuss any conversation about inappropriate touching, and if either child initiates any such conversation, it should be referred to their therapist; (4) Ms. Berry's desire to exercise control has interfered with Mr. Berry's ability to co-parent the children; and, (5) primary custody of the children should be placed with Mr. Berry, if Ms. Berry is unable to set aside her focus on the abuse allegations and accept the recommendations on shared parenting.

DSS used Dr. Sortisio's report as part of its investigation. In its final report on the allegations dated 7 March 2016, DSS substantiated emotional abuse and injurious environment charges against Ms. Berry, but found no support that either child had been sexually abused by Mr. Berry. The trial court did not include this report in its findings of fact.

On 27 January 2016, Mr. Berry filed a motion to modify the temporary custody order, and sought primary legal and physical custody of the children. A permanent custody trial was held in district court 8 August

through 12 August 2016. In an order dated 13 October 2016, the court granted the parties joint legal custody of the children. Ms. Berry was granted primary physical custody and Mr. Berry was granted secondary physical custody. The court also appointed a parenting coordinator.

On 26 October 2016, Ms. Berry filed motions under Rules 52, 59, and 60 of the North Carolina Rules of Civil Procedure seeking relief from the 13 October orders. Mr. Berry filed a Rule 52(b) motion to amend the 13 October custody order on the same day, specifically seeking to include the final report from the last DSS investigation. The trial court heard post-trial motions, and entered an order modifying custody on 23 February 2017. The modified custody order granted in part and denied in part the parties' post-trial motions, and made minor changes to the custody arrangement. Mr. Berry timely filed notice of appeal on 24 March 2017.

II. Jurisdiction

Jurisdiction lies with this Court as an appeal from a final judgment under N.C. Gen. Stat. § 7A-27(b)(2) (2017).

III. Issues

Mr. Berry argues the trial court erred by: (1) granting primary physical custody to Ms. Berry and denying primary physical custody to him; (2) including findings of fact numbered 173 and 174, as they are not supported by any competent evidence; (3) concluding the custody order is in the best interests of the children; (4) denying Mr. Berry's Rule 52(b) motion to include in its findings of fact the disposition of the 2015-16 DSS investigation; (5) disregarding the court-appointed expert's recommendations on primary physical custody; (6) including findings of fact 119, 120 and 128, as they are mere recitations of trial testimony; and, (7) ordering Mr. Berry to submit to a sexual abuse assessment and to install pornography filters on his computer.

IV. Standard of Review

When this Court reviews child custody orders from a bench trial, we must "ascertain (1) whether the challenged findings of fact are supported by substantial evidence; (2) whether the trial court's findings of fact support its conclusions of law; and (3) whether the trial court abused its discretion in fashioning the custody and visitation order." *Peters v. Pennington*, 210 N.C. App. 1, 12, 707 S.E.2d 724, 733 (2011). "[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Id.* at 12-13, 707 S.E.2d at 733. "Whether those

findings of fact support the trial court's conclusions of law is reviewable *de novo*. *Carpenter v. Carpenter*, 225 N.C. App. 269, 270, 737 S.E.2d 783, 785 (2013).

"Broad discretion is given to the trial court in its fact-finding duties and in making ultimate custody determinations." *O'Connor v. Zelinske*, 193 N.C. App. 683, 687, 668 S.E.2d 615, 617 (2008). "The evidence upon which the trial court relies must be substantial evidence and be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Everette v. Collins*, 176 N.C. App. 168, 170, 625 S.E.2d 796, 798 (2006). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . . [and] that [its decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

V. Custody Order

A. Findings of Fact

[1] Mr. Berry argues the trial court erred by including findings of fact 173 and 174, as they are unsupported by competent evidence. We disagree.

"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 v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

These two contested findings of fact include:

> 173. The parties are fit and proper for the custodial roles assigned to them in the decretal section of this Order.
>
> 174. It is in the minor children's individual and collective best interests that their legal and physical custody be awarded as set forth below.

The district court's thirty-eight page order also includes other numerous and uncontested findings of fact, including: (1) Ms. Berry's role as the children's primary caregiver throughout their lives since birth; (2) her involvement in their education and extracurricular activities; (3) the appropriateness of her home; (4) the fact Ms. Berry is "a good parent" and is very close and bonded with her children; (5) Ms. Berry's progress in therapy to manage her anxiety and stressors in a positive manner; and, (6) her use of therapy to seek advice on co-parenting and proper responses to her children's behaviors.

This substantial evidence provides support for the trial court to find and conclude, in its discretion, that each parent is "fit and proper" for their assigned roles and the resulting custody order is in the best interests of the children. Mr. Berry's arguments concerning these two findings of fact fail to show any abuse of the trial court's discretion that would allow us to set aside or reverse the trial court's conclusions. These arguments are overruled.

Mr. Berry also argues three findings of fact, numbers 119, 120, and 128, are not actual findings, but mere recitations of trial testimony. Beyond raising this issue, Mr. Berry provides no support for this argument. However, "[presuming], *arguendo*, that those findings of fact were only [recitations], the record [evidence and the order] still contain[] findings of fact, not challenged by defendant or already determined to be supported by competent evidence by this Court, to support the trial court's 'best interest' determination." *Hall v. Hall*, 188 N.C. App. 527, 532, 655 S.E.2d 901, 905 (2008). Mr. Berry's arguments concerning those three findings of fact do not show any abuse of the trial court's findings or reversible error in its conclusions. These arguments are overruled.

B. Conclusions of Law

[2] Mr. Berry argues the trial court erroneously ignored competent evidence contrary to the ultimate conclusion, disregarded the recommendations of its court-appointed expert, and no competent evidence supports the trial court assigning primary custody to Ms. Berry.

Within the 170 uncontested findings of fact, sufficient evidence supports the trial court continuing primary physical custody of the children with Ms. Berry. While some of the findings of fact clearly show Ms. Berry's less positive traits and negative behaviors, as the finder of fact "it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994).

In the same manner, the trial court, as finder of fact, retains discretion over "the weight and credibility" to accord to expert witnesses' opinions and conclusions. *See id.* The trial court's order included Dr. Sortisio's findings, including her ultimate recommendation in favor of Mr. Berry, among its own findings of fact, but it was under no obligation to assign any or greater weight to Dr. Sortisio's findings, or to regard or hold them to be binding and conclusive of the ultimate issue. *See In re K.G.W.*, __ N.C. App. __, __, 791 S.E.2d 540, 542 (2016).

Nothing Mr. Berry argues indicates the trial court disregarded its appointed expert's findings; it merely exercised its appropriate role as the ultimate fact finder in weighing the evidence presented before it. *See Riley v. Ken Wilson Ford, Inc.*, 109 N.C. App. 163, 168, 426 S.E.2d 717, 720 (1993) ("When the trial judge sits as trier of fact [he or] she has the duty to determine the credibility of the witnesses and weigh the evidence[.]").

It is unnecessary to address Mr. Berry's argument asserting the trial court ignored competent evidence. Long ago, our Supreme Court stated: "[t]he trial court must itself determine what pertinent facts are actually established by the evidence before it, and *it is not for an appellate court to determine de novo the weight and credibility to be given to evidence disclosed by the record on appeal.*" *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980) (emphasis supplied).

Uncontested facts, binding upon appeal, exist to support the trial court's ultimate conclusion to continue and award Ms. Berry with primary physical custody, expressly subject to the conditions set forth in the order. These uncontested findings are sufficient to uphold the trial court's conclusion, even in the face of evidence and findings of fact that would support a contrary conclusion. *See Peters*, 210 N.C. App. at 12-13, 707 S.E.2d at 733. Mr. Berry's arguments concerning the uncontested findings and factually supported conclusions of law are overruled.

C. Unsupported Arguments

[3] Mr. Berry argues the trial court erred in denying his Rule 52(b) motion and by requiring him to undergo a sexual abuse assessment and follow recommended treatment and to install software to block "inappropriate and harmful material" on his electronic devices. Outside these bare assertions, Mr. Berry does not provide any support for either argument, other than to assert the trial court was biased against him and showed a preference for maternal primary custody.

In the absence of any recusal motions or hearing, or anything other than his disagreement with the trial court's exercise of discretion and conclusions, we decline to address and dismiss them. *See* N.C. R. App. P. 28 (declining to address arguments on appeal which are not supported by case law or other authority).

VI. Conclusion

The trial court exercises and retains wide discretion in adjudicating conflicting evidence, in fact-finding, and in crafting custody orders. *O'Connor*, 193 N.C. App. at 687, 668 S.E.2d at 617. The trial court's

findings of fact are supported by substantial and competent evidence. Even though some findings may be mere recitations of testimony or would support contrary conclusions, sufficient findings exist to support the trial court's exercise of discretion and its conclusions to award continued primary custody to Ms. Berry. *See Peters*, 210 N.C. App. at 12, 707 S.E.2d at 733.

Plaintiff has failed to show the trial court abused its discretion in its adjudications and determinations of the credibility or weight of the evidence presented. Plaintiff has also failed to show reversible error in his challenges to the competent evidence underlying the uncontested findings of fact to support the trial court's conclusions in the custody order. "[I]t is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble*, 300 N.C. at 712-13, 268 S.E.2d at 189.

We dismiss any unsupported arguments. The trial court's custody order is affirmed. *It is so ordered.*

AFFIRMED.

Judges HUNTER and DAVIS concur.

LAUREN K. BROWN, Plaintiff
v.
MARQUIS SWARN, Defendant

No. COA17-683

Filed 16 January 2018

1. Appeal and Error—notice of appeal seven months after order entered—actual notice—child custody

The Court of Appeals had jurisdiction over a child custody appeal, notwithstanding that defendant father noticed his appeal seven months after the second custody order was entered, where nothing in the record showed when defendant was served or indicated that defendant otherwise received actual notice of its entry more than thirty days before he noticed his appeal.

2. Appeal and Error—interlocutory orders and appeals—child custody order final—no future proceedings

Defendant father's appeal from the trial court's second child custody order was not from an interlocutory order where the terms of the order did not mention withholding prejudice to either party, and there were no dates established in the order for future proceedings.

3. Child Custody and Support—child custody modification—temporary order—best interests of child

The trial court did not err in a child custody modification case by applying a best interests of the child standard in a 2016 order to modify a 2015 consent order because modification of a temporary order required a less stringent standard than the substantial change of circumstances required for permanent orders.

Appeal by Marquis Swarn from order entered 26 August 2016 by Judge T. Mack Brittain in Transylvania County District Court. Heard in the Court of Appeals 28 November 2017.

Emily Sutton Dezio for the Plaintiff-Appellee.

Donald H. Barton, P.C., by Donald H. Barton, for the Defendant-Appellant.

DILLON, Judge.

Lauren K. Brown ("Mother") and Marquis Swarn ("Father") are the parents of a minor child, Annie[1]. Father appeals from the trial court's second custody order entered in this matter. We hold that we have jurisdiction over this appeal, notwithstanding that Father noticed his appeal seven months after the second custody order was entered. On the merits, we affirm.

I. Background

In June 2014, Mother commenced this action against Father, seeking custody of their child, Annie.

In April 2015, the trial court entered a Consent Order (the "2015 Consent Order"), setting forth certain custody terms as agreed to by the parties.

Over the course of the next year, Father allegedly violated the 2015 Consent Order by depriving Mother of some custody time. To address

1. A pseudonym.

Father's violation, in April 2016, Mother filed a Motion to Show Cause and Modify Custody, in part, to seek additional custody time with Annie to make up for the custody time she had lost.

In August 2016, the trial court entered a second custody order entitled the Temporary Non-Prejudicial Custody Order (the "2016 Order"). Seven months later, on 13 March 2017, Defendant filed written notice of appeal from the 2016 Order.

II. Jurisdiction

Mother makes essentially two arguments challenging our appellate jurisdiction in this matter, which we address in turn.

A. Father's Appeal Was Timely

[1] Mother argues that we should dismiss Father's appeal because he failed to appeal in a timely manner, as Father did not notice his appeal until seven months after the 2016 Order was entered. We disagree, as there is nothing in the record showing when Father was served with the 2016 Order or indicating that Father otherwise received actual notice of its entry more than thirty days before he noticed his appeal.

Rule 3 of the North Carolina Rules of Appellate Procedure provides that, unless the judgment is served on the appellant within three days of its entry, an appellant must notice his appeal within thirty (30) days of being *served* the judgment:

> In civil actions and special proceedings, a party must file and serve a notice of appeal:
>
> (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period[.]

N.C.R. App. P. 3(c) (2015).

There appears to be a tension in our case law regarding the timeliness of an appeal where the record fails to indicate when the judgment was served on the appellant. In at least two cases, our Court has held that where the record fails to include the certificate of service showing the date when the appellant was served the judgment, the time by which the appellant must notice his appeal is tolled indefinitely.

Rice v. Coholan, 205 N.C. App. 103, 110-11, 695 S.E.2d 484, 489-90 (2010) (holding that "[b]ecause there was no certificate of service filed, the time for filing the notice of appeal was tolled"); *Davis v. Kelly*, 147 N.C. App. 102, 105, 554 S.E.2d 402, 404 (2001).

But in another line of cases, our Court has held that even if the record does not show that the appellant was properly served the judgment, the appellant still must notice his appeal within thirty (30) days of receiving *actual notice* of a judgment's entry. *Manone v. Coffee*, 217 N.C. App. 619, 623, 720 S.E.2d 781, 784 (2011) ("[W]e hold that when a party receives actual notice of the entry and content of a judgment, . . . the service requirements of Rule 3(c) of the Rules of Appellate Procedure are not applicable."); *see also E. Brooks Wilkins Family Med., P.A., v. WakeMed*, ___ N.C. App. ___, ___, 784 S.E.2d 178, 183 (2016); *Magazian v. Creagh*, 234 N.C. App. 511, 513, 759 S.E.2d 130, 131 (2014); *Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 424-26, 667 S.E.2d 309, 311-12 (2008).

The tension arises because, in *Rice* and *Davis*, the records on appeal each showed that the appellant had, in fact, received actual notice of the judgment's entry more than thirty days before noticing the appeal. For instance, in *Rice*, the appellee actually argued that the appeal should be dismissed based on the appellant's receipt of actual notice as evidenced in the record, notwithstanding the lack of a certificate of service. *Rice*, 205 N.C. App. at 110, 695 S.E.2d at 489 (stating that trial court sent copies of its order to the parties' counsel). And in the 2001 *Davis* opinion, our Court cited to evidence that the appellant had received actual notice of the filed judgment more than thirty days before noticing the appeal:

> In the present case, judgment was entered 24 August 2000 and was served on defendant 1 September 2000 as evidenced by a copy of a letter from plaintiff to defendant. Plaintiff did not, however, file a certificate of service as required by Rule 5(d) until 26 October 2000. . . . Defendant subsequently filed a proper notice of appeal . . . on 10 October 2000. Plaintiff argues that defendant filed the notice of appeal more than 30 days after the judgment was entered and that her appeal should therefore be dismissed. We note that plaintiff did not fully comply with the service requirements of Rule 58 of the Rules of Civil Procedure until 26 October 2000 since that is the date he filed a certificate of service with the court. The running of the time for filing and serving a notice of appeal was

> tolled pursuant to N.C.R. App. P. 3 until plaintiff's compliance, and defendant's notice of appeal is, therefore, timely. Plaintiff's motion to dismiss the appeal is denied.

Davis, 147 N.C. App. at 105, 554 S.E.2d at 404.

We note, however, that the tension is more apparent than real. Specifically, *Rice* and *Davis* never squarely addressed the relevance of the appellant's actual notice of a judgment's entry. For instance, the 2011 *Rice* opinion never mentions the "actual notice" argument made by the appellee in that case, but simply relied on the 2001 *Davis* holding in concluding that the appeal was timely noticed due to the lack of a certificate of service. *Rice*, 205 N.C. App. at 110-11, 695 S.E.2d at 489-90. And the *Davis* Court did not address the "actual notice" argument, as we held in our 2008 *Huebner* opinion:

> Contrary to plaintiff's assertion, we do not read *Davis* as conclusively resolving the issues of actual notice and waiver. While it appears that similar to plaintiff here, the defendant in *Davis* had actual notice of entry of judgment and the judgment's content, the Court did not discuss the issue of actual notice. . . .
>
> Based on the lack of discussion of actual notice and waiver in *Davis* . . . , we do not believe that *Davis* forecloses dismissal of an appeal based on waiver due to an appellant's extended delay in filing the notice of appeal where the record clearly indicates that an appellant has actual notice of the entry of judgment and its content.

Huebner, 193 N.C. App. at 424-25, 667 S.E.2d at 312. Therefore, whereas *Davis* and *Rice* do not address the actual notice issue head-on, the line of cases which do address the issue head-on stands for the following proposition: where evidence in the record shows that the appellant received actual notice of the judgment more than thirty days before noticing the appeal, the appeal is not timely.

Our Supreme Court has similarly acknowledged the importance of "fair notice" in determining when the time for an appellant to file an appeal begins to run. *Stachlowski v. Stach*, 328 N.C. 276, 287, 401 S.E.2d 638, 645 (1991) (holding that constructive entry of a judgment may occur when the judgment's terms are final and the parties have received fair notice of the judgment). In 1993, we relied on *Stachlowski* in holding that an appeal was not timely when noticed *thirty-one* days after appellant

received actual notice of the judgment. *Saieed v. Bradshaw*, 110 N.C. App. 855, 860, 431 S.E.2d 233, 236 (1993).[2]

All the cases however, implicitly suggest, and we so hold, that the burden is *on the appellee* to show that the appellant, in fact, received actual notice more than thirty days before the appeal to warrant a dismissal of the appeal. That is, where there is no certificate in the record showing when the appellant was served with the judgment, it is not the appellant's burden to show when (s)he received actual notice. There was no such burden placed on the appellant in *Rice* or *Davis* or in any of the cases discussing the issue of actual notice.

In the instant case, the trial court orally *rendered* its 2016 Order on 2 August 2016 at the conclusion of the hearing and *entered* the 2016 Order on 26 August 2016. The record, however, does not contain a certificate to evidence when Father was *served* with the 2016 Order or anything indicating when Father *received actual notice* that it had been entered.[3] Accordingly, we hold that where, as here, there is no certificate of service in the record showing *when* appellant was served with the trial court judgment, appellee must show that appellant received actual notice of the judgment more than thirty days before filing notice of appeal in order to warrant dismissal of the appeal.

B. Father's Appeal Is Not Interlocutory

[2] Mother argues that even if Father's appeal was timely noticed, it should be dismissed because it is from an interlocutory order. We disagree.

"As a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). This Court has held that temporary child custody orders are interlocutory, that they do not affect a substantial right, and that no

2. *Saieed* was decided when Rule 58 required that the clerk mail a notice of a judgment's filing to the parties in order to complete the "entry" of the judgment. In *Saieed*, the record failed to show that the clerk ever mailed the notice and, therefore, there was no evidence that the judgment was technically "entered." Relying on our Supreme Court's reasoning, we dismissed the appeal, notwithstanding that the judgment had not yet been properly entered pursuant to the requirements under Rule 58, where the record showed that the appellant had received actual notice of the judgment thirty-one (31) days before noticing the appeal, making the notice one day too late.

3. It is obvious from the record that Father did receive such actual notice of the 2016 Order's entry at some point based on his reference to the Order in his notice of appeal. However, there is no indication in the record that Father received actual notice more than thirty days before noticing his appeal.

immediate right to appeal lies therefrom, *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (2012); but that an appeal of right does lie from the final, permanent custody order reflecting the trial court's ultimate disposition. *Id.* For the reasons stated below, we hold that the 2016 Order, though denominated a "temporary order," is in fact a permanent order and, therefore, is immediately appealable.

This Court has repeatedly followed the rule that "an order is temporary if either (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003). We find that, despite the Order's title given by the trial court, the 2016 Order is a permanent child custody order. The terms of the Order do not mention withholding prejudice to either party, and there are no dates established in the Order for future proceedings. The 2016 Order provides a custody schedule and states that the "parties shall continue with this schedule until there are further orders of this court," giving permanent effect to the order's terms until such time as they are properly superseded or modified. The 2016 Order speaks to all pertinent issues and appears to be permanent and final. Father's appeal is not interlocutory.

Therefore we hold that we have jurisdiction over Father's appeal.

III. Analysis

[3] Here, the trial court entered the 2016 Order, which modified certain terms of the 2015 Consent Order, based on findings that such changes were in the best interests of Annie. Father argues that the 2016 Order should be reversed because the trial court failed to make appropriate findings of fact regarding a *substantial change in circumstances* from the time the earlier custody order (the 2015 Consent Order) was entered. That is, Father contends that the earlier 2015 Consent Order was a *permanent* custody order which could only be modified based on a "change of circumstances" analysis. We disagree.

Modification of a *permanent* child custody order requires the trial court to make specific findings of fact showing a substantial change in circumstances warranting modification. *See Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003); N.C. Gen. Stat. § 50-13.7(a) (2015). Modification of a temporary order, however, requires a much less stringent standard, such as considering the best interests of the child. *See Smith v. Barbour*, 195 N.C. App. 244, 251, 671 S.E.2d 578, 583 (2009).

We hold that the prior 2015 Consent Order was a *temporary* custody order. Though the 2015 Consent Order made no mention of prejudice to the parties or stated a definitive future date for further proceedings, the 2015 Consent Order did leave issues concerning Annie's custody to be determined at a later date. For instance, the 2015 Consent Order states that "[t]he parties shall attend Child Custody Mediation in June of 2015 to discuss elementary school attendance and any other custody matter which needs to be addressed." Further, the 2015 Consent Order did not resolve with whom Annie would spend holidays, leaving it up to the parties to reach some agreement. This language reflects the trial court's intent to have the 2015 Consent Order bridge the gap until future discussions could lead to entry of a more permanent order covering all issues. *See Dancy v. Dancy*, ___ N.C. App. ___, ___, 785 S.E.2d 126, 129 (2016) (finding that the issue of custody on holidays had been decided, but that additional visitation issues remained). Therefore, we conclude that the 2015 Consent Order was temporary and, accordingly, the trial court did not err in applying a "best interests of the child" standard in its 2016 Order to modify the 2015 Consent Order.

AFFIRMED.

Judges BRYANT and Judge DIETZ concur.

IN THE MATTER OF B.P.

No. COA17-658

Filed 16 January 2018

1. Child Abuse, Dependency, and Neglect—neglect—dependency—sufficiency of findings of fact—domestic violence

The trial court erred in an adjudication of neglect and dependency by making two erroneous findings of fact—that the alleged putative father swung at respondent mother and the Child Protective Services Report was substantiated for domestic violence—where these findings were not supported by competent evidence.

2. Child Abuse, Dependency, and Neglect—neglect—dependency—sufficiency of findings of fact—father

The trial court erred in an adjudication of neglect and dependency by erroneously finding that a man was the minor's father where a paternity test indicated he was not the father.

3. Child Abuse, Dependency, and Neglect—neglect—dependency—sufficiency of findings of fact—dismissal of criminal charges

The trial court erred in an adjudication of neglect and dependency by finding that respondent mother was charged with certain criminal offenses (which was technically correct) but failing to reflect that these charges were dismissed.

4. Child Abuse, Dependency, and Neglect—neglect—dependency—sufficiency of findings of fact—mental illness—therapy or treatment

The trial court erred in an adjudication of neglect and dependency by erroneously finding that respondent mother suffered from a mental illness and was not attending any therapy or mental health treatment.

5. Child Abuse, Dependency, and Neglect—neglect—dependency—sufficiency of findings of fact—staying at a laundromat

The trial court did not err in an adjudication of neglect and dependency by finding that respondent mother was "staying" at a laundromat. Respondent mother had stated that she was spending her days at the laundromat and then spending some nights in the alley with her baby.

6. Child Abuse, Dependency, and Neglect—neglect—dependency—sufficiency of findings of fact—temporary guardianship document

The trial court erred in an adjudication of neglect and dependency by making an erroneous finding regarding the purported temporary guardianship document where it was apparent from the record that the guardian was able to obtain medical treatment for the minor.

7. Child Abuse, Dependency, and Neglect—neglect—dependency—consideration of prior orders

The trial court did not err in an adjudication of neglect and dependency where it considered prior orders but made independent findings of fact.

8. Child Abuse, Dependency, and Neglect—neglect—dependency—findings of fact—no allegation of neglectful conditions causing impairment—appropriate placement

The trial court's sustained findings of fact did not support adjudications of neglect and dependency where the trial court failed to make a finding of the alleged neglectful conditions that caused

the minor impairment or put her at substantial risk of impairment. Moreover, all the evidence and the trial court's findings did not support a determination that the minor was neglected. Although respondent mother was homeless, she placed the minor in a home that both the Department of Social Services and the trial court found to be appropriate.

9. Child Abuse, Dependency, and Neglect—dependency—appropriate alternative caregiver arrangement

The trial court erred in an adjudication of neglect and dependency by finding that respondent mother lacked an appropriate alternative caregiver arrangement where respondent mother herself placed her child with an appropriate alternative caregiver.

Judge MURPHY concurring in separate opinion.

Appeal by Respondent from order entered 17 March 2017 by Judge Ty M. Hands in Mecklenburg County District Court. Heard in the Court of Appeals 21 December 2017.

No brief filed for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Mercedes O. Chut for respondent-appellant mother.

William L. Gardo II for Guardian ad Litem-appellee.

HUNTER, JR., Robert N., Judge.

Respondent, the mother of the juvenile B.P. ("Beth")[1], appeals from an order adjudicating the juvenile neglected and dependent. After careful review, we vacate and remand.

I. Factual and Procedural Background

On 18 October 2016, the Mecklenburg County Department of Social Services, Youth and Family Services ("DSS"), filed a petition alleging Beth was a neglected and dependent juvenile. DSS stated it received a child protective services ("CPS") report on 24 July 2016 regarding Beth. DSS's investigation revealed police had responded to a domestic violence call

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C.R. App. P. 3.1(b).

where Respondent reported Beth's putative father ("Mr. P.") "had swung at her and then pushed the stroller over with the baby inside."[2] Mr. P. was arrested for communicating threats and assault on a female. Meanwhile, Respondent informed police she was homeless and had not been taking her medication, and police became concerned about her mental status. Respondent's case was transferred to Family Intervention Services to address concerns regarding domestic violence, mental health, and parenting issues. The next day, Respondent was arrested on charges of common law robbery and conspiracy. Respondent did not expect to be released prior to December 2016.

DSS stated during the course of their investigation, Respondent was staying in a laundromat. The laundromat's owners tried to assist Respondent. The owners had friends ("Mr. and Mrs. M.") in Cabarrus County who were willing to take Beth. Respondent placed Beth with Mr. and Mrs. M., and Beth was still in their care when the petition was filed. DSS noted Respondent attempted to grant Mr. and Mrs. M. "guardianship" of Beth via a handwritten, notarized document.

In addition to the events which led to the filing of the petition, DSS alleged Respondent had been diagnosed with bipolar disorder, depression, and anxiety, and had not been compliant with treatment. DSS also noted Respondent had her parental rights to two older children terminated. Among the issues which led to the termination of her parental rights to those children were: Respondent's criminal activity and resulting arrest and incarceration; leaving the juveniles with an inappropriate caretaker; yelling at one of the children while at a domestic violence shelter; and pulling a knife on a friend who was holding one of the juveniles. A third child of Respondent was placed in foster care after DSS received a report in 2013 Respondent was using crack cocaine, engaging in prostitution, and not meeting the child's needs. Additionally, Respondent had placed the child with someone who had an extensive CPS history. The child was ultimately placed in her father's custody, and Respondent was denied visitation. DSS obtained non-secure custody of Beth and continued her placement with Mr. and Mrs. M.

On 10 January 2017, the date of the start of the adjudicatory hearing, DSS filed an amended petition. DSS amended the petition to add the allegation Mr. P. had "posted a large number of statements on Facebook that [Respondent had] engaged in prostitution and drug use since November

2. DNA tests later ruled out Mr. P. as the father of the juvenile and he is not a party to this action.

22, 2016." On 17 March 2017, the trial court entered an order adjudicating Beth a neglected and dependent juvenile. Respondent appeals.

II. Standard of Review

"The role of this Court in reviewing a trial court's adjudication of neglect [and dependency] is to determine '(1) whether the findings of fact are supported by "clear and convincing evidence," and (2) whether the legal conclusions are supported by the findings of fact[.]' " *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* (citation omitted). We review the trial court's conclusions of law *de novo* on appeal. *In re D.M.M.*, 179 N.C. App. 383, 385, 633 S.E.2d 715, 716 (2006) (citation omitted).

III. Analysis

Respondent argues the trial court erred by adjudicating Beth a neglected and dependent juvenile. Here, the trial court found as fact:

> a. On 24 July 2016, [DSS] received a [CPS] report regarding the child.
>
> b. The Charlotte-Mecklenburg Police Department [responded] to a domestic violence call where the mother reported that the father had swung at her and then pushed the stroller over with the baby inside.
>
> . . . .
>
> d. [F.P.] has pending charges for Felony Possession of Cocaine and Habitual Felon . . . . The father has a substantial criminal history.
>
> e. The 24 July 2016 report was substantiated and the case was transferred to Family Intervention Services to address domestic violence, mental health and parenting concerns.
>
> f. On 21 September 2016, the day after the case was transferred to Family Intervention, the mother was arrested for three (3) counts of Common Law Robbery and two (2) counts of Felony Conspiracy. The mother informed [DSS] that her next court date was in December 2016, and that she did not expect to be released before her next court date.

> g. The mother informed . . . the investigative social worker, that she has a mental health diagnosis of bipolar disorder, and is supposed to see a therapist at Monarch. The mother has provided no proof of mental health treatment or therapy involvement.
>
> h. During the course of the investigation, the mother was staying in a laundromat. The laundromat owners tried to assist the mother. They had friends in Cabarrus County who were willing to take the child and the mother placed the child with [Mr. and Mrs. M.], the friends of the laundromat owners. The child remains in the care of [Mr. and Mrs. M.], the friends of the laundromat owners.
>
> i. The mother attempted to give [Mr. and Mrs. M.] "guardianship" via a handwritten, notarized document. It is not a legal document. [Mr. and Mrs. M.] have no document or authority providing them with the ability to seek medical or other care for the child.
>
> j. The mother has two older children, ... Her parental rights to those children were involuntarily terminated. . . . The issues regarding [one child] included the mother's criminal activity. [The other child] was placed in foster care pursuant to the mother having an open case and not making sufficient progress on addressing the issues that led to the placement of the older sibling.
>
> k. The mother had another child, . . . who was also placed in foster care[.] The child was ultimately placed in the child's father's care.
>
> l. [DSS] has conducted a kinship assessment of the persons currently caring for the child. They do not have criminal or CPS history and the home is appropriate. They have indicated their willingness to continue to care for the child for as long as needed.

We are bound by those findings not challenged by Respondent on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (unchallenged findings are deemed "supported by competent evidence and [are] binding on appeal").

Respondent first challenges several of the trial court's findings of fact as being unsupported by the evidence. We address each finding in turn.

[1] Respondent first argues there was no evidence to support findings of fact b. and e. Specifically, Respondent contends there is no evidence Mr. P. "swung" at her, or the CPS report was "substantiated" for domestic violence. We agree. The only evidence supporting these findings is the officer's trial testimony stating he responded to a domestic violence call where Respondent reported Mr. P. pushed the juvenile's stroller over while Beth was in the stroller. But, there is no competent evidence in the record upon which to base the contentions in the report. The responding officer also testified:

> I verified that there was no apparent injury to the baby, nothing that appeared that the baby had been on the ground. The call was that the baby had been pushed down in a -- in that stroller onto the ground or onto the pavement. I looked closely at the stroller and at the child. There was no signs that the stroller had been turned over in any way, no scuffs, no marks, no dirt, no debris of any kind. The child was bundled up secure and safely in the stroller, no dirt of any kind. It did not appear that there was any damage or anything done to the child.

A peer support specialist for the State of North Carolina who worked with Respondent through Community Care Service, LLC, testified Respondent told her Mr. P. flipped over the stroller while the baby was in it. Yet, Respondent later admitted to DSS she lied about Mr. P. knocking over Beth's stroller. Thus, the evidence in the record concerning Mr. P. knocking over Beth's stroller is not clear and convincing. Furthermore, while there is evidence in the record Mr. P. at one point struck Respondent in the mouth, there is no evidence indicating this occurred on 24 July 2016. Accordingly, we conclude findings b. and e. are unsupported by the evidence.

[2] Respondent also contends finding d. is incorrect because it refers to Mr. P. as "the father." We agree. The evidence indicated Mr. P. submitted to a paternity test which indicated he is not Beth's father. Thus, this finding is not supported.

[3] Respondent next argues finding f. is misleading because the charges were dismissed. We agree. While the finding of fact is technically accurate in stating Respondent was charged with the criminal offenses listed in finding of fact f., the record further demonstrates these charges were dismissed. The trial court's findings fail to reflect this material fact.

[4] Respondent next challenges finding of fact g. as being "misleading" and "inaccurate." The substance of the finding is Respondent has

a diagnosis of bipolar disorder and is supposed to be attending therapy, but failed to do so. However, a peer support specialist for the State of North Carolina who worked with Respondent through Community Care Service, LLC, testified: (1) Respondent was diagnosed with bipolar disorder and generalized anxiety disorder; and (2) she was attending therapy at Primary Care Solutions. Additionally, a DSS investigator testified Respondent told her she was "on mental health medications to aid . . . bipolar, anxiety, and depression"; and she brought Respondent to Monarch "to get her set up with a medication and a therapy appointment." Thus, while there was evidence in the record to support a finding that Respondent suffered from mental illness and may not have been taking prescribed medications, there was insufficient evidence to support a finding that she was not attending *any* therapy or mental health treatment.

[5] Respondent next contends finding of fact h. was insufficiently specific, because the finding did not provide any dates or clarify what was meant by "staying" at a laundromat. We disagree. Mrs. M. testified when she met with Respondent in July 2016, Respondent told her "she was spending the days in the Laundromat, and then it closes at midnight, and she said she spent some nights with her and the baby in an alley nearby." We apply the plain and obvious meaning of the trial court's finding and conclude Respondent was residing at the laundromat. Accordingly, Respondent's challenge to the trial court's finding of fact is overruled.

[6] Respondent next challenges finding of fact i. Respondent contends the record contains no evidence regarding the purported temporary guardianship document. Moreover, Respondent argues Mr. and Mrs. M. had no difficulty obtaining medical treatment for Beth. We agree in substance with Respondent's argument. Mrs. M. testified she brought the document to the doctor in August in order to obtain medical treatment for Beth, and she returned to the doctor with Beth in September because Beth was suffering from a stomach virus. Mrs. M. also was able to obtain updated vaccinations for Beth. Therefore, regardless of the nature of the "guardianship" document provided to Mr. and Mrs. M. by Respondent, it is apparent from the record Mrs. M. was able to obtain medical treatment for Beth. Accordingly, we conclude this finding is unsupported by the evidence.

[7] Respondent lastly challenges findings j. and k. Respondent cites *In re J.S.*, and argues the trial court's findings were improper because the court merely incorporated prior court orders without making evidentiary and ultimate findings of fact. 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004), *superseded by statute on other grounds as recognized in*

In re A.S., 793 S.E.2d 285). Respondent's argument is misplaced. In *J. S.*, this Court found the trial court failed to comply with section 7B-907(b) when "the trial court entered a cursory two page order" and "did not incorporate any prior orders or findings of fact from those orders. Instead, the trial court incorporated a court report from DSS and a mental health report . . . as a finding of fact." *Id.*[3]

Here, the trial court did not "simply recite allegations" or find "a single evidentiary fact." Instead, the trial court employed a process of "logical reasoning," which is evidenced through its having made several independent findings of fact. *See In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (quoting *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003)). Furthermore, we note "[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile . . . has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15) (Supp. 2016). In predicting whether neglect is likely to recur, the court must consider the historical facts and background of a case. *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). When making this determination, the court may consider other relevant orders and documents in related proceedings. *In re J.W.*, 173 N.C. App. 450, 456, 619 S.E.2d 534, 540 (2005), *aff'd per curiam*, 360 N.C. 361, 625 S.E.2d 780 (2006). Thus, it was proper for the trial court to consider the challenged orders, and the court's findings reflect it did not merely incorporate these prior orders. Accordingly, we overrule Respondent's challenge to these findings of fact.

[8] We must next determine whether the trial court's sustained findings of fact support the adjudications of neglect and dependency.

A "[n]eglected juvenile" is defined in N.C. Gen. Stat. § 7B-101(15) 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. In determining whether a juvenile is a

3. N.C. Gen. Stat. § 7B-907 was repealed effective 1 October 2013, and similar provisions are found in § 7B-906.1.

> neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (Supp. 2016). To sustain an adjudication of neglect, this Court has stated the alleged conditions must cause the juvenile "some physical, mental, or emotional impairment" or create a substantial risk of such impairment. *See In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993). This Court has also stated, however, "[w]here there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding." *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003).

Here, the trial court failed to make a finding the alleged neglectful conditions caused Beth impairment, or put her at substantial risk of impairment. Moreover, we cannot conclude "all the evidence" and the trial court's findings support a determination the juvenile was neglected. The evidence and supported findings demonstrate Respondent suffered from mental health issues, but was attending some treatment. While Respondent did have older children who were removed from her care, the findings were insufficiently detailed to determine the grounds for their removal. The findings merely state Respondent's parental rights to one child were terminated due to Respondent's "criminal activity." Respondent's parental rights to a second child were terminated due to her failure to correct the issues which led to the child's placement in foster care. However, the trial court fails to identify the nature of these issues. No reason is stated for why a third child was placed in foster care.

Finally, it is apparent from the evidence and the trial court's findings of fact Respondent was homeless. However, the evidence and findings also demonstrate, prior to the filing of the petition, Respondent placed Beth in a home which was found by both DSS and the trial court to be appropriate. Thus, the findings and evidence do not support a conclusion, at the time the petition was filed, Beth was living in an environment injurious to her welfare and not receiving proper care and supervision. *See In re B.M.*, 183 N.C. App. 84, 87, 643 S.E.2d 644, 646 (2007) ("At the adjudication and dispositional stage it is the status of the juvenile that is at issue rather than the status of a parent.").

We note this Court has nevertheless upheld an adjudication of neglect where the juvenile was in an appropriate placement when the petition was filed. In *In re K.J.D.*, 203 N.C. App. 653, 692 S.E.2d 437 (2010), the

mother argued the trial court erred by adjudicating the child neglected where, at the time the petition was filed, the juvenile was in a voluntary kinship arrangement with the maternal grandparents. In upholding the adjudication of neglect, this Court stated "[t]he determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the [adjudication] proceeding*." *Id.* at 660, 692 S.E.2d at 443 (emphasis in original) (citation omitted). This Court emphasized "[t]he need for the court to consider the conditions as they exist at the time of the adjudication *as well as the risk of harm to the child from return to a parent*[.]" *Id.* at 661, 692 S.E.2d at 443 (emphasis added).

We find *K.J.D.* to be distinguishable from the instant case. First, we note in *K.J.D.*, the mother placed the juvenile in a kinship arrangement at the behest of DSS. *See id.* at 654, 692 SE.2d at 439-40. Here, unlike the mother in *K.J.D.*, Respondent voluntarily placed Beth with Mr. and Mrs. M. on her own, without DSS's input. Furthermore, the uncontested findings in *K.J.D.* which supported the adjudication of neglect included the mother's: continuing inability to care for the child; inability to correct the conditions which led to the placement of the child in kinship care; continuing assaultive behavior; failure to complete counseling to address anger issues or her mental disorder; and lack of stable housing or employment. *Id.* at 661, 692 S.E.2d at 444. Moreover, the trial court in *K.J.D.* made the ultimate finding the juvenile would be at substantial risk of harm if removed from kinship placement and returned to the mother's care. *Id.* Such supported findings are mostly absent from the case *sub judice*. Consequently, we conclude the trial court erred by adjudicating Beth a neglected juvenile.

[9] We next consider the trial court's determination Beth was a dependent juvenile. A dependent juvenile is defined as:

> A juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (Supp. 2016). "In determining whether a juvenile is dependent, 'the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.' " *In re B.M.*, at 90, 643 S.E.2d at 648 (quoting *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)).

Respondent contends the trial court's finding regarding the second prong, she lacked an appropriate alternative caregiver arrangement, was erroneous, as evidenced by the fact she was the one who placed Beth with Mr. and Mrs. M. We agree. Our Court has stated in order for a parent to have an alternative caregiver arrangement, the parent must have taken some action to identify the alternative arrangement, and "it is not enough that the parent merely goes along with a plan created by DSS." *In re L.H.*, 210 N.C. App. 355, 366, 708 S.E.2d 191, 198 (2011).

Here, it is undisputed Respondent placed Beth with Mr. and Mrs. M., not DSS. While it may have been with the assistance of the laundromat's owners, this was not a case where Respondent merely acquiesced in DSS's plan for the juvenile. *See id.* Consequently, we conclude the trial court erred by adjudicating Beth a dependent juvenile.

Accordingly, the adjudications of neglect and dependency are vacated. Because we vacate the adjudications of neglect and dependency, we need not address Respondent's remaining arguments on appeal.

IV. Conclusion

For the foregoing reasons, we vacate the trial court's order.

VACATE AND REMAND.

Judge DILLON concurs.

Judge MURPHY concurs in a separate opinion.

MURPHY, Judge, concurring.

I concur fully with the opinion of the Majority, however, I write separately to commend the actions of the owners of the laundromat and Mr. and Mrs. M in helping Beth and respondent. The positive impact they have made on Beth's young life cannot be measured today, but will be measured in decades to come. Thank you for not only recognizing the needs of a total stranger, but also for acting upon it.

KABASAN v. KABASAN

[257 N.C. App. 436 (2018)]

SONIA KABASAN, PLAINTIFF
v.
DENNIS KABASAN, DEFENDANT

No. COA17-254

Filed 16 January 2018

1. Witnesses—expert witness—forensic accounting and valuation—doubts on opinions go to weight of testimony and not competence

The trial court did not abuse its discretion in an equitable distribution, alimony, and child support case by accepting plaintiff wife's expert in forensic accounting and valuation where doubts as to an expert's opinions went to the weight of the witness's testimony and not to competence as a witness.

2. Divorce—equitable distribution—valuation—coverture fraction—annuity—trust—IRA

The trial court did not abuse its discretion in an equitable distribution, alimony, and child support case by applying the coverture fraction to determine the value of the marital portion of a Federal Thrift Savings Plan, an Aviva annuity, a Vanguard Trust, and a Vanguard IRA as of the date of separation where defendant failed to show the findings and conclusions on this issue violated a mandatory requirement enunciated in *Watkins v. Watkins*, 228 N.C. App. 548 (2013).

3. Child Custody and Support—calculation—annuity—early withdrawal penalty

The trial court did not abuse its discretion by including defendant husband's annuity among defendant's potential sources of income in its orders for child support and alimony. Defendant failed to establish that the terms of the orders, considered separately or together, would require him to cash in the annuity and incur a withdrawal penalty.

4. Divorce—equitable distribution—valuation—marital property—condominium—expert opinion—date of distribution—comparable sale

The trial court did not abuse its discretion in an equitable distribution, alimony, and child support case by assigning a current fair market value of $255,000 for a Miami condominium where the date of a comparable sale upon which an expert based her opinion

took place within the last 6 months before trial. The date of distribution was a factor that went to the weight of the evidence and not its admissibility. Further, defendant did not preserve this issue for review, by failing to object as required by North Carolina Rules of Appellate Procedure Rule 10(a)(1).

5. Divorce—equitable distribution—valuation—marital property—Brazil properties

The trial court did not abuse its discretion in an equitable distribution, alimony, and child support case by determining the value of properties owned by the parties in Brazil on the date of distribution where defendant's generalized assertions that plaintiff's evidence should be disregarded did not entitle him to relief on appeal.

6. Divorce—equitable distribution—valuation—separate property

The trial court did not abuse its discretion in an equitable distribution, alimony, and child support case by determining that a specific property located in Brazil was plaintiff wife's separate property where defendant did not identify findings or conclusions by the trial court that did not comply with North Carolina law or that were based on Brazilian law.

7. Divorce—equitable distribution—prenuptial agreement—sale of asset—failure to show prejudice

The trial court did not abuse its discretion in an equitable distribution, alimony, and child support case by not enforcing the parties' prenuptial agreement requiring the sale of an asset if the parties could not agree on the value or could not agree on who would receive the asset. Defendant failed to establish that the trial court's error, if any, prejudiced him.

8. Divorce—equitable distribution—marital asset—pension

The trial court did not abuse its discretion in an equitable distribution, alimony, and child support case by failing to award a portion of a FERS pension to plaintiff as a distribution in kind and by awarding plaintiff half of the marital portion of the FERS pension payments that were paid to defendant after separation, when that income was included in the income calculation of the post-separation support order.

9. Divorce—alimony—insufficient findings of fact—expenses—dependent spouse

The trial court abused its discretion in an equitable distribution, alimony, and child support case by failing to make any findings on

plaintiff wife's expenses or the minor child's expenses which defendant husband paid, before concluding that plaintiff was a dependent spouse and entering an order for permanent alimony.

10. Divorce—alimony—income calculation—inclusion of child's social security income—no prejudicial error

The trial court did not abuse its discretion in an equitable distribution, alimony, and child support case by including a child's social security income in defendant husband's income calculation in the alimony order where defendant failed to show that the trial court's error, if any, was prejudicial.

11. Child Custody and Support—child support order—additional income from investments

The trial court did not abuse its discretion in a child support order by "imputing" additional income to defendant father based on its finding that defendant was deferring income in bad faith with naive indifference to the reasonable needs of the child for the purpose of minimizing his support obligation. A trial court has the discretion to consider all sources of a parent's income and is not required to make findings that will support imputation of income before considering income from investments.

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

Although defendant husband contended the trial court abused its discretion by using two different incomes for his income for purposes of calculating child support and alimony, and by largely adopting the terms of a proposed order submitted by plaintiff wife, defendant did not support either of these arguments by citation to authority and was improperly asking the Court of Appeals to reweigh the evidence.

Appeal by defendant from orders entered 22 August 2016 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 24 October 2017.

Siemens Family Law Group, by Jim Siemens, for plaintiff-appellee.

Cecilia Johnson for defendant-appellant.

ZACHARY, Judge.

This appeal arises from domestic litigation between Dennis Kabasan (defendant) and his ex-wife Sonia Kabasan (plaintiff). Defendant appeals from equitable distribution, alimony, and child support orders entered by the trial court on 22 August 2016. Defendant has raised fourteen issues on appeal, in two of which he challenges the trial court's acceptance of Phaedra Xanthos as an expert in accounting, as well as the court's adoption of most of plaintiff's proposed findings and conclusions. Defendant also contends that the trial court abused its discretion in the classification, valuation, and distribution of certain assets in its equitable distribution order. Defendant further argues that the trial court erred in the calculations and rulings made in the court's alimony and child support orders. After consideration of defendant's arguments, in light of the record on appeal and the applicable law, we affirm in part and reverse and remand in part.

Factual and Procedural Background

The parties met in Brazil and were married there on 16 January 1999. Plaintiff was born in Brazil in 1960, and lived in Brazil until her marriage to defendant. Defendant, who was born in 1946, worked until his retirement in 2010 as a physician at the Veterans Administration Hospital in Asheville, North Carolina. Prior to marrying, the parties executed a prenuptial agreement. After they married, the couple moved to Asheville. One child was born to the marriage, a daughter born in 2000. During the marriage, the parties acquired property in the United States and Brazil. They traveled to Brazil, and plaintiff spent time in Brazil with her family.

On 27 December 2013, plaintiff filed a complaint, which was assigned Buncombe County No. 13 CVD 5370, seeking divorce from bed and board, postseparation support, alimony, attorney's fees, and possession of the marital home. Defendant filed an answer on 31 January 2014, denying the material allegations of plaintiff's complaint, raising various defenses, stating a counterclaim for joint legal and physical custody of their daughter, and asking the court to impose travel restrictions on the minor child. In his answer and counterclaim, defendant also alleged that the parties' prenuptial agreement barred plaintiff's claims for alimony, postseparation support, and attorney's fees, and that the terms of the prenuptial agreement should govern the division of the parties' property. Plaintiff filed a reply on 28 March 2014, in which she agreed that the prenuptial agreement was valid, asked the court to determine child custody, and sought child support from defendant. On the same day, the trial court entered an order that awarded plaintiff temporary postseparation support and child support, granted the parties joint legal and physical custody of the minor child, and granted plaintiff a writ of

possession of the marital home. On 9 July 2015, the trial court entered a final child custody order granting the parties joint legal and physical custody of their daughter.

On 26 August 2015, plaintiff filed a complaint that was assigned Buncombe County No. 15 CVD 3789, seeking absolute divorce, equitable distribution of the parties' marital assets, and consolidation of the action with her previously-filed complaint. Plaintiff alleged that the prenuptial agreement did not bar her claim for equitable distribution, and that a division of the marital estate "in favor of plaintiff" would be equitable. On 18 September 2015, defendant filed an answer and counterclaim seeking, *inter alia*, an equal division of the marital estate. The parties were divorced on 26 February 2016. On 8 March 2016, the trial court entered a declaratory judgment that the prenuptial agreement was valid and would be enforced, and that an equal division of the marital estate would be equitable.

A trial was conducted on the issues raised by the parties' pleadings beginning on 25 April 2016, and on 22 August 2016, the trial court entered orders for equitable distribution, alimony, and child support. The evidence adduced at trial and the provisions of the court's orders are discussed below, as relevant to the issues raised on appeal. Defendant has appealed to this Court from these orders.

Standard of Review

"It is undisputed that '[t]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cushman v. Cushman*, __ N.C. App. __, __, 781 S.E.2d 499, 501 (2016) (quoting *Pegg v. Jones*, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007)). "The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Resort Realty of the Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116, 593 S.E.2d 404, 408 (2004) (citation omitted). "Simply stated, where the trial court's findings of fact are supported by competent evidence, and the findings of fact, in turn, support the trial court's conclusions of law, the decision of the trial court will be affirmed. This Court will not reweigh the evidence." *Pegg*, 187 N.C. App. at 358, 653 S.E.2d at 231. Moreover, "where a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *Juhnn v. Juhnn*, 242 N.C. App. 58, 63, 775 S.E.2d 310, 313 (2015) (citation omitted). "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*." *Robbins v. Robbins*, 240 N.C. App. 386, 394, 770 S.E.2d 723, 728 (internal quotation marks omitted), *disc. review denied*, 368 N.C. 283, 775 S.E.2d 858 (2015).

Defendant has appealed from orders for equitable distribution, child support, and alimony. "[W]hen reviewing an equitable distribution order, this Court will uphold the trial court's written findings of fact as long as they are supported by competent evidence. However, the trial court's conclusions of law are reviewed *de novo*. Finally, this Court reviews the trial court's actual distribution decision for abuse of discretion." *Mugno v. Mugno*, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (citations and quotation marks omitted). Similarly, our review of a child support order

> is limited to a determination whether the trial court abused its discretion. Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. The trial court must, however, 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.

Spicer v. Spicer, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citations omitted). This Court has summarized our review of alimony orders as follows:

> If the court's findings of fact are supported by competent evidence, they are conclusive on appeal, even if there is contrary evidence. Whether a spouse is entitled to an award of alimony or post-separation support is a question of law. This Court reviews questions of law *de novo*. . . . The trial court's determination of the amount of alimony is reviewed for an abuse of discretion.

Collins v. Collins, __ N.C. App. __, __, 778 S.E.2d 854, 856 (2015) (citing *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972)) (other citations omitted).

Qualification of Plaintiff's Expert Witness

[1] Defendant first argues that the trial court "abused its discretion when it accepted Phaedra Xanthos as an expert in forensic accounting

and valuation" and that the court "should have disqualified her and her testimony once it became apparent she was not competent to testify as an expert." We disagree.

Initial Qualification of Ms. Xanthos as an Expert in Accounting

Defendant argues that it was error to allow Ms. Xanthos to testify as an expert in "forensic accounting and valuation." Although in its equitable distribution order, the trial court found that Ms. Xanthos "was qualified as an expert in forensic accounting and valuation," the transcript establishes that, following voir dire, the trial court ruled that "Ms. Xanthos is qualified by this Court in the area -- as an expert in the area of accounting." At no time during the trial did the trial court rule that Ms. Xanthos was an expert in forensic accounting and valuation. We conclude that Ms. Xanthos testified as an expert in accounting, rather than as an expert in related specialties. Moreover, at trial, defendant did not dispute that Ms. Xanthos was well-qualified as an expert in accounting, forensic accounting, or valuation. Following voir dire, defendant's counsel stated:

> Your Honor, I certainly don't deny that she, Miss Xanthos, has an impressive resume. Certainly she's well qualified in fraud investigations, in business valuations, all of these things listed here. I would contend, however, that she is certainly not an expert in coverture fractions, in valuing pensions in North Carolina, anything like that. . . . So I have very real reservations about Miss Xanthos presenting herself as an expert in this case specifically as to a retirement account and an annuity.

Discussion

On appeal, defendant argues that the trial court abused its discretion by failing to disqualify Ms. Xanthos as an expert, on the grounds that she offered "speculative" testimony as to the value of certain financial assets and real property, and that her responses to defendant's cross-examination raised doubts as to whether Ms. Xanthos was familiar with Brazilian family law or with the proper interpretation of *Watkins v. Watkins*, 228 N.C. App. 548, 746 S.E.2d 394 (2013). Defendant contends that although Ms. Xanthos was "qualified as an expert initially" she "should have later been disqualified" and that the trial court "abused its discretion in not disqualifying Ms. Xanthos and striking her testimony[.]"

During the trial, defendant objected to the trial court's consideration of certain portions of Ms. Xanthos's testimony, but did not move

to disqualify Ms. Xanthos as an expert in accounting. Thus, defendant's appellate argument is apparently that that the trial court erred by not disqualifying her *ex mero motu*. Defendant has not cited any legal authority in support of his position. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). "It is likewise not the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein." *State v. Hill*, 179 N.C. App. 1, 21, 632 S.E.2d 777, 789 (2006).

Furthermore, it is well-established that doubts as to an expert's opinions go "to the weight of the witness's testimony and not to his competence as a witness." *Winston-Salem v. Cooper*, 315 N.C. 702, 714, 340 S.E.2d 366, 373 (1986). In *Winston-Salem*, the appellant argued that "its own expert showed [the appellee's expert's] opinion was based on an erroneous understanding of the applicable zoning ordinances, thus disqualifying [him] as a competent expert witness." *Id.* at 713, 340 S.E.2d at 373. Our Supreme Court rejected this argument:

> Even if [the expert] based his ultimate opinion as to value on a misunderstanding of the allowable uses permitted by the zoning ordinance, this would not be grounds for striking his testimony. It would constitute an attack on part of the data he might have considered in arriving at his opinion. "The process or method used . . . might be considered on the question of the credibility of the expert witnesses, but not on the competency or admissibility of their evidence."

Winston-Salem, 315 N.C. at 714, 340 S.E.2d at 373 (quoting *State v. Tola*, 222 N.C. 406, 409, 23 S.E.2d 321, 323 (1942)). We conclude that defendant has failed to establish that he is entitled to relief on the basis of this argument.

Court's Valuation of Financial Instruments

[2] Defendant argues next that the trial court abused its discretion in "how it valued the marital portion of the TSP account, the Aviva annuity, the Vanguard Trust, and the Vanguard IRA, as of [the] date of separation[.]" We have carefully considered defendant's contentions concerning this issue, and conclude that defendant is not entitled to relief.

N.C. Gen. Stat. § 50-20.1 (2016) addresses equitable distribution awards of vested and nonvested "pension, retirement, or other deferred compensation benefits." N.C. Gen. Stat. § 50-20.1(d) provides that the

percent of such benefits to which each spouse is entitled is calculated as follows:

> (d) The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. The award shall be based on the vested and nonvested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and shall not include contributions, years of service, or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation.

"The numerator of this fraction, termed a coverture fraction, 'represents the total number of years of marriage, up to the date of separation, which occurred simultaneously with the employment which earned the vested [and nonvested] pension. The denominator represents the total years of employment during which the pension accrued.' " *Robertson v. Robertson*, 167 N.C. App. 567, 572, 605 S.E.2d 667, 670 (2004) (quoting *Bishop v. Bishop*, 113 N.C. App. 725, 729-30, 440 S.E.2d 591, 595 (1994) (internal quotation marks omitted)).

In the present case, defendant argues that the trial court abused its discretion by applying the coverture fraction to determine the value of the marital portion of four financial assets: the TSP, the Aviva account, the Vanguard IRA, and the Vanguard Trust. Defendant has not challenged the evidentiary support for any specific findings of fact in the trial court's order. Accordingly, the court's findings are conclusively established. "Unchallenged findings of fact are binding on appeal. . . . The trial court's conclusions of law must be supported by adequate findings of fact." *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

In the present case, the trial court's findings of fact included the following findings relevant to the court's valuation of the marital portion of the TSP account, the Aviva annuity, the Vanguard IRA, and the Vanguard Trust:

> 37. The Defendant retired from the V.A. on May 17, 2010.

38. During the Defendant's employment at the V.A., he participated in the Federal Employees Retirement Savings program (hereinafter, FERS) and in the Federal Thrift Savings Plan (hereinafter, TSP).

. . .

46. The TSP is similar to a 401(k) type plan except that the TSP associated with the FERS employees includes employer or agency contributions which are subject to vesting. FERS employees have a time in service requirement before agency contributions vest.

47. The Defendant transferred TSP funds, including TSP funds properly classified as marital funds, into an Aviva Annuity and into a Vanguard IRA.

48. The parties disagree about the proper method of valuing the marital portion of the TSP, and therefore disagree as to the value of the marital portion of the Aviva Annuity and the Vanguard IRA.

49. The parties also disagree about the fair market value of the Aviva Annuity at date of separation and presently.

50. To resolve these issues, the Court must first consider the proper valuation approach to take in determining the value of the marital portion of the TSP. The Plaintiff contends that the use of the coverture fraction is proper pursuant to N.C.G.S. §50-20.1. Using this approach, the Plaintiff concludes that 50.2% of the TSP is marital.

51. The Plaintiff then goes on to conclude that 50.2% of the money transferred from the TSP to purchase the Aviva Annuity created a 50.2% interest in the Aviva Annuity.

52. The Defendant rolled $400,000 in TSP money into the Aviva Annuity, in order to purchase the Aviva Annuity on June 2, 2011. . . .

53. The Plaintiff concludes that $200,738 or 50.2% of the Aviva Annuity was purchased with marital money from the TSP.

54. The Defendant also rolled $196,193 in TSP money out to a Vanguard IRA on March 11, 2013. . . .

55. The Plaintiff concludes that $98,458 or 50.2% of this rollover was marital money. . . .

56. Both the Aviva Annuity and the Vanguard IRA have passively increased in value since these rollovers occurred.

57. On the date of separation, the Plaintiff contends that the marital portion of the Vanguard IRA was $103,219. . . . The Plaintiff contends that date of distribution value is $112,372, again due to passive growth.

58. The Defendant has valued the TSP by using a tracing method, considering and totaling each contribution to the account made during the marriage, together with passive gains and losses on these amounts. In support of this approach, which is not supported by N.C.G.S. §50-20.1, the Defendant relies on *Watkins v. Watkins*, 228 N.C. App. 548, 746 S.E.2d 394 (2013).

59. In *Watkins*, the trial court was reversed for failing to use a coverture fraction to divide an IRA that was funded with "deferred compensation" even though all compensation had been earned by Defendant Watkins at his date of separation.

60. The TSP in this case likewise contained deferred compensation; that is, compensation from the employer that was subject to vesting. Although the Defendant's TSP was fully vested at the time of his retirement, Defendant Kabasan's [situation] cannot be discerned from that of Defendant Watkins, who had also separated from his employer and whose benefits were fully vested at the time of his trial.

61. The Court of Appeals in *Watkins* has stated that: "We note that there are certain 401(k) plans pursuant to which employer contributions vest over a designated period of time and that employer contributions in these instances might be construed as 'deferred compensation benefits.' " *Watkins v. Watkins*, 228 N.C. App. 548[, 554,] 746 S.E.2d 394[, 398] (2013). . . .

62. The TSP in this case is analogous to a 401(k) that contains "deferred compensation benefits" in that a certain portion of the TSP contributions made by the Defendant's employer were subject to vesting.

63. The Defendant's expert, Edward Fidelman, did not consider *Watkins* before using his tracing valuation method with respect to the TSP.

64. Mr. Fidelman was unable to state what portion of TSP contributions by the Defendant's employer [was] subject to vesting requirements.

65. Mr. Fidelman defined deferred compensation as all compensation by an employer that is "not immediately subject to tax[,]" a definition that is actually broader than the definition provided in *Watkins*.

66. The Court has no evidence upon which it can make a determination as to what part of the TSP contributions occurring during marriage [was] subject to vesting and therefore "deferred compensation" and what portion of said contributions [was] immediately vested.

67. The Defendant's analysis, produced by Edward Fidelman, . . . contains an assumption that all marital money traced in the TSP was used to purchase the Aviva Annuity. Because the methodology applied by the Defendant to determine the marital portion of the TSP is rejected, the Court need not further consider whether or not the Defendant's assumption is correct.

68. The Court finds that Phaedra Xanthos, the Plaintiff's expert, has correctly applied a coverture fraction to the TSP.

69. The Court finds it equitable therefore, that this coverture fraction be extended to the Aviva Annuity, in order to determine the marital component of the Aviva Annuity, and extended to the Vanguard IRA, in order to determine the marital component of the Vanguard IRA.

70. The Court finds that on the date of separation, the marital value of the Vanguard IRA was $103,219. . . . The Court finds that the date of distribution marital value of this IRA is $112,372 due to passive growth.

. . .

81. On the date of separation, the Aviva Annuity accumulated value was $484,707.86.

82. The present Aviva Annuity accumulated value is $543,877.40.

83. The marital portion of the Aviva Annuity is 50.2% or $272,942 of the present value.

. . .

136. The parties dispute whether or not a portion of the balance of the Defendant's Vanguard Securities Account, which existed as a Family Trust at date of separation, is marital.

137. Defendant's exhibit 2 was introduced through the Defendant's expert Ed Fidelman, CPA.

138. Schedule 4 of exhibit 2 traces separate and marital contributions into this account.

139. It is clear from schedule 4 of exhibit 2 that contributions were made into this account during marriage, and Mr. Fidelman has calculated passive gains on those contributions during marriage.

140. Mr. Fidelman then assumes that any marital contributions made during marriage were spent during marriage for the remodel of 9 Crowningway Drive and for the acquisition of 240 Collins Avenue, Unit 6D, otherwise referred to as Terrace View Towers.

141. Mr. Fidelman's assumption is not supported by the evidence, the Defendant having testified clearly that he used separate funds to remodel 9 Crowningway Drive and for the acquisition of 240 Collins Avenue, Unit 6D, otherwise referred to as Terrace View Towers.

142. The parties have further testified that 9 Crowningway Drive and 240 Collins Avenue, Unit 6D, otherwise referred to as Terrace View Towers, are marital property.

143. Marital funds, therefore, remained in the Vanguard Securities Account/Family Trust, at date of separation.

144. Plaintiff's expert, Phaedra Xanthos, CPA has conducted the same tracing analysis as Ed Fidelman, to determine the balance of marital funds existing in the Family Trust at date of separation, which total $153,140.

145. Ms. Xanthos' analysis of marital money moving through the Vanguard Securities Account and into the Family Trust, was introduced as Plaintiff's exhibit 28.

146. The Court finds Ms. Xanthos' tracing of marital funds, as illustrated by exhibit 28, to be credible.

147. At date of separation, the Defendant was in possession of $153,140 in marital funds, held in a Family Trust.

Based upon these and other findings, the trial court entered findings and conclusions stating that the financial assets at issue had the date of separation values cited above. Defendant does not challenge the evidentiary support for the court's findings, contend that the court's findings fail to support its conclusions, or dispute the mathematical calculations made by the court. Instead, defendant's sole challenge to the trial court's valuation of these assets is that the court abused its discretion by adopting the approach taken by Ms. Xanthos which, according to defendant, fails "to comply with *Watkins* [*v. Watkins*, 228 N.C. App. 548, 746 S.E.2d 394 (2013), *disc. review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).]" We conclude that this argument lacks merit.

In *Watkins*, as in this case, the defendant appealed the trial court's equitable distribution order. On appeal, the defendant argued that, *inter alia*, "the trial court erred in classifying and valuing two of his investment retirement accounts (IRAs)." *Watkins*, 228 N.C. App. at 551, 746 S.E.2d at 396. The defendant had funded one IRA with the proceeds of a defined benefit pension plan, and the other with the proceeds of a 401(k) account to which he and his employer had contributed during his employment. The trial court relied upon the calculations of plaintiff's expert, Mr. Shriner,[1] in its determination of the respective values of the marital and separate components of the IRAs. Mr. Shriner computed the total value of the IRAs at the date of marriage, which he considered to be separate property, and applied a rate of growth to these funds during the marriage. Mr. Shriner thus "traced" the defendant's premarital contribution to the IRAs, multiplied by a fixed rate of growth for the duration of the marriage, and reported the resulting figure as defendant's separate property.

On appeal, Mr. Watkins argued that the trial court erred by accepting Mr. Shriner's approach, on the grounds that "the coverture fraction method . . . was the required method of valuation under N.C. Gen. Stat.

1. Mr. Shriner testified as an expert for defendant in the instant case.

§ 50-20.1 (2011) and this Court's precedent." *Watkins* at 552, 746 S.E.2d at 397. This Court held that the statute did not require the court to apply the coverture fraction in every circumstance:

> In the case *sub judice*, Defendant posits that N.C. Gen. Stat. § 50-20.1 *required* the trial court to apply the coverture ratio because Defendant's IRAs are "defined contribution plans." Defendant relies upon *Robertson v. Robertson*, 167 N.C. App. 567, 605 S.E.2d 667 (2004), in support of this contention. . . . [W]e believe that neither N.C. Gen. Stat. § 50-20.1 nor our holding in *Robertson requires* that a trial court apply the coverture ratio to determine the marital portion of an IRA, except to the extent that the IRA is funded through a deferred compensation plan or is otherwise brought within the purview of N.C. Gen. Stat. § 50-20.1.

Id. at 352-53, 746 S.E.2d at 397 (emphasis in original).

This Court concluded that if the funds in an IRA were immediately available to the employee, the IRA would not include "deferred compensation" and, as a result, the trial court would not be required to apply the coverture fraction, because imposing such a mandatory requirement might "lead to grossly inequitable results[.]" *Watkins* at 555, 746 S.E.2d at 398. On the facts of *Watkins*, this Court held that, because the funds in the 401(k) did not include any deferred compensation, the trial court had the discretion to apply the tracing approach espoused by Mr. Shriner. The Court reached a different conclusion with regard to the IRA that was funded with the proceeds of a traditional defined benefit pension. Because those funds had been subject to a vesting requirement, the Court reversed and remanded for recalculation of the value, using the coverture fraction system. In sum, *Watkins* applied the provisions of N.C. Gen. Stat. § 50-20.1 to an IRA funded with the proceeds of a deferred compensation plan, as specified in the statute. On the other hand, the Court held that a trial court was not *required* to apply the coverture fraction approach to valuation of a financial asset that included no deferred compensation.

Defendant argues that the application of the coverture fraction to the financial assets at issue in this case did not "comply" with *Watkins*. First of all, the value of the Vanguard Trust was determined by use of the "tracing" method for which defendant argues, and not by application of the coverture fraction approach. With regard to the valuation of the remaining financial assets at issue, it must be noted that this Court's

opinion in *Watkins* emphasized that "neither N.C. Gen. Stat. § 50-20.1 nor our holding in *Robertson requires* that a trial court apply the coverture ratio to determine the marital portion of an IRA, except to the extent that the IRA is funded through a deferred compensation plan or is otherwise brought within the purview of N.C. Gen. Stat. § 50-20.1." *Id.* at 552, 746 S.E.2d at 397. This Court did not hold that in such a situation the trial court was barred from applying the coverture fraction, if appropriate. Nor did the opinion announce some other mandatory practice restricting the discretion traditionally afforded to a trial court.

In support of his position, defendant relies primarily upon the opinions of his two expert witnesses, Mr. Shriner and Mr. Fidelman, which are not binding on this Court. Defendant also alleges that "Mr. Shriner had to use a coverture fraction in the *Watkins* trial, because there were no records on which to base an accurate tracing of separate funds. The trial court agreed with him and was upheld." Defendant's contention is both puzzling and inaccurate. As discussed above, (1) in *Watkins*, Mr. Shriner *did not* use the coverture fraction approach, and (2) his use of the "tracing" approach was reversed as to one of the IRAs. Moreover, the opinion includes no discussion of what records were available to Mr. Shriner.

We conclude that defendant has failed to show that the trial court erred by adopting the coverture fraction approach employed by Ms. Xanthos in the valuation of the TSP account, the Aviva annuity, or the Vanguard IRA, or that the trial court's findings and conclusions on this issue violated a mandatory requirement enunciated in our opinion in *Watkins*. As this is the only basis upon which defendant challenges the trial court's valuation of the subject assets, we conclude that defendant is not entitled to relief on this issue.

Trial Court's Treatment of Potential Surrender Penalties

[3] Defendant argues next that the trial court "abused its discretion when it found that potential surrender charges/early withdrawal penalties on the Aviva annuity were speculative and could not be considered, when in the child support and alimony orders, this same court imputed additional income specifically based on these assets being immediately drawn against." This argument lacks merit.

The terms of the Aviva annuity included a penalty for withdrawal of funds during the first twelve years after purchase. It is undisputed that defendant did not intend to withdraw money from the annuity during this period. In its equitable distribution order, the trial court made

several findings of fact concerning the penalty for early withdrawal of funds from the Aviva annuity:

> 71. The parties experts disagree as to the total value of the Aviva Annuity at date of separation, and presently.
>
> 72. The Defendant's expert, Ed Fidelman, CPA, contends that the correct value of the Aviva Annuity at date of separation and presently is the cash "surrender" value.
>
> 73. Both the Defendant and the Defendant's expert, concede, however, that the Defendant does not intend to surrender the policy.
>
> 74. Any potential surrender charges are therefore speculative and should not be considered by the trial Court.
>
> 75. "Evidence of circumstances not in existence on the date of separation [such as surrendering the annuity] is not competent evidence for the purpose of valuing a marital asset." *Crowder v. Crowder*, 147 N.C. App. 677, 682[,] 556 S.E.2d 639, 642 (2001).

The effect of these findings was that the trial court rejected defendant's proffer of a reduced value for the Aviva annuity. On appeal, defendant does not dispute the evidentiary support for these findings, or challenge the trial court's decision to disregard the penalties for early withdrawal, given that there was no evidence that defendant intended to incur this penalty by accessing the annuity. Defendant argues, instead, that having made these findings, it was "contradictory" for the trial court to include the annuity among defendant's potential sources of income in its orders for child support and alimony. Defendant's argument is not supported by citation to legal authority and rests on the premises that "Plaintiff-wife's attorney wanted Defendant-husband ordered to immediately access his annuity" and that "the trial court force[d]" defendant to incur surrender penalties by including the annuity in its child support and alimony orders. Defendant cites no authority suggesting that the wishes or strategy of opposing counsel is legally relevant to our analysis of whether the trial court abused its discretion, and we decline to consider this.

Nor has defendant identified any findings or conclusions in the child support or alimony orders that support his assertion that the provisions of either order will "force" him to access the Aviva annuity. In its child support order, the trial court found that:

13. Counsel for the parties have stipulated and agreed that the Court may make a determination of the parties' income, for purposes of determining child support, by considering evidence presented in the alimony case.

14. The application of the North Carolina Child Support Guidelines meets the reasonable needs of the minor child in this cause.

. . .

23. Health insurance for the benefit of [the child] is paid by the Defendant at the rate of $355 per month.

24. The minor child does attend private school at Veritas. The Court finds tuition, which the Defendant pays, to be an extraordinary need of the minor child, in the monthly amount of $975 for the 2016/2017 school year.

25. The calculation that results from these findings is attached hereto and incorporated by reference herein.

26. The Defendant owes a duty of support in the amount of $636.40 per month.

27. The Defendant shall pay support of $636.40 per month commencing August 1st, 2016 and thereafter on the first of each month.

28. The Defendant shall continue to provide health insurance for the use and benefit of the minor child.

29. The Defendant shall continue to pay Veritas tuition.

In its alimony order, the trial court made the following findings:

61. The Defendant's income includes a monthly FERS payment of $3136 per month.

62. The Defendant also receives social security payments of $2,094 for himself.

. . .

68. The Defendant lives modestly, showing his living expenses of $2762 per month on his 2015 financial affidavit.

69. The Defendant shows expenses associated with the parties' minor child in the amount of $1678 which includes

> private school tuition[, court-ordered child support, and health insurance].
>
> 70. On his 2015 affidavit, the Defendant shows total gross income of $6,972.
>
> 71. By the Defendant's own representation, he has a surplus of his claimed income over his expenses in the amount of $4210, even without considering whether or not the Defendant should or could draw against retirement or elect to receive an annual benefit from the Aviva Annuity.
>
> 72. Including the minor child's expenses as the Defendant's own expenses, he still has a surplus of his claimed income over expenses in the amount of $2532.
>
> . . .
>
> 85. Based upon all of the foregoing findings, the Court further finds that alimony in the amount of $1,250 per month, terminable upon the Plaintiff's death, the Defendant's death, the Plaintiff's remarriage, or cohabitation is equitable.

These unchallenged findings show that after subtracting alimony, court-ordered child support, private school tuition, health insurance premiums for the minor child, and defendant's claimed expenses, from defendant's stated gross monthly income of $6972, defendant would have a surplus of $1282, and thus would not be "forced" to immediately surrender the Aviva annuity.

Moreover, despite a passing reference to "other pre-tax investments," defendant's appellate argument is restricted to the Aviva annuity. In its child support order, the trial court found that defendant could potentially receive $2812 per month from his IRA. Defendant has not directed our attention to testimony or other evidence of a penalty that would be triggered by withdrawal from his IRA. In fact, defendant's expert witness testified that the only "penalty" would be the taxation of the funds upon withdrawal. Finally, we observe that defendant has not indicated what the amount of any withdrawal penalty would be for defendant's access to either source of income.

Defendant argues that it was an abuse of discretion for the trial court to include defendant's potential income from the Aviva annuity in calculating defendant's child support obligation, because defendant would be "forced" by the court's orders to immediately access the annuity and incur a withdrawal penalty that the trial court did not include

in its valuation of the annuity for equitable distribution purposes. Defendant has failed to establish that the terms of the child support and alimony orders, considered separately or together, would require him to cash in the annuity. We conclude that defendant is not entitled to relief on this issue.

Trial Court's Valuation of the Miami Condominium

[4] Defendant argues next that the trial court "abused its discretion when it assigned a current fair market value of $255,000 for the Miami condo[minium]." We have considered this argument, and conclude that it is without merit.

In its equitable distribution order, the trial court made the following findings of fact regarding the value of the condominium:

> 90. 240 Collins Avenue, Unit 6D, otherwise referred to as Terrace View Towers is a condominium in Dade County, Miami Beach, FL.
>
> 91. The parties acquired the FL Condominium in 2011 using the Defendant's separate funds.
>
> 92. The condominium was titled to the parties jointly and the parties have stipulated that the condominium is marital property.
>
> 93. The parties have stipulated that the condominium, at date of separation, had a value of $250,000.
>
> 94. The Plaintiff contends the condominium has a date of distribution value of $255,000, based upon a recent comparable sale of a unit of identical square footage, in the same building, which has been improved.
>
> 95. The unit owned by the parties has not been improved since purchase, and has been rented, with the Defendant receiving the rental income.
>
> 96. The Plaintiff's opinion with respect to date of distribution value is credible, and supported by a credible comparable sale.
>
> 97. The Defendant has also offered his opinion as to date of distribution value, pointing to the report of a comparable sale of "5G" occurring in May of 2016 for $299,000.

98. The Defendant offered as evidence of this comparable sale, a marketing letter from a realtor.

99. The marketing letter does not reference an address or a building but only "unit 5G."

100. The Defendant did not testify to the square footage of his comparable and the marketing letter is silent as to that fact.

101. The Defendant also conceded on cross examination that he has not visited the unit that sold for $299,000 and that he knew nothing about its condition[] or improvements.

102. The Defendant offered no other evidence to corroborate the content of the realtor's letter which references the sale of "5G."

103. The Defendant's opinion as to date of distribution value is not credible.

104. The date of distribution value of 240 Collins Avenue, Unit 6D, Miami Beach, FL, otherwise referred to as Terrace View Towers, is $255,000.

Defendant does not challenge the evidentiary support for any specific finding, or argue that the findings fail to support the trial court's conclusions regarding the value of the condominium. We conclude that the court's evidentiary findings support its ultimate finding that the value of the condominium on the date of distribution was $255,000.

In urging us to reach a contrary result, defendant argues that the evidence offered by plaintiff's expert regarding the value of the condominium on the date of distribution did not comply with N.C. Gen. Stat. § 50-21(b) (2016), which provides in relevant part that "[d]ivisible property and divisible debt shall be valued as of the date of distribution."

Defendant has argued that this "is not an issue where the trial court can, in its discretion, consider the weight of each opinion[,]" because, as a matter of law, the evidence offered by plaintiff's expert as to the value of the condominium on the date of distribution "must be disqualified[.]" The sole basis for this contention is that the comparable sale upon which plaintiff's expert witness based her opinion took place "within the last six months" prior to the trial, rather than on the date of distribution. On appeal, defendant cites *Kiell v. Kiell*, 240 N.C. App. 602, 772 S.E.2d 873 (2015) (unpublished), for the rule that divisible property is valued as

of the date of distribution. The parties have not disputed that divisible property is valued as of the date of distribution and as an unpublished case, *Kiell* is not binding on this court.

Furthermore, the general rule is that weaknesses in a party's evidence go to the weight of the evidence, rather than its admissibility. "Questions of credibility and the weight to be accorded the evidence remain in the province of the finder of facts." *Bodie v. Bodie*, 221 N.C. App. 29, 38, 727 S.E.2d 11, 18 (2012) (internal quotation marks omitted). N.C. Gen. Stat. § 50-21(b) (2016) provides that "[f]or purposes of equitable distribution, . . . [d]ivisible property and divisible debt shall be valued as of the date of distribution." However, defendant has not cited any authority holding that evidence of a sale of comparable property within the six months prior to trial is inadmissible on the grounds that the sale did not occur on the date of distribution. As a practical matter, there are likely many instances in which, as in the present case, the most recent comparable sale took place several months before trial. We hold that the date of the comparable sale upon which Ms. Xanthos based her opinion as to the value of the Miami condominium on the date of distribution is a factor that goes to the weight of the evidence, not its admissibility.

In addition, we conclude that defendant failed to preserve this issue for appellate review. At trial, Ms. Xanthos testified that in her opinion the condominium had a value of $255,000. Ms. Xanthos based her opinion on evidence of the sale of a condominium in the same building, with the same square footage and tax-assessment value, that had been sold "within the last six months" before the trial. Defendant objected on the grounds that Ms. Xanthos was not a real estate appraiser, and that her reliance on public records rendered her opinion "speculative" because Ms. Xanthos had not personally inspected the condominium that was sold. Nonetheless, at no time did defendant object to Ms. Xanthos's testimony based on the date of the comparable sale, or argue that evidence of the sale was inadmissible because of the passage of time between the sale and the trial.

N.C. R. App. P. Rule 10(a)(1) (2016) provides in relevant part that 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" and must have "obtain[ed] a ruling upon the party's request, objection, or motion." "As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal." *State v. Johnson*, 204 N.C. App. 259, 266, 693 S.E.2d 711, 716-17 (2010). "Our Supreme Court has long held that where a theory argued on appeal

was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *Cushman* at __, 781 S.E.2d at 504 (internal quotation marks omitted). We conclude that by failing to raise this issue at the trial level, defendant failed to preserve it for appellate review.

Trial Court's Valuation of the Brazilian Properties

[5] Defendant argues next that the trial court abused its discretion when it determined the value on the date of distribution for properties owned by the parties in Brazil. Defendant asserts that "Ms. Xanthos's opinion should be disqualified" for the reasons stated in his earlier argument that the trial court erred by failing to disqualify Ms. Xanthos as an expert. In that we have held that defendant failed to show that the trial court abused its discretion in this regard, we likewise reject the same argument as applied to Ms. Xanthos's opinion on the value of the Brazilian properties.

Defendant also contends that the evidence he presented was credible, and that Ms. Xanthos's opinion "must be disqualified" as "being a date of separation value multiplied by the current currency exchange rate." Defendant cites no authority on the proper role of evidence on currency exchange rates in determination of the value of real estate. Moreover, even assuming, *arguendo*, that defendant has correctly identified weaknesses in Ms. Xanthos's calculations, "[t]he foregoing is all relevant in considering the expert witness' credibility, but it does not render his opinion testimony inadmissible." *McLean v. McLean*, 323 N.C. 543, 556, 374 S.E.2d 376, 384 (1988). We conclude that defendant has failed to establish that his generalized assertions that plaintiff's evidence should be disregarded entitle him to relief on appeal.

Determination that 501 Rua Intendente was Plaintiff's Separate Property

[6] Defendant's next argument is that the trial court abused its discretion by determining that a specific property located in Brazil was plaintiff's separate property. We conclude that this argument lacks merit.

The property at issue is referred to by the parties by its street address, which is 501 Rua Intendente. In its equitable distribution order, the trial court made the following findings about the property:

> 123. There is an additional piece of real property in Brazil, identified as 501 Rua Intendente Alfredo Azevedo, the classification of which is disputed.

124. The Plaintiff has introduced a certified copy of the property certificate to 501 Rua Intendente Alfredo Azevedo . . . which has been admitted into evidence.

121.[2] This property was owned by the Plaintiff before marriage and was received by the Plaintiff in the context of a prior divorce, in Brazil, from Jose Vilmar Gomes.

125. The Plaintiff did not register the transfer of ownership from her former spouse, Jose Vilmar Gomes, until after her marriage to the Defendant.

> 1. The Defendant testified, and the Court finds, that the Plaintiff delayed the transfer of this property into her name because there was a charge involved in doing so.

126. According to the Defendant, during a trip to Brazil in 2002, the Plaintiff reported to him that she had to go [to] the clerk's office to perform a legally required act with respect to the property certificate.

127. The property certificate reflects. . . . that:

> i. It has been declared by SONIA REGINA DE OLIVEIRA KABASAN that she married DENNIS KABASAN under the partial communi[ty] property regime. As from the marriage, she uses the name indicated above.

128. The Defendant admits that there was at no time during the marriage a discussion between [him] and the Plaintiff to the effect that the Plaintiff intended to gift 501 Rua Intendente Alfredo Azevedo to the marriage.

129. The Plaintiff credibly testified that at no time during the marriage, did she discuss with the Defendant the prospect of gifting 501 Rua Intendente Alfredo Azevedo to the marriage.

130. The Defendant's position in support of the classification of this property as marital rests on the fact that his name appears as set forth above.

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2. The out-of-sequence numbering is set out as in the equitable distribution order.

131. The Court finds the Defendant's argument on the point of classification without merit.

132. The partial community property regime in Brazil is consistent with North Carolina law in that property owned before marriage remains separate (unless gifted to the marriage), while property acquired during the marriage is presumed to be marital or "of the community" in the context of Brazilian law.

133. When the Plaintiff went to the Brazilian clerk's office in 2002, she recorded the transfer of property from her former marriage to her, she recorded her divorce from her former Husband, and she recorded her marriage to the Defendant. There is no evidence of a gift of this real estate to be discerned from this recordation.

134. The Defendant would extend the McLean presumption, which rises from the peculiar species of North Carolina tenancy by the entireties, to this property certificate. Such an extension is not credible, and in any event, the Court finds that the [Plaintiff] has rebutted any such presumption by the greater weight of the evidence, pursuant to N.C.G.S. §50-20(b)(1).

135. 501 Rua Intendente Alfredo Azevedo is the Plaintiff's separate property.

Defendant does not dispute the evidentiary support for these findings, and we conclude that they support the trial court's conclusion that the 501 Rua Intendente property is plaintiff's separate property. In reaching this conclusion, we have considered, but ultimately rejected, defendant's arguments for a contrary result.

Defendant's primary argument is that, because the parties' prenuptial agreement provided that the "terms and provisions" *of the agreement* would be construed and determined in accordance with North Carolina law, the trial court erred by admitting testimony concerning Brazilian family law. For several reasons, we hold that defendant has failed to establish a right to relief based upon this argument. First, defendant has not identified any provision of the prenuptial agreement that was improperly interpreted or construed under Brazilian law. Secondly, during trial, defendant did not object to the admissibility of Ms. Xanthos's testimony about Brazilian law on the grounds that it was barred by

the prenuptial agreement. Instead, defendant's objections were based, *inter alia*, upon a supposed lack of foundation or the fact that certain documents were written in Portuguese.

The thrust of defendant's argument is that the court's equitable distribution order reflects an inappropriate consideration of Brazilian law in its determination that the 501 Rua Intendente property was plaintiff's separate property. However, the trial court's only reference to Brazilian law was the observation that it was consistent with North Carolina law. Defendant does not identify findings or conclusions by the trial court that do not comply with North Carolina law, or that were based on Brazilian law rather than North Carolina law. We conclude that defendant has failed to show that the trial court improperly based its decision upon Brazilian law.

Defendant also asserts that the trial court made an error of law by stating that plaintiff had "rebutted [the] . . . presumption [that plaintiff intended the 501 Rua Intendente property to be a gift to the marriage] by the greater weight of the evidence, pursuant to [N.C. Gen. Stat.] §50-20(b)(1)." Defendant contends, based upon our Supreme Court's opinion in *McLean*, that the proper standard is whether the presumption was rebutted by "clear, cogent and convincing evidence" and that it "is not clear whether or not, under this higher burden of proof, the trial court would still conclude that this property was the separate property of Plaintiff-wife." *McLean* was decided in 1988, and in 1991, our legislature amended N.C. Gen. Stat. § 50-20 to provide that "[i]t is presumed that all real property creating a tenancy by the entirety acquired after the date of marriage and before the date of separation is marital property. Either presumption may be rebutted by the greater weight of the evidence." (emphasis added). Therefore, this argument lacks merit.

For the reasons discussed above, we conclude that defendant has failed to establish that the trial court abused its discretion in its determination that the property located at 501 Rua Intendente was plaintiff's separate property.

Prenuptial Agreement's Provision Regarding Sale of Assets

[7] Defendant next contends that the trial court abused its discretion "when it failed to comply with the parties' valid prenuptial agreement, which required the sale of an asset if the parties could not agree on the value, or could not agree on who would receive the asset." We conclude that defendant has failed to establish that the trial court's error, if any, prejudiced him.

The prenuptial agreement executed by the parties stated the following with regard to the division of marital property acquired after marriage in the event that the parties separated or divorced:

> If the parties cannot agree as to the value of any such subsequently acquired marital property, it shall be sold and the net proceeds split equally. If the parties cannot agree as to who should receive which particular assets to effectuate the equal division required by this Agreement, then any disputed asset shall be sold by public or private sale and the net proceeds split equally.

In its order the trial court made the following findings relevant to this issue:

> 148. The parties signed a Premarital Agreement. The Court has previously declared that the Premarital Agreement is valid and therefore ordered that [the] Court shall make an equal division of the marital estate.
>
> 149. The Premarital Agreement does not bar equitable distribution.
>
> 150. It is the Court's duty in an equitable distribution proceeding to identify, classify, value and distribute marital assets in kind.
>
> 151. The Court does not find it necessary to order any marital property to be sold, in order to make an equal division of the marital estate.
>
> 152. The Court notes that a provision of the premarital agreement recites that:
>
> > ii. If the parties cannot agree as to the value of any such subsequently acquired marital property, it shall be sold and the net proceeds split equally. If the parties cannot agree as to who should receive which particular assets to effectuate the equal division required by this agreement, then any disputed asset shall be sold by public or private sale and the net proceeds split equally.
>
> 153. Both parties having asserted claims for equitable distribution rather than an action to enforce this Premarital Agreement, except to the limited extent of the declaratory action brought by the Defendant.

154. As to real property values at date of separation, the parties were in complete agreement, and these sale provisions are not triggered by disagreements with respect to real property values at date of separation.

155. The parties disagree about the valuation of many marital assets in this case. For many of these assets, such as the FERS pension, the Survivor Benefit, the Aviva Annuity, the Vanguard IRA or the Vanguard Securities account, a forced sale would be impracticable, [and would] result in the wasting of the marital estate, [and in] undesired tax consequence[s].

156. A full scale application of the sale provision contained in the Premarital Agreement as to each marital asset as to which there is a disagreement as to value or distribution, is not practical and would not be equitable.

157. Both parties having asserted claims for equitable distribution, and the Court hearing the same, places the marital estate within the jurisdiction of the Court. To the extent the parties have entered into Stipulations and to the extent that the Court has entered a Declaratory Order with respect to an equal division of the marital estate, the Court must honor the same.

Defendant characterizes these findings as showing that "[i]nstead of implementing [the] provision [in the prenuptial agreement,] the trial court . . . argue[d] around it." Defendant does not elaborate on the basis of this assertion, and has neither challenged the evidentiary support for the court's findings, nor identified any specific error of law on the part of the trial court.

Defendant cites *Huntley v. Huntley*, 140 N.C. App. 749, 538 S.E.2d 239 (2000), in support of his argument that the trial court erred by not ordering that disputed property be sold. In *Huntley*, the parties executed a prenuptial agreement that expressly barred equitable distribution proceedings. When the husband sought equitable distribution, the wife argued that the terms of their agreement precluded it. On appeal, this Court agreed with the appellant. Defendant has not articulated the relevance of *Huntley* to the facts of the present case, in which both parties sought equitable distribution and neither party sought to prevent the equitable distribution proceeding on the grounds that it was barred by the terms of the agreement. The issue in this case is not the

enforceability of the agreement but whether the trial court abused its discretion in its interpretation of the agreement.

Moreover, it is axiomatic that " '[t]he party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result.' " *Westlake v. Westlake*, 231 N.C. App. 704, 706, 753 S.E.2d 197, 200 (2014) (quoting Lawing v. Lawing, 81 N.C. App. 159, 162, 344 N.C. 100, 104 (1986)). In this case, defendant has failed to offer any argument on the issue of prejudice. For example, defendant has not identified any disputed property of which he would have benefitted by a sale rather than a distribution. Nor has defendant directed our attention to any point during the trial when he raised this issue. We conclude that defendant has failed to show that he is entitled to relief on the basis of this argument.

Trial Court's Treatment of Defendant's FERS Pension

[8] Defendant's next two arguments challenge the court's distribution of his FERS pension. Defendant argues that the court abused its discretion by failing "to award a portion of the FERS pension to plaintiff as a distribution in kind" and by "awarding plaintiff half of the marital portion of the FERS pension [payments] that were paid to defendant after separation, when that income was included in the income calculation of the post separation support order."

After he retired in 2010, defendant received a monthly pension pursuant to his participation in the Federal Employees Retirement System, or FERS. The parties do not dispute that (1) the marital portion of the FERS payments that defendant received between the date of separation and the date of distribution was $36,550; (2) the date of distribution value of the marital component of the FERS retirement benefit was $142,160; and (3) the value of the FERS survivor's benefit was $169,495. In its equitable distribution order, the trial court distributed the present value of the survivor's benefit to plaintiff, and the present value of the retirement benefit to defendant. Defendant argues on appeal that the trial court abused its discretion by failing to distribute half of the marital component of the FERS retirement benefit to plaintiff. Defendant notes that N.C. Gen. Stat. § 50-20(e) provides in part that "it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable" and apparently contends that the trial court abused its discretion by failing to order an "in-kind" distribution of monthly benefits from the FERS program to plaintiff.

The sole basis of defendant's argument on this issue is his contention that, if plaintiff had been awarded benefits of $1500 per month, this

would have had a favorable effect on his potential liability for alimony. However, N.C. Gen. Stat. § 50-20(f) expressly states that "[t]he court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties." (emphasis added). We conclude that defendant has failed to show that the trial court abused its discretion by distributing the FERS benefits as discussed above or by failing to consider the alimony implications of its distribution of marital assets.

On 28 March 2014, the trial court entered an interim order that, *inter alia*, provided temporary postseparation support for plaintiff. In its determination of defendant's postseparation support obligation, the court included defendant's FERS retirement benefits in its calculation of defendant's monthly income. The trial court found that defendant had a monthly income of $7024 and expenses of $2539, and that plaintiff was a dependent spouse with reasonable expenses of $1705 per month. Defendant has not challenged any aspect of this order.

In its equitable distribution order, the trial court included in its calculation of the marital portion of the FERS retirement benefits the $36,550 in monthly benefits that defendant received between the date of separation and the date of distribution. Defendant contends that this was an abuse of discretion, and that plaintiff is "double dipping" as a result. However, N.C. Gen. Stat. § 50-16.2A(b) (2016) provides that:

> In ordering postseparation support, the court shall base its award on the financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.

We conclude that it was not an abuse of discretion for the trial court to consider defendant's FERS pension income in its determination of defendant's ability to pay postseparation support. The basis of defendant's argument on "double dipping" is not entirely clear, given that although defendant's FERS benefits were included in the trial court's determination of postseparation support for the purpose of establishing defendant's ability to pay postseparation support, none of defendant's FERS benefits were distributed to plaintiff prior to the entry of the equitable distribution order. We conclude that defendant has failed to show

that the trial court abused its discretion by including defendant's FERS benefits in its postseparation support order and later distributing a portion of these benefits to plaintiff.

Findings Required for Alimony Order

[9] Defendant argues next that the trial court "abused its discretion when it failed to make any findings on plaintiff's expenses, or the minor child's expenses which defendant pays, before concluding that plaintiff is a dependent spouse and entering an order for permanent alimony[.]" Defendant contends that the trial court's findings of fact with regard to plaintiff's and the child's expenses were insufficient to support its conclusion that plaintiff was a dependent spouse. We conclude that defendant's argument has merit.

N.C. Gen. Stat. § 50-16.1A(2) (2016) defines a dependent spouse as "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.3A(a) (2016) states that when a party applies for alimony, the "court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section."

"In all non-jury trials, the trial court must specifically find 'those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached.' " *Carpenter v. Carpenter*, __ N.C. App. __, __, 781 S.E.2d 828, 832 (2016) (quoting *Crocker v. Crocker*, 190 N.C. App. 165, 168, 660 S.E.2d 212, 214 (2008) (internal quotation marks omitted)). Pursuant to N.C. Gen. Stat. § 50-16.3A(a), a party is entitled to alimony if the court finds that the party "is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors[.]" This Court has previously held:

> A "dependent spouse" must be either actually substantially dependent upon the other spouse or substantially in need of maintenance and support from the other spouse. . . . A party is "actually substantially dependent" upon her spouse if she is currently unable to meet her own maintenance and support. A party is "substantially in need of maintenance and support" if she will be unable to meet her needs in the future, even if she is currently meeting

> those needs. If the trial court determines that a party's reasonable monthly expenses exceed her monthly income, and that she has no other means with which to meet those expenses, it may properly conclude the party is dependent.

Carpenter, __ N.C. App. at __, 781 S.E.2d at 832-33 (citing *Barrett v. Barrett*, 140 N.C. App. 369, 370-71, 536 S.E.2d 642, 644 (2000) (internal citation omitted)), and *Beaman v. Beaman*, 77 N.C. App. 717, 723, 336 S.E.2d 129, 132 (1985)).

In order to decide whether a party is substantially in need of maintenance and support, and thus is a dependent spouse, "the court must determine whether [that] spouse would be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other." *Vadala v. Vadala*, 145 N.C. App. 478, 481, 550 S.E.2d 536, 538 (2001). As a result, in order to determine whether a party is a dependent spouse, "the trial court must look at the parties' income and expenses in light of their accustomed standard of living." *Helms v. Helms*, 191 N.C. App. 19, 24, 661 S.E.2d 906, 910 (2008) (citing *Williams v. Williams*, 299 N.C. 174, 182, 261 S.E.2d 849, 856 (1980)). If the trial court fails to make findings regarding the parties' expenses, we must remand for entry of additional findings. *Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000).

In the present case, the court's alimony order does not include any findings as to plaintiff's expenses. On appeal, plaintiff notes that in its order the trial court stated that "the Court takes Judicial Notice of all prior Orders entered in this file number and the same are incorporated herein as if by reference." **(Rp 109)** However, the "general incorporation of all findings from other court documents is not sufficiently specific to demonstrate whether the trial judge properly considered the statutory factors for awarding alimony . . . [and] these findings of fact cannot be considered in determining whether the court's findings of fact are adequate under N.C.G.S. § 50-16.3A." *Crocker*, 190 N.C. App. at 170, 660 S.E.2d at 215. We conclude that the trial court's order must be reversed and remanded for entry of additional findings concerning the parties' expenses.

Inclusion of the Child's Social Security Income in Alimony Calculations

[10] Defendant also argues that the trial court "abused its discretion when it included the child's social security income in the defendant's income calculation, in the alimony order." We conclude that defendant has failed to show that the trial court's error in this regard, if any, was prejudicial.

The North Carolina Child Support Guidelines provide that, for purposes of determining a party's child support obligation, "Social Security benefits received for the benefit of a child as a result of the . . . retirement of either parent are included as income attributed to the parent on whose earnings record the benefits are paid, but are deductible from that parent's child support obligation." It is less clear whether such benefits are appropriately considered in the court's ruling on alimony. N.C. Gen. Stat. § 50-16.3A(b)(4) directs the court, in determining the amount and duration of alimony, to consider the "amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others[.]" Although the statute references "social security," it does not address the proper treatment of social security benefits received by a party on behalf of a child.

In this case, defendant included social security benefits received on behalf of the parties' minor child in his 2015 financial affidavit, as noted by the trial court in its alimony order. The trial court made findings pertaining to the parties' accustomed standard of living and other factors relevant to an award of alimony, including defendant's liability for child support, and concluded that plaintiff was entitled to alimony in the amount of $1250 a month. We have held that this order must be reversed and remanded for entry of additional findings. We conclude, however, that defendant has failed to show that he was prejudiced by the trial court's inclusion of social security benefits received by defendant on behalf of the minor child in its alimony order. Defendant is not entitled to relief on the basis of this argument.

Imputation of Additional Income to Defendant

[11] Defendant also argues on appeal that the trial court "abused its discretion in the child support order when it imputed additional income to defendant, after improperly finding that defendant was deferring income in bad faith, with naive indifference to the reasonable needs of the child, for the purpose of minimizing his support obligation." Defendant contends that the trial court's findings of fact do not support this conclusion.

The North Carolina Child Support Guidelines ("the Guidelines") state:

> (3) Potential or Imputed Income. If the court finds that the parent's voluntary unemployment or underemployment is the result of the parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income. . . .

In the present case, the child support order included the following findings of fact relevant to defendant's potential sources of income, in addition to his retirement and social security benefits:

> 18. After equitable distribution, and based upon the Defendant's 2015 form 4 affidavit and Defendant's exhibit 15, Defendant's gross monthly income consists of the following:
>
> | | |
> |---|---|
> | FERS Pension: | $3136 |
> | Social Security: | $2026 |
> | Social Security for [the child]: | $1262 |
> | TOTAL: | $6424 |
>
> 19. The Defendant has acknowledged, however, deferring income that he could be receiving from an IRA Account, a Trust Account and an Aviva Annuity. The Court finds that the Defendant could receive the following monthly income, from these accounts:
>
> | | |
> |---|---|
> | Aviva Annuity: | $2488 . . . |
> | IRA: | $2812 . . . |
> | ADJUSTED TOTAL | $11,724 |
>
> 20. The Court finds that the Defendant is suppressing income by deferring income, in bad faith and with naive indifference to the reasonable needs of the minor child, for the purpose of minimizing his support obligations.
>
> 21. The minor child's reasonable needs are not met without imputing the income that the Defendant seeks to defer in a guideline calculation.
>
> 22. The Defendant's income, for guideline purposes is $11,724, being the total of income actually received by the Defendant, and income being deferred by the Defendant.

Defendant is correct that, in its order, the trial court characterized its consideration of defendant's potential investment income as "imputing" income to defendant based upon defendant's deliberate deferral of available income. However, a trial court has the discretion to consider all sources of a parent's income and is not required to make findings that will support imputation of income before considering income from investments. For example, in *Burnett v. Wheeler*, 128 N.C. App. 174, 493 S.E.2d 804 (1997), the defendant argued that the trial court had erred by

imputing additional income to him without making the requisite findings. We rejected the defendant's interpretation of the court's order and held that:

> The amount of child support awarded is in the discretion of the trial judge and will be disturbed only upon a showing of abuse of that discretion. Defendant is correct in his contention that a person's capacity to earn income may be the basis of an award only if there is a finding that the party deliberately depressed his income or otherwise acted in deliberate disregard of the obligation to provide[] reasonable support for the child. However, we find that defendant mischaracterizes Judge Foster's order. Judge Foster did not "impute" an income of $ 77,000 to defendant. A careful review of the record reveals that the trial court found that defendant's total income, from all available sources, equaled at least $77,000. When setting child support and determining the defendant's gross income, it is appropriate to consider all sources of income along with the defendant's earning capacity. *See North Carolina Child Support Guidelines*. The trial court found as fact that defendant had retirement accounts which totaled $722,384 and that he had stocks and land valued at $60,000 and $74,000, respectively. . . . We find that the trial court did not impute any income to defendant and therefore overrule this assignment of error.

Burnett, 128 N.C. App. at 177, 493 S.E.2d at 806 (citations omitted) (emphasis added). Thus, *Burnett* upheld the trial court's inclusion of defendant's potential income from real estate and investments in the absence of a finding by the court that it was "imputing" such income to the defendant on the basis of the defendant's capacity to earn. We conclude that the trial court had the discretion to consider defendant's potential investment income, and do not reach the issue of whether the evidence supported the court's findings regarding imputed income.

Remaining Issues

[12] Defendant has raised two other issues. Defendant argues that the trial court abused its discretion by using "two different incomes for [defendant's] income for purposes of calculating child support and alimony," and that the court abused its discretion by largely adopting the terms of a proposed order submitted by plaintiff. Defendant does not support either of these arguments by citation to authority and we

conclude that defendant is essentially asking us to reweigh the evidence, which we will not do. "Although a party may disagree with the trial court's credibility and weight determinations, those determinations are solely within the province of the trial court." *Smith v. Smith*, __ N.C. App. __, __, 786 S.E.2d 12, 29 (2016) (quotation omitted).

Conclusion

For the reasons discussed above, we conclude that the trial court's alimony order must be reversed and remanded for entry of additional findings concerning the parties' expenses. We conclude that the trial court did not otherwise err and that in all other respects, its equitable distribution, child support and alimony orders should be affirmed.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge CALABRIA concur.

TIMOTHY LESH, PLAINTIFF
v.
MARGARET S. LESH, DEFENDANT

No. COA17-399

Filed 16 January 2018

1. Divorce—equitable distribution—marital property—military disability benefits

The trial court did not err by denying plaintiff husband's motion under N.C. Rule of Civil Procedure 60(b) to set aside a portion of the parties' equitable distribution order. Federal law did not prohibit plaintiff husband's veteran's military disability benefits from being considered as income for purposes of satisfying a distributive award to his former spouse pursuant to an equitable distribution order.

2. Contempt—civil contempt—equitable distribution—present ability to pay—willful refusal

The trial court did not err by holding plaintiff husband in civil contempt for his failure to make monthly distributive payments required by an equitable distribution order, where the trial court found that defendant possessed the present ability to pay the full court-ordered support obligation. Further, defendant failed to show

that the trial court erred in determining that his failure to make the distributive payments was willful.

Appeal by plaintiff from order entered 27 January 2017 by Judge Meader W. Harriss, III, in Currituck County District Court. Heard in the Court of Appeals 19 September 2017.

The East Carolina Law Group, by Timothy P. Koller, for plaintiff-appellant.

The Twiford Law Firm, PC, by Courtney S. Hull, for defendant-appellee.

DAVIS, Judge.

The primary issue in this appeal is whether federal law prohibits a veteran's military disability benefits from being considered as income for purposes of satisfying a distributive award to his former spouse pursuant to an equitable distribution order. Timothy Lesh ("Mr. Lesh") appeals on federal preemption grounds from the trial court's order denying his motion pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure to set aside a portion of the parties' equitable distribution order and holding him in civil contempt for failing to make payments required under that order. Because we conclude that federal law does not preclude the treatment of his disability payments as income for this purpose, we affirm.

Factual and Procedural Background

Mr. Lesh was married to Margaret S. Lesh ("Ms. Lesh") on 14 October 1989. On 1 December 2012, the parties separated, and they divorced on 16 September 2014. On 1 August 2014, Mr. Lesh filed a complaint for absolute divorce in Currituck County District Court. Ms. Lesh filed an answer and counterclaim on 27 August 2014, seeking post-separation support, alimony, and equitable distribution of the parties' marital property.

On 22 and 23 February 2016, a hearing was held before the Honorable Meader W. Harriss, III. On 13 April 2016, the trial court entered an order (the "Equitable Distribution Order") distributing 75% of the marital estate to Mr. Lesh and 25% to Ms. Lesh. The court further concluded that "[i]n order for [Ms. Lesh] to receive her share of the net marital estate, it is necessary for [Mr. Lesh] to pay [Ms. Lesh] a distributive award in the sum of $31,590.59, which reflects her 25% of the estate minus the $3,010.00 value of the marital property hereby distributed to her and in

her possession." The trial court ordered that this distributive award "be paid in monthly installments in the amount of $877.22, the first of which is due April 1, 2016 to continue to be due the first of the month every month until said sum is paid in full." The Equitable Distribution Order further permitted Mr. Lesh to "pay off the remaining balance of the lump sum at any time, in lieu of continuing monthly installment payments."

On 11 May 2016, Mr. Lesh filed a notice of appeal from the Equitable Distribution Order. However, he dismissed his appeal on 28 July 2016. On 8 August 2016, Mr. Lesh filed a motion in the cause pursuant to Rule 60(b) seeking to set aside the portion of the Equitable Distribution Order requiring his monthly payments of the distributive award. In this motion, he contended that the Equitable Distribution Order was an "irregular" judgment because it would require him to use his military disability benefits to make the distributive award payments despite the fact that federal law preempted the trial court's ability to require him to do so.

On 7 September 2016, Ms. Lesh filed a motion for contempt, requesting that the trial court hold Mr. Lesh in contempt for "fail[ing] and refus[ing] to comply with [the Equitable Distribution] Order in that [he] ha[d] not made any payments to [her] . . . and his failure to comply [wa]s willful, without just cause or excuse." A hearing on Mr. Lesh's motion in the cause and Ms. Lesh's motion for civil contempt was held on 17 October 2016. On 27 January 2017, the trial court entered an order captioned "Amended[1] Order of Contempt" denying Mr. Lesh's motion under Rule 60(b) and granting Ms. Lesh's motion for civil contempt. Mr. Lesh filed a timely notice of appeal.

Analysis

On appeal, Mr. Lesh argues that the trial court erred by (1) denying his Rule 60(b) motion to set aside the portion of the Equitable Distribution Order requiring monthly distributive payments based on his contention that his only source of income is his military disability benefits, which under federal law cannot be distributed as divisible property; and (2) holding him in civil contempt for failing to make the monthly payments required by the Equitable Distribution Order. We address each argument in turn.

I. Denial of Rule 60(b) Motion

[1] Mr. Lesh argues that the trial court erred by denying his motion under Rule 60(b)(6) because the Equitable Distribution Order was an

1. It appears that an initial contempt order was entered on 18 January 2017. However, that initial order is not contained in the record on appeal.

irregular judgment. Specifically, he contends that the order was irregular because it required him to make monthly payments of the distributive award despite the trial court's awareness that the entirety of his monthly income was comprised of his military disability benefits.

Ms. Lesh, conversely, contends that this portion of his appeal lacks merit due to the fact that he withdrew his appeal of the Equitable Distribution Order and therefore lost his right to challenge the validity of that order. She further contends that his motion in the cause was defective due to the fact that Rule 60(b)(6) cannot be used as a substitute for appeal.

A. Applicability of Rule 60(b)(6)

Rule 60(b) states, in pertinent part, as follows:

> (b) ***Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.*** — On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void;
>
> (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. R. Civ. P. 60(b).

Rule 60(b)(6) "serves as a grand reservoir of equitable power by which a court may grant relief from a judgment whenever extraordinary circumstances exist and there is a showing that justice demands

it." *Dollar v. Tapp*, 103 N.C. App. 162, 163-64, 404 S.E.2d 482, 483 (1991) (citation and quotation marks omitted). We have held that "[a] party seeking to set aside an irregular judgment may properly do so by filing a motion for relief from judgment pursuant to Rule 60(b)(6)." *Brown v. Cavit Scis., Inc.*, 230 N.C. App. 460, 464, 749 S.E.2d 904, 908 (2013) (citation omitted). "It is well settled, however, that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments." *Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 210, 450 S.E.2d 554, 557 (1994) (internal citations omitted). "We review the denial of a motion pursuant to Rule 60(b)(6) for an abuse of discretion." *Sharyn's Jewelers, LLC v. Ipayment, Inc.*, 196 N.C. App. 281, 284, 674 S.E.2d 732, 735 (2009) (citation omitted).

Our Supreme Court has explained the distinction between irregular, erroneous, and void judgments as follows:

> A judgment may be valid, irregular, erroneous, or void. . . . An irregular judgment is one rendered contrary to the course and practice of the court, as for example, at an improper time; or against an infant without a guardian; or by the court on an issue determinable by the jury; or where a plea in bar is undisposed of; or where the debt sued on has not matured; and in other similar cases (citing authorities). An erroneous judgment is one rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles, as where, judgment is given for one party when it [should] have been given for another; or where the pleadings require several issues and only one is submitted; or where the undenied allegations of the complaint are not sufficient to warrant a recovery; and in other cases involving a mistake of law (citing authorities). . . . A void judgment is one that has semblance but lacks some essential element, as jurisdiction or service of process.

Wynne v. Conrad, 220 N.C. 355, 359-60, 17 S.E.2d 514, 518 (1941) (internal citations and quotation marks omitted).

"The correct procedure for attacking a judgment is dependent upon the type of defect asserted." *Burton v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 383 (1992).

> The last subsection of Rule 60(b) authorizes the court to relieve a party from the operation of a judgment for any

> other reason not enumerated in the first five clauses. While Rule 60(b)(6) and the first five clauses of this rule are mutually exclusive, clause (6) should not be characterized as a catchall provision. Rule 60(b)(6) is not intended as substitute relief for reasons that would be deficient if asserted under one of the other five clauses, *or where the facts would more appropriately support one of the five preceding clauses*.

G. Gray Wilson, North Carolina Civil Procedure § 60-11 (3d ed. 2007) (internal citations omitted and emphasis added); *see also Norton v. Sawyer*, 30 N.C. App. 420, 426, 227 S.E.2d 148, 153 ("Rules 60(b)(1) and 60(b)(6) were mutually exclusive, so that any conduct which generally fell under the former could not stand as a ground for relief under the latter."), *disc. review denied*, 291 N.C. 176, 229 S.E.2d 689 (1976).

"A Rule 60(b)(4) motion is . . . proper where a judgment is 'void' as that term is defined by the law." *Burton*, 107 N.C. App. at 616, 421 S.E.2d at 382. As noted above, "[a] judgment is void . . . when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered." *Id.* (citations omitted).

In the present case, Mr. Lesh is erroneously invoking Rule 60(b)(6) to set aside, in part, a judgment that he is contending is *void* — based on his assertion that the trial court lacked the authority to order him to make distributive award payments from funds that are exempt from distribution under federal law. Such an argument would have been procedurally proper under Rule 60(b)(4). However, he has failed to show that the Equitable Distribution Order was *irregular* and thus subject to being set aside under Rule 60(b)(6).

However, because Mr. Lesh's substantive argument is based on a recent United States Supreme Court case — *Howell v. Howell*, __ U.S. __, 137 S. Ct. 1400, 197 L. Ed. 2d 781 (2017) — that had not been decided at the time of the trial court's Equitable Distribution Order or its order denying his Rule 60(b) motion, we elect to exercise our discretion under Rule 21 of the North Carolina Rules of Appellate Procedure and treat his appeal as a petition for *certiorari*. *See Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606, 596 S.E.2d 285, 289 (2004) (treating appeal as a petition for writ of *certiorari*), *disc. review denied*, 359 N.C. 643, 617 S.E.2d 662 (2005); *see also Hill v. StubHub*, Inc., 219 N.C. App. 227, 232, 727 S.E.2d 550, 554 (2012) (granting *certiorari* where judicial review would promote judicial economy and appeal involved issues of first impression in North Carolina), *disc. review denied*, 366 N.C. 424, 736 S.E.2d 757 (2013).

B. Federal Preemption

Mr. Lesh's argument is that the doctrine of federal preemption prohibits state courts from ordering persons receiving military disability benefits to make distributive payments to their former spouses where the trial court has reason to know that the funds used to make the distributive payments will include those benefits. In order to analyze Mr. Lesh's argument, it is helpful to review the federal statutes and applicable case law bearing on this issue.

Pursuant to 10 U.S.C. § 3911, *et seq.*, "[m]embers of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with retired pay." *Mansell v. Mansell*, 490 U.S. 581, 583, 104 L. Ed. 2d 675, 681 (1989). The amount of retired pay a veteran is entitled to receive is calculated according to the number of years served and rank achieved. *Id.* In addition, pursuant to 38 U.S.C. §§ 310 and 311, "[v]eterans who became disabled as a result of military service are eligible for disability benefits[,]" which are calculated "according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired." *Id.* at 583, 104 L. Ed. 2d at 681-82.

However, federal law prevents a veteran from receiving *both* retired pay and disability benefits. Thus, "[i]n order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay." *Id.* at 583, 104 L. Ed. 2d at 682.

Generally, "federal law . . . preempt[s] state law with regard to all military payments except 'disposable retired or retainer pay' . . . ." *Hillard v. Hillard*, 223 N.C. App. 20, 23, 733 S.E.2d 176, 179 (2012), *disc. review denied*, 366 N.C. 432, 736 S.E.2d 490 (2013). The Uniformed Services Former Spouses' Protection Act ("USFSPA") authorizes state courts to treat "disposable retired or retainer pay" as property divisible upon divorce that can be distributed to a former spouse. *See id.*

However, although the USFSPA classifies military *retired* pay as "disposable retired or retainer pay," the statute does not include military *disability* benefits within the definition of "disposable retired or retainer pay." *Id.* at 22-23, 733 S.E.2d at 179 (emphasis added). Thus, military disability benefits "cannot be classified as marital property subject to distribution" and are instead "treated as the retiree's separate property." *Id.* at 23, 733 S.E.2d at 179 (citations omitted).

"Because disability benefits are exempt from federal, state, and local taxation, military retirees who waive their retirement pay in favor

of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common." *Mansell*, 490 U.S. at 583-84, 104 L. Ed. 2d at 682 (internal citation omitted).

Mr. Lesh's argument straddles two lines of cases from the United States Supreme Court. The first line of cases follows *Mansell* and stands for the proposition that federal law preempts state courts from ordering the division of military disability benefits and the distribution of these benefits to a veteran's former spouse. The second line of cases follows *Rose v. Rose*, 481 U.S. 619, 95 L. Ed. 2d 599 (1987), and permits state courts to consider military disability benefits as income for purposes of calculating a veteran's ability to fulfill support obligations.

As noted above, Mr. Lesh is contending in this appeal that the United States Supreme Court's recent decision in *Howell* constituted a substantive change in the law on this subject. Therefore, in order to fully address Mr. Lesh's argument, we must first review the state of the law as it existed prior to *Howell* and then determine whether — and to what extent — *Howell* changed the law as it applies to Mr. Lesh's obligations under the Equitable Distribution Order.

In *Mansell*, a husband and wife entered into a property settlement upon their divorce in which the husband agreed to pay the wife 50% of his total military retirement pay, "including that portion of retirement pay waived so that [he] could receive disability benefits." *Mansell*, 490 U.S. at 585-86, 104 L. Ed. 2d at 683. Four years later, the husband made a motion to modify the divorce decree, requesting that the trial court remove the provision requiring him to share his total retirement pay with his ex-wife. *Id.* at 586, 104 L. Ed. 2d at 683. The trial court denied the request, and California's appellate courts affirmed this decision. *Id.* at 587, 104 L. Ed. 2d at 684.

The United States Supreme Court reversed. The Court examined the statutory definition of "disposable retired or retainer pay" contained in 10 U.S.C. § 1408(a)(4) and the complementary provisions contained in 10 U.S.C. § 1408(c) that limit property divisible upon divorce to "disposable retired pay." *Id.* at 590-92, 104 L. Ed. 2d at 686-87. The Supreme Court then stated as follows:

> [T]he view that the [USFSPA] is solely a garnishment statute and therefore not intended to pre-empt the authority of state courts is contradicted not only by § 1408(c)(1), but also by the other subsections of § 1408(c). Sections 1408(c)(2), (c)(3), and (c)(4) impose new substantive limits on state courts' power to divide military retirement pay.

> Section 1408(c)(2) prevents a former spouse from transferring, selling, or otherwise disposing of her community interest in the military retirement pay. Section 1408(c)(3) provides that a state court cannot order a military member to retire so that the former spouse can immediately begin receiving her portion of military retirement pay. And § 1408(c)(4) prevents spouses from forum shopping for a State with favorable divorce laws. Because each of these provisions pre-empts state law, the argument that the Act has no pre-emptive effect of its own must fail. Significantly, Congress placed each of these substantive restrictions on state courts in the same section of the Act as § 1408(c)(1). We think it unlikely that every subsection of § 1408(c), except § 1408(c)(1), was intended to pre-empt state law.

Id.

The Court further ruled that "the legislative history, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees." *Id.* at 594, 104 L. Ed. 2d at 688. Thus, the Court held that "the [USFSPA] does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 594-95, 104 L. Ed. 2d at 689.

Since *Mansell*, North Carolina courts have held that military disability benefits cannot be considered marital property and therefore are not subject to distribution. *See*, *e.g.*, *Halstead v. Halstead*, 164 N.C. App. 543, 547, 596 S.E.2d 353, 356 (2004) ("Disability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage."); *Bishop v. Bishop*, 113 N.C. App. 725, 734, 440 S.E.2d 591, 597 (1994) (holding that defendant's military income based on "service related disability retirement" could not be classified as marital property).

Although *Mansell* is controlling on the issue of whether military disability benefits can be *distributed*, it does not answer the separate question of whether such benefits can be considered *income* for purposes of determining the financial ability of a veteran to pay a distributive award. On this latter question, we must examine the United States Supreme Court's decision in *Rose* in which the United States Supreme Court addressed the extent to which trial courts can consider military disability benefits as "income" for purposes of calculating support obligations.

In *Rose*, a disabled veteran whose main source of income was his military disability benefits was held in contempt for failing to pay child support to his ex-wife. He argued that the state court was preempted from enforcing the child support payment by 38 U.S.C. § 3101(a), which provided that veterans' benefits payments could not be subject to attachment, levy, or seizure. *Rose*, 481 U.S. at 620-22, 95 L. Ed. 2d at 605. He contended that because his only means of satisfying his child support obligation was by using his veterans' disability benefits, the court was effectively ordering him to make payments in violation of federal law. *Id.*

The Supreme Court rejected this argument, concluding that the state court could "consider disability benefits as part of the veteran's income in setting the amount of child support to be paid." *Id.* at 626, 95 L. Ed. 2d at 608 (emphasis omitted). The Court "d[id] not agree that . . . the state court's award of child support from appellant's disability benefits does major damage to any clear and substantial federal interest created by this statute." *Id.* at 628, 95 L. Ed. 2d at 609 (quotation marks omitted). In so ruling, the Court held that "[n]either the Veterans' Benefits provisions of Title 38 nor the garnishment provisions of the Child Support Enforcement Act of Title 42 indicate unequivocally that a veteran's disability benefits are provided solely for that veteran's support." *Id.* at 636, 95 L. Ed. 2d at 614. Thus, the United States Supreme Court has permitted military disability benefits to be classified as income for purposes of the fulfillment of a veteran's child support obligations.

We are also guided by the North Carolina Supreme Court's decision in *Comstock v. Comstock*, 240 N.C. 304, 771 S.E.2d 602 (2015). In *Comstock*, the defendant possessed a U.S. Trust IRA as his separate property, and the trial court concluded that it could not be classified as a marital asset. However, in ordering distributive payments during equitable distribution, the trial court included the trust account in determining the defendant's available income for purposes of satisfying the distributive award. *Id.* at 321, 771 S.E.2d at 614.

On appeal, the defendant argued that the trial court had improperly considered the trust account as income from which he could pay a distributive award. Our Supreme Court rejected his argument, stating the following:

> Here, the U.S. Trust IRA was not a marital asset as the parties stipulated that it was defendant's separate property. As such, it was not subject to division through equitable distribution . . . . However, defendant's U.S. Trust IRA, a separate liquid asset, was available as a resource from which the trial court could order a distributive award.

Id. at 321, 771 S.E.2d at 614 (internal citation omitted). Thus, because the trial court did not distribute the asset and was instead merely considering it as a source of income for purposes of distributive payments, our Supreme Court held that the distributive award did not violate North Carolina law. *Id.*

Our analysis of *Mansell*, *Rose*, and *Comstock* leads us to the following conclusion: In equitable distribution cases where a trial court is considering a veteran's income for the purpose of ordering payment of a distributive award, the court may treat the veteran's military benefits as income from which he can make distributive payments, but the court cannot actually treat the military disability benefits as marital property to be divided. *See id.* at 321, 771 S.E.2d at 614. The only remaining question is whether the United States Supreme Court's decision in *Howell* materially alters this conclusion. We conclude that it does not.

In *Howell*, a husband and wife divorced, and an Arizona trial court entered an order awarding the wife 50% of the husband's future Air Force retirement pay, which she began to receive when he retired the following year. Thirteen years later, the Department of Veterans Affairs determined that the husband was partially disabled due to an earlier service-related injury. In order to receive military disability benefits, the husband elected to waive an equivalent amount of his military veteran's retirement pay. *Howell*, __ U.S. at __, 137 S. Ct. at 1401, 197 L. Ed. 2d at 783. After the wife petitioned to enforce the original order, the Arizona court entered an order restoring her share of the husband's retired pay. The Arizona Supreme Court attempted to distinguish *Mansell* in holding that federal law did not preempt the trial court's order distributing the husband's military disability benefits to the wife. *Id.* at __, 137 S. Ct. at 1401, 197 L. Ed. 2d at 783.

On appeal, the wife contended that she had a vested interest in her ex-husband's military veteran's retirement pay despite the fact that he had elected to waive these payments in the future. *Id.* at __, 137 S. Ct. at 1404, 197 L. Ed. 2d at 787. She argued that because the husband had waived $250 of this retirement pay by election in order to instead receive military disability benefits, he had reduced her 50% share in his benefits. Thus, she asserted, she was entitled to a 50% share of her husband's total retirement pay, including the military disability benefits. *Id.* at __, 137 S. Ct. at 1404, 197 L. Ed. 2d at 787-88.

The United States Supreme Court held that the Arizona court could not order the husband to indemnify his divorced spouse for the loss of her portion of his retirement pay resulting from his waiver. The Court

held that pursuant to 38 U.S.C. § 5301 "federal law . . . [has] completely pre-empted the application of state community property law to military retirement pay." *Id.* at __, 137 S. Ct. at 1403, 197 L. Ed. 2d at 786 (citation and quotation marks omitted).

> We see nothing in this circumstance that makes the reimbursement award to [the wife] any the less an award of the portion of military retirement pay that [the husband] waived in order to obtain disability benefits. And that is the portion that Congress omitted from the Act's definition of "disposable retired pay," namely, the portion that federal law prohibits state courts from awarding to a divorced veteran's former spouse. That the Arizona courts referred to [the wife's] interest in the waivable portion as having "vested" does not help. State courts cannot "vest" that which (under governing federal law) they lack the authority to give. Accordingly, while the divorce decree might be said to "vest" [the wife] with an immediate right to half of [the husband's] military retirement pay, that interest is, at most, contingent, depending for its amount on a subsequent condition: [the husband's] possible waiver of that pay.

Id. at __, 137 S. Ct. at 1405-06, 197 L. Ed. 2d at 788 (citation and quotation marks omitted).

The Supreme Court further held that because 38 U.S.C. § 5301 prohibits military benefits from being assignable by state courts, the Arizona court was prohibited from requiring the husband to reimburse or indemnify the wife for the cost of his waiver after the entry of the divorce decree. *Id.* at __, 137 S. Ct. at 1406, 197 L. Ed. 2d at 788. In so ruling, the Court stated as follows:

> Neither can the State avoid *Mansell* by describing the family court order as an order requiring [the husband] to "reimburse" or to "indemnify" [the wife], rather than an order that divides property. The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, *i.e.*, to restore that portion of retirement pay lost due to the postdivorce waiver. And we note that here, the amount of indemnification mirrors the waived retirement pay, dollar for dollar. Regardless of their form, such reimbursement and indemnification

> orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted.

Id. at __, 137 S. Ct. at 1406, 197 L. Ed. 2d at 788.

Therefore, while *Howell* reaffirms and clarifies the holding in *Mansell*, it has no effect on the *Rose* line of cases. Thus, *Howell* does not change our analysis in the present case.

Here, as discussed above, the Equitable Distribution Order required Mr. Lesh to pay Ms. Lesh a distributive award in the amount of $31,590.59 by means of monthly installments of $877.22. The trial court did not attempt to treat Mr. Lesh's military disability benefits as marital property. Indeed, to the contrary, the Equitable Distribution Order expressly stated the following:

> b. *Husband's Military Medical Retirement*: The parties stipulated that because Husband receives military disability retired pay, which is exempt from division pursuant to 10 U.S.C. 1408, said property is separate.

Accordingly, the military disability benefits were excluded by the trial court in calculating the total amount of marital property eligible to be divided upon the parties' divorce.

In attempting to rely upon *Howell*, Mr. Lesh is apparently contending that the trial court's order effectively requires him to "reimburse" or "indemnify" Ms. Lesh the amount that she would have received had he not elected to waive his retirement pay in order to receive his military disability benefits. However, this characterization of the Equitable Distribution Order is incorrect. The trial court's Equitable Distribution Order simply does not involve the type of issue addressed in *Howell*.

Nothing in *Howell* alters the holding in *Rose* that military disability benefits are not required to be excluded from the definition of income for purposes of calculating the resources a party can draw upon to fulfill child support obligations. *See Rose*, 481 U.S. at 636, 95 L. Ed. 2d at 614. As our Supreme Court held in *Comstock*, a similar principle applies to distributive awards. Therefore, the trial court properly determined that federal law did not preempt the portion of the Equitable Distribution Order requiring Mr. Lesh to make distributive payments. Accordingly, Mr. Lesh's argument on this issue is overruled.[2]

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2. In her appellate brief, Ms. Lesh has sought sanctions against Mr. Lesh pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure for appealing the denial of his

II. Civil Contempt

[2] Mr. Lesh's final argument is that the trial court erred by holding him in civil contempt for his failure to make the monthly distributive payments required by the Equitable Distribution Order. We disagree.

> The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. When the trial court fails to make sufficient findings of fact and conclusions of law in its contempt order, reversal is proper.

Thompson v. Thompson, 223 N.C. App. 515, 518, 735 S.E.2d 214, 216 (2012) (internal citations omitted). N.C. Gen. Stat. § 5A-21 states as follows:

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21 (2015).

Mr. Lesh contends that the trial court erred by concluding that (1) he had the present ability to pay the distributive award; and (2) his failure to comply with the order was willful. In its 27 January 2017 order, the trial court made the following pertinent findings of fact:

> 6. [Mr. Lesh] has failed to comply with the terms of the aforesaid Order in that [Mr. Lesh] has failed to pay the distributive award to [Ms. Lesh] or make any payments thereon.

Rule 60(b)(6) motion. In our discretion, we decline to impose sanctions under Rule 34. *See State v. Hudgins*, 195 N.C. App. 430, 436, 672 S.E.2d 717, 721 (2009) ("In our discretion, we do not impose sanctions upon counsel pursuant to Rule 34.").

7. [Mr. Lesh]'s non-compliance with the aforesaid Order has been willful and without legal justification or excuse in that since the entry of the aforesaid Order, [Mr. Lesh] has had the means and ability whereby to comply with the terms of the aforesaid Order of the Court and presently has the means and ability with which to comply with the aforesaid Order or is able to take measures that would enable him to comply with the said Order.

8. [Mr. Lesh] should be ordered to comply with the order of the Court and held in contempt for his violation thereof.

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

2. The failure of [Mr. Lesh] to comply with the Orders of this Court as hereinabove described is willful, deliberate, and without just cause.

3. [Mr. Lesh] is in civil contempt of this Court's Orders directing him to pay a distributive award to [Ms. Lesh] in the sum of $31,590.59, to be paid in monthly installments in the amount of $877.22, commencing on April 1, 2016 and continuing on the first of the month every month until said sum is paid in full.

. . . .

5. [Mr. Lesh] should pay attorney's fees on behalf of [Ms. Lesh] in the sum of $660.04.

On appeal, Mr. Lesh has not specifically challenged any of the trial court's findings of fact. Therefore, they are binding on appeal. *See 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."). Therefore, we review the trial court's order to determine if the unchallenged findings of fact support its conclusions of law.

First, with regard to the "present ability to pay" prong, this Court has held that

> [a] factual finding that the [individual] has had the ability to pay as ordered supports the legal conclusion that violation of the order was willful; however, standing alone, this

> finding of fact does not support the conclusion of law that [the individual] has the present ability to purge himself of the contempt by paying the arrearages.

Thompson, 223 N.C. App. at 519, 735 S.E.2d at 217 (citation and quotation marks omitted).

Mr. Lesh attempts to rely on cases in which this Court has held that the trial court failed to make specific findings that a defendant possessed the *present* ability to pay the *full* court-ordered support obligation. *See Spears v. Spears*, __ N.C. App. __, __, 784 S.E.2d 485, 495 (2016) (trial court's finding that defendant had ability to "pay *more*" of his support obligation was insufficient to conclude that defendant had the ability to "pay *all*" of his support obligation (quotation marks omitted and emphasis added)); *Teachey v. Teachey*, 46 N.C. App. 332, 333-35, 264 S.E.2d 786, 787-88 (1980) (trial court's finding that defendant "*has* possessed the means with which to comply with the Order" was insufficient to support conclusion that defendant "had the *present* ability to pay" (emphasis added)).

Here, conversely, Mr. Lesh does not argue that the 27 January 2017 order failed to contain findings as to his present ability to pay. Nor could he make such an argument as the court expressly found both that Mr. Lesh "has had the means and ability whereby to comply with the . . . Order" *and* that he "*presently* has the means and ability with which to comply with the . . . Order or is able to take measures that would enable him to comply with the . . . Order." (Emphasis added). Unlike the findings of fact in *Spears* and *Teachey*, this finding meets the requirements of N.C. Gen. Stat. § 5A-21.

Moreover, we note that this finding is supported by competent evidence. Mr. Lesh filed an affidavit in which he stated that he receives monthly income of $5,109.24 and that his monthly expenses (assuming the monthly payment of the distributive award was included) would total $5,001.43. Therefore, even after payment of the distributive award and his other monthly bills, Mr. Lesh would still retain $107.81 per month. While Mr. Lesh contends that such a breakdown of his monthly income fails to take into account the fact that his income consists of his military disability benefits (and is therefore exempt from distribution), this contention is merely derivative of his federal preemption argument, which we have rejected.

Second, Mr. Lesh argues that the willfulness prong has not been met. "This Court has held that willfulness is (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so."

Moss v. Moss, 222 N.C. App. 75, 80, 730 S.E.2d 203, 206 (2012) (citation and quotation marks omitted). A court may find a party's noncompliance to be willful "if there is both knowledge and a stubborn resistance of a trial court directive." *Williams v. Chaney*, __ N.C. App. __, __, 792 S.E.2d 207, 210 (2016) (citation and quotation marks omitted). "However, if the prior order is *ambiguous* such that a defendant could not understand his respective rights and obligations under that order, he cannot be said to have *knowledge* of that order for purposes of contempt proceedings." *Id.* at __, 792 S.E.2d at 210.

Mr. Lesh does not argue that he lacked knowledge of the Equitable Distribution Order or that the order contained any ambiguity. Instead, he simply repeats his federal preemption argument regarding his military disability benefits. Because that argument lacks merit, he has failed to show that the trial court erred in determining that his failure to make the distributive payments was willful. *See Hartsell v. Hartsell*, 99 N.C. App. 380, 393, 393 S.E.2d 570, 578 (1990) (affirming order holding defendant in civil contempt where evidence supported findings that his noncompliance with court order was willful), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).

Conclusion

For the reasons stated above, we affirm the trial court's 27 January 2017 order.

AFFIRMED.

Judges BRYANT and INMAN concur.

JOE WALLACE POWELL, JR., PLAINTIFF
v.
ROBERT KENT AND CYNTHIA YOUNG, DEFENDANTS

No. COA17-708

Filed 16 January 2018

Process and Service—personal injury—uninsured motorist insurance—untimely service

The trial court did not err in a personal injury case by granting summary judgment in favor of unnamed defendant uninsured motorist carrier where it was served after expiration of the three-year statute of limitations under N.C.G.S. § 20-279.21(b)(3)(a).

Appeal by plaintiff from order entered 8 February 2017 by Judge Sharon Tracey Barrett in Haywood County Superior Court. Heard in the Court of Appeals 13 December 2017.

Hyler & Lopez, P.A., by Robert J. Lopez, for plaintiff-appellant.

Sizemore McGee, PLLC, by Charles E. McGee, for unnamed defendant-appellee Mid-Continent Casualty Company.

ARROWOOD, Judge.

Joe Wallace Powell, Jr. ("plaintiff") appeals from an order granting the unnamed defendant, Mid-Continent Casualty Company's ("Mid-Continent") motion for summary judgment. For the reasons stated herein, we affirm the order of the trial court.

I. Background

On 4 February 2009, plaintiff filed a complaint for personal injury against Robert Kent ("defendant Kent") and Cynthia Young ("defendant Young") in case number 09 CVS 156. On the same date, summons were issued against defendants Kent and Young. Service of the summons and complaint on defendants Kent and Young was made on 10 February 2009. On 24 February 2009, summons was issued to Mid-Continent. Service of the summons and complaint as to Mid-Continent was made through the Commissioner of Insurance on 31 March 2009. On 1 October 2013, Mid-Continent filed a motion to dismiss. On 13 December 2013, an order of voluntary dismissal without prejudice and with leave to re-file pursuant to Rule 41(a)(2) of the North Carolina Rules of Civil Procedure was entered.

On 24 February 2014, plaintiff re-filed the action in case number 14 CVS 00168. On the same date, summonses were issued against defendant Kent, defendant Young, and Mid-Continent. Service of the summons and complaint on defendants Kent and Young was made on 3 March 2014. Service of the summons and complaint as to Mid-Continent was made through the Commissioner of Insurance on 20 March 2014 and was received on 24 March 2014. On 2 November 2014, a notice of voluntary dismissal without prejudice as to his claim against Mid-Continent was filed and a stipulated notice of voluntary dismissal without prejudice was filed as to the claims against defendants Kent and Young.

On 26 February 2016, plaintiff re-filed his complaint against defendants Kent and Young in case number 16 CVS 188. Plaintiff alleged as follows: Plaintiff was the owner of a 1997 Chevrolet truck, defendant Kent was the owner of a Chevrolet Silverado truck, and defendant Young was the owner of a Ford F-350 truck. Defendant Kent was in default in the payment of an automobile loan which was secured by the Chevrolet Silverado truck. Plaintiff's employer had contracted with the financial institution which had made the secured loan to defendant Kent to repossess the Chevrolet Silverado. Plaintiff was informed that the Chevrolet Silverado was located on defendant Young's property, and plaintiff, with his wife as passenger, drove his 1997 Chevrolet truck to repossess the Chevrolet Silverado. After taking possession of the Chevrolet Silverado, plaintiff's truck was blocked by a cable and another vehicle, leaving plaintiff unable to return to the public road.

Plaintiff further alleged that after he exited his truck, he saw defendant Kent, driving defendant Young's Ford F-350 truck, drive toward plaintiff's direction. Defendant Kent slammed on the brakes of the Ford F-350 truck, which began "skidding and sliding in the [plaintiff's] direction[.]" While the Ford F-350 was coming to a sliding stop, defendant Kent opened the door in an attempt to exit the truck. The Ford F-350 struck plaintiff "in a glancing blow[,]" causing plaintiff's body to be spun around and into the open driver's side door. Defendant Kent then struck both his Chevrolet Silverado and plaintiff's 1997 Chevrolet truck with a metal bar, causing substantial property damage to both vehicles. Defendant Kent removed items from the Chevrolet Silverado and told plaintiff to leave the property. Defendant Young remained in the vehicle throughout the entire incident. Plaintiff and his wife then left the property in plaintiff's truck, with the Chevrolet Silverado. Based on the foregoing, plaintiff alleged the following claims: negligence, personal injury, and punitive damages as to defendants Kent and Young; uninsured/underinsured coverage claim against Mid-Continent.

On 3 January 2017, Mid-Continent filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Mid-Continent argued that because defendants Kent and Young did not have an insurance policy to provide liability coverage for the claims against them and because Mid-Continent had an insurance policy covering plaintiff's vehicle at the time of the incident, plaintiff's claims against Mid-Continent fell exclusively within the realm of uninsured motorist ("UM") claims, governed by N.C. Gen. Stat. § 20-279.21(b)(3). Mid-Continent, citing several North Carolina cases, contended that the statute of limitations for UM claims requires that UM insurance carriers be served with the summons and complaint no later than three years after the date of injury. Because the automobile accident in this case occurred on 8 February 2006 and Mid-Continent was not served with the summons and complaint until more than six weeks after the expiration of the statute of limitations, Mid-Continent argued that plaintiff's claims against Mid-Continent should be dismissed at summary judgment.

On 8 February 2017, the trial court entered an order granting Mid-Continent's motion for summary judgment and dismissing plaintiff's claims against Mid-Continent.

On 6 March 2017, plaintiff filed timely notice of appeal.

II. Discussion

On appeal, plaintiff's sole argument is that the trial court erred by granting summary judgment in favor of Mid-Continent and dismissing his claims. Specifically, plaintiff contends that he was not required to obtain service upon the UM insurer within three years of the date of injury to be within the statute of limitations time period, that N.C. Gen. Stat. § 20-279.21(b)(3) did not require that a civil summons be issued against the UM insurer, and that he timely served Mid-Continent in accordance with N.C. Gen. Stat. § 20-279.21(b)(3). We disagree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l., Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citation omitted).

N.C. Gen. Stat. § 20-279.21(b)(3)(a) provides that in order for a UM carrier to be bound by a judgment against an uninsured motorist, the insurer must be "served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law[.]" N.C. Gen. Stat. § 20-279.21(b)(3)(a) (2015). Once the insurer has been properly served, it becomes "a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name." *Id.*

N.C. Gen. Stat. § 20-279.21(b)(3)(a) does not specify a time limitation for service of the UM carrier. However, we are bound by our Court's holding in *Thomas v. Washington*, 136 N.C. App. 750, 525 S.E.2d 839, *disc. review denied*, 352 N.C. 598, 545 S.E.2d 223 (2000), which was more recently confirmed in *Davis v. Urquiza*, 233 N.C. App. 462, 757 S.E.2d 327 (2014). *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

In *Thomas*, the plaintiff was injured in an automobile accident on 31 March 1995, when she was struck by an uninsured vehicle. *Thomas*, 136 N.C. App. at 751, 525 S.E.2d at 840. The plaintiff's vehicle was insured by North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") and her policy provided UM coverage for the plaintiff. *Id.* While the plaintiff instituted an action against the defendants within the three-year statute of limitations applicable to automobile negligence actions, and properly served them with the summons and complaint, the plaintiff failed to properly serve Farm Bureau within the statutory time limit. *Id.* at 753, 525 S.E.2d at 841. The plaintiff attempted to argue that because her action against Farm Bureau arose from a contract of insurance, the three-year statute of limitations did not apply, and that her action was kept alive through alias and pluries summonses. *Id.* at 754, 525 S.E.2d at 842. Our Court rejected the plaintiff's arguments, holding that "the three-year tort statute of limitations, which begins running on the date of an accident, also applies to the uninsured motorist carrier[]" and that alias or pluries summonses only extend the action upon defendants who are not served, until such time as service can be made. *Id.* at 754-55, 525 S.E.2d at 842-43. The trial court's order granting the defendant's motion for summary judgment was affirmed. *Id.* at 756, 525 S.E.2d at 843.

In *Davis*, the plaintiffs filed suit against the defendant, an uninsured motorist, seeking monetary damages for personal injuries resulting from a collision that occurred on 15 July 2009. *Davis*, 233 N.C. App. at 462-63, 757 S.E.2d at 329. The plaintiffs contended that Farm Bureau provided UM coverage for the accident in accordance with N.C. Gen. Stat. § 20-279.21(b)(3). *Id.* at 463, 757 S.E.2d at 329. The suit was filed 31 May 2012 and the defendant was served with a copy of the summons and complaint on 29 July 2012. *Id.* at 462-63, 757 S.E.2d at 329. On 2 January 2013, plaintiffs mailed a copy of the summons and complaint to the Commissioner of Insurance, by certified mail, in order to serve Farm Bureau. It was received on 7 January 2013. *Id.* at 463, 757 S.E.2d at 329. Our Court upheld the trial court's dismissal of the plaintiffs' claim against Farm Bureau, stating that mere notice to the UM carrier is insufficient under N.C. Gen. Stat. § 20-279.21(b)(3)(a); "the carrier must be formally served with process." *Id.* at 464, 757 S.E.2d at 330. Relying on the holding in *Thomas*, our Court stated that "[t]he applicable statute of limitations for personal injury in tort, and for service on a UM carrier, arising out of an automobile accident is three years." *Id.* at 466, 757 S.E.2d at 331 (citing N.C. Gen. Stat. § 1-52(16) and *Thomas*). The Court reiterated that "[w]here a plaintiff seeks to bind an uninsured motorist carrier to the result in a case, the carrier must be served by the traditional means of service, within the limitations period." *Id.* at 467, 757 S.E.2d at 332.

The holdings in *Thomas* and *Davis* appear to be inconsistent with other applications of the statute of limitation which hold that cases are timely when filed within the statute of limitation, with service of process permitted within the time frames set forth in Rule 4 of the North Carolina Rules of Civil Procedure, even when service is accomplished after the statute of limitation has expired. While we are unable to discern any requirement in N.C. Gen. Stat. § 20-279.21(b)(3)(a) that specifically requires in an uninsured motorist action that service of process also be accomplished before the date the statute of limitation expires, we are bound by the prior determinations in *Thomas* and *Davis*. Given this inconsistent application of the statutes of limitation for similarly situated litigants, this situation appears ripe for determination or clarification by our Supreme Court or the Legislature.

In the present case, the automobile accident occurred on 8 February 2006. In accordance with the decisions discussed above, the three-year statute of limitations applicable to automobile negligence actions expired on 8 February 2009. Although plaintiff instituted an action within the limitations period and properly served defendants Kent and Young,

Mid-Continent was not served with the summons and complaint until 31 March 2009, outside of the three-year statute of limitations. Accordingly, we are compelled to hold that the trial court did not err by granting summary judgment in favor of Mid-Continent.

AFFIRMED.

Judges STROUD and ZACHARY concur.

BRENDA LEMUS RODRIGUEZ, Plaintiff
v.
LILIANA SILVERIO LEMUS, Defendant

No. COA16-1285

Filed 16 January 2018

Alienation of Affections—criminal conversation—sufficiency of findings of fact—post-separation conduct used to corroborate pre-separation conduct

The trial court did not err in an alienation of affection and criminal conversation case by finding that defendant had engaged in sexual conduct with plaintiff's spouse prior to their date of separation. Evidence of post-separation conduct may be used to corroborate evidence of pre-separation conduct so long as the evidence of pre-separation conduct is sufficient to give rise to more than mere conjecture.

Appeal by Defendant from judgment entered 25 July 2016 by Judge Timothy S. Kincaid in Catawba County Superior Court following trial without a jury. Heard in the Court of Appeals 15 May 2017.

No brief filed on behalf of Plaintiff-Appellee.

Wesley E. Starnes for Defendant-Appellant.

INMAN, Judge.

We hold that the evidence presented below, while circumstantial, was sufficient to support the trial court's findings and conclusions supporting a judgment for alienation of affection and criminal

conversation. We further hold that although these torts impose liability only for conduct occurring before a married couple has separated, evidence of post-separation conduct is competent to support findings of pre-separation conduct.

Liliana Silverio Lemus ("Defendant") appeals from a final judgment awarding Brenda Lemus Rodriguez ("Plaintiff") $65,000 for criminal conversation and alienation of affection claims against Defendant. Defendant argues that the trial court erred in finding that Defendant engaged in sexual conduct with Andres Jimenez ("Jimenez")—Plaintiff's husband—during Plaintiff and Jimenez's marriage and before Plaintiff and Jimenez separated. After careful review, we affirm.

Factual and Procedural Background

Plaintiff filed a complaint on 30 March 2015 asserting claims against Defendant pursuant to N.C. Gen. Stat. § 52-13 for criminal conversation and alienation of affection.

The evidence at trial tended to show the following:

Plaintiff and Jimenez were married 27 December 2007. Defendant, a family friend, attended the couple's wedding and often spent time with them. In December 2011, Plaintiff began to notice her marital relationship change. Due to her suspicions, Plaintiff checked Jimenez's phone records and discovered that he and Defendant were in regular contact through phone calls and text messages, including 120 contacts in a one-month period in early 2012. Plaintiff confronted Jimenez and Defendant about their increased communications, but both denied any wrongdoing.

In addition to checking Jimenez's phone records, Plaintiff also found a credit card bill for Jimenez reflecting charges for stays at two different hotels on 30 and 31 January 2012, weekdays when Jimenez was supposed to be at work. Plaintiff also learned on 21 March 2012 that Jimenez was staying at one of the two hotels. She called the hotel, was told that her husband had been there with an unidentified woman, and obtained a copy of the bill from the hotel for that stay.

On 8 April 2012, Jimenez told Plaintiff their relationship was over and moved out of the marital home. On 26 April 2012, Plaintiff gave birth to her and Jimenez's first child. Plaintiff and Jimenez discussed reconciliation in January 2013, but Jimenez refused to return to the relationship. Jimenez eventually began living with Defendant, who gave birth to a child in October 2013. Plaintiff and Jimenez finalized their divorce in September 2014.

Following a bench trial on 11 July 2016, the trial court entered judgment in favor of Plaintiff. The court concluded that Defendant had maliciously and wrongfully injured a genuine marital relationship between Plaintiff and her spouse; Defendant committed criminal conversation with Plaintiff's spouse; and Plaintiff was entitled to recover $65,000 from Defendant. Defendant filed timely notice of appeal.

Analysis

Defendant challenges the trial court's finding of fact that Defendant had engaged in sexual conduct with Plaintiff's spouse prior to their date of separation, arguing that there was no competent evidence of pre-separation activity that gave rise to more than mere conjecture of sexual conduct. We disagree.

A. Standard of Review

In reviewing a trial court's findings of fact, "we are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the judge's ultimate conclusions of law." *Reeder v. Carter*, 226 N.C. App. 270, 274, 740 S.E.2d 913, 917 (2013) (internal citation and quotation marks omitted). Conclusions of law, however, are reviewed *de novo*. *Id.* at 274, 740 S.E.2d at 917. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgement for that of the lower tribunal. *Id.* at 274, 740 S.E.2d at 917.

B. Applicable Law

A claim for criminal conversation requires the plaintiff to present evidence of (1) marriage between the spouses and (2) sexual intercourse between the defendant and the plaintiff's spouse during the marriage. *Coachman v. Gould*, 122 N.C. App. 443, 446, 470 S.E.2d 560, 563 (1996). A claim of alienation of affection requires the plaintiff to present evidence showing that "(1) there was a marriage with love and affection existing between the husband and wife; (2) that love and affection was alienated; and (3) the malicious acts of the defendant produced the loss of that love and affection." *Nunn v. Allen*, 154 N.C. App. 523, 533, 574 S.E.2d 35, 41-42 (2002) (internal citation and quotation marks omitted). A malicious act "has been loosely defined to include any intentional conduct that would probably affect the marital relationship." *Pharr v. Beck*, 147 N.C. App. 268, 272, 554 S.E.2d 851, 854 (2001), *overruled on other grounds*, *McCutchen v. McCutchen*, 360 N.C. 280, 624 S.E.2d 620 (2006) (internal citation and quotation marks omitted). Malice is

conclusively presumed by a showing that the defendant engaged in sexual intercourse with the plaintiff's spouse. *Id.* at 272, 554 S.E.2d at 854.

This Court and the North Carolina Supreme Court have previously held that sexual conduct occurring after a married couple has separated, but before their divorce, is sufficient to support claims for criminal conversation and alienation of affection. *McCutchen*, 360 N.C. at 284, 624 S.E.2d at 684 ("[F]or an alienation claim to arise, the couple need only be *married* with genuine love and affection at the time of defendant's interference.") (emphasis in original); *Jones v. Skelley*, 195 N.C. App. 500, 511, 673 S.E.2d 385, 393 (2009) ("North Carolina law is clear that a claim for criminal conversation can be based solely on post-separation conduct.").

In *Pharr v. Beck*, this Court held that post-separation conduct is admissible to prove a claim for alienation "only to the extent it corroborates pre-separation activities resulting in the alienation of affection." 147 N.C. App. at 273, 554 S.E.2d at 855. The Court reasoned that allowing a claim based solely on post-separation conduct was incompatible with North Carolina's alimony statute, which limits culpability to post-separation conduct. *Id.* at 273, 554 S.E.2d at 855 (citing N.C. Gen. Stat. § 50-16.1A (1999)). The Supreme Court in *McCutchen* overruled that holding in *Pharr* "because North Carolina's alimony statute does not govern the common law tort of alienation of affections." 360 N.C. at 285, 360 S.E.2d at 624.

Pharr's holding was inconsistent with prior and subsequent decisions by this Court. In *Johnson v. Pearce*, 148 N.C. App. 199, 557 S.E.2d 189 (2001), this Court held that evidence of sexual intercourse between the defendant and the plaintiff's spouse after the date of separation, but before the date of divorce, was sufficient to support a claim for criminal conversation, explaining: "Until the legislature or Supreme Court acts to modify the tort of criminal conversation, we are bound by decisions of our Supreme Court and prior panels of this Court recognizing that the mere fact of separation does not bar a claim for criminal conversation occurring during the separation." *Id.* at 202, 557 S.E.2d at 191.

More recently, however, the reasoning of the *Pharr* decision regarding liability arising from post-separation conduct has become the law. In 2009, the General Assembly codified alienation of affection and criminal conversation in a statute specifically limiting these torts to arise only from acts committed prior to a married couple's separation: "No act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation *that occurs after the plaintiff and*

the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent." N.C. Gen. Stat. § 52-13(a) (2015) (emphasis added). Stated simply, these torts now impose liability for conduct occurring only: (1) during the marriage and (2) prior to physical separation. Therefore, claims of alienation of affection and criminal conversation arising after the effective date of Section 52-13 cannot be sustained without evidence of pre-separation acts satisfying the elements of these respective torts.

What is less clear is whether evidence of post-separation acts is admissible to support an inference of pre-separation acts constituting alienation of affection or criminal conversation. With respect to the tort of criminal conversation, and with respect to the element of malice in an alienation of affection case being satisfied by criminal conversation, prior decisions in cases addressing evidence necessary to prove adultery are instructive, because criminal conversation is adultery. *See Scott v. Kiker*, 59 N.C. App. 458, 461, 297 S.E.2d 142, 145 (1982).

In re Estate of Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991), which held that a surviving spouse was barred by adultery from receiving a year's allowance from a decedent's estate, is routinely cited in criminal conversation cases considering what evidence is sufficient to prove that sexual intercourse occurred. Our Supreme Court observed in *Trogdon* a principle that transcends generations: "Adultery is nearly always proved by circumstantial evidence . . . as misconduct of this sort is usually clandestine and secret." *Id.* at 148, 409 S.E.2d at 900 (internal citation and quotation marks omitted). When there is no direct evidence of sexual intercourse between the defendant and the plaintiff's spouse, the plaintiff can prove criminal conversation by circumstantial evidence. However, circumstantial evidence of sexual intercourse must rise to more than "mere conjecture," and is generally sufficient "if a plaintiff can show opportunity and inclination, [because] it follows that such evidence will tend to support a conclusion that more than 'mere conjecture' exists to prove sexual intercourse by the parties." *Coachman*, 122 N.C. App. at 447, 470 S.E.2d at 563. In *Trogdon*, the Court held that adultery was proven by circumstantial evidence including the spouse moving out of the marital home and living with the third party and the spouse's refusal to testify about the nature of her relationship with the third party. 330 N.C. at 151, 409 S.E.2d at 903.

This Court has held that intentional acts by a defendant other than sexual intercourse satisfied the malice element of alienation of affection. In *Pharr*, this Court held that malice was shown by evidence including the following pre-separation conduct by the defendant: meeting

regularly with the plaintiff's spouse knowing that he was married; holding the spouse's hand when he was in the hospital; giving him presents; giving him "flirtatious looks;" hosting the spouse in her bedroom where mixed drinks were found; and giving the spouse a calling card and allowing him to use her post office box. 147 N.C. App. at 273-74, 554 S.E.2d at 855. The Court also held that evidence of post-separation sexual intercourse between the defendant and the plaintiff's spouse "corroborates the pre-separation relationship between these parties." *Id.* at 274, 554 S.E.2d at 855.

Based on our precedent, we hold that evidence of post-separation conduct may be used to corroborate evidence of pre-separation conduct and can support claims for alienation of affection and criminal conversation, so long as the evidence of pre-separation conduct is sufficient to give rise to more than mere conjecture.

C. Application of the Law to This Case

Defendant contends that one of the trial court's factual findings was not supported by competent evidence, that the trial court's conclusions that Defendant was liable for alienation of affection and criminal conversation were not supported by the trial court's findings, and that Plaintiff presented insufficient evidence to support her claims.

"Where trial is by judge and not by jury, the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, *even though the evidence might sustain findings to the contrary*." *Trogdon*, 330 N.C. at 147, 409 S.E.2d at 900 (emphasis in original).

Plaintiff's evidence of pre-separation conduct included: (1) phone records showing 120 contacts between Defendant and Plaintiff's spouse in a one-month period, all at times when Jimenez was away from home; (2) two hotel charges on Jimenez's credit card bill; (3) a third hotel receipt dated 21 March 2012 and information from the third hotel that Jimenez was there with a woman; and (4) social media postings by Defendant and Jimenez which Plaintiff interpreted as their initials used as a code between them. Plaintiff's evidence of post-separation conduct included: (1) Jimenez and Defendant began living together in December 2012 or January 2013; (2) Defendant gave birth to a child with the name Andres—Jimenez's first name—in October 2013; (3) Jimenez told Plaintiff in 2013 that he loved Defendant; (4) Jimenez told Plaintiff that they could not reconcile because Defendant was pregnant; and (5) Defendant admitted in her trial testimony that she had sexual intercourse with Jimenez after

he had separated from Plaintiff. Defendant does not appeal from the trial court's findings of fact concerning any of these circumstances, and such findings are binding on appeal.

Defendant contends that the evidence was insufficient to support the trial court's finding that Jimenez and Defendant "had sexual relations during the time [Jimenez and Plaintiff] were married" and that Jimenez and Plaintiff "did not have any legal separation at the time."

In considering the sufficiency of Plaintiff's evidence to support this finding, we are mindful of the factually specific nature of claims for alienation of affection, criminal conversation, and adultery and our Supreme Court's observance that these cases often rest solely on circumstantial evidence. *Trogdon*, 330 N.C. at 148, 409 S.E.2d at 900. We hold that evidence of post-separation conduct between Defendant and Jimenez corroborates evidence of their pre-separation conduct, including allowing a reasonable inference that Defendant was the unidentified woman who accompanied Jimenez at a hotel on one occasion in March 2012 and that she engaged in sexual intercourse with him on that occasion, a few weeks before Plaintiff and Jimenez separated. Although Defendant at times in her trial testimony denied living with Jimenez and claimed not to know who the father of her child was, the trial court found otherwise based on evidence including Plaintiff's testimony and inconsistencies in Defendant's testimony. Accordingly, we affirm the trial court's finding that Defendant and Jimenez had sexual relations during a time when Plaintiff and Jimenez were married and not separated.

Had the trial court found simply that Jimenez and Defendant had sexual relations while Plaintiff was married to Jimenez, its finding would on its face be insufficient to support Plaintiff's claims without specifying that such conduct occurred prior to the couple's separation. But the trial court also found that Defendant and Jimenez had sexual relations prior to a "legal separation" of Plaintiff and Jimenez. This finding, in the context of all evidence of record, is sufficiently specific to support the trial court's conclusions that Defendant is liable to Plaintiff for alienation of affection and criminal conversation.

Defendant contends that the trial court's use of the term "legal separation" rendered its finding insufficient to support the trial court's conclusion that Defendant was liable for alienation of affection and criminal conversation because a legal separation could mean an event later than the married couple's physical separation, and thus beyond the scope of liability allowed by statute. On the facts before us, we disagree. Subpart (a) of Section 52-13 defines separation in legal terms by referring

to an occurrence in which "the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent." N.C. Gen. Stat. § 52-13(a) (2015). Although we acknowledge, as Defendant argues, that in other contexts legal separation may refer to spouses' execution of a separation agreement or entry of a court order for pendent lite relief pending divorce, in this case neither party presented evidence of any occurrence manifesting Jimenez's separation from Plaintiff other than his moving out of the marital home on 8 April 2012. So there is no basis to interpret the trial court's finding to refer to any other date or occurrence as the couple's "legal separation." On this record, we hold that the trial court's factual findings and conclusions of law impose liability on Defendant for conduct that occurred within the limited time period allowed by the statute.

Conclusion

For the reasons set forth above, we hold that the trial court's findings were supported by the evidence, and that the trial court's conclusions were sufficiently supported by the findings.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

STATE OF NORTH CAROLINA
v.
ANTRAVIOUS QUANEALIOUS BRIGGS, DEFENDANT

No. COA17-583

Filed 16 January 2018

Jurisdiction—motion for post-conviction DNA testing—appeal of original conviction pending

The trial court lacked jurisdiction to enter an order denying defendant's motion for post-conviction DNA testing under N.C.G.S. § 15A-269 while defendant's appeal from the original judgment of conviction for attempted second-degree sexual offense was pending.

Appeal by defendant from order entered 13 July 2016 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 15 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

ZACHARY, Judge.

The issue presented is whether the trial court lacked subject matter jurisdiction to enter an order denying defendant's motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 while defendant's appeal from the original judgment of conviction was pending. We conclude that the trial court lacked subject matter jurisdiction, and vacate the court's order.

Background

Defendant Antravious Quanealious Briggs was convicted of attempted second-degree sexual offense and sentenced to 73-100 months in prison on 10 November 2014. Defendant gave notice of appeal the same day. On 6 April 2016, while his appeal was pending in this Court, defendant filed a *pro se* Motion to Locate and Preserve Evidence and Motion for Post-Conviction DNA Testing pursuant to N.C. Gen. Stat. § 15A-269. The trial court denied defendant's motion on 13 July 2016, while defendant's appeal was still pending. Defendant timely filed notice of appeal from the denial of his motion for post-conviction DNA testing. On 16 August 2016, this Court issued an opinion in defendant's original appeal, vacating his sentence and remanding the case to the trial court for re-sentencing. *State v. Briggs*, ___ N.C. App. ___, 790 S.E.2d 671 (2016). The mandate issued on 6 September 2016.

On appeal, defendant argues that the trial court lacked subject matter jurisdiction to enter the order denying his motion for post-conviction DNA testing because the trial court was divested of jurisdiction over the case from the date on which defendant gave his initial notice of appeal of the 10 November 2014 judgment until the date on which this Court's mandate issued.

Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012) (citation 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. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008). Lack of subject matter jurisdiction may be raised by any party "at any time, even for the first time on appeal[.]" *State v. Kostick*, 233 N.C. App. 62, 72, 755 S.E.2d 411, 418 (2014).

Discussion

Subject matter jurisdiction is "the authority of a court to adjudicate the type of controversy presented by the action before it, and is conferred upon the courts by either the North Carolina Constitution or by statute." *State v. Petty*, 212 N.C. App. 368, 371, 711 S.E.2d 509, 512 (2011) (citations and quotation marks omitted) (alterations omitted). "A trial court must have subject matter jurisdiction over a case in order to act in that case." *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008). Where a court enters an order without jurisdiction to do so, the order is void *ab initio*, *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986), and "the appropriate action on the part of the appellate court is to arrest judgment or vacate [the] order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981).

Generally, in criminal cases, "a particular judge's jurisdiction over a particular case terminates at the end of the session at which a particular case is heard and decided." *Petty*, 212 N.C. App. at 374, 711 S.E.2d at 513. Even where a statute allows the trial court to act beyond the close of the original session, "[t]he jurisdiction of the trial court with regard to the case" will remain divested as of the filing of a notice of appeal. N.C. Gen. Stat. § 15A-1448(a)(3) (2016); *State v. Williams*, 177 N.C. App. 725, 731, 630 S.E.2d 216, 221 (2006), *disc. review denied*, 360 N.C. 581, 636 S.E.2d 198 (2006); *Petty*, 212 N.C. App. at 373, 711 S.E.2d at 513. Once a notice of appeal has been filed, the trial court retains jurisdiction only over matters that are "ancillary to the appeal[.]" N.C. Gen. Stat. § 15A-1453 (2016); *State v. Davis*, 123 N.C. App. 240, 242, 472 S.E.2d 392, 393 (1996). A matter that is ancillary to the appeal typically involves the correction of a clerical error, as doing so does not implicate the trial court "exercis[ing] any judicial discretion or undertak[ing] any judicial reasoning[.]" *State v. Everette*, 237 N.C. App. 35, 43, 764 S.E.2d 634, 640 (2014); *see e.g.*, *Davis*, 123 N.C. App. at 242-43, 472 S.E.2d at 393-94. On the other hand, a "trial court lacks jurisdiction to correct judicial errors, or address issues never litigated, . . . following valid entry of notice of appeal." *State v. Price*, 233 N.C. App. 386, 394, 757 S.E.2d 309, 314 (2014). Such non-ancillary matters may only be resolved once the pending appeal has been finalized. *See State v. Dixon*, 139 N.C. App. 332, 338, 533 S.E.2d 297, 302 (2000).

Pursuant to N.C. Gen. Stat. § 15A-269, a defendant "may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing[.]" N.C. Gen. Stat. § 15A-269(a) (2016). The trial court must grant the motion for post-conviction DNA testing if it determines that

> (1) [the testing]
>
> [(a)] Is material to the defendant's defense.
>
> [(b)] Is related to the investigation or prosecution that resulted in the judgment.
>
> [(c)] Meets either of the following conditions:
>
> [i.] It was not DNA tested previously.
>
> [ii.] It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results[;]
>
> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
>
> (3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269(a)-(b) (2016).

In the instant case, it is clear from the text of N.C. Gen. Stat. § 15A-269 that the trial court's order entered pursuant thereto did not constitute a matter ancillary to the original judgment on appeal. The fact that N.C. Gen. Stat. § 15A-269 authorized the trial court to act beyond the close of the original session did not render that matter ancillary, or otherwise vest the trial court with jurisdiction while the appeal was pending. *See Petty*, 212 N.C. App. at 373, 711 S.E.2d at 513 ("Th[e] power of a court to hear and determine (subject matter jurisdiction) is not to be confused with the way in which that power may be exercised in order to comply with the terms of a statute (authority to act)."). Rather, the plain language of Section 15A-269 directly implicates an exercise of the trial court's judicial discretion and judicial reasoning, *Everette*, 237 N.C. App. at 43, 764 S.E.2d at 640, and requires the trial court to make determinations on new issues never litigated. *Price*, 233 N.C. App. at 394, 757 S.E.2d at 314. Accordingly, in this case, the trial court's order entered

pursuant to N.C. Gen. Stat. § 15A-269 was not "ancillary" to defendant's initial pending appeal.

The State, however, asserts that a motion for post-conviction DNA testing is not a "motion in the original cause," and thus may be decided by the trial court while the case is pending appeal, because N.C. Gen. Stat. §§15A-269-15A-270.1 do not explicitly provide otherwise. To illustrate this point, the State directs our attention to the language of N.C. Gen. Stat. § 15A-1411(b), which provides that a motion for appropriate relief is "a motion in the original cause and not a new proceeding." N.C. Gen. Stat. § 15A-1411(b) (2016). Because a motion for appropriate relief is a motion in the original cause, it is the appellate court, rather than the trial court, that has jurisdiction to rule on such a motion while the case is pending on appeal. *Williams*, 177 N.C. App. at 731, 630 S.E.2d at 221. According to the State, because a motion for post-conviction DNA testing is not a motion for appropriate relief, and because the statute governing post-conviction DNA testing does not explicitly state that the motion is part of the "original cause and not a new proceeding," defendant's motion constituted a new proceeding over which the trial court retained its jurisdiction. We do not find this argument persuasive.

Upon review of the provisions of N.C. Gen. Stat. §§15A-269-15A-270.1, defendant's motion for post-conviction DNA testing was, in fact, a motion in the original cause. If the trial court were to grant defendant's motion for post-conviction DNA testing and the results were favorable to defendant, the appropriate relief would have been for the trial court to (1) vacate and set aside the judgment; (2) discharge defendant; (3) resentence defendant; or (4) grant defendant a new trial. N.C. Gen. Stat. § 15A-270(c). Each of these provisions relates to the original case filed against defendant, and not to any ancillary matter over which the trial court retains jurisdiction during the pendency of an appeal. Moreover, permitting the trial court to rule on a defendant's motion for post-conviction DNA testing while an appeal from the case is pending would run the risk of the trial court granting relief pursuant to N.C. Gen. Stat. § 15A-270(c) that conflicts with the mandate issued by the appellate court. *See* N.C. Gen. Stat. § 15A-1448 (official commentary) ("Problems have arisen in the processing of appeals when post-trial motions are pending.").

In the instant case, the trial court was divested of jurisdiction when defendant filed notice of appeal from the judgment entered on his conviction for attempted second-degree sex offense on 10 November 2014. Because defendant's motion for post-conviction DNA testing opened an inquiry into a case that this Court was already reviewing, the trial court

lacked jurisdiction to rule on it until after the case was returned to the trial court by way of mandate, which issued on 6 September 2016. We therefore must vacate the trial court's order denying defendant's motion for post-conviction DNA testing. *Felmet*, 302 N.C. at 176, 273 S.E.2d at 711.

Conclusion

For the foregoing reasons, we conclude that the trial court did not have jurisdiction to enter its 13 July 2016 order denying defendant's motion for post-conviction DNA. Accordingly, the order is

VACATED.

Judges STROUD and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
TREVOR WILKS FORTE, DEFENDANT

No. COA16-513

Filed 16 January 2018

1. Appeal and Error—preservation of issues—failure to argue constitutional issues at trial

Defendant in a trafficking heroin case waived review of any constitutional grounds regarding the denial of his motion to suppress by failing to argue them at trial.

2. Search and Seizure—unreasonable searches—trafficking heroin—issuance of pen register—trap and trace device on cell phone

The trial court did not err in a drug trafficking case by concluding that the issuance of a pen register/trap and trace device order for real-time location information from defendant's cell phone was properly issued under N.C.G.S. § 15A-263. Under the totality of circumstances, the trial court had the necessary specific and articulable facts to show reasonable grounds to believe the records sought from the pen register order were relevant and material to an ongoing investigation under the Stored Communications Act in 18 U.S.C. § 2703(d). Defendant's other argument, based on the Fourth Amendment, was waived based on his failure to argue it at trial.

Appeal by defendant from judgment entered on or about 12 August 2015 by Judge Wayland J. Sermons, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 6 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph A. Newsome, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

STROUD, Judge.

Defendant Trevor Wilks Forte ("defendant") appeals from his conviction of trafficking more than 14 grams, but less than 28 grams, of heroin by possession and of trafficking more than 14 grams, but less than 28 grams, of heroin by transportation. On appeal, defendant argues that his Fourth Amendment right against unreasonable searches was violated because the trial court allowed the State to retrieve location information from his cell phone without a search warrant. Because defendant did not present any constitutional argument before the trial court, he has waived review of this issue on appeal. The trial court correctly determined that issuance of the pen register and trap and trace order was proper under N.C. Gen. Stat. § 15A-263, so we affirm the trial court's denial of defendant's motion to suppress.

Facts

In addressing the suppression motion before trial, the trial court heard these facts. On 8 November 2012, Officer Charlie Espinoza ("Officer Espinoza") of the Greenville Police Department contacted Detective Steven Cottingham ("Detective Cottingham") of the Greenville Police Department and told him that a known drug dealer -- Mr. Oliver -- was in custody for a narcotics investigation. Detective Cottingham spoke with Mr. Oliver, who said that he "had been selling bundles of heroin in the New Town housing project" for approximately two or three months he bought from a black man from New York he only knew by the nickname "Roam."[1] Mr. Oliver did not know Roam's real name but said "he was a shorter brown-skinned male that wears fitted baseball caps."

Mr. Oliver explained to Detective Cottingham that "over two months, he was buying two bricks of heroin from the subject known as Roam

1. According to Det. Cottingham, 10 small bags of heroin make up a "bundle;" a "brick" is five bundles, or 50 small bags.

every two or three days, and he said maybe thirty bricks over that time period." Mr. Oliver would pay $300.00 per brick of heroin and made the purchases randomly, not as part of any consistent schedule. Mr. Oliver then explained to Detective Cottingham in more detail that:

> Roam always comes to [Mr. Oliver] before he travels to New York in order to purchase heroin, and . . . [Mr. Oliver admitted] to giving Roam $2,500.00 to put in on the heroin, and even helped him purchase a rental car. And . . . the first of the month Roam traveled to New York to purchase a large quantity of heroin, but only stayed in New York a couple of days; and . . . Roam purchased a rental car . . . in Greenville[.]

On 10 November 2012, Mr. Oliver called Detective Cottingham and informed him he spoke with Roam on the same phone number he had previously used and Roam "advised he was going to be in New York and will be returning soon with some heroin." Mr. Oliver told Detective Cottingham that Roam said he would be driving a car that belonged to a local white female heroin user with the last name "Hamilton" who was possibly under arrest in Pitt County Detention Center. Mr. Oliver explained that the vehicle was a small black Hyundai or Honda hatchback vehicle with a small rope holding down the hood and said that Roam would be a passenger in the vehicle with a female driving because Roam had no driver's license. Mr. Oliver noted that Roam owed him $1,000.00 worth of heroin, so part of the heroin Roam was supposed to be bringing from New York would be for Mr. Oliver. Roam would typically call Mr. Oliver right before he got on the road headed to North Carolina. Mr. Oliver further stated that when Roam got to Greenville from New York, it would probably be early morning and he would take the heroin to a local hotel room and distribute the heroin from there, and Roam would probably call Mr. Oliver before arriving at this hotel.

Mr. Oliver gave Detective Cottingham Roam's phone number, and Detective Cottingham applied for and obtained a court order titled "Order Authorizing Pen Register/Trap and Trace and Disclosure of Records and Other Information Pursuant to 18 USC § 3123 and 2703(d)" signed by a superior court judge, which enabled the SBI to receive GPS location information of the cell phone, monitor it, and then notify Detective Cottingham of the phone's location and the direction of travel. The order was signed and registered on 11 November 2012.

Early in the morning on 12 November 2012, an SBI agent informed Detective Cottingham that the phone was in New York traveling south.

Detective Cottingham and other officers knew a couple of potential routes to Greenville from the north, so they went to those areas to try to intercept the vehicle. At 6:01 a.m., an SBI agent told Detective Cottingham that the phone was in Virginia traveling towards North Carolina. Mr. Oliver called Detective Cottingham around 6:45 a.m. and said that Roam had called him from the same number as usual and said that he was about 30 minutes from Greenville. Officers spotted the vehicle, a small black four-door Honda, at 7:50 a.m. on Highway 11. It was traveling south into Greenville on Memorial Drive; a black female was driving and a black male was in the passenger seat. Officers followed the vehicle southbound on Memorial Drive into Greenville until Officer Espinoza and another office conducted a traffic stop on the vehicle just before 8:00 a.m. "on North Memorial Drive near Airport[.]" One of the officers conducting the stop called Detective Cottingham at 8:05 a.m. and said that "both subjects were extremely nervous" and stated that "the female driver consented to the search of the vehicle[.]" A canine alerted on the vehicle and the heroin was located during a later search under the back seat. Defendant was identified as the passenger in the car and had a cell phone matching the pen register number.

Defendant was arrested on 12 November 2012 on charges of trafficking more than 28 grams of heroin by possession and trafficking more than 28 grams of heroin by transportation. Then on or about 29 September 2014, defendant was indicted on the offenses of trafficking more than 14 grams, but less than 28 grams of heroin by possession and trafficking more than 14 grams, but less than 28 grams of heroin by transportation. Before a jury was impaneled, the trial court heard various pretrial motions, including defendant's 11 August 2015 motion to suppress all evidence of "any seizures, arrest, detentions, and wire taps of [defendant] based on information provided by Michael Oliver."

On 11 August 2015, after hearing arguments on defendant's motion to suppress, the court orally stated that defendant's motion to quash the search warrant and order was denied and then entered two written orders, which were file stamped on 25 August 2015: one regarding the stop of the vehicle and one on the search of the vehicle. In the order on the stop of the vehicle, the trial court made detailed findings of fact, essentially as summarized in the facts above, and denied defendant's motion to suppress the application and order authorizing a pen register/trap and trace and his motion to suppress the stop of the vehicle defendant was riding in on 12 November 2012. The trial court's only conclusions of law relevant to the arguments on appeal are:

> 2. That Officer Espinoza had reasonable suspicion based on articulable facts that the vehicle was carrying a controlled substance, and further that the vehicle was following another vehicle too closely in violation of Chapter 20 of North Carolina General Statutes.
>
> 3. That pursuant to N.C.G.S. 15A-263, the Order authorizing the pen register was properly issued.

Defendant's trial began later that same day, 11 August 2015. At the close of the State's evidence, defendant moved to dismiss the charges against him, but his motion was denied. Defendant was ultimately found guilty of both trafficking charges. Defendant timely appealed to this Court.

Discussion

On appeal, defendant presents the issue as whether "Defendant-Appellant's Fourth Amendment right against unreasonable searches [was] violated by the issuance of a Pen Register/Trap and Trace Device Order for real time location information from his cell phone?" He argues that the trial court violated his constitutional right against unreasonable searches by denying defendant's motion to suppress and allowing the State to present evidence of real-time location information from his cell phone, which was retrieved without a search warrant. But we must first determine whether defendant has preserved his arguments on appeal by presenting them first before the trial court.

[1] On the day trial was to begin, defendant filed a motion to suppress. The entire substance of the motion is one sentence: "The state shall be ordered to suppress any seizures, arrest, detentions, and wire taps of [defendant] based on information provided by Michael Oliver." The motion is accompanied by his counsel's affidavit, which avers:

> 2. That Officer D. S. Cottingham and C. Espinoza, Greenville Police Department interviewed Michael Oliver on November 8, 2012 after arresting Oliver for possession of crack cocaine.
>
> 3. The officers in the discovery provided to the defendant in this case . . . detail that NO promises were made for Oliver's assistance.
>
> 4. The officers provide there was only one meeting on November 8, 2012 with Oliver.
>
> 5. Oliver never provides an actual name of anyone.
>
> 6. Oliver only uses a nickname for someone.

7. Oliver has only known the person for 2 or 3 months.

8. Oliver states he is unsure of when this person will arrive in North Carolina.

9. The information provided by Oliver is insufficient to allow the issuance of a search warrant.

10. The information is not proven reliable.

11. The information is not shown to be specific.

12. The information is not shown to be credible.

When the case was called for trial, the trial court noted that the motion itself set forth no grounds. The State objected to its consideration, since it was filed the day before trial and the affidavit was provided only that morning. The trial court agreed to consider the motion, stating "even though the motion to suppress does not contain any grounds, . . . I'm not going to penalize the Defendant for his attorney's lack of proper form of pleading, and I'm going to hear evidence."

During the argument of the motion to suppress, the trial court asked defendant to clarify the legal grounds of the motion as well as the evidence he was seeking to suppress. Defendant's argument treated the issue as the sufficiency of the information to support issuance of a search warrant:

> And to get a search warrant, I certainly understand -- the search warrant should be in the file, but they essentially go to T-Mobile, get a search warrant, and then use that telephone number, Judge. The only thing I can argue, the four corners of that search warrant and those things have not been properly asserted in the four corners of that document. I'm not saying what the officers knew from their experience and training and things like that, they're entitled to that, but they didn't put it in the four corners of that document how they knew this Oliver fellow was reliable. He had not been watched go do a transaction and come back. There's no evidence of that. It's not in the discovery, and it is certainly not in the search warrant.
>
> So, Judge, if the State had a hunch, maybe, had a probably, maybe, but it takes more than that to get a search warrant. It takes more than that to stop an automobile. And in fact, my client was not driving the automobile. There's no allegation he was driving the automobile. In fact, the discovery, as I read it, says that this other

> lady, who is in this courtroom, she had the phone with an address of where they were going; not my client.
>
> The simple sentences that I listed in my affidavit, 10, 11, and 12, it's not reliable, and it's not specific, it's not credible. There's no evidence of that, Judge. And as to that, Judge, I would argue that the stopping of the automobile and the detention of my client was not lawful based on the Fourth Amendment.

But no search warrant was issued in this case. Instead, the order in question was the trial court's "Order Authorizing Pen Register/Trap and Trace and Disclosure of Records and Other Information" entered under 18 U.S.C. § 3123 and the Stored Communications Act ("SCA"), 18 U.S.C. § 2703(d). Later in the argument, defendant's counsel noted that he was actually addressing the order allowing "[t]he wire tap, telephone trace; sometimes called a trap. They're traps where the information is pinged off, where a specific phone number is pinged off of." Defendant made no other argument regarding the Fourth Amendment and never mentioned the Stored Communications Act or North Carolina General Statutes Chapter 15A, Article 12 at the hearing.

Although the trial court heard defendant's motion to suppress, despite its late filing and lack of grounds, on appeal we can consider only the grounds actually presented before the trial court. *See*, *e.g.*, *State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013) ("According to well-established North Carolina law, where a theory argued on an appeal was not raised before the trial court, the argument is deemed waived on appeal. . . . Thus, a criminal defendant is not entitled to advance a particular theory in the course of challenging the denial of a suppression motion on appeal when the same theory was not advanced in the court below." (Citation, quotation marks, and brackets omitted)); *State v. Edmonds*, 212 N.C. App. 575, 577-78, 713 S.E.2d 111, 114 (2011) ("Generally, error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion. Objections must state the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error on appeal. Constitutional errors not raised by objection at trial are deemed waived on appeal. A thorough review of the record in this case gives us no indication that defendant raised any constitutional grounds or argument as to any of the issues which the defendant now argues on appeal. Since those

constitutional arguments were not raised by a specific objection at trial, those arguments are waived." (Citations, quotation marks, brackets, and ellipses omitted)).

[2] On appeal, defendant presents the issue as whether "Defendant-Appellant's Fourth Amendment right against unreasonable searches [was] violated by the issuance of a Pen Register/Trap and Trace Device Order for real time location information from his cell phone?" Specifically, defendant now contends that the "Trial Court violated the Defendant's Constitutional Right against Unreasonable Searches by allowing the State to retrieve Real Time Location Information from his Cell Phone Without a Search Warrant." Most of defendant's brief is devoted to discussion of the Stored Communications Act's requirements, cases interpreting the Stored Communications Act as it applies to real-time location information, the application of the Fourth Amendment to these "real time" searches, and the lack of probable cause to support issuance of a search warrant. Defendant made none of these arguments to the trial court. The trial court ruled on the only issue defendant argued, and concluded that "pursuant to N.C.G.S. 15A-263, the Order authorizing the pen register was properly issued." Defendant's only argument before the trial court was that law enforcement did not have sufficient evidence to support issuance of the pen register order. The trial court ruled on this issue only, and this is the only argument we may consider on appeal.

I. Standard of Review

> It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. However, conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. O'Connor, 222 N.C. App. 235, 238-39, 730 S.E.2d 248, 251 (2012) (citations, quotation marks, and brackets omitted). Defendant has challenged none of the trial court's findings of fact, so they are binding on appeal. *See, e.g.*, *State v. Medina*, 205 N.C. App. 683, 685, 697 S.E.2d 401, 403 (2010) ("If a defendant does not challenge a particular finding of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." (Citation and quotation marks omitted)).

II. Stored Communications Act

Here, Detective Cottingham applied for -- and the trial court entered -- an order authorizing a pen register for defendant's phone. This order differs from a search warrant, as the trial court's "Order Authorizing Pen Register/Trap and Trace and Disclosure of Records and Other Information" was entered under 18 U.S.C. § 3123 and the Stored Communications Act ("SCA"), 18 U.S.C. § 2703(d). The order allowing the pen register authorized, in relevant part, the disclosure of:

> all published and non published subscriber records, call detail and data detail records, text or short message service records, IP addresses, telephone toll records, direct connect records, cellular tower and originating, handover and terminating cell site and sector information to include towers, switches, Global Positioning Location (GPS) without geographical limitations within the United States, timing advance, geolocation service, triangulation, E911, real time call detail records with coordinating real time cell site location information, historical call detail records to include cell site location information, IP address history. . . .

Under the SCA, the government is authorized to require disclosure under specific circumstances, including when the government gets a court order for such disclosure under 18 U.S.C. § 2703(d):

> A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity--
>
> (A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction;
>
> (B) *obtains a court order for such disclosure under subsection (d) of this section*; [or]
>
> (C) has the consent of the subscriber or customer to such disclosure[.]

18 U.S.C. § 2703(c)(1)(A)-(C) (emphasis added).

The SCA requires less than probable cause and essentially only requires reasonable suspicion for issuance of an order for disclosure. *See* 18 U.S.C. § 2703(d) ("A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the government entity offers *specific and articulable facts showing that there are reasonable grounds to believe* that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." (Emphasis added)). *See also* N.C. Gen. Stat. § 15A-263 (2015) ("Issuance of order for pen register or trap and trace device"). Thus, a pen register order differs from a search warrant in that the standard to grant such an order is lower than probable cause; these orders authorize use of surveillance that does not require a search warrant. *See Smith v. Maryland*, 442 U.S. 735, 745-46, 61 L. Ed. 2d 220, 230, 99 S. Ct. 2577, 2583 (1979) ("The installation and use of a pen register, consequently, was not a 'search,' and no warrant was required.").

As noted above, the trial court's detailed findings of fact are not challenged on appeal. Detective Cottingham's application requesting the pen register and trap and trace order set forth detailed and extensive supporting facts. Detective Cottingham received information not from an anonymous source, but from an identified and known drug dealer, Mr. Oliver. "In evaluating the reliability of an informant's tip, due weight must be given to the informant's veracity, reliability, and basis of knowledge as highly relevant factors in determining whether an informant's tip is sufficient from the totality of circumstances." *State v. Sanchez*, 147 N.C. App. 619, 624, 556 S.E.2d 602, 606-07 (2001). There are multiple indications of reliability in Mr. Oliver's statements, including that Mr. Oliver made substantial admissions against his penal interest. *See*, *e.g.*, *State v. Jackson*, __ N.C. App. __, __, 791 S.E.2d 505, 511 (2016) ("In order for a reviewing court to weigh an informant's tip as confidential and reliable, evidence is needed to show indicia of reliability. Indicia of reliability may include statements against the informant's penal interests and statements from an informant with a history of providing reliable information." (Citations, quotation marks, and brackets omitted)), *aff'd per curiam*, __ N.C. __, 807 S.E.2d 141 (2017). Mr. Oliver admitted to buying and selling a large amount of heroin from Roam regularly, an admission against his penal interest. He also provided a nickname, general description of defendant, background information from dealing with him previously, and current travel information of the suspect. Mr. Oliver spoke with Detective Cottingham in person, after having been identified and brought in to custody, and they spoke more than once,

adding to the reliability of his tip. *See*, *e.g.*, *State v. Allison*, 148 N.C. App. 702, 705, 559 S.E.2d 828, 830 (2002) ("Foremost, the tip in this case came through a 'face-to-face' encounter rather than by an anonymous telephone call. Under this scenario [the officer] had an opportunity to observe the demeanor of the female informant in an effort to assess the reliability of her tip. Furthermore, by engaging [the officer] directly, the female informant significantly increased the likelihood that she would be held accountable if her tip proved to be false."). These facts, which are evident in the application for the order, lend sufficient reliability and credibility to the information Detective Cottingham received from Mr. Oliver. And defendant's phone number and where he would most likely be traveling in Greenville, North Carolina, was also identified in the application. Under the totality of the circumstances, the trial court had the necessary specific and articulable facts to show reasonable grounds to believe the records sought from the pen register order were relevant and material to an ongoing investigation. *See* 18 U.S.C. § 2703(d).

III. Fourth Amendment

Defendant acknowledges that the evidence may have been enough to meet the lesser "reasonable grounds" standard in 18 U.S.C. § 2703(d), but argues that the Fourth Amendment ultimately controls the issue, because the trial court's order allowed officers to collect real-time location information from defendant's cell phone, constituting a search under the Fourth Amendment for which a search warrant based upon probable cause is required. But as noted above, defendant failed to present this argument to the trial court. "Constitutional arguments not made at trial are generally not preserved on appeal." *State v. Canty*, 224 N.C. App. 514, 516, 736 S.E.2d 532, 535 (2012). *See also Edmonds*, 212 N.C. App. at 578, 713 S.E.2d at 114 ("A thorough review of the record in this case gives us no indication that defendant raised any constitutional grounds or argument as to any of the issues which the defendant now argues on appeal. Since those constitutional arguments were not raised by a specific objection at trial, those arguments are waived." (Citation omitted)). Although defendant mentioned the Fourth Amendment -- briefly -- before the trial court, he presented no argument regarding the distinction between real-time and historical data collection and the constitutional issues raised by potentially real-time information. His argument focused only on the reliability and sufficiency of the evidence supporting issuance of the pen register order, and the trial court correctly ruled only on that issue.

Conclusion

For the reasons stated above, we hold that the trial court did not err when it denied defendant's motion to suppress the evidence resulting from the pen register/trap and trace order. We therefore affirm the denial of the motion to suppress.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

STATE OF NORTH CAROLINA
v.
CHARLES ADAM FRIEND

No. COA17-309

Filed 16 January 2018

1. Appeal and Error—writ of certiorari—untimely appeal from criminal judgment—civil judgment on attorney fees meritorious

The Court of Appeals exercised its discretion to issue a writ of certiorari to review a criminal judgment for assault and burglary where defendant failed to timely appeal, and also for a civil judgment for attorney fees where the issue was meritorious.

2. Evidence—videotaped custodial interrogation—plain error review

The trial court did not commit plain error in an assault and burglary case by admitting defendant's videotaped custodial interrogation where defendant could not show that, but for the alleged error, the jury probably would have reached a different result.

3. Constitutional Law—effective assistance of counsel—premature claim—dismissed without prejudice

Defendant's ineffective assistance of counsel claim in an assault and burglary case was premature and dismissed without prejudice to pursue it through a motion for appropriate relief in the trial court.

4. Costs—attorney fees—opportunity to be heard—money judgment

The trial court erred in an assault and burglary case by failing to give defendant notice and an opportunity to be heard at sentencing

before entering a money judgment against him for his counsel's fees under N.C.G.S. § 7A-455, where the interests of defendant and trial counsel were not necessarily aligned. The trial court did not inform defendant of his right to be heard on the issue, and nothing in the record indicated that defendant understood that he had this right.

Appeal by defendant from judgments entered 27 July 2016 and order entered 1 August 2016 by Judge Robert T. Sumner in Catawba County Superior Court. Heard in the Court of Appeals 18 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody R. Hairston, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant.

DIETZ, Judge.

Defendant Charles Adam Friend appeals his conviction and sentence for assault with a deadly weapon inflicting serious injury and first degree burglary.

As explained below, Friend concedes that his challenge to the admission of his videotaped interrogation must be reviewed for plain error. Under that narrow standard of review, Friend has not shown that "absent the error, the jury probably would have returned a different verdict." *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012).

We dismiss Friend's corresponding claim for ineffective assistance of counsel because it involves questions of fact not suited for review on direct appeal. *State v. Todd*, __ N.C. __, __, 799 S.E.2d 834, 838 (2017).

Friend also argues that the trial court erred by entering a civil judgment against him for the attorneys' fees incurred by his court-appointed counsel under N.C. Gen. Stat. § 7A-455 without providing him with notice and an opportunity to be heard. As explained in more detail below, we agree and therefore vacate that money judgment and remand for further proceedings.

With respect to counsel fees incurred under § 7A-455, the interests of defendants and their counsel may not always align. Because indigent defendants may feel that the fees charged by counsel were unreasonable in light of the time, effort, or responsibility involved in the case, and because those defendants might reasonably believe—as is the case

at various stages of the criminal trial and sentencing—that they may speak only through their counsel, we hold that trial courts must provide criminal defendants, personally and not through their appointed counsel, with an opportunity to be heard before entering a money judgment under § 7A-455. Because Friend was not informed of his right to be heard before the court entered the money judgment in this case, we vacate that judgment and remand for further proceedings.

Facts and Procedural History

On 14 July 2015, Friend got into a fight with an acquaintance, André Douglas Gay, during which Friend repeatedly stabbed Gay with a knife. The fight occurred around midnight at Gay's apartment, where Gay was staying with his sister and his girlfriend.

In Friend's version of events, which the jury heard through the testimony of law enforcement officers and a videotape of Friend's police interrogation, Friend went to Gay's apartment to discuss money that Gay owed him and an argument ensued. According to Friend, Gay came out of the apartment and hit Friend with a floor lamp. After Gay hit Friend with the lamp, the two fell to the ground and into the apartment fighting. At some point during the struggle, Gay grabbed a knife. Seeing this, Friend took out his own knife and stabbed Gay in self-defense.

In Gay's version of events, the fight began with Friend standing outside Gay's apartment and Gay remaining inside while the two argued through a screen door. During this heated, verbal argument, Friend pulled out his knife and threatened to "gut" Gay. Gay then grabbed a knife from the kitchen while Friend still remained outside the apartment door.

Gay claimed that he never once stepped outside his apartment during the fight. Gay also claimed that he never tried to stab Friend and that, after discovering the knife he picked up was broken, he threw it on the floor and never picked it up again.

Gay testified that he closed the front door of the apartment to keep Friend out, at which point Friend "busted" the side window from outside. Gay cracked the door open to see what was happening and Friend—still carrying his knife—pushed the door open. Gay claims that it was at this moment that he hit Friend with the lamp to keep Friend from entering. Friend still managed to push his way into the apartment, forcing Gay to the ground and stabbing him until Gay's girlfriend came to Gay's defense.

At trial, the State played a videotape of Friend's interrogation by law enforcement following the stabbing. In that videotaped interrogation, Friend contradicted himself, admitted that he pushed his way into the

apartment while Gay closed the door on him, and acknowledged that Gay "probably" put down his knife before Friend stabbed him.

The State also introduced several photographs of the apartment into evidence, all of which were taken shortly after the fight. The photographs showed a broken window on the side of Gay's apartment with shattered glass underneath it. One law enforcement officer testified that, given the positioning of the curtains on the window, the location of the broken glass indicated the window was broken from the outside.

The State also admitted the two knives from the fight into evidence. Gay's knife had no blood on it and was "broken" and "loose." Friend's knife, which law enforcement found hidden in a container on top of a microwave in his apartment, had blood stains on it.

The jury convicted Friend of first degree burglary and assault with a deadly weapon inflicting serious injury. The trial court sentenced him to 64 to 89 months in prison for the burglary and 25 to 42 months in prison for the assault. The court also entered a civil judgment against Friend for $1,750, which included the attorneys' fees incurred by Friend's court-appointed counsel during the case. Friend's counsel gave oral notice of appeal from the criminal judgment in open court the day after the court entered the judgment.

Analysis

I. Defendant's petition for writ of certiorari

[1] We first address our jurisdiction to hear the merits of this appeal. Friend seeks review of both the criminal judgment and the civil money judgment against him for attorneys' fees and costs. Friend acknowledges that under controlling precedent from this Court, his appeal is untimely because he noted his appeal from the criminal judgment one day *after* the trial court entered the judgment and he did not file a written notice of appeal from the civil judgment.

This Court routinely allows a petition for a writ of certiorari to review a criminal judgment where the defendant failed to timely appeal. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319 (2004) (citing N.C. R. App. P. 21(a)). In our discretion, we likewise do so here.

It is less common for this Court to allow a petition for a writ of certiorari where a litigant failed to timely appeal a civil judgment. But, as explained below, Friend's argument on the issue of attorneys' fees is meritorious. Accordingly, in our discretion, we issue a writ of certiorari to review this issue as well. *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959).

II. Admission of videotape of Friend's interrogation

[2] Friend first argues that the trial court erred by admitting his videotaped custodial interrogation. Friend concedes that he did not object to the videotape's admission at trial and we must therefore review this issue under the plain error standard of review. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Id.* "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* In other words, the defendant must show that, "absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335.

We reject Friend's argument because he cannot show that, but for the alleged error, the jury probably would have reached a different result. To be sure, Friend's videotaped interrogation was incriminating: he contradicted himself, thus damaging his credibility, and he acknowledges that he forced his way into Gay's apartment and that Gay had put down his own knife before Friend stabbed him.

But Friend has not shown that, "absent the error, the jury probably would have returned a different verdict." *Id.* Friend points to the "conflicting and general confusing nature of all the evidence" to suggest that admission of his incriminating statements "had a probable impact on the jury's findings." This ignores that the physical evidence at trial supported Gay's version of events, not Friend's. For example, the State presented evidence that the window to Gay's apartment had been smashed from the outside, as Gay described, and that Gay's knife was indeed broken, as he claimed when explaining why he dropped his knife even before Friend stabbed him.

Simply put, without the videotaped interrogation, the jury *might* have believed Friend's version of events. But that is not enough to satisfy the plain error standard. Friend has not met his burden to show that, absent the alleged error, the jury *probably* would have believed his account, rejected the victim's account and corroborating evidence, and therefore acquitted him. Accordingly, we find no plain error in the trial court's judgment.

III. Ineffective assistance of counsel

[3] Friend next argues that he received ineffective assistance of counsel because his trial attorney did not move to suppress Friend's videotaped statements or object to their admission at trial.

We decline to address this argument on direct appeal. The merits of an ineffective assistance of counsel claim will be decided on direct appeal only "when the cold record reveals that no further investigation is required." *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004). Where the claim raises "potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues." *State v. Stroud*, 147 N.C. App. 549, 556, 557 S.E.2d 544, 548 (2001).

Recently, in *State v. Todd*, our Supreme Court dismissed an appeal in which a defendant claimed his counsel was ineffective for failing to make a meritorious motion to dismiss for insufficiency of the evidence, outside the presence of the jury. __ N.C. __, __, 799 S.E.2d 834, 838 (2017). Although the record in *Todd* did not disclose any apparent strategic reason for declining to assert a meritorious, dispositive motion, particularly outside the jury's presence, our Supreme Court held that whether defense counsel "made a particular strategic decision remains a question of fact, and is not something which can be hypothesized" by an appellate court on direct appeal. *Id.*

Here, there is nothing in the record to indicate why Friend's counsel chose not to make a motion to suppress the videotaped interrogation or declined to object when it was admitted at trial. Friend argues that his counsel's failure to address the issue was not strategic because it was "the result of defense counsel's inadvertent mistake arising from his failure to familiarize himself with the facts of the case and to research the applicable law on the issue." But Friend cites no portion of the record showing this to be true. The State, in response, asserts that it "cannot make any representation regarding the trial strategy or thought process of [Friend's] trial counsel." In short, the reason why Friend's counsel did not raise this issue below "remains a question of fact, and is not something which can be hypothesized" by this Court on direct review. *Id.*

"[W]hen this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *Thompson*, 359 N.C. at 122–23, 604 S.E.2d at 881. Accordingly, we dismiss Friend's ineffective assistance of counsel claim without prejudice to pursue it through a motion for appropriate relief in the trial court.

IV. Civil judgment for court-appointed attorneys' fees

[4] Finally, Friend argues that the trial court failed to give him notice and an opportunity to be heard at sentencing before entering a money

judgment against him for his counsel's fees. As explained below, we vacate that judgment and remand for further proceedings.

In certain circumstances, trial courts may enter civil judgments against convicted indigent defendants for the attorneys' fees incurred by their court-appointed counsel. *See* N.C. Gen. Stat. § 7A-455. By statute, counsel's fees are calculated using rules adopted by the Office of Indigent Defense Services, but trial courts awarding counsel fees must take into account factors such as "the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases." N.C. Gen. Stat. § 7A-455(b). Before imposing a judgment for these attorneys' fees, the trial court must afford the defendant notice and an opportunity to be heard. *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005); *State v. Crews*, 284 N.C. 427, 442, 201 S.E.2d 840, 849 (1974).

This Court recently revisited Jacobs in two unpublished cases, *State v. Farabee*, __ N.C. App. __, 786 S.E.2d 432, 2016 WL 1745003 (2016), and *State v. Hurley*, __ N.C. App. __, __ S.E.2d __, No. COA16-1202, 2017 WL 4638192 (Oct. 17, 2017). In both cases, we vacated and remanded the civil judgments because the trial court did not ask the defendants if they wished to be heard. Instead, the trial court in both cases stated that it was taking up the issue, questioned the defendants' counsel about the amount of fees to be awarded, and then announced that it was entering a judgment in the amount of those fees. *Farabee*, __ N.C. App. at __, 2016 WL 1745003 at *7–8; *Hurley*, __ N.C. App. at __, 2017 WL 4638192 at *8. In both cases, this Court held that trial court's discussion with counsel did not provide the defendant with sufficient opportunity to be heard. *Id.*

Ordinarily, when a defendant is represented by counsel, notice to defendant's counsel that the court is taking up the issue would be sufficient to satisfy the requirement that the defendant must have notice and an opportunity to be heard. *In re Stuhl*, 292 N.C. 379, 389, 233 S.E.2d 562, 568 (1977). Counsel for defendants understand that, if they wish to be heard on an issue during an ongoing court proceeding, they can simply rise and ask the court for permission to be heard. Thus, ordinarily, by not asserting a particular argument when discussing an issue with the court, defendants (through counsel) were given the opportunity to raise the argument and waived it.

But on this particular issue, attributing counsel's silence to the defendant could lead to injustice. When the court is contemplating a money judgment against the defendant for attorneys' fees incurred by appointed counsel under N.C. Gen. Stat. § 7A-455, the interests of

the defendant and trial counsel are not necessarily aligned. For example, a defendant may believe that the amount of fees requested is unreasonable given the time, effort, or responsibility involved in defending the case. Counsel, unsurprisingly, might feel otherwise. Further complicating the issue, courts typically address the question of attorneys' fees at the end of the criminal sentencing proceeding. At nearly every other point in a criminal proceeding, defendants represented by counsel who ask to be personally heard on an issue would be told that they must speak through their counsel. *See*, *e.g.*, *State v. Thorne*, __ N.C. App. __, 785 S.E.2d 187, 2016 WL 1320808 at *1 (2016). Those defendants might reasonably believe the same is true when the court turns to the issue of attorneys' fees for their court-appointed lawyers.

To avoid the risk that defendants are deprived of the opportunity to be heard in this context, we adopt the reasoning of our unpublished decisions in *Farabee* and *Hurley* and hold that, before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Here, the State concedes that the trial court did not inform Friend of his right to be heard on the issue of attorneys' fees, and nothing in the record indicates that Friend understood he had that right. Accordingly, we vacate the civil judgment for attorneys' fees under N.C. Gen. Stat. § 7A-455 and remand to the trial court for further proceedings on this issue.

Our holding today does not announce a new rule of constitutional law. The requirement that defendants be afforded notice and an opportunity to be heard before imposition of a civil judgment for attorneys' fees was established in *Jacobs* and *Crews*. *See* 172 N.C. App. at 235–36, 616 S.E.2d at 316; 284 N.C. at 442, 201 S.E.2d at 849. This opinion simply provides further guidance on what trial courts should do to ensure that this Court can engage in meaningful appellate review when defendants raise this issue.

Conclusion

We hold Friend has failed to demonstrate plain error in the trial court's criminal judgment. We dismiss the claim for ineffective assistance

of counsel without prejudice. We vacate the civil judgment for attorneys' fees and remand for further proceedings on that issue.

NO PLAIN ERROR IN PART; DISMISSED IN PART; VACATED AND REMANDED IN PART.

Judges ELMORE and INMAN concur.

STATE OF NORTH CAROLINA
v.
DAVID MICHAEL REED, DEFENDANT

No. COA16-33-2

Filed 16 January 2018

Search and Seizure—traffic stop—motion to dismiss—authority to seize ended

The trial court erred in a drug trafficking case by denying defendant's motion to dismiss evidence found during a traffic stop where a trooper's authority to seize ended when he gave defendant a copy of his warning ticket. A reasonable person in defendant's position would not believe he was permitted to leave when one trooper told him to stay in the patrol car and another trooper was positioned outside the vehicle door. In light of *State v. Bullock*, 370 N.C. 256 (2017), the trooper unlawfully detained defendant without reasonable suspicion of criminal activity.

Judge DILLON dissenting.

Appeal by Defendant from judgment entered 20 July 2015 by Judge Thomas H. Lock in Johnston County Superior Court. Originally heard in the Court of Appeals 6 June 2016. By opinion issued 20 September 2016, a divided panel of this Court reversed the decision of the trial court denying Defendant's motion to suppress evidence. Upon discretionary review granted by the Supreme Court and by judgment dated 27 November 2017, the Supreme Court of North Carolina vacated and remanded the case to the Court of Appeals for reconsideration in light of the Supreme Court's decision in *State v. Bullock*, ___, N.C. ___, ___ S.E.2d ___ (2017) (194A16).

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

David Michael Reed ("Defendant") filed a motion to suppress evidence found during a traffic stop. On 14 July 2015, the trial court entered an order denying Defendant's motion to suppress. On 21 July 2015, Defendant pleaded guilty to trafficking more than 200 grams but less than 400 grams of cocaine by transportation, and trafficking more than 200 grams but less than 400 grams of cocaine by possession. The trial court sentenced Defendant to 70 to 93 months imprisonment and imposed a $100,000.00 fine and $3,494.50 in court costs. On appeal, this Court held the trial court committed reversible error by denying Defendant's motion to suppress.

On 5 October 2016, the State filed a petition for writ of *supersedeas* and a motion for temporary stay with the Supreme Court of North Carolina. The same day, the Supreme Court allowed the State's motion for temporary stay. On 25 October 2016, the State filed notice of appeal, pursuant to the dissenting opinion. On 2 November 2016, the court allowed Defendant's petition for writ of *supersedeas*. In an opinion filed 3 November 2017, the court vacated the opinion of this Court and remanded for reconsideration in light of the Supreme Court's recent decision in *State v. Bullock*, ___ N.C. ___, ___ S.E.2d ___ (2017) (194A16). On remand, after reviewing Bullock and the arguments advanced by the parties, we reverse the decision of the trial court.

I. Factual and Procedural Background

At 8:18 a.m. on 9 September 2014, Defendant drove a rented Nissan Altima faster than the posted sixty-five miles per hour speed limit on Interstate 95 ("I-95") in Johnston County, North Carolina. His fiancée, Usha Peart, rode in the front passenger seat and held a female pit bull in her lap. Trooper John W. Lamm, of the North Carolina State Highway Patrol, was parked in the median of I-95. Trooper Lamm used his radar to determine Defendant was traveling seventy-eight miles per hour, and performed a traffic stop for Defendant's speeding infraction. Trooper Lamm's patrol car had a camera that faced forwards towards the hood of the vehicle, and recorded audio inside and outside of the patrol car.

Defendant pulled over on the right shoulder of I-95, Trooper Lamm pulled behind him, and Trooper Lamm approached the passenger side of the Nissan. Trooper Lamm saw energy drinks, trash, air fresheners, and dog food scattered on the floor of the vehicle. He asked if the dog in Peart's lap was friendly and Defendant and Peart said the dog was friendly.

Trooper Lamm stuck his arm inside the vehicle to pet the dog and asked Defendant for his driver's license and the rental agreement. Defendant gave Trooper Lamm his New York driver's license, a registration card, and an Enterprise rental car agreement. The rental agreement listed Peart as the renter and Defendant as an authorized driver. Trooper Lamm told Defendant "come on back here with me" motioning towards his patrol car.

Defendant exited the Nissan and Trooper Lamm asked if he had any guns or knives on his person. Defendant asked Trooper Lamm why the frisk was necessary, and Trooper Lamm replied, "I'm just going to pat you down for weapons because you're going to have a seat with me in the car." Trooper Lamm found a pocket knife, said it was "no big deal," and put it on the hood of the Nissan.

Trooper Lamm opened the passenger door of his patrol car. His K-9 was in the back seat of the patrol car at that time. Defendant sat in the front passenger seat with the door open and one leg outside of the car. Trooper Lamm told Defendant to close the door. Defendant hesitated and said he was "scared" to close the door; Lamm replied, "Shut the door. I'm not asking you, I'm telling you to shut the door. I mean you're not trapped, the door [is] unlocked. Last time I checked we were the good guys." Defendant said, "I'm not saying you're not," and Trooper Lamm said, "You don't know me, don't judge me." Defendant said he was stopped before in North Carolina, but he was never taken to the front passenger seat of a patrol car during a stop. Following Trooper Lamm's orders, Defendant closed the front passenger door.

Trooper Lamm ran Defendant's New York license through record checks on his mobile computer. While doing so, Trooper Lamm asked Defendant about New York, and "where are y'all heading to?" Defendant said he was visiting family in Fayetteville, North Carolina. Trooper Lamm noted the rental agreement restricted travel to New York, New Jersey, and Connecticut, but told Defendant the matter could likely be resolved with a phone call to the rental company.

Then, Trooper Lamm asked Defendant about his criminal history. Defendant admitted he was arrested for robbery in the past, when he

was in the military. Trooper Lamm asked Defendant about his living arrangements with Peart, and whether he or Peart owned the dog in the Nissan. Trooper Lamm noticed the rental agreement was drafted for a Kia Rio not a Nissan Altima. Trooper Lamm exited the patrol car to ask Peart for the correct rental agreement, and told Defendant to "sit tight."

Trooper Lamm approached the front passenger side of the Nissan Altima and asked Peart for the correct rental agreement. He asked about her travel plans with Defendant and the nature of their trip. She said they were visiting family in Fayetteville but might also travel to Tennessee or Georgia. She explained the first rental car they had, the Kia Rio, was struck by another car and the rental company gave them the Nissan Altima as a replacement. She could not find the rental agreement for the Nissan Altima and continued to look for it. Trooper Lamm told Peart he was going to issue Defendant a speeding ticket and the two would "be on [their] way."

Trooper Lamm returned to the patrol car, explained Peart could not locate the correct rental agreement, and continued to question Defendant about the purpose of the trip to Fayetteville. Then, Trooper Lamm called the rental company and the rental company confirmed everything was fine with the Nissan Altima rental, but informed Trooper Lamm that Peart still needed to call the company to correct the restricted travel condition concerning use of the car in New York, New Jersey, and Connecticut. After the call, Trooper Lamm told Defendant his driver's license was okay and he was going to receive a warning ticket for speeding. Trooper Lamm issued a warning ticket, returned all of Defendant's paperwork including his license and asked Defendant if he had any questions.

Then, Trooper Lamm told Defendant he was "completely done with the traffic stop," but wanted to ask Defendant additional questions. Defendant did not make an audible response, but at the suppressing hearing, Trooper Lamm testified Defendant nodded his head. Trooper Lamm did not tell Defendant he was free to leave. At this point, an additional officer, Trooper Ellerbe, was present on the scene. Trooper Ellerbe parked his patrol car behind Trooper Lamm's and left his blue lights on. He stood directly beside the passenger door of Trooper Lamm's vehicle where Defendant sat.

Trooper Lamm asked Defendant if he was carrying a number of controlled substances, firearms, or illegal cigarettes in the Nissan Altima. Defendant responded, "No liquor, no nothing, you can break the car down." Trooper Lamm continued questioning Defendant and said, "I want to search your car, is that okay with you?" Defendant hesitated,

mumbled, and told Trooper Lamm to ask Peart. Defendant stated, "I'm just saying, I've got to go to the bathroom, I want to smoke a cigarette, we're real close to getting to the hotel so that we can see our family, like, I don't, I don't see a reason why." Trooper Lamm responded, "[W]ell let me go talk to her then, sit tight," and walked to the front passenger side of the Nissan Altima. By this time, two additional officers were present at the scene.

Trooper Lamm told Peart everything was fine with the rental agreement and asked her the same series of questions he asked Defendant, whether the two were carrying controlled substances, firearms, or illegal cigarettes. Trooper Lamm asked Peart if he could search the car. Peart hesitated, expressed confusion, and stated, "No. There's nothing in my car, I mean . . . ." Trooper Lamm continued to ask for consent, Peart acquiesced and agreed to sign a written consent form. Trooper Lamm searched the Nissan Altima and found cocaine under the back passenger seat.

II. Analysis

Defendant originally argued before this Court the trial court erred in denying his motion to suppress evidence discovered pursuant to an unlawful traffic stop. Specifically, Defendant argued the trial court made findings of fact which were not supported by competent evidence because his "initial investigatory detention was not properly tailored to address a speeding violation." He also contended Trooper Lamm seized him without reasonable suspicion of criminal activity, when the trooper told him to exit his vehicle and sit in the patrol car. Defendant further argued the officer unlawfully seized items from the car during the search, and these items are fruit of the poisonous tree, which must be suppressed. This Court agreed.

Relying on the United States Supreme Court's guidance in *Rodriguez v. United States* and our prior decision in *State v. Bullock* we held:

> [A]n officer may offend the Fourth Amendment if he unlawfully extends a traffic stop by asking a driver to step out of a vehicle. The same is true of an officer who unlawfully extends a traffic stop by asking a driver to sit in his patrol car, thereby creating the need for a weapons pat down. It is also possible for an officer to unlawfully extend a traffic stop by telling a driver to close the patrol car's front passenger door, while the officer questions the driver about matters unrelated to the traffic stop.

State v. Reed, ___ N.C. App. ___, ___, 791 S.E.2d 486, 492 (2016) (citations and footnotes omitted). We determined the trooper's authority to seize Defendant for speeding ended "when tasks tied to the traffic infraction [were]—*or reasonably should have been*—completed." *Id.* (quoting *Rodriguez v. United States*, ___ U.S. ___, ___, 191 L. Ed. 2d 492, 498 (2015) (emphasis added) (citation omitted)). We determined at the very latest, the authority to seize ended when the officer told Defendant he was going to issue a warning ticket, and gave him a copy of the ticket. *Id.*

We ultimately held Trooper Lamm did not have reasonable suspicion to search the vehicle after the traffic stop concluded, because the evidence the trial court relied upon in support of a finding of reasonable suspicion constituted legal behavior, consistent with innocent travel. *Id.* at ___, 791 S.E.2d at 493. Therefore, we reversed the decision of the trial court denying Defendant's motion to suppress. *Id.*

In *State v. Bullock*, our Supreme Court addressed a similar factual scenario. There, the Supreme Court held an officer may require a driver to exit his vehicle, without unlawfully extending the traffic stop. ___ N.C. ___, ___, ___ S.E.2d ___, ___ (Nov. 3, 2017) (No. 194A16). In *Bullock*, after the officer required the driver to exit his vehicle, he frisked the driver for weapons. *Id.* The Supreme Court held this frisk was lawful, due to concerns of officer safety, and the very brief duration of the frisk. *Id.* The officer then required the driver to sit in the patrol car, while he ran database checks. *Id.* The court determined this did not unlawfully extend the stop either. *Id.* The court then held the officer had reasonable suspicion to thereafter extend the stop and search the defendant's vehicle. *Id.* The defendant's nervous demeanor, as well as his contradictory and illogical statements provided evidence of drug activity. *Id.* Additionally, he possessed a large amount of cash and multiple cell phones, and he drove a rental car registered in another person's name. *Id.* The court determined these observations provided reasonable suspicion of criminal activity, allowing the officer to lawfully extend the traffic stop and conduct a dog sniff. *Id.*

In reconsideration of our decision, we are bound by the Supreme Court's holdings in *Bullock*. Therefore, we must conclude Trooper Lamm's actions of requiring Defendant to exit his car, frisking him, and making him sit in the patrol car while he ran records checks and questioned Defendant, did not unlawfully extend the traffic stop. Yet, this case is distinguishable from *Bullock* because after Trooper Lamm returned Defendant's paperwork and issued the warning ticket, Defendant remained unlawfully seized in the patrol car.

Ordinarily, "an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration." *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009); *see also State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001) (stating "[a] reasonable person, under the circumstances, would have felt free to leave when the documents were returned. Therefore, the first seizure concluded when [the officer] returned the documents to defendant."). Yet, the governing inquiry is whether under the totality of the circumstances a reasonable person in the detainee's position "would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980).

Here, a reasonable person in Defendant's position would not believe he was permitted to leave. When Trooper Lamm returned Defendant's paperwork, Defendant was sitting in the patrol car. Trooper Lamm continued to question Defendant as he sat in the patrol car. When the trooper left the patrol car to seek Peart's consent to search the rental car, he told Defendant to "sit tight." At this point, a second trooper was present on the scene, and stood directly beside the passenger door of Trooper Lamm's vehicle where Defendant sat. Moreover, at trial Trooper Lamm admitted at this point Defendant was not allowed to leave the patrol car.

A reasonable person in Defendant's position would not feel free to leave when one trooper told him to stay in the patrol car, and another trooper was positioned outside the vehicle door. Therefore, even after Trooper Lamm returned Defendant's paperwork, Defendant remained seized. To detain a driver by prolonging the traffic stop, an officer must have "reasonable articulable suspicion that illegal activity is afoot." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166-67 (2012).

As we concluded in our first opinion, Trooper Lamm did not have reasonable suspicion of criminal activity to justify prolonging the traffic stop. The facts suggest Defendant appeared nervous, Peart held a dog in her lap, dog food was scattered across the floorboard of the vehicle, the car contained air fresheners, trash, and energy drinks—all of which constitute legal activity consistent with lawful travel. While Trooper Lamm initially had suspicions concerning the rental car agreement, the rental company confirmed everything was fine.

These facts are distinguishable from *Bullock* in which the officer observed the defendant "speeding, following a truck too closely, and weaving briefly over the white line marking the edge of the road."

Bullock at ___, ___ S.E.2d at ___. Then the defendant's hand trembled as he handed over his license. *Id.* Additionally, the defendant was not the authorized driver on his rental agreement, he had two cell phones, and a substantial amount of cash on his person. *Id.* He failed to maintain eye contact, and made several contradictory, illogical statements. *Id.*

We therefore conclude, after reconsideration of our prior opinion in light of *Bullock*, the trial court erred in denying Defendant's motion to suppress because after the lawful duration of the traffic stop concluded Trooper Lamm unlawfully detained Defendant without reasonable suspicion of criminal activity.

III. Conclusion

For the foregoing reasons, we reverse the trial court's order.

REVERSE.

Chief Judge McGEE concurs.

Judge DILLON dissents in a separate opinion.

DILLON, Judge, dissenting.

Because I agree with the State that Judge Adams's findings support a conclusion that Trooper Lamm obtained Defendant's consent to search the rental vehicle *after* the traffic stop had concluded, and that Defendant was otherwise free to leave, I respectfully dissent.

Even assuming, *arguendo*, that Trooper Lamm's exchange with Defendant following the conclusion of the traffic stop was non-consensual, Trooper Lamm had *reasonable suspicion* of separate, independent criminal activity to support an extension of the traffic stop beyond the time necessary to complete the mission of citing Defendant for the traffic violation.

I. The Seizure Had Ended Because the Traffic Stop Had Concluded and Defendant was Free to Leave.

The majority contends that the stop was unconstitutionally extended when Defendant was sitting in the patrol car and his companion, Ms. Peart, had returned to the rental car. The majority concluded that a person in Defendant's position would not feel free to leave at the point of the encounter when Trooper Lamm told Defendant to "sit tight" in the patrol car while Trooper Lamm returned to the rental vehicle

to seek to Ms. Peart's consent to search the rental vehicle. However, I disagree with this analysis: As explained below, the findings of Judge Adams show that Defendant gave his consent to Trooper Lamm to search the rental vehicle (or ask Ms. Peart for consent) at a point during the encounter when Defendant was no longer seized, well before Trooper Lamm told Defendant to "sit tight." And once Defendant gave his consent to the search, it was certainly reasonable for Trooper Lamm to direct Defendant to "sit tight" for officer safety while he returned to the rental vehicle, which Ms. Peart was seated inside.

I agree with the majority that while Trooper Lamm held Defendant's paperwork and "issued the warning ticket for speeding as Defendant was sitting in the patrol car, Defendant was still seized.

However, based on controlling jurisprudence, the seizure ended when, as the trial court found, Trooper Lamm gave the warning ticket, along with Defendant's paperwork, to Defendant and told Defendant that the traffic stop was completed. Indeed, our Court and the Fourth Circuit Court of Appeals have held on a number of occasions that "[g]enerally, an initial traffic stop concludes and the encounter becomes consensual . . . after an officer returns the detainee's driver's license and registration." *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009).[1] *United States v. Sullivan*, 138 F.3d 126, 133-34 (4th Cir. 1998)[2]. Further, as Judge Adams found, Trooper Lamm did not seek Defendant's consent to search the rental car until *after* returning Defendant's paperwork to him and informing Defendant that the traffic stop had concluded. There is no finding to suggest any restraint or compulsion by Trooper Lamm when he obtained Defendant's consent to search the rental vehicle. That is, Trooper Lamm did not simply launch into an interrogation after returning to Defendant his license and other paperwork. Rather, as Judge Adams found, Trooper Lamm took the extra step of first *asking* Defendant for his consent to question him further. *See Kincaid*, 147 N.C. App. at 102, 555 S.E.2d at 300 (holding in a similar situation when the

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1. *See also State v. Henry*, 237 N.C. App. 311, 324, 765 S.E.2d 94, 104 (2014) (recognizing that "a traffic stop is not terminated until after the officer returns the driver's license or other documents to the driver"); *State v. Cottrell*, 234 N.C. App. 736, 742-43, 760 S.E.2d 274, 279 (2014) (restating the general principle that the return of motorist documentation typically renders any subsequent exchanges between motorist and law enforcement consensual). In *State v. Kincaid*, we recognized that "subject to a totality of the circumstances test, that once an officer returns the license and registration, the stop is over and the person is free to leave." 147 N.C. App. 94, 99, 555 S.E.2d 294, 298 (2001).

2. *See also United States v. Whitney*, 391 F. App'x. 277, 280-81 (4th Cir. 2010); *United States v. Meikle*, 407 F.3d 670, 673-74 (4th Cir. 2005).

officer "asked if he could question defendant . . . [,] [he] did not deprive defendant of freedom of action in any significant way. After [the officer] handed back defendant's license and registration, defendant was free to leave and free to refuse to answer questions"). Judge Adams also found that Trooper Lamm "was at all times casual and conversational in his words and manner."[3] *See Sullivan*, 138 F.3d at 133 (finding relevant that "there is no indication that [the officer] employed any physical force or engaged in any outward displays of authority"). Also significant is that the questioning occurred on a public highway during the daytime.

It is true that there is no indication (or finding) that Trooper Lamm ever expressly told Defendant that he "was free to leave." The United States Supreme Court, however, has held that an officer is *not required* to inform a detainee that he is free to leave in order to transform a traffic stop into a consensual encounter. *See Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996) (concluding that it would be "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."). The Fourth Circuit has reached this same conclusion. *See Sullivan*, 138 F.3d at 133 ("While [the officer] never told [the defendant] that he was free to go, that fact alone is not dispositive.") And our Court has also reached this same conclusion. *See Kincaid*, 147 N.C. App. at 97, 555 S.E.2d at 297 (affirming the trial court's conclusion that the defendant was free to leave "although the officer never told defendant that he was free to leave").

Judge Adams further found that *after* Defendant gave Trooper Lamm consent to search the rental vehicle (subject to Ms. Peart's consent), Trooper Lamm directed Defendant to "sit tight" in the unlocked patrol car while he returned to the rental vehicle to ask Ms. Peart for her consent to the search. I conclude that it was constitutionally permissible for Trooper Lamm, for purposes of officer safety, to direct Defendant to remain in the patrol car while he carried out the search to which Defendant had voluntarily consented.[4] Certainly, where an individual has consented to a search, an officer can direct that individual away

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3. Defendant challenges the finding regarding the casualness of the conversation; however, he does not challenge this finding with regards to any portion of the encounter occurring after Trooper Lamm informed Defendant that the traffic stop was completed.

4. Defendant does not make any argument concerning whether *Ms. Peart* would not have felt free to leave when *she* gave *her* consent to search the vehicle or any argument about the impact the validity of Ms. Peart's consent should have on our analysis in this prosecution of Defendant. Therefore, any issue concerning Ms. Peart's consent is not before us.

from the place being searched and away from other companions for purposes of officer safety.

In conclusion, since Defendant gave his consent to search the car *after* the traffic stop had concluded and the encounter between Defendant and Trooper Lamm became consensual, I would affirm Judge Adams' order.

II. Trooper Lamm Otherwise Had Reasonable Suspicion to Extend the Stop.

Assuming, *arguendo*, that the traffic stop did not become consensual after Trooper Lamm returned all of the paperwork to Defendant, informed Defendant that the traffic stop had concluded, and asked Defendant for his consent to question him further, I believe that Judge Adams's findings support her conclusion that Trooper Lamm had reasonable suspicion that Defendant was transporting illegal drugs. I so conclude based on the holding of our Supreme Court in *State v. Bullock*, ___ N.C. ___, 805 S.E.2d 671 (2017), and for the reasons stated in my dissent in the first opinion filed in the present case, *State v. Reed*, ___ N.C. App. ___, ___, 791 S.E.2d 486, 493-96 (2016).

STATE OF NORTH CAROLINA
v.
ANTHONY WORTH WYRICK, DEFENDANT

No. COA16-1244

Filed 16 January 2018

Evidence—cross-examination—prior inconsistent statements—impeachment—right to remain silent

The trial court did not err in a rape case by allowing a cross-examination of defendant on prior inconsistent statements made at trial and to a detective two years before trial where defendant provided a detailed account of what transpired during trial but failed to provide any of these details when speaking to a detective. The prosecutor did not exploit defendant's right to remain silent, but instead merely inquired as to why he did not remain consistent.

Appeal by defendant from judgment entered 20 May 2016 by Judge Jesse B. Caldwell in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

BERGER, Judge.

Anthony Worth Wyrick ("Defendant") appeals alleging the State's impeachment of Defendant with his post-Miranda silence was a violation of his Fifth and Fourteenth Amendment rights to be free from self-incrimination, to counsel, and to due process. Defendant also alleges that the prosecutor improperly cross-examined him regarding his post-arrest silence, and this allegedly improper impeachment resulted in prejudicial error. We disagree.

Factual and Procedural Background

D.K. was sixteen years old in 1985, and lived with her mother in a Charlotte apartment. On September 6, 1985, while D.K.'s mother was out of town, D.N., who was fifteen years old at the time, stayed in the apartment with D.K. At 4:30 a.m., they were awakened when the doorbell rang. They spoke with a man named "Tony" through the door, who claimed to be looking for the property manager's apartment. Tony left when the girls told him he had the wrong apartment.

The girls were awakened again at 7:30 a.m. to D.K.'s dog barking and a man entering the room with a crowbar. He removed their clothing, tied their hands, and placed pillowcases over their heads. The man was later identified as Defendant. Defendant fondled the girls and inserted his fingers into their vaginas. He began having sexual intercourse with D.K, then forced her to perform oral sex on him, threatening to hurt D.N. if she refused. Defendant ejaculated into D.K.'s mouth and wiped her face off with a pillowcase. Subsequently, he had sexual intercourse with D.N.

Defendant apologized to the girls and left the room. D.K. heard Defendant walk downstairs and exit through a sliding glass door. After he left, D.K. managed to get her hands free, but could not free D.N. D.K. called her brother, who came to the apartment and used a knife to free D.N.'s hands. The police were called at that time.

D.K. and D.N. submitted to a sexual assault examination by Dr. Carey Ziemer at Charlotte Memorial Hospital. Dr. Ziemer determined that the results of D.K.'s examination was consistent with the information she had provided. For D.N., Dr. Ziemer observed a laceration to the

base of her vulva that was still bleeding. Dr. Ziemer believed this injury occurred during a recent struggle. With the aid of a pediatric speculum, Dr. Ziemer observed that D.N.'s vagina had a whitish mucoid fluid with a reddish tinge. Dr. Ziemer collected additional evidence from the girls and provided the rape kits to law enforcement.

Pillowcases, sheets, clothing, and other items were collected from the apartment by crime scene investigators. Semen was found on D.N.'s panties and vaginal swabs, D.K.'s shorts, and a bed sheet. However, DNA testing was not available in 1985, and the case went unsolved for nearly thirty years.

In January 2006, the Charlotte-Mecklenburg Police Department ("CMPD") created a sexual assault cold case unit because the department had approximately 5,000 open rape cases. In 2013, Detective Troy Armstrong reviewed the evidence. He submitted the physical evidence to a crime lab in Beaufort County, South Carolina for DNA analysis. DNA analyst Timothy French examined physical evidence for biological fluids and DNA. DNA from one male individual was located on D.N.'s panties, vaginal swabs and shorts, a pillowcase, and bedsheets. The South Carolina crime lab established a DNA profile from the evidence collected in 1985. Defendant was developed as a suspect by the CMPD. Detective Armstrong discovered that Defendant lived within three and a half miles of D.K.'s apartment complex in 1985.

On September 24, 2014, Defendant was arrested by CMPD. Defendant was read his *Miranda* rights, and signed a waiver before speaking with Detective Armstrong. Defendant informed officers he did not recall the details of that night. Detective Armstrong obtained buccal swabs from Defendant in a search incident to his arrest and sent the samples to the Beaufort County, South Carolina facility for testing. Defendant's DNA profile matched the male DNA profile on the evidence collected in 1985.

On October 13, 2014, Defendant was indicted by a Mecklenburg County grand jury for one count of first degree burglary, two counts of first degree rape, three counts of first degree sexual offense, and two counts of first degree kidnapping.

In May 2016, Defendant was tried in Mecklenburg County Superior Court. At trial, Defendant stated that he had a "memorable" consensual sexual encounter with two girls on September 6, 1985 despite not recalling that night while being interrogated by Detective Armstrong. The jury found Defendant guilty of two counts of second degree rape, three counts of second degree sexual offense, and two counts of second degree kidnapping. Defendant was sentenced pursuant to the Fair

Sentencing Act to five consecutive forty year maximum sentences, and two consecutive thirty year maximum sentences which were to begin at the expiration of Defendant's federal imprisonment. Defendant was also ordered to register as a sex offender upon release for a period of thirty years. Defendant timely appealed.

Analysis

Defendant contends that the prosecutor improperly cross-examined him regarding his post-arrest silence when he testified at trial in violation of Rule 607 of the North Carolina Rules of Evidence. Defendant further contends that this allegedly improper impeachment resulted in prejudicial error, requiring a new trial. We disagree.

"[O]ur standard of review for rulings made by the trial court pursuant to Rule 607 of the North Carolina Rules of Evidence is abuse of discretion." *State v. Banks*, 210 N.C. App. 30, 38, 706 S.E.2d 807, 814 (2011) (citation omitted).

The United States Constitution protects an individual from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), individuals are guaranteed protections under the Fifth and Fourteenth Amendments of the U.S. Constitution during a custodial police interrogation. A criminal defendant's exercise of his right to remain silent cannot be used against him "to impeach an explanation subsequently offered at trial." *Doyle v. Ohio*, 426 U.S. 610, 618, 49 L. Ed. 2d 91, 98 (1976). The United States Supreme Court has given latitude to the several states to "formulate [their] own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative." *Jenkins v. Anderson*, 447 U.S. 231, 239, 65 L. Ed. 2d 86, 95 (1980).

The North Carolina Constitution guarantees "[i]n all criminal prosecutions, every person charged with crime has the right to . . . not be compelled to give self-incriminating evidence." N.C. Const. art. I, § 23. "Prior statements of a witness which are inconsistent with his present testimony are not admissible as *substantive evidence* because of their hearsay nature." *State v. Mack*, 282 N.C. 334, 339, 193 S.E.2d 71, 75 (1972) (citations omitted) (emphasis added). However, our Supreme Court has established longstanding precedent that "such prior inconsistent statements are admissible for the purpose of impeachment." *Id.* at 340, 193 S.E.2d at 75 (citing *State v. Chance*, 279 N.C. 643, 185 S.E.2d 227 (1971); *State v. Britt*, 225 N.C. 364, 34 S.E.2d 408 (1945); Stansbury, N.C. Evidence, § 46 (2d ed. 1963)). "If the former statement fails to mention

a material circumstance presently testified to, which it would have been natural to mention in the prior statement, the prior statement is sufficiently inconsistent, and is termed an *indirect inconsistency*." *Id.* (citations, internal quotation marks, and brackets omitted).

" ' The credibility of a witness may be attacked by any party, including the party calling him.' " *State v. Williams*, 355 N.C. 501, 533, 565 S.E.2d 609, 628 (2002) (citing N.C.G.S. § 8C-1, Rule 607 (2001)), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). "However, extrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern matters collateral to the issues." *Id.* (citing *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989)).

On cross-examination, impeachment of a witness is proper if it "merely inquires into prior inconsistent statements." *State v. Fair*, 354 N.C. 131, 156, 557 S.E.2d 500, 519 (citation and internal quotation marks omitted), *reconsideration denied*, 354 N.C. 576, 558 S.E.2d 862 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Further, our Supreme Court has held "[s]uch questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *Id.* at 156, 557 S.E.2d at 518-19 (citation and internal quotation marks omitted).

Here, Defendant's testimony on direct examination highlighted many specific details of the night of September 6, 1985. Defendant recounted driving an unknown man home from a local nightclub to an apartment complex, meeting two young women in the complex's parking lot, and having a consensual sexual encounter with the two young women. Defendant explained that the two women offered him "white liquor," marijuana, and invited him to their apartment. However, Defendant failed to mention any of these details when questioned by Detective Armstrong. Instead, Defendant stated he did not recall the details of that night.

On cross-examination, the prosecutor asked Defendant why he had not disclosed this detailed account to the detective during his interview two years prior to trial. The following transpired:

> THE STATE: Now, when Detective Armstrong interviewed you on September 24th, [2014], . . . he gave you all the warrants and let you have plenty of time to read over the warrants; correct? Because you asked to see them because you wanted to read them.
>
> DEFENDANT: Yeah, that sounds right.

> THE STATE: And he sat there with you maybe thirty minutes or so while you went over and read them in detail. So you knew exactly what you were being charged with, and the address and the names of the victims, and everything that you were being accused of doing; isn't that right?
>
> DEFENDANT: Yes, ma'am.

Defendant stated that he was unable to recall the account because he was medicated at the time of the interview due to a recent series of operations, and that the medication affected his memory during the interview.

The prosecutor's cross-examination was directly related to the subject matter and details raised in Defendant's own direct testimony, including the nature of the sexual encounter itself, the police interrogation, and his prior convictions. Further, the inquiry by the prosecutor was not in an effort to proffer substantive evidence to the jury, but rather to impeach Defendant with his inconsistent statements. *See Fair*, 354 N.C. 131, 557 S.E.2d 500; *State v. Westbrooks*, 345 N.C. 43, 478 S.E.2d 483 (1996). Defendant's post-*Miranda* silence is within the exceptions since "no governmental action induced petitioner to remain silent before arrest." *Westbrooks*, 345 N.C. at 63, 478 S.E.2d at 495 (citation and internal quotation marks omitted).

Defendant failed to mention his story of a consensual sexual encounter to the detective which he later recalled with a high level of particularity during direct examination. Such a "memorable" encounter would have been natural for Defendant to recall at the time Detective Armstrong was conducting his investigation; thus, his prior statement was an "indirect inconsistency." Further, the prosecutor did not exploit Defendant's right to remain silent, but instead merely inquired as to why he did not remain consistent between testifying on direct examination and in his interview with the detective two years prior. Accordingly, the trial court did not err when it allowed the prosecutor to impeach Defendant with his inconsistent statements made at trial and two years prior to the detective.

Conclusion

The trial court did not err in allowing the cross-examination of Defendant in regards to his prior inconsistent statements. We conclude Defendant received a fair trial, free from error.

NO ERROR.

Judges DILLON and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 JANUARY 2018)

CECCHETTINI v. CECCHETTINI No. 17-556	Wake (13CVD13992)	Dismissed
CRAZIE OVERSTOCK PROMOTIONS, LLC v. McVICKER No. 16-932-2	Bladen (16CVS204)	Affirmed
DALTON v. DALTON No. 17-622	Onslow (12CVD4182)	Vacated and Remanded
IN RE A.B.K. No. 17-792	Mecklenburg (15JA515) (15JA516)	Affirmed
IN RE ADOPTION OF S.K.G. No. 17-638	Wake (16SP1666)	Affirmed
IN RE Z.E. No. 17-776	Durham (15J4-6)	Affirmed
N.C. FARM BUREAU MUT. INS. CO. v. LILLEY No. 16-998	Wake (14CVS9338)	Affirmed
PICOTTE v. HULL No. 17-786	Durham (16CVD722)	Affirm
RUSSELL v. BLDG. MATERIALS MFG. CORP. No. 16-1273	Wake (14CVD12936)	Affirmed
SAPPINGTON v. SAPPINGTON No. 17-127	Avery (07CVD59)	Vacated in part and remanded
SARGENT v. EDWARDS No. 17-623	Buncombe (15CVS5411)	Affirmed in Part and Reversed in Part
STATE v. BATTLE No. 16-355-2	Duplin (14CRS50827)	No Error
STATE v. DEVEGA No. 16-1302	Wake (08CRS76923-25) (08CRS76927-28) (08CRS76932)	No Error

STATE v. JOHNSON No. 17-244	Wake (15CRS202046) (15CRS202049)	No Error
STATE v. SPACE No. 17-774	Brunswick (15CRS55230)	Affirmed

BADIN SHORES RESORT OWNERS ASS'N, INC. v. HANDY SANITARY DIST.

[257 N.C. App. 542 (2018)]

BADIN SHORES RESORT OWNERS ASSOCIATION, INC., A/K/A BADIN SHORES RESORT HOMEOWNERS ASSOCIATION, PLAINTIFF
v.
HANDY SANITARY DISTRICT, DEFENDANT

No. COA17-718

Filed 6 February 2018

1. Civil Procedure—motion for summary judgment—timeliness of service—waiver of objection

Plaintiff in a contract dispute waived any objection to the timeliness of service of defendant's motion for summary judgment (which was served 7 days before the hearing rather than the minimum of 10 days) by attending and participating in the hearing, without making any objection.

2. Civil Procedure—summary judgment—affidavit in support of motion—opposing party presented only bare allegations

In a case involving a contract dispute over sewer services, the trial court did not err by concluding there were no issues of material fact as to the reasonableness of the rate increase imposed by defendant sanitary district. In support of its motion for summary judgment, defendant submitted an affidavit of its general manager, explaining the criteria by which defendant set its rates, while plaintiff failed to produce any evidence outside bare allegations to establish a genuine issue for trial.

3. Sewage—wastewater services agreement—base rate increase—contract dispute—meaning of "online and operational"

In a case involving a contract dispute over sewer services, the Court of Appeals rejected plaintiff homeowner association's argument that the trial court improperly interpreted the language in the wastewater services agreement between the parties, which required that the base rate not be raised until the area sewer system was "online and operational"—and thereby erroneously granted summary judgment for defendant sanitary district. Whether the area sewer system had received a final permit from the N.C. Department of Environmental and Natural Resources did not, in the ordinary meaning of the term, control whether the system was "online and operational."

4. Sewage—rate increase—alleged violation of N.C.G.S. § 130A-64(a) —unsubstantiated allegations

In a case involving a contract dispute over sewer services, the trial court did not err by granting summary judgment in favor of defendant sanitary district on plaintiff's claim alleging that defendant violated N.C.G.S. § 130A-64(a) by imposing an unreasonable rate increase as the result of the mismanagement of a project. Plaintiff failed to respond with any factual evidence to defendant's prima facie evidence of the reasonableness of the rate increase.

5. Unfair Trade Practices—sanitary district—quasi-municipal corporation—no cause of action

In a case involving a contract dispute over sewer services, the trial court did not err by granting summary judgment in favor of defendant sanitary district on plaintiff's claim for unfair and deceptive trade practices. As a quasi-municipal corporation, defendant sanitary district could not be sued for unfair and deceptive trade practices.

Appeal by plaintiff from order entered 26 January 2017 by Judge Edwin G. Wilson, Jr. in Montgomery County Superior Court. Heard in the Court of Appeals 29 November 2017.

Higgins Benjamin PLLC, by Gilbert J. Andia, Jr., for plaintiff-appellant.

Megerian & Wells, by Jonathan L. Megerian and Franklin E. Wells, Jr., for defendant-appellee.

ZACHARY, Judge.

Plaintiff Badin Shores Resort Owners Association, Inc., also known as Badin Shores Resort Homeowners Association ("BSR"), is a nonprofit corporation representing the interests of homeowners in the planned unit development known as Badin Shores Resort. Defendant Handy Sanitary District ("Handy") is a sanitary district created pursuant to N.C. Gen. Stat. § 130A-47 (2016) that provides water and sewer utility services in various locations in North Carolina, including Montgomery County, where BSR is located. The present appeal arises from a dispute regarding the terms of a contract executed by the parties in 2009. BSR appeals from the trial court's entry of summary judgment in favor of Handy and its dismissal of BSR's complaint against Handy. On appeal, BSR argues that Handy's summary judgment motion was not properly

before the court, and that the trial court erred by granting summary judgment in favor of Handy. After careful review, we conclude that BSR is not entitled to relief and that the trial court's order should be affirmed.

Factual and Procedural Background

In 2009, BSR operated its own wastewater collection system, treatment plant, and associated spray field. On 12 March 2009, the parties signed a Wastewater Services Agreement (hereafter "the Contract") that provided for Handy to assume responsibility for BSR's wastewater services. Article II of the Contract stated that "Handy shall provide full wastewater service to BSR under this Agreement beginning no later [than] 90 days after the Badin Lake Area Sewer System [(hereafter "the BLSP")] is granted a full permit by DENR [(North Carolina Department of Environment and Natural Resources)] and is fully operational." Article V provided that BSR would be charged a fee of $30.00 per occupied lot. Article VI stated that Handy could adjust the rate charged to BSR "from time to time by action of the Handy Board of Directors, in the ordinary course of Handy's business" but that the base rate charged to BSR would not be increased "before the [BLSP] is online and operational."

On 22 July 2010, Handy filed suit against BSR, alleging "that [BSR] had refused [Handy's] multiple attempts to provide the contracted-for services and requested that the court issue an injunction ordering [BSR] to allow [Handy] to provide wastewater services under the contract." *Handy Sanitary Dist. v. Badin Shores Resort Owners Ass'n*, 225 N.C. App. 296, 297, 737 S.E.2d 795, 797-98 (2013). Handy also alleged that it was in the process of developing the BLSP, and that the agreed-upon charge of $30.00 per occupied lot was an important part of the consideration for Handy's agreement to the Contract. "[BSR] filed a motion to dismiss, answer, and counterclaim in response. [BSR] raised multiple affirmative defenses, including that Article II of the Agreement contained an unfulfilled condition precedent, namely that the North Carolina Department of Environment and Natural Resources ("DENR") had to issue a permit allowing operation of [BSR's] sewer system prior to operation of the system." *Id.* at 297, 737 S.E.2d at 798. "On 9 March 2011, the Superior Court entered a consent order requiring [BSR] to permit [Handy] to enter its land and connect [BSR's] properties to [Handy's] sewer system, [and to] maintain the current system[.] . . . The consent order 'resolve[d] all pending claims between the parties with prejudice.' " *Id.* at 298, 737 S.E.2d at 798.

On 20 January 2012, BSR filed a motion asking that the trial court order Handy to appear and show cause why it should not be held in

contempt of court for its violation of the terms of the Contract incorporated into the consent order, as well as other terms of the consent order, entered on 9 March 2011. BSR alleged that, although Handy had assumed operation of BSR's wastewater system, it refused to provide maintenance services to components of the wastewater system. "The Superior Court, Montgomery County, entered an order to show cause on 23 January 2012, to which [Handy] responded with a counter motion to show cause, alleging in part that because DENR has not yet issued a permit, it was not required to provide services to [BSR]. . . . [B]y order entered 25 April 2012, [the trial court] made findings of fact, concluded that Article II of the Agreement concerning the DENR permit was not a condition precedent, and ordered [Handy] and [BSR] to perform all of their contractual duties." *Id.*

Handy appealed to this Court from that order, arguing that the trial court erred by ruling that Article II of the parties' contract was not a condition precedent. This Court noted that " '[w]here the plain language of a consent judgment is clear, the original intention of the parties is inferred from its words. The trial court's determination of original intent is a question of fact. On appeal, a trial court's findings of fact have the force of a jury verdict and are conclusive if supported by competent evidence.' " *Id.* at 299, 737 S.E.2d at 798 (quoting *Hemric v. Groce*, 169 N.C. App. 69, 75-76, 609 S.E.2d 276, 282 (2005)). The opinion in *Handy Sanitary* then set out the following unchallenged findings of fact from the trial court's order:

> 3. On or about March 9, 2011, the Parties entered into a Consent Order in which the contract executed the 12th day of March, 2009 (hereinafter "The Contract") by the Parties was incorporated into the Consent Order and all of the terms of the contract, were reaffirmed, except as expressly modified in the Consent Order.
>
> 4. The Contract entered into by the Parties states: . . .
>
> B. Article II. Connection/Activation Date. Handy shall provide full wastewater service to [Badin Shores] under this Agreement beginning no later than 90 days after the Badin Lake Area Sewer System is granted a full permit by the North Carolina Department of Environment and Natural Resources (DENR) and is fully operational.
>
> . . .

> E. Article IX (B). Handy will operate the existing collection system and will maintain, make repairs, and install replacements to that system as from time to time may be necessary. . . .
>
> (a) Handy will operate the [Badin Shores] Wastewater System until the connection is made to Handy's Wastewater Collection System. Handy will operate under the [Badin Shores] permit if permitted to do so by DENR.
>
> . . .
>
> 9. The Contract when taken as a whole and in connection with the Consent Order entered to [sic] and executed by the parties and filed with the Court [on] March 9, 2011 is clear and unambiguous as it relates to the requirements of Handy to assume the obligation of operating, maintaining, repairing, and when and if necessary, replacing the existing [Wastewater] Collection System within [Badin Shores].
>
> 10. The Court after reviewing pages from the Fifth Edition of Black's Law Dictionary for the words assume, maintain, maintenance, obligate, obligation, operate, repair, and replace find[s] those words to be clear and unambiguous and that the Contract requires that Handy perform those services pursuant to the terms of the Contract and the Consent Order for the benefit of [Badin Shores] which services are to include all costs for electricity needed to operate, maintain, and or [sic] replace the [Badin Shores] collection system. . . .

Id. at 299-300, 737 S.E.2d at 799. On the basis of these and other findings, the court concluded in relevant part that:

> 3. The Wastewater] Services Agreement entered into between the Parties on or about March 12, 2009 and the Consent Order entered by the Court on or about March 9, 2011 are clear and unambiguous and Handy is required to perform it's [sic] obligations as set forth in the [Wastewater] Services Agreement and Consent Order without further delay. . . .
>
> 4. Paragraph II CONNECTION/ACTIVATION DATE of the Wastewater Services Agreement as set forth hereinabove is not a condition precedent and the Badin Lake Area Sewer System does not need to be fully operational

> and the Plaintiff does not need to be granted a full permit by the North Carolina Department of Environment and Natural Resources before the contractual right arises for [Handy] to provide full wastewater service to [BSR].

Id. at 300-01, 737 S.E.2d at 799-800.

In sum, following the parties' execution of the initial contract, legal proceedings were conducted in which (1) BSR argued unsuccessfully that it was not permitted or obligated to allow Handy to provide wastewater services until the BLSP was "fully operational" and had been granted "a full permit by DENR," and (2) Handy argued unsuccessfully that, although it was providing wastewater services to BSR for a monthly fee of $30.00 per occupied lot, it was not obligated to provide maintenance services to BSR's wastewater system until the BLSP was "fully operational" and had been granted "a full permit by DENR." In both instances, the trial court ruled that the terms of the Contract did not establish as a condition precedent to the challenged obligation that Handy have received a final "full permit" by DENR. In *Handy Sanitary*, we observed that "[a]lthough [Handy's] position before the trial court in the contempt hearing and on appeal is the exact opposite of its position in the complaint, [BSR] apparently raised neither estoppel nor judicial admissions below, as the trial court made no mention of either in its order." *Id.* at 301, 737 S.E.2d at 800. This Court held that the consent order had established that Article II's reference to the BLSP's being "fully operational" and having a "full permit" from DENR was not a condition precedent to the parties' obligations under the Contract:

> The relevant language from the Agreement states that "Handy shall provide full wastewater service to BSR under this Agreement beginning no later than 90 days after the Badin Lake Area Sewer System is granted a full permit by . . . (DENR) and is fully operational." . . . In [Handy's] complaint, it requested immediate access to [BSR's] lots in order to begin performance. . . . If [BSR] had been correct that it was a condition precedent, [Handy] would not have been entitled to specific performance as it had requested. Thus, the issue of whether Article II was a condition precedent was a central part of the controversy. . . . By requiring immediate performance of the contractual duties by both parties, the consent order necessarily disposed of any potential condition precedent.

Id. at 302-03, 737 S.E.2d at 800 (citations omitted).

On 20 November 2015, BSR filed suit against Handy, seeking damages for claims arising out of Handy's increase of the monthly rate per occupied lot for provision of wastewater services. BSR's complaint cited the language in Article VI, stating that the per lot rate paid by BSR "may be adjusted from time to time" but that the "base rate charged to BSR will not increase in any event before the Badin Lake Area Sewer System is online and operational." BSR alleged that the "BLSP is not online and operational as those terms were understood in the [contract]." BSR sought damages for breach of contract, violation of the requirements of N.C. Gen. Stat. § 130A-64, and unfair and deceptive trade practices. BSR also sought a declaratory judgment establishing its rights under the parties' contract.

On 28 December 2015, BSR filed a "Motion to Interplead Funds in Dispute," in which it asked to "be entitled to pay the amount in dispute . . . into an interest bearing trust account . . . until the Court may resolve the dispute regarding the increase." **(19-22)** Following a hearing conducted on 19 January 2016, the trial court entered an order on 21 March 2016 denying BSR's motion and making "mixed findings of fact and conclusions of law," including the following:

> 2. [BSR] filed a motion for interpleader in this case pursuant to Rule 22 of the North Carolina Rules of Civil Procedure, alleging, among other things, that [Handy's] proposed rate increase is violative of the parties' contract[.]
>
> . . .
>
> 3. At the request of the Court, counsel for both parties conducted a conference telephone call with Michael Leggett, the Environmental Engineer with the NCDENR Division of Water Resources. Counsel reported to the Court by email that Mr. Leggett stated that [the BLSP] received its initial permit in 2009, which set out the scope of the full Project. The first certification, for the force main and pump stations, was issued in the summer of 2011. Eight additional partial certifications have been issued for the Badin Lake sewer system and those certified portions are operational. Mr. Leggett agreed with counsel for Handy that the system described in the permit is capable of performing its intended function; however, only partial certifications have been issued to date.

(emphasis added).

On 3 February 2016, Handy filed an answer in which it asserted various defenses and moved to dismiss BSR's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2016) for failure to state a claim upon which relief could be granted. Handy then filed a motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) (2016) on 21 October 2016. On 3 January 2017, BSR filed a motion seeking summary judgment on its claim for a declaratory judgment. In support of its summary judgment motion, BSR submitted documents produced during discovery, including the parties' responses to interrogatories and requests for production of documents. On 10 January 2017, Handy filed a motion seeking summary judgment in its favor on all of BSR's claims.

On 17 January 2017, a hearing was conducted on BSR's motion for summary judgment on its declaratory judgment claim, and on Handy's motions for summary judgment on all claims and for dismissal of BSR's complaint under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and 12(c). On 26 January 2017, the trial court entered an order granting summary judgment for Handy and dismissing BSR's complaint. BSR noted an appeal to this Court.

Standard of Review

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(c) (2016), summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (internal quotation marks omitted). In addition:

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal quotation marks and citations omitted).

"[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the [non-moving] party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (internal quotation omitted). Thus, "when a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor, the non-moving party . . . must . . . forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment." *Steele v. Bowden*, 238 N.C. App. 566, 577, 768 S.E.2d 47, 57 (2014) (citations omitted). *See also* N.C. Gen. Stat. § 1A-1, Rule 56(e) (2016):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

"The standard of review for summary judgment is *de novo*." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Timeliness of Defendant's Motion for Summary Judgment

[1] BSR argues first that with respect to BSR's claims for breach of contract, violation of the provisions of N.C. Gen. Stat. § 130A-64, and unfair and deceptive trade practices, Handy's summary judgment motion was "not properly before the trial court." BSR correctly notes that N.C. Gen. Stat. § 1A-1, Rule 56(c) provides that a summary judgment "motion shall be served at least 10 days before the time fixed for the hearing" and that, in the present case, Handy's summary judgment motion was served seven days before the hearing, rather than ten days. We conclude, for several reasons, that BSR is not entitled to relief on this basis.

It is well-established that "[a] party who is entitled to notice of a motion may waive notice. A party ordinarily does this by attending the hearing of the motion and participating in it." *Collins v. Highway*

Commission, 237 N.C. 277, 283, 74 S.E.2d 709, 714-15 (1953) (citation omitted). In the present case, BSR attended the hearing and participated in it, without requesting a continuance, objecting, or arguing that BSR needed more time to prepare. In fact, after informing the court that Handy's motion was served seven days prior to the hearing rather than the ten days that is required by statute, BSR's counsel immediately added, "I don't think this is important necessarily." BSR's participation in the hearing is similar to the facts of cases such as *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E.2d 904 (1978), in which this Court held that:

> At the hearing on the motions to dismiss, plaintiff stipulated to the use of documents outside the pleadings, [and] participated in oral arguments. . . . Plaintiff did not make a timely objection to the hearing on 15 September 1977. Plaintiff did not request a continuance. Plaintiff did not request additional time to produce evidence pursuant to Rule 56(f). On the contrary, plaintiff participated in the hearing through counsel. The 10-day notice required by Rule 56 can be waived by a party. The notice required by this rule is procedural notice as distinguished from constitutional notice required by the law of the land and due process of law. By attending the hearing of the motion on 15 September 1977 and participating in it and failing to request a continuance or additional time to produce evidence, plaintiff waived any procedural notice required.

Raintree, 38 N.C. App. at 667-668, 248 S.E.2d at 907 (citation omitted). We conclude that BSR waived any objection to the timeliness of the service of Handy's summary judgment motion.

Moreover, it is axiomatic that in order to " 'obtain relief on appeal, an appellant must not only show error, but . . . must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action.' " *Bogovich v. Embassy Club of Sedgefield, Inc.*, 211 N.C. App. 1, 14, 712 S.E.2d 257, 266 (2011) (quoting *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996)). Thus, a party is not entitled to relief where the party "makes no argument, showing, or claim that [the party] was prejudiced in any way by" an error. *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 196, 511 S.E.2d 31, 34 (1999). In addition, Rule 61 provides that:

> No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything

> done or omitted by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right.

N.C. Gen. Stat. § 1A-1, Rule 61 (2016).

Furthermore, the hearing was conducted in order to rule on Handy's motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c), which provides in relevant part that:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. (emphasis added).

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2016).

In this case, matters outside the pleadings were presented to the trial court, which required the court to treat Handy's motion under Rule 12(c) as a summary judgment motion.

At the hearing, BSR did not request a continuance, object, or ask for more time to prepare. In addition, BSR does not argue that it was prejudiced by the fact that the hearing on Handy's summary judgment motion was conducted seven days after service, rather than the statutorily required ten days. We conclude that (1) the trial court appropriately treated Handy's motion under Rule 12(c) as a motion for summary judgment; (2) BSR waived any objection to the fact that Handy's motion was served seven days before the hearing, rather than ten days before; and (3) BSR has failed to establish that it suffered any prejudice. As a result, BSR is not entitled to relief on the basis of this argument.

Breach of Contract

BSR argues that the trial court erred by granting summary judgment for Handy on its claim for breach of contract. BSR alleges that the evidence before the trial court created a genuine issue of material fact as to the reasonableness of the rate hike, and that the trial court erred as a matter of law in its interpretation of the contractual requirement that the rate not be raised until the BLSP was "online and operational." We conclude that these arguments lack merit.

Reasonableness of Rate Hikes

[2] BSR argues that the trial court erred by granting summary judgment for Handy, on the grounds that the evidence raised genuine issues of material fact as to whether the rate increase imposed by Handy was reasonable. We disagree.

Preliminarily, we review certain features of sanitary districts. N.C. Gen. Stat. § 130A-47(a) (2016) provides that "[f]or the purpose of preserving and promoting the public health and welfare, the Commission may create sanitary districts without regard for county, township or municipal lines." (N.C. Gen. Stat. § 130A-2(1a) (2016) defines "Commission" as "the Commission for Public Health."). Pursuant to N.C. Gen. Stat. § 130A-50(b) (2016), the "sanitary district board shall be composed of either three or five members as the county commissioners in their discretion shall determine." This statute also provides that the sanitary district board members shall serve terms of either two or four years, must reside in the sanitary district, and are "elected at each biennial election." N.C. Gen. Stat. § 130A-64 (2016) authorizes a sanitary district board to impose service charges for wastewater treatment:

> A sanitary district board shall apply service charges and rates based upon the exact benefits derived. These service charges and rates shall be sufficient to provide funds for the maintenance, adequate depreciation and operation of the work of the district. If reasonable, the service charges and rates may include an amount sufficient to pay the principal and interest maturing on the outstanding bonds and, to the extent not otherwise provided for, bond anticipation notes of the district. Any surplus from operating revenues shall be set aside as a separate fund to be applied to the payment of interest on or to the retirement of bonds or bond anticipation notes. The sanitary district board may modify and adjust these service charges and rates.

It is an "accepted principle . . . that courts may not interfere in a given case with the exercise of discretionary powers conferred on these local administrative boards for the public welfare, unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." *Halifax Paper Co. v. Roanoke Rapids Sanitary Dist.*, 232 N.C. 421, 430, 61 S.E.2d 378, 385 (1950) (internal quotation marks omitted).

In support of its motion for summary judgment, Handy submitted the affidavit of Darrell Hinnant, Handy's general manager, in which Mr. Hinnant averred in relevant part that:

> 2. . . . [Handy] is a quasi-municipal corporation, and its Board is "a body politic and corporate," N.C.G.S. 130A-55.
>
> 3. The governing board of the [Handy] Sanitary District sets water and sewerage rates in accordance with statute, and the fixing of said rates is a legislative action on the part of the board. . . .
>
> 4. Handy has operated a water distribution system in parts of Davidson, Montgomery, and Randolph counties since the 1970s. It has, within the past 15 years, undertaken to provide wastewater services as well, and has developed the . . . (BLSP) to provide wastewater services in areas surrounding Badin Lake. . . .
>
> 5. . . . As part of the BLSP, Handy and BSR entered into a contract for the supply of sewer system services by the [Handy] Sanitary District to [BSR]. . . . Handy initially charged BSR a bulk rate . . . [of] $30 per occupied lot within BSR. Unlike other users of the sewage system provided by [Handy, BSR] was never charged, and is not now being charged with any usage amount per gallon over the bulk rate charged.
>
> 6. Handy, in accordance with paragraph VI of the contract, notified BSR that the monthly rate charged for sewerage service to each lot in [BSR's] development would increase from the original contract rate of $30 to $58.00. This increase in rates is the same as the increase throughout the sanitary district and is a reflection of the costs of operating the sewerage system, including the debt service for the project.
>
> 7. [Handy] sets its rates for sewage by calculating the amount necessary to charge each user in order to pay for the service; that is, the rate is set by the board, at a public hearing, in the amount necessary for the sanitary district to pay for the cost of furnishing sewer service to all its customers. In 2015, the Handy Sanitary District board initially believed that a rate of $66 per month would be necessary to cover the expenses of the Sanitary District's sewerage

> service. . . . In June 2015, however, it became apparent that the loan that the Handy Sanitary District had obtained from the State of North Carolina to pay for the completion of the sewer project could be repaid without an interest charge. With that reduction in expenses for the Sanitary District, the adopted rate per customer became $58.00 per month in place of the $66.00 originally proposed. This rate, which is in place today, was again calculated in an amount sufficient to pay the expenses of the sanitary district. The calculations supporting the setting of that rate appear in [Handy's] responses to requests for production labeled 8-2.
>
> 8. The base rate charged [BSR] for sewerage service is identical to that charged for every other customer receiving such service, with the exception that [BSR] does not pay any usage rate over the base rate charged. That is, [BSR] is charged a slightly more favorable rate than any other customer of [Handy].
>
> 9. Handy Sanitary District's sewage service would not be able to continue to operate if rates charged were lower than the $58 rate currently in place.

Mr. Hinnant's affidavit established that, as Handy's general manager, he was an appropriate spokesperson for Handy. The affidavit explained the criteria by which Handy set the current per lot rate for sewer service. We conclude that Mr. Hinnant's affidavit constituted *prima facie* evidence that the rate set by Handy was reasonable. "If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576. It is thus well-established that:

> "[A]s a general rule, upon a motion for summary judgment, supported by affidavits, 'an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.' "

Pacheco, 157 N.C. App. at 448, 579 S.E.2d at 507 (quoting *Spinks v. Taylor*, 303 N.C. 256, 263, 278 S.E.2d 501, 505 (1981) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)). "To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and

efficient procedural tool of summary judgment." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992).

On appeal, BSR argues that the parties produced conflicting evidence raising a genuine issue of material fact regarding the reasonableness of Handy's rate increase. In support of this contention, BSR directs our attention to the fact that in its complaint and in its responses to Handy's interrogatories, BSR alleged that the rate set by Handy was unreasonable. BSR has not identified any evidence that it presented in support of its contentions. BSR instead simply contends that the allegations in its verified complaint constitute competent evidence on the issue of the reasonableness of Handy's rate increase.

It is true that a " 'verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.' " *Spinks*, 303 N.C. at 264, 278 S.E.2d at 505-06 (quoting *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972)). In addition, "verified responses . . . [to] Interrogatories and Requests for Admission . . . are also appropriate for the court's consideration in ruling on summary judgment." *In re Dispute over the Sum of $375,757.47*, 240 N.C. App. 505, 511, 771 S.E.2d 800, 805 (2015) (citation omitted). However, the facts of the present case do not support BSR's contention that the allegations in its complaint or its answers to interrogatories should be treated as statements in an affidavit. BSR alleged in its complaint "upon information and belief" that the rate increase imposed by Handy was the result of Handy's "mismanagement of the BLSP project." In its response to Handy's interrogatory, BSR similarly asserted that the increase was not based upon increased costs incurred by Handy, was not within "one and one-half percent (1.5%) of the median household income," and that the increase was the result of Handy's "mismanagement of the [BLSP.]" BSR did not, however, support its allegations with evidence pertaining to any of these contentions, and thus failed to establish that these assertions were "made on personal knowledge," that they stated "facts as would be admissible in evidence," or that BSR would be "competent to testify to the matters stated therein." *Id.* For the reasons discussed above, we conclude that the trial court did not err by concluding that there were no genuine issues of material fact regarding the reasonableness of Handy's rate hike.

"Online and Operational"

[3] BSR also argues that the trial court erred by granting summary judgment for Handy, on the grounds that the court failed to properly interpret

the language in the Contract. Specifically, BSR challenges the court's interpretation of the contractual provision in Article VI stating that BSR would initially be charged a monthly rate of $30.00 per occupied lot, that Handy may change the rate "from time to time . . . in the ordinary course of Handy's business," but that Handy would not increase the per lot rate "before the [BLSP] is online and operational." BSR contends that the BLSP will not be "online and operational" until it has received a final permit from DENR. We conclude that this argument lacks merit.

"In construing contracts ordinary words are given their ordinary meaning unless it is apparent that the words were used in a special sense. The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense." *Harris v. Latta*, 298 N.C. 555, 558, 259 S.E.2d 239, 241 (1979) (internal quotation marks and citations omitted). The meaning of operational is "[e]ngaged in operation; able to function." BLACK'S LAW DICTIONARY 1124 (8th ed. 2004).

The record establishes that the parties executed the Contract in March, 2009. As discussed above, in 2011 the parties entered into a consent judgment, pursuant to which Handy began to provide wastewater services to BSR. Four years later, in June, 2015, Handy informed BSR's customers that the monthly per lot rate was being raised. At that point, certifications had been issued by DENR for the individual sections of the BLSP. BSR does not dispute that Handy serves between 900 and 1000 customers in BSR, and more than 2350 customers in the BLSP. BSR also concedes that Handy did not raise its rates until the State required Handy to begin repaying the construction loan that enabled Handy to build the BLSP, which was several years after Handy began providing wastewater services to BSR. In addition, the affidavit of Handy's general manager avers in relevant part that:

> 10. The NCDENR Division of Water Services issued the [BLSP] its initial permit in 2009. This permit set out the full scope of the project. The first certification, for the force main and pump stations, was issued in the summer of 2011. Eight additional partial certifications have been issued for the [BLSP], and those certified portions are now in operation. [Handy] has been collecting and treating sewage from [BSR] for more than five years now, and its sewerage system is online [and] fully operational.

Thus, at the time that Handy implemented a rate hike, the construction was substantially complete and the BLSP was operating to provide wastewater services to BSR. And, as discussed above, in its order denying

BSR's motion for interpleader, the court found that the environmental engineer for DENR "agreed with counsel for Handy that the system described in the permit is capable of performing its intended function." We conclude that Handy did not raise its base rate until after the BLSP was "online and operational" in the ordinary meaning of the term.

In urging us to reach a different conclusion, BSR contends that the BLSP cannot be considered to be "operational" until it has received a final certification from DENR. BSR "recognizes that the plain meaning of the words 'online' and 'operational' might provide some support for [Handy's] position." BSR argues, however, that the context of the Contract suggests that the parties intended a specialized meaning, under which Handy's receipt of a full permit from DENR, rather than its completion of the BLSP and provision of wastewater services to more than 2300 customers, determines when the BLSP is "operational."

BSR asserts that "the term 'operational' cannot be equivalent to the mere 'connection' of [BSR] to the [BLSP]" and that "[i]f only connection was required, the parties would have expressed that requirement[.]" BSR then argues that, if the Contract had been interpreted so that the BLSP were deemed to be "operational" immediately upon the connection of BSR's customers to Handy's wastewater service, Handy might then have attempted improperly to raise the per lot rate prior to completion of the BLSP. BSR devotes much of this argument to challenging the idea that Handy could have raised its rates as soon as BSR's customers were connected to Handy. It is undisputed, however, that Handy *did not* attempt to raise the per lot rate immediately upon connection. Because Handy never asserted a right to raise the per lot rate based merely upon connection to its system, we find it unnecessary to consider whether Handy could reasonably have taken such a position in the past.

BSR also argues that the position taken by Handy in *Handy Sanitary* was inconsistent with an interpretation of the Contract that would have allowed Handy to raise the per lot rate upon connection. *Handy Sanitary* did not address the meaning of "online and operational." Moreover, as discussed above, Handy did not impose a rate increase upon connection, which diminishes the legal relevance of this argument.

Furthermore, we observe that there are two undisputed circumstances that support both BSR's contention that it would have been improper for Handy to raise its per lot rate in 2011, as well as Handy's decision to impose a rate increase in 2015. First, Handy did not raise the per lot rate until construction was completed and the State required Handy to repay its construction loan. This is an external, "real world"

circumstance that created an additional expense for Handy and supports its need to increase rates. Secondly, in 2011, Handy connected to the 900 - 1000 customers in BSR. The mathematical calculation of a rate increase imposed at that time would have involved dividing the additional expense by some 900 customers. In contrast, by the time Handy actually sought a rate increase, it was serving more than 2350 customers, which allowed Handy to distribute the increased cost among a greater number of customers, thus reducing the necessary per lot increase. These two circumstances -- the additional expense of repaying the construction loan, and the increased number of customers -- bear a substantive relationship to Handy's need to increase its per lot rate. In contrast, Handy's receipt of its final permit from DENR has no apparent relationship to Handy's expenses or its need to raise rates.

We conclude that at the time Handy raised its per lot rate, the BLSP was "online and operational" in the ordinary meaning of those words. We further conclude that the trial court did not err by rejecting BSR's proposed interpretation of the Contract, and that BSR is not entitled to relief on the basis of this argument.

BSR's Claim for Violation of N.C. Gen. Stat. § 130A-64

[4] BSR also brought a claim against Handy for violation of N.C. Gen. Stat. § 130A-64(a) (2016), which provides in relevant part that a "sanitary district board shall apply service charges and rates based upon the exact benefits derived. These service charges and rates shall be sufficient to provide funds for the maintenance, adequate depreciation and operation of the work of the district. . . . The sanitary district board may modify and adjust these service charges and rates."

In its complaint, BSR alleged "upon information and belief" that Handy's rate increase was not reasonable, having been required by Handy's "mismanagement" of the BLSP project. For the reasons discussed in connection with BSR's claim for breach of contract, we conclude that Handy produced *prima facie* evidence that the rate increase was reasonable, and that BSR failed to respond with factual evidence, as opposed to unsubstantiated allegations, that the rate increase was unreasonable. We conclude that the trial court did not err by granting summary judgment for Handy on this claim.

BSR's Claim for Unfair and Deceptive Trade Practices

[5] BSR argues next that the trial court erred by granting summary judgment for Handy on BSR's claim for unfair and deceptive trade practices. Much of BSR's argument on this issue is devoted to its contention that

the court erred by considering Handy's motion for summary judgment, on the grounds that it was not served ten days prior to the hearing. For the reasons discussed above, we reject this argument.

BSR then argues that a sanitary district is not entitled to sovereign immunity, and notes that, pursuant to N.C. Gen. Stat. § 130A-55 (2016), a "sanitary district board shall be a body politic and corporate and may sue and be sued in matters relating to the sanitary district." BSR thus frames the issue as being whether a sanitary district is entitled to immunity from all lawsuits against it.

However, the question presented by Handy's summary judgment motion was not whether a sanitary district was generally immune from suit, but whether it could properly be sued for unfair and deceptive trade practices. In this regard, we observe that "[sanitary] districts have been defined as quasi-municipal corporations." *State ex rel. East Lenoir Sanitary Dist. v. Lenoir*, 249 N.C. 96, 100, 105 S.E.2d 411, 414 (1958) (citing *Halifax Paper Co. v. Roanoke Rapids Sanitary Dist.*, 232 N.C. 421, 61 S.E.2d 378 (1950)). "We have previously held that 'the consumer protection and antitrust laws of Chapter 75 of the General Statutes do not create a cause of action against the State, regardless of whether sovereign immunity may exist.' " *Rea Constr. Co. v. City of Charlotte*, 121 N.C. App. 369, 370, 465 S.E.2d 342, 343 (1995) (quoting *Sperry Corp. v. Patterson*, 73 N.C. App. 123, 125, 325 S.E.2d 642, 644 (1985)). We conclude that, regardless of whether a sanitary district is entitled to sovereign immunity, as a quasi-municipal corporation it cannot be sued for unfair and deceptive trade practices.

Moreover, "[i]t is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1. . . . '[A] plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act, which allows for treble damages.' " *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992) (quoting *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989)). In this case, BSR's complaint alleges "upon information and belief" that Handy misrepresented the expected total cost of the BLSP. BSR did not support this contention with any evidence before the trial court, and does not argue on appeal that Handy's alleged breach of contract was accompanied by "substantial aggravating circumstances." We conclude that the trial court did not err by granting summary judgment for Handy on BSR's claim for unfair and deceptive trade practices.

Conclusion

For the reasons discussed above, we conclude that the trial court did not err by granting summary judgment for defendant and that its order should be affirmed.

AFFIRMED.

Judges STROUD and ARROWOOD concur.

JERRY W. BALLARD AND BRENDA K. BALLARD, PLAINTIFFS

v.

MARK E. SHELLEY AND VIRGINIA J. SHELLEY, DEFENDANTS AND THIRD-PARTY PLAINTIFFS

v.

ASHEFORD GREEN PROPERTY OWNERS' ASSOCIATION, INC. ET AL., THIRD-PARTY DEFENDANTS AND FOURTH-PARTY PLAINTIFFS

v.

CABARRUS COUNTY, FOURTH-PARTY DEFENDANT

No. COA17-61

Filed 6 February 2018

1. Appeal and Error—interlocutory orders and appeals—dismissal based on governmental immunity

The trial court's dismissal of plaintiffs' tort claims against defendant county, based on governmental immunity, was immediately appealable to the Court of Appeals.

2. Immunity—governmental—waiver—excess insurance policy

In a case arising from a neighborhood dispute about a fence, the trial court properly dismissed plaintiffs' common law tort claims against defendant county pursuant to Rule of Civil Procedure 12(b)(1). The terms of defendant county's excess insurance policy did not waive governmental immunity.

3. Appeal and Error—interlocutory orders and appeals—redundant claim—substantial rights

The Court of Appeals dismissed plaintiffs' interlocutory appeal from the dismissal of their declaratory judgment claims against defendant county, based on lack of appellate jurisdiction. The

dismissal of a redundant claim that mirrored two other remaining claims did not implicate substantial rights.

4. Appeal and Error—interlocutory orders and appeals—issues in other claims—risk of inconsistent verdicts

The trial court's dismissal of a constitutional claim against defendant county was immediately appealable to the Court of Appeals due to the risk of inconsistent verdicts. The claim turned on issues that had to be determined as part of other claims pending before the trial court (the permit and building code approval for a fence).

5. Constitutional Law—procedural due process—reconsideration of fence permit—sufficiently pled claim

In a case arising from a neighborhood dispute about a fence, plaintiff property owners sufficiently stated a valid procedural due process claim where their complaint alleged that defendant county reconsidered previously approved permit and code determinations without notifying plaintiffs or allowing them an opportunity to contest the decision.

Appeal by third-party plaintiffs from order entered 5 July 2016 by Judge C.W. Bragg in Cabarrus County Superior Court. Heard in the Court of Appeals 21 August 2017.

Smith Moore Leatherwood LLP, by Elizabeth Brooks Scherer and Kip David Nelson, for third-party plaintiffs-appellants Mark and Virginia Shelley.

Erwin, Bishop, Capitano & Moss, P.A., by J. Daniel Bishop, and Cabarrus County Attorney Richard M. Koch for fourth-party defendant-appellee Cabarrus County.

DIETZ, Judge.

This case began as a neighborhood dispute about a fence that Mark and Virginia Shelley built in their backyard. Some of the Shelleys' neighbors believed this fence, which obstructed the view from their own property, was a retaining wall that violated county building code or permitting requirements. The case evolved over time into a complicated lawsuit involving various claims, counterclaims, and crossclaims by the Shelleys, their neighbors, their homeowners' association, and Cabarrus County.

This interlocutory appeal concerns the dismissal of the Shelleys' crossclaims against Cabarrus County. As explained below, we affirm the dismissal of the Shelleys' common law tort claims based on governmental

immunity, dismiss the Shelleys' appeal from the dismissal of their declaratory judgment claim for lack of appellate jurisdiction, and reverse the dismissal of their procedural due process claim and remand for further proceedings on that claim.

Facts and Procedural History

In 2009, Mark and Virginia Shelley obtained permits from Cabarrus County to build a fence to enclose their backyard pool. As construction on the fence progressed, a dispute arose between the Shelleys and some of their neighbors, who believed the fence was a retaining wall subject to stricter permitting and building code requirements.

After several unsuccessful efforts to get Cabarrus County to condemn the fence for building code violations, Jerry and Brenda Ballard—two of the Shelleys' neighbors—sued the Shelleys and the Asheford Green Property Owners' Association, alleging that the fence violated various neighborhood covenants. The Shelleys filed an answer, asserting defenses and counterclaims.

The Property Owners' Association later filed claims against Cabarrus County, alleging that the Shelleys' fence did not comply with county permitting and building code requirements, and seeking a writ of mandamus and injunction to compel Cabarrus County to enforce the building code. Cabarrus County then filed a crossclaim against the Shelleys seeking an order requiring them to comply with the building code or tear down the fence.

The Shelleys then asserted crossclaims against Cabarrus County including various common law tort claims, a due process claim, and a declaratory judgment claim. The county moved to dismiss the Shelleys' crossclaims on the grounds of governmental immunity and failure to state a claim on which relief can be granted.

After a hearing, the trial court dismissed the Shelleys' tort claims based on governmental immunity, finding that the county had not waived its immunity by its purchase of excess liability insurance. The trial court dismissed the Shelleys' declaratory judgment and constitutional claims for failure to state a claim under Rule 12(b)(6). The Shelleys timely appealed these interlocutory rulings.

Analysis

I. Dismissal of the tort claims

The Shelleys first challenge the dismissal of their tort claims based on governmental immunity.

[1] We begin by addressing our jurisdiction over this issue on appeal. Generally speaking, governmental immunity, as a form of sovereign immunity, is not merely an affirmative defense to claims; it is a "complete immunity from being sued in court." *Magana v. Charlotte-Mecklenburg Bd. of Educ.*, 183 N.C. App. 146, 147, 645 S.E.2d 91, 92 (2007). In other words, this immunity not only prevents courts from entering judgments against our state government, but also protects the government from being haled into court in the first instance. *Id.*

As a result, when the State or its subdivisions move to dismiss a tort claim based on immunity and the trial court *denies* the motion, that denial unquestionably affects a substantial right. This is so because, if the governmental agency were forced to litigate the case to judgment before appealing the immunity ruling, it could deprive the government of its right not to have to appear in court and defend the case at all.

The same is not true when the trial court *grants* a motion to dismiss a tort claim based on sovereign or governmental immunity. In that circumstance, the losing party is in the same position as any other litigant whose claim was dismissed for lack of jurisdiction or for failure to state a claim on which relief can be granted. One might assume, therefore, that an appeal from an order *granting* a motion to dismiss based on sovereign or governmental immunity would not automatically affect a substantial right, simply because the ruling involved immunity.

But, as is often the case with our jurisprudence, what one might reasonably assume is not what our case law holds. In a series of cases that we are unable to distinguish from this one, our Court has held that the *grant* of a motion to dismiss based on sovereign or governmental immunity is immediately appealable. *See Greene v. Barrick*, 198 N.C. App. 647, 649–50, 680 S.E.2d 727, 729–30 (2009); *Odom v. Lane*, 161 N.C. App. 534, 535, 588 S.E.2d 548, 549 (2003). Because one panel of this Court cannot overrule another, we are bound to hold that the Shelleys' interlocutory appeal on this issue is permissible. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). If the holdings in *Greene*, *Odom*, and similar cases warrant reconsideration, it must come from this Court sitting en banc, or from our Supreme Court.

[2] We thus turn to the merits of the Shelleys' claim. Counties and other municipalities, as governmental agencies, enjoy the protections of governmental immunity. *Magana*, 183 N.C. App. at 147, 645 S.E.2d at 92. This sovereign immunity applies unless the county "consents to suit or waives its right to sovereign immunity." *Hinson v. City of Greensboro*, 232 N.C. App. 204, 210, 753 S.E.2d 822, 827 (2014).

A county may waive its immunity by purchasing liability insurance covering a particular risk. N.C. Gen. Stat. § 153A-435(a). But that waiver applies only "to the extent of insurance coverage." *Id.* In other words, "immunity is waived only to the extent that the [county] is indemnified by the insurance contract from liability for the acts alleged." *Hinson*, 232 N.C. App. at 210, 753 S.E.2d at 827. If the liability policy, by its plain terms, does not provide coverage for the alleged acts, then the policy does not waive governmental immunity. *Id.* When this Court examines policy provisions allegedly waiving governmental immunity, we must strictly construe the provision against waiver. *Magana*, 183 N.C. App. at 149, 645 S.E.2d at 92.

A series of cases from this Court have examined how this waiver rule applies to an insurance policy like the one in this case, that provides *excess* liability coverage above the municipality's own self-insured retention. These cases uniformly have held that excess policies do not waive immunity when they are not triggered until the municipality first pays the entire amount of the self-insured retention.

As this Court reasoned in *Magana*, if a municipality "has statutory immunity from liability for tort claims, it cannot be required to pay any part of the . . . self-insured amount and, therefore, the excess policy will provide no indemnification." 183 N.C. App. at 149, 645 S.E.2d at 93. In other words, because the county "is immune from negligence claims up to [the self-insured amount], it will never have a legal obligation to pay this self-insured amount and, thus, has not waived its immunity through the purchase of this excess liability insurance policy." *Hinson*, 232 N.C. App. at 212, 753 S.E.2d at 828.

This case is indistinguishable from *Magana* and *Hinson*. The county moved to dismiss under Rule 12(b)(1) of the Rules of Civil Procedure and submitted evidence to support its motion. Among those submissions, the county produced an affidavit from its risk manager attaching the relevant terms of the county's excess liability policies. Those policies include a self-insured retention amount of $350,000 that must be paid by the county before coverage is triggered, and contain the following policy language:

> [W]e agree to indemnify the Insured for ultimate net loss in excess of the retained limit *which the Insured becomes legally obligated to pay* because of bodily injury, personal injury, advertising injury, or property damage which occurs during this policy period and to which this insurance applies. Our indemnification obligation *shall not*

> *arise until the Insured itself has paid in full the entire amount of its retained limit*. The retained limit must be paid by the Insured, and may not be paid or satisfied, in whole or in part, by any other source of payment, including but not limited to other insurance, or negated, in whole or in part, by any form of immunity to judgment or liability. No other obligation or liability to pay sums or perform acts or services is covered. The Insured's obligation to pay *shall have been determined by judgment against the Insured after a contested suit or by written agreement, which has received our prior approval*, between the Insured(s) and the claimant(s) or the claimant's legal representative.

(Emphasis added.)

We agree with the county that this language demonstrates that the excess policy does not waive its immunity with respect to the common law tort claims at issue here. The policy language states that the insurer's obligation to pay is not triggered until a judgment is entered against the county or the county agrees to pay the claim, with the insurer's approval. The Shelleys have not shown that either of these triggering events has occurred.

The Shelleys argue that they were afforded no discovery into the terms of the policy, and that the trial court relied entirely on the risk manager's affidavit and the policy provisions attached to it, without "giving the Shelleys the opportunity to fully develop the record." But the Shelleys do not cite any evidence in the record that they *asked* for the opportunity to conduct discovery on this issue. We cannot fault the trial court for deciding this issue based on an uncontested affidavit received without objection from the Shelleys.

Accordingly, on the record before this Court, and applying the settled rule from *Hinson* and *Magana*, the terms of this excess insurance policy do not waive the county's governmental immunity. The trial court therefore properly dismissed the Shelley's common law tort claims under Rule 12(b)(1) of the Rules of Civil Procedure based on the county's assertion of immunity.

II. Dismissal of the declaratory judgment claim

[3] The Shelleys next argue that the trial court erred in dismissing their declaratory judgment claim against the county for failure to state a claim under Rule 12(b)(6).

The trial court did not dismiss this claim based on governmental immunity. Thus, we must separately address whether we have jurisdiction to address this interlocutory ruling on appeal. *See Richmond County Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586, 739 S.E.2d 566, 568 (2013); *Bynum v. Wilson County*, 228 N.C. App. 1, 6, 746 S.E.2d 296, 300 (2013), *rev'd in part on other grounds*, 367 N.C. 355, 758 S.E.2d 643 (2014).

The Shelleys argue that their declaratory judgment claim is immediately appealable under the substantial rights doctrine because of the risk of inconsistent verdicts. But the Shelleys concede in their appellate brief that this declaratory judgment claim is "a reciprocal claim mirroring two other claims" asserted against them in the action below, both of which remain to be litigated. The dismissal of this sort of redundant declaratory judgment claim does not implicate substantial rights. Accordingly, we lack jurisdiction to address this portion of the appeal.

III. Dismissal of the constitutional claim

Finally, the Shelleys argue that the trial court erred in dismissing their constitutional claim against the county.

[4] As with the declaratory judgment claim, the constitutional claim was not dismissed based on governmental immunity, and we must therefore determine whether some other basis exists for exercising appellate jurisdiction. *Richmond County Bd. of Educ.*, 225 N.C. App. at 586, 739 S.E.2d at 568.

The Shelleys argue that their constitutional claim involves issues of fact intertwined with other claims and defenses that remain in the case. They contend that, without an immediate appeal, there is a risk "of inconsistent factual determinations by two different juries." We agree. The Shelleys' constitutional claim, which we describe in more detail below, turns on facts concerning the permit and building code approval of the Shelleys' fence. Those fact issues also must be determined as part of other claims pending below. Accordingly, there is a sufficient risk of inconsistent verdicts to invoke our appellate jurisdiction under the substantial rights doctrine. *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011).

[5] We thus turn to the merits of the Shelleys' constitutional claim. The trial court dismissed that claim under Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim on which relief could be granted. "This Court reviews the grant of a Rule 12(b)(6) motion to dismiss de novo." *Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, __ N.C. App. __, __, 796 S.E.2d 120, 123 (2017). "We examine whether the

allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* "Dismissal is only appropriate if it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim." *Id.*

We note at the outset that, in contrast to the other claims asserted by the Shelleys, their constitutional claim is quite vague. In the portion of the crossclaim describing this particular cause of action, the only specific factual allegation is that the county's actions "constitute a violation of the Shelleys' rights and effectively are an attempt to deprive the Shelleys of their property without due process of law." That brief statement provides little insight into what specific governmental acts violated the Shelleys' due process rights. But our Supreme Court has emphasized that "North Carolina is a notice pleading jurisdiction" and courts should not "deny a party his day in court because of his imprecision with the pen." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

When we view the allegations in the crossclaim as a whole, including other allegations that appear earlier in the crossclaim and that are incorporated by reference into the constitutional claim, we can discern a properly pleaded due process claim. In essence, the Shelleys allege that the county approved their fence and found that it complied with applicable building code and permit requirements. Then, after the time to administratively challenge those code and permitting determinations expired, and under pressure from other county residents, the county "fabricated" code or permit violations and used these new violations to challenge the construction of the fence. The Shelleys further allege that the county pursued these new code or permit violations outside the normal administrative and judicial review process and without providing the Shelleys with notice and an opportunity to be heard.

These allegations, taken as true, are sufficient to state a valid constitutional claim. To state a claim for violation of procedural due process rights, the complainant must allege (1) that "the State has interfered with a liberty or property interest" and (2) that the State did not use "a constitutionally sufficient procedure to interfere with the liberty or property interest." *Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 308, 750 S.E.2d 46, 48–49 (2013). A "constitutionally sufficient procedure" requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* at 308–09, 750 S.E.2d at 49.

The allegations in the Shelleys' crossclaim, as summarized above, allege a valid procedural due process claim under this standard. In

short, the Shelleys allege that the county reconsidered previously approved (and final) permit and code determinations without notifying the Shelleys or permitting them an opportunity to contest the decision through available legal means.

Of course, our holding that the allegations in the complaint, taken as true, state a valid procedural due process claim does not mean that the Shelleys are likely to succeed on that claim. In its appellate brief, the county asserts that the Shelleys misstate the applicable permitting and administrative review processes, and that the Shelleys had ample notice and many opportunities to be heard, including through both the administrative process and the claims and defenses available in this action.

We cannot address these arguments at the motion to dismiss stage. Indeed, at this stage, the Court cannot even examine the county's building code and permitting requirements. *See Jackson/Hill Aviation, Inc.*, __ N.C. App. at __, 796 S.E.2d at 123 ("[O]ur Supreme Court repeatedly has held that courts cannot take judicial notice of the provisions of municipal ordinances."). Simply put, at the motion to dismiss stage, this Court is limited to reviewing the allegations contained within "the four corners of the complaint." *Id.* If, as the county contends in its appellate briefing, the Shelleys' allegations are plainly false, the county can make that showing in an appropriate motion for summary judgment.

Conclusion

For the reasons discussed above, we affirm the trial court's dismissal of the Shelleys' common law tort claims; we dismiss the Shelleys' appeal with respect to their declaratory judgment claim for lack of appellate jurisdiction; and we reverse the trial court's dismissal of the Shelley's procedural due process claim and remand for further proceedings on that claim.

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

Chief Judge McGEE and Judge BERGER concur.

ANTHONY BUTLER, PETITIONER
v.
SCOTLAND COUNTY BOARD OF EDUCATION, RESPONDENT

No. COA17-501

Filed 6 February 2018

1. Schools and Education—appeal from school board to superior court—controlling statute

It was appropriate to apply N.C.G.S. § 150B-46 where a dismissed teacher appealed his dismissal by the school board to the superior court since the statute under which the teacher appealed, N.C.G.S. § 115C-325.8, did not specifically address the contents or service of a petition for judicial review of a school board's decision.

2. Schools and Education—dismissal of teacher—appeal from school board to superior court—content of petition

An appeal by a dismissed teacher from the school board to superior court was properly dismissed under N.C.G.S. § 150B-46 where the petition failed to state any specific exceptions to the Board's decision or the relief sought, and the teacher failed to comply with the requirements of service in that he served a copy of his petition on the attorney for the board rather than personally serving the board with the time limit.

Appeal by petitioner from order entered 23 January 2017 by Judge Tanya T. Wallace in Scotland County Superior Court. Heard in the Court of Appeals 5 October 2017.

Van Camp, Meacham & Newman, PLLC, by Amanda L. Tomblyn and Thomas M. Van Camp, for petitioner-appellant.

Tharrington Smith, L.L.P., by Kenneth A. Soo and Lindsay Vance Smith, for respondent-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jill R. Wilson and Elizabeth L. Troutman, and Allison B. Schafer, for amicus curiae North Carolina School Boards Association.

DAVIS, Judge.

This appeal requires us to revisit the issue of which provisions from North Carolina's Administrative Procedure Act ("APA") should be used to fill gaps existing in statutes authorizing appeals to superior court from decisions by a local school board. Anthony Butler appeals from the trial court's order dismissing his petition for judicial review in which he sought to challenge the termination of his employment as a teacher by the Scotland County Board of Education (the "Board"). Because we conclude that Butler's petition failed to comply with several essential requirements under N.C. Gen. Stat. § 150B-46, we affirm.

Factual and Procedural Background

In 2016, Butler was a career teacher employed at Scotland County High School. On 9 May 2016, the Superintendent of Scotland County Schools notified him that he was being placed on suspension without pay and that his dismissal had been recommended to the Board. On 9 June 2016, the Board held a hearing and entered an order terminating his contract of employment.

On 7 July 2016, Butler filed a document captioned "Notice of Appeal and Petition for Judicial Review" in Scotland County Superior Court. Butler served the petition by mailing a copy to the attorney who had represented the Board in the administrative proceeding. On 3 August 2016, the Board filed a motion to dismiss in which it asserted that a number of errors existed in the petition and that Butler had failed to properly serve the petition upon the Board.

A hearing was held on the Board's motion to dismiss on 28 November 2016 before the Honorable Tanya T. Wallace. On 23 January 2017, the trial court entered an order granting the Board's motion. Butler filed a timely notice of appeal to this Court.

Analysis

[1] It is well established that "[o]n appeal of a decision of a school board, a trial court sits as an appellate court and reviews the evidence presented to the school board." *Davis v. Macon Cty. Bd. of Educ.*, 178 N.C. App. 646, 651, 632 S.E.2d 590, 594 (2006) (citation omitted), *disc. review denied*, 360 N.C. 645, 638 S.E.2d 465 (2006). "The proper standard of review depends upon the nature of the asserted error." *Id.* (citation omitted). Because Butler's appeal to this Court concerns the purely legal issues of whether his petition for judicial review was legally sufficient and whether he properly served the petition on the Board, we review *de novo* the trial court's order dismissing his appeal. *See In re Taylor*, 242 N.C. App. 30, 34, 774 S.E.2d 863, 866 (2015).

Butler's petition stated as follows:

> NOW COMES Petitioner, Anthony Butler, by and through his undersigned counsel, and pursuant to N.C. Gen. Stat. § 115C-325.8, et. seq., N.C. Gen. Stat. § 150B-43, et. seq., N.C. Gen. Stat. § 150B-45, et. seq., and N.C. Gen. Stat. § 7A-250(a), et. seq., and hereby gives Notice of Appeal to the Superior Court of Scotland County, North Carolina from the Order of Dismissal by the Scotland County Board of Education, dated June 9, 2016. Petitioner respectfully requests that the Court enter an appropriate Order requiring the Respondent to promptly transmit and deliver to this Court a complete copy of the administrative record compiled in this matter, including any and all transcripts, exhibits, evidence, or other similar matters, pursuant to N.C. Gen. Stat. § 115C-325.8(b).

Chapter 115C of the North Carolina General Statutes governs appeals from various types of decisions made by local school boards. The particular statute within Chapter 115C relied upon by Butler in challenging his dismissal was N.C. Gen. Stat. § 115C-325.8, which states as follows:

> (a) A teacher who (i) has been dismissed, demoted, or reduced to employment on a part-time basis for disciplinary reasons during the term of the contract as provided in G.S. 115C-325.4, or has received a disciplinary suspension without pay as provided in G.S. 115C-325.5, and (ii) requested and participated in a hearing before the local board of education, shall have a further right of appeal from the final decision of the local board of education to the superior court of the State on one or more of the following grounds that the decision:
>
> (1) Is in violation of constitutional provisions.
>
> (2) Is in excess of the statutory authority or jurisdiction of the board.
>
> (3) Was made upon unlawful procedure.
>
> (4) Is affected by other error of law.
>
> (5) Is unsupported by substantial evidence in view of the entire record as submitted.
>
> (6) Is arbitrary or capricious.

> (b) An appeal pursuant to this section must be filed within 30 days of notification of the final decision of the local board of education and shall be decided on the administrative record. The superior court shall have authority to affirm or reverse the local board's decision or remand the matter to the local board of education. The superior court shall not have authority to award monetary damages or to direct the local board of education to enter into an employment contract of more than one year, ending June 30.

N.C. Gen. Stat. § 115C-325.8 (2017).

Because N.C. Gen. Stat. § 115C-325.8 does not specifically address the contents of a petition for judicial review of a school board's decision or the manner in which it must be served, the Board contends that N.C. Gen. Stat. § 150B-46 — a statute within the APA — governs these issues. N.C. Gen. Stat. § 150B-46 states, in pertinent part, as follows:

> The petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings. . . .

N.C. Gen. Stat. § 150B-46 (2017).

It is undisputed that Butler's petition failed to comply with N.C. Gen. Stat. § 150B-46 in several respects. First, the petition did not contain any specific exceptions to the Board's decision or state what relief was being sought by Butler. Second, Butler failed to personally serve the Board within ten days of the filing of the petition by means of either personal service or certified mail. Thus, the question before us is whether N.C. Gen. Stat. § 150B-46 applied to Butler's appeal to superior court.

As an initial matter, it is clear that "local school boards and local school administrative units are local governmental units, and, as such, are not 'agencies' for the purpose of the APA." *Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cty. Bd. of Educ.*, 236 N.C. App. 207, 215, 763 S.E.2d 288, 295 (2014) (citation omitted). However, although school board appeals are exempted from the scope of the APA as a general proposition, our appellate courts have nevertheless repeatedly "borrowed" certain provisions of the APA to fill gaps existing in the

judicial review provisions of Chapter 115C. Thus, it is helpful to review the pertinent case law from our appellate courts on this subject.

In *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977), a career teacher was suspended pursuant to N.C. Gen. Stat. § 115-142(f). The Wake County Board of Education subsequently entered an order dismissing the teacher, and he appealed to superior court. *Id.* at 408, 233 S.E.2d at 540. The court reversed the Board's decision. *Id.* On appeal, our Supreme Court addressed the question of what standard of review applied to appeals to superior court from local school board decisions. The Court held that "the whole record rule" as set out in N.C. Gen. Stat. § 150A-51 — a provision of the APA — was the applicable standard of review in such appeals. *Id.* at 410, 233 S.E.2d at 541.

The Supreme Court reiterated the holding of *Thompson* in *Overton v. Goldsboro City Board of Education*, 304 N.C. 312, 283 S.E.2d 495 (1981). In *Overton*, a school board dismissed the plaintiff from his position as a middle school physical education teacher. He appealed the dismissal to superior court, which determined that the board's decision was not supported by substantial evidence in the record. *Id.* at 316, 283 S.E.2d at 498.

In reviewing his appeal, the Supreme Court once again considered the issue of what standard of review applied to school board appeals.

> We first determine the appropriate standard of judicial review. Plaintiff appealed the Board's action to the superior court pursuant to the provisions of G.S. 115-142(n) (1978). That statute, however, provides no standards for review. We find no standards for judicial review for an appeal of a school board decision to the courts set forth in Chapter 115 of our General Statutes. Moreover, we note that G.S. 150A-2(1) expressly excepts county and city boards of education from the coverage of the Administrative Procedure Act (APA), Chapter 150A, N.C. General Statutes. However, this Court held in *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977), that the standards for judicial review set forth in G.S. 150A-51 are applicable to appeals from school boards to the courts. Since no other statute provides guidance for judicial review of school board decisions and in the interest of uniformity in reviewing administrative board decisions, we reiterate that holding and apply the standards of review set forth in G.S. 150A-51 . . . .

Id. at 316-17, 283 S.E.2d at 498.

Since *Overton*, our appellate courts have routinely applied the standard of review set out in the APA to appeals from school board decisions. *See*, *e.g.*, *Farris v. Burke Cty. Bd. of Educ.*, 355 N.C. 225, 235, 559 S.E.2d 774, 781 (2002) (applying standards set out in N.C. Gen. Stat. § 150B-51 (citation omitted)); *Davis*, 178 N.C. App. at 651, 632 S.E.2d at 594 ("N.C. Gen. Stat. § 150B-51(b) governs judicial review of school board actions . . . ." (citation omitted)); *Evers v. Pender Cty. Bd. of Educ.*, 104 N.C. App. 1, 9-10, 407 S.E.2d 879, 884 (1991) ("[O]ur Supreme Court has . . . held that the standards for judicial review set forth in N.C. Gen. Stat. § 150A-51 (now section 150B-51) apply to appeals from school boards." (citation omitted)), *aff'd per curiam*, 331 N.C. 380, 416 S.E.2d 3 (1992).

We have also, however, utilized *other* APA provisions in school board appeals on issues as to which Chapter 115C was silent. For example, in *Coomer v. Lee County Board of Education*, 220 N.C. App. 155, 723 S.E.2d 802, *appeal dismissed and disc. review denied*, 366 N.C. 238, 731 S.E.2d 428 (2012), the petitioner appealed to superior court pursuant to N.C. Gen. Stat. § 115C-45 from a school board's decision to terminate her employment as a bus driver. The superior court dismissed her appeal as untimely based on the requirement in N.C. Gen. Stat. § 150B-45 imposing a thirty-day time limit on appeals from agency decisions. *Id.* at 156-57, 723 S.E.2d at 803. In affirming the court's dismissal of her appeal, we stated as follows:

> . . . Section 115C-45(c) does not contain a time limit, so the superior court looked to the time limit set out in Article 4 of the Administrative Procedure Act (APA). Under the APA, a person seeking judicial review of a final decision under Article 4 of the APA "must file a petition within 30 days after the person is served with a written copy of the decision." N.C. Gen. Stat. § 150B-45(a) (2011). Although local boards of education are generally excluded from the requirements of the APA, *see* N.C. Gen. Stat. §§ 115C-2, 150B-2(1a) (2011), our appellate courts have consistently applied the standards for judicial review set out in § 150A-51 to appeals from school boards to the courts, *e.g.*, *Overton v. Board of Education*, 304 N.C. 312, 316-17, 283 S.E.2d 495, 498 (1981). As the Supreme Court explained in *Overton*, because "no other statute provides guidance for judicial review of school board decisions and in the interest of uniformity in reviewing administrative board decisions," the courts "apply the standards of review set forth in G.S. 150A-51[.]" *Id.*

> Similarly, here, no other statute provides guidance for the judicial review of school board decisions, so the superior court, following *Overton*, properly looked to Article 4 of the APA to determine the correct time limit for appealing from school boards to the courts. . . .

Id. at 157, 723 S.E.2d at 803-04 (internal citation omitted).

Indeed, we specifically noted the applicability of N.C. Gen. Stat. § 150B-46 to an appeal under Chapter 115C in *Tobe-Williams v. New Hanover County Board of Education*, 234 N.C. App. 453, 759 S.E.2d 680 (2014). That case involved a local school board's decision not to renew the contract of an assistant principal. She appealed to superior court, and the court reversed the board's decision and reinstated her. On appeal to this Court, the school board argued that the trial court had erred by failing to dismiss the assistant principal's petition for judicial review based on lack of personal jurisdiction. *Id.* at 460, 759 S.E.2d at 687. Based on *Overton*, we determined that "[t]he Board's decision not to renew an assistant principal's employment contract is subject to judicial review in accordance with Article 4 of the North Carolina Administrative Procedure Act . . . ." *Id.* at 459, 759 S.E.2d at 686 (citation omitted). We then stated the following:

> The Board first argues that the trial court erred in failing to dismiss the petition for lack of personal jurisdiction. The APA provides that "the person seeking review must file a petition within 30 days after the person is served with a written copy of the decision." N.C. Gen. Stat. § 150B-45(a) (2013). Additionally, "[w]ithin 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings." N.C. Gen. Stat. § 150B-46 (2013).
>
> Here, Ms. Tobe-Williams filed her petition on 9 August 2012, but the Board was not served by personal service or by certified mail until 5 September 2012, more than 10 days later. Service was, therefore, defective.

Id. at 460-61, 759 S.E.2d at 687.[1]

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1. However, because the board had failed to raise the issue of personal jurisdiction in superior court, we ultimately determined that the issue had been waived. *Id.* at 461, 759 S.E.2d at 687.

In *Ragland v. Nash-Rocky Mount Board of Education*, __ N.C. App. __, 787 S.E.2d 422, *appeal dismissed and disc. review denied*, __ N.C. __, 793 S.E.2d 237 (2016), the petitioner was a part-time teacher who was terminated by the school board. After filing a petition for judicial review of the school board's decision pursuant to N.C. Gen. Stat. § 115C-325.8, the petitioner filed three motions — a motion for entry of default, a motion for default judgment, and a motion for summary judgment — based on his contention that the school board had failed to file an appropriate responsive pleading to his petition for judicial review. *Id.* at __, 787 S.E.2d at 429-30. The superior court denied the motions, and the petitioner appealed. *Id.* at __, 787 S.E.2d at 430. We held that because the petition was filed to initiate an administrative appeal rather than a new civil action the school board's response was not required to set forth affirmative defenses or specifically deny allegations set forth in the petition as would be required of an answer to a complaint under the North Carolina Rules of Civil Procedure.

> . . . Here, N.C. Gen. Stat. § 150B-46 provides that, in response to a petition filed following administrative proceedings, "parties to the proceeding may file a response to the petition within 30 days of service. Parties, including agencies, may state exceptions to the decision or procedure and what relief is sought in the response." *Id.* § 150B-46 (2015).
>
> Respondent-Board responded in a timely manner to the Petition. Respondent-Board was served with a copy of the Amended Petition by certified mail on 24 February 2015 and respondent-Board filed a copy with the trial court on 25 March 2015, within thirty days after receipt of the Petition (twenty-nine days later). Respondent-Board had no duty to respond to petitioner's improper motions. . . .

Id. at __, 787 S.E.2d at 430.

Thus, as the above-referenced cases make clear, this Court has previously applied N.C. Gen. Stat. § 150B-46 — as well as other provisions of the APA — in administrative appeals arising under Chapter 115C in the absence of contrary statutory guidance contained therein. Accordingly, given the lack of any provision in N.C. Gen. Stat. § 115C-325.8 governing the contents and service of petitions for judicial review, we conclude it is likewise appropriate to apply N.C. Gen. Stat. § 150B-46 in the present case.

[2] In a number of prior instances, we have affirmed the dismissal of petitions for judicial review based on (1) their failure to adequately state

exceptions to the underlying agency decision, *see, e.g.*, *Gray v. Orange Cty. Health Dep't*, 119 N.C. App. 62, 72, 457 S.E.2d 892, 899 (mere listing of broad exceptions to agency decision could not "operate to salvage a petition which utterly disregards the statutory specificity requirements"), *disc. review denied*, 341 N.C. 649, 462 S.E.2d 511 (1995); *Vann v. N.C. State Bar*, 79 N.C. App. 173, 174, 339 S.E.2d 97, 98 (1986) (petition for judicial review "was not sufficiently explicit to allow effective judicial review of respondent's proceedings"); and (2) the petitioner's failure to serve the petition in compliance with N.C. Gen. Stat. § 150B-46, *see, e.g.*, *Follum v. N.C. State Univ.*, 198 N.C. App. 389, 395, 679 S.E.2d 420, 424 (2009) (petitioner's service of petition for judicial review upon university board's attorney did not comply with mandate of N.C. Gen. Stat. § 150B-46 because attorney was "not a party of record to the administrative proceedings").

Butler's appeal was deficient in these same respects. First, his petition failed to state *any* specific exceptions to the Board's decision or the relief he sought to obtain as expressly required by N.C. Gen. Stat. § 150B-46. Second, he failed to comply with N.C. Gen. Stat. § 150B-46's service requirements in that instead of personally serving the Board with his petition within the ten-day time limit he simply served a copy of his petition upon the *attorney* for the Board. Thus, his petition for judicial review was properly dismissed by the trial court.[2]

Conclusion

For the reasons stated above, we affirm the trial court's 23 January 2017 order.

AFFIRMED.

Judges ZACHARY and BERGER concur.

2. While not necessary to our decision, we observe that Butler expressly referenced several provisions of the APA in his petition, thereby demonstrating his awareness that the APA supplemented N.C. Gen. Stat. § 115C-325.8 in terms of imposing certain procedural requirements applicable to his appeal of the Board's decision. Moreover, in his appellate brief, he has not directed our attention to any alternative statutes addressing what must be contained in a petition for judicial review or the manner in which such a petition must be served.

CHERRY CMTY. ORG. v. CITY OF CHARLOTTE

[257 N.C. App. 579 (2018)]

THE CHERRY COMMUNITY ORGANIZATION, PLAINTIFF
v.
THE CITY OF CHARLOTTE, THE CITY COUNCIL FOR THE CITY OF CHARLOTTE, AND MIDTOWN AREA PARTNERS II, LLC, DEFENDANTS

No. COA16-1292

Filed 6 February 2018

Declaratory Judgments—standing—rezoning—failure to show special damages

The Court of Appeals dismissed plaintiff nonprofit's appeal in a rezoning case where it did not show it had standing to maintain a declaratory judgment action by failing to forecast evidence that it sustained special damages that were distinct from the rest of the community.

Judge HUNTER, Robert N., concurring in separate opinion.

Appeal by plaintiff from order entered 15 August 2016 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 May 2017.

James, McElroy & Diehl, P.A., by Jon P. Carroll, John R. Buric, and Preston O. Odom, III, for Plaintiff-Appellant.

Charlotte City Attorney's Office, by Senior Assistant City Attorney Terrie Hagler-Gray and Assistant City Attorney Daniel E. Peterson for Defendants-Appellees City of Charlotte and City Council for the City of Charlotte.

K&L Gates LLP, by Roy H. Michaux, Jr., for Defendant-Appellee Midtown Area Partners II, LLC.

MURPHY, Judge.

The Cherry Community Organization ("CCO") appeals from the trial court's order granting the City of Charlotte and the City Council's (collectively, "Charlotte") Motion for Summary Judgment, granting Midtown Area Partners II, LLC's ("MAP") Motion for Summary Judgment, and denying CCO's Motion for Summary Judgment. Specifically, CCO maintains: (1) Charlotte's approval of an oral amendment made to MAP's rezoning petition violated its ordinance and was arbitrary and capricious;

and (2) Charlotte's violation of city ordinances and N.C.G.S. § 160A-383 (2017) renders the zoning amendment null and void. However, because we conclude that CCO failed to show it had standing to maintain its declaratory judgment action, we dismiss this appeal and need not reach the issues raised by CCO.

Background

CCO is a nonprofit organization that endeavors to protect the residential character, safety, and stability of, as well as the affordable housing within, the Cherry Community ("Cherry") – a historically African American neighborhood located in the Midtown Morehead Cherry District of Charlotte. In 1999 and 2012, respectively, Charlotte adopted the Cherry Small Area Plan and the Midtown Morehead Cherry Area Plan (the "MMC Area Plan") to guide land-use decisions in Cherry.

The real property (the "Parcels") at issue in this case involves four parcels owned by MAP in and around Cherry.[1] In August 2014, MAP submitted an application to Charlotte ("Initial Rezoning Petition") to rezone the Parcels from general-use districts to mixed-use development districts in furtherance of plans to construct a mixed-use development, which was to contain office, retail, hotel, and residential spaces. Specifically, MAP proposed constructing a 270,000 square foot building, 187,450 square foot parking structure, and 8 single-family attached dwelling units. The building's then-proposed height was 119 feet.

Two community meetings were held to discuss the nature of the proposed rezoning, and CCO filed a Protest Rezoning Petition urging Charlotte to deny MAP's Initial Rezoning Petition.[2] MAP thereafter submitted an Amended Rezoning Application (the "First Amended Petition") in which it increased the size of the rezoning site from 1.698 to 1.99 acres and requested that MAP be given five-year vested rights regarding its rezoning site plan.

On 12 February 2015, MAP submitted a Second Amended Rezoning Application, which changed the requested zoning of the Parcels "to B-2

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1. Previously, three of the parcels were owned by StoneHunt. MAP and StoneHunt, LLC entered into a Joint Venture Agreement to develop their adjacent properties in a mixed-use development, with MAP holding a majority interest in the Joint Venture. Charlotte and MAP's brief notes that, since that time, "StoneHunt, LLC conveyed its three parcels to [MAP] on February 6, 2017 and MAP is authorized to pursue the development of the [Parcels]."

2. CCO owns one property across from the MAP Project. The area of the MAP Project immediately across from that property is designated for eight townhomes.

(PED-O), UR-C (PED-O) and R-8 MF (PED-O)," with five-year vested rights. On the basis of the amendment, a new community meeting was held on 4 March 2015. It is this Second Amended Petition (the "Rezoning Petition") that is at issue in this case.

Charlotte held a public hearing on the Rezoning Petition on 20 April 2015. Representatives of MAP and CCO attended and commented on the Rezoning Petition. Charlotte's Planning Department staff also commented that: (1) MAP's proposed development was inconsistent with the Pedestrian Zoning Overlay District ("PED Overlay") requirements that limit buildings in the area to a maximum height of 100 feet; (2) the proposed development was inconsistent with the MMC Area Plan recommendations relating to the maximum permissible building height, street setbacks, streetscapes, and residential density; and (3) the proposed parking structure would encroach on a portion of the area that the MMC Area Plan recommended for residential development.

By the time the Rezoning Petition came on for a vote before Charlotte at its meeting, MAP lowered the projected height of its building from 119 feet to 106 feet, which was still 6 feet over the maximum height permitted by the PED Overlay. The motion to approve the Rezoning Petition failed.

Several hours later, prior to adjourning the meeting, MAP agreed to bring the building's height down to a compliant 100 feet. Accordingly, Charlotte passed a motion to "reconsider" the Rezoning Petition as orally amended at the next scheduled meeting. At the next meeting on 28 September 2015, Charlotte voted 10-to-1 against sending the orally amended Rezoning Petition back to the Zoning Committee for a recommendation, and 10-to-1 in favor of rezoning the Parcels as outlined.

CCO petitioned the Mecklenburg County Superior Court for Writ of Certiorari and later added a claim for declaratory judgment against Charlotte and MAP. After the trial court dismissed CCO's certiorari petition, all parties moved for summary judgment on CCO's declaratory judgment claim. On 15 August 2016, the trial court granted summary judgment in favor of Charlotte and MAP and dismissed the case with prejudice. CCO timely appealed.

Standing

Typically, landowners may use their property as they wish, free from the interference of the government. However, our Supreme Court has held that lawful zoning ordinances are an exercise of the State's police powers. *See, e.g.*, *Turner v. City of New Bern*, 187 N.C. 541, 549, 122 S.E. 469, 474 (1924). The interference by the State, by exercising its

police powers, is the pinnacle of intrusion on private property rights by the government. Accordingly, our Courts appropriately have set a high bar for third parties to establish standing to bring actions relating to the exercise of police powers between the State and its citizens. CCO does not clear the bar to allow it to privately exercise Charlotte's police power over MAP.

As a preliminary matter, we must address Charlotte and MAP's assertion that CCO lacks standing to prosecute this declaratory judgment action. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91, 184 L. Ed. 2d 533, ___ (2013) ("We have repeatedly held that an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." (citation and internal quotation marks omitted)); *see Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) ("A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity."). Standing must be maintained throughout the entirety of the suit. Charlotte and MAP contend that CCO has not forecasted evidence that it sustained special damages as a result of the rezoning at issue that are distinct from the rest of the community.[3] We agree and therefore modify and affirm the decision of the trial court to dismiss CCO's claims and, as a result, we need not reach the merits of CCO's appeal.

Standing refers to "[w]hether a party has a sufficient stake in an otherwise justiciable controversy" so as to properly seek adjudication of a matter, *Sierra Club v. Morton*, 405 U.S. 727, 731-32, 31 L. Ed. 2d 636, 641 (1972), and it "is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Thrash Ltd. P'ship v. Cty. of Buncombe*, 195 N.C. App. 678, 680, 673 S.E.2d 706, 708 (2009) (citation omitted). As standing is a question of law, we review the issue of standing de novo, *Cherry v. Wiesner*, ___ N.C. App. ___, ___, 781 S.E.2d 871, 876, *disc. review denied*, 369 N.C. 33, 792 S.E.2d 779 (2016), and the party invoking jurisdiction, in this case CCO, bears the burden of establishing standing. *Thrash Ltd. P'ship*, 195 N.C. App. at 680, 673 S.E.2d at 708.

Specifically, "[s]ince standing is a jurisdictional requirement, the party seeking to bring [a] claim before the court must include allegations which demonstrate why she has standing in the particular case[.]" *Wiesner*, ___ N.C. App. at ___, 781 S.E.2d at 877. In establishing the

3. Charlotte and MAP also argue on appeal that CCO failed to properly elect its Board of Directors in accordance with its bylaws, and, therefore, the Board of Directors could not have properly authorized this litigation. We need not reach this contention, however, as we resolve this issue on the basis of insufficient evidence of special damages.

elements of standing, "each element must be supported in the same way as any other matter on which [CCO] bears the burden of proof, i.e., *with the manner and degree of evidence required at the successive stages of the litigation*." *Id.* at ___, 781 S.E.2d at 877 (quotation omitted) (emphasis added).

A party only has standing to challenge a zoning ordinance in an action for declaratory judgment when it "has a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby." *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976) (citations omitted). In this way, the standing requirement for an action for declaratory judgment is analogous to the requirement that a party seeking review of a municipal decision by writ of certiorari suffer damages that are "distinct from the rest of the community." *Compare Heery v. Zoning Bd. of Adjustment*, 61 N.C. App. 612, 614, 300 S.E.2d 869, 870 (1983) (holding that petitioners failed to allege that they would be subject to special damages distinct from the rest of the community), *with Wiesner*, ___ N.C. App. at ___, 781 S.E.2d at 880 (holding that allegations that fail to demonstrate special damages distinct to respondent and instead reference generalized damage to the overall neighborhood are insufficient to establish a party has standing to sue).

Although owning property immediately adjacent to or within close proximity of the subject property is not in and of itself sufficient to plead special damages, "it does bear some weight on the issue of whether the complaining party has suffered or will suffer special damages distinct from those damages to the public at large." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008); *see also Village Creek Property Owners' Ass'n, Inc. v. Town of Edenton*, 135 N.C. App. 482, 486, 520 S.E.2d 793, 796 (1999) (citing *Godfrey v. Zoning Bd. of Adjustment of Union County*, 317 N.C. 51, 66, 344 S.E.2d 272, 281 (1986), for the proposition that "owners of property in the adjoining area affected by [an] ordinance[ ] are parties in interest entitled to maintain [a declaratory judgment] action" (citation and internal quotation marks omitted)).

Specifically, this Court has recognized that "[e]xamples of adequate pleadings include allegations that the rezoning would cut off the light and air to the petitioner's property, increase the danger of fire, increase the traffic congestion and increase the noise level." *Wiesner*, ___ N.C. App. at ___, 781 S.E.2d at 877 (quotation omitted). Further, the owner of property has standing to maintain a legal action to prevent a proposed use of nearby or adjacent property where he will suffer a reduction in

the value of his property pursuant to a proposed use that is prohibited by a valid zoning ordinance. *Jackson v. Guilford Cty. Bd. of Adjustment*, 275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969).

"Once the petitioner's aggrieved status is properly put in issue, the trial court must then, *based on the evidence presented*, determine whether an injury has resulted or will result from the zoning action." *Wiesner*, ___ N.C. App. at ___, 781 S.E.2d at 877 (quoting *Kentallen, Inc. v. Town of Hillsborough*, 110 N.C. App. 767, 770, 431 S.E.2d 231, 232 (1993) (citations, quotation marks, and brackets omitted)) (emphasis added).

In the instant case, CCO pleaded in its complaint that it:

> is an aggrieved party who owns real property immediately adjacent to and/or in close proximity with the subject property, and will suffer special damages in the form of increased noise, traffic and parking, decreased visibility due to the height of the proposed project, diminution in the peaceful residen[tial] character of the Cherry neighborhood, and a reduction in the value of [CCO's] real property if MAP is allowed to proceed as approved by the City Council. Accordingly, [CCO's] damages are distinct from the community at large.

In comparing CCO's pleadings with the guidelines embraced by *Wiesner*, it is clear that CCO met the minimum pleading requirements of standing to survive a motion to dismiss in accordance with Rule 12(b)(6) of the North Carolina Rules of Civil Procedure in generally alleging special damages. However, the *evidence* submitted before the Superior Court is insufficient to *show* that CCO has or will suffer any individual harm as a result of the rezoning such that CCO is entitled to survive Charlotte's and MAP's motion for summary judgment. *See Wiesner*, ___ N.C. App. at ___, 781 S.E.2d at 877 (holding that the plaintiff must establish each element "with the manner and degree of evidence required at the *successive* stages of the litigation" (emphasis added)).

In its brief, CCO submits that it proffered evidence of the specific harm it will suffer due to its proximity to the rezoned property. To support its contention, CCO refers this Court to the following record evidence of special harm: (1) the pleading quoted above; (2) page 167 of the record, wherein Dr. Bittle-Patton was speaking at the required public hearing before the City Council on the Rezoning Petition; (3) pages 98-100 of the transcript, which record CCO's argument at the summary judgment hearing pertaining to the issue of standing; and (4) document exhibit pages 5, 16, 32, and 40. However, a close inspection of these

materials reveals that they are utterly devoid of any actual proof of special damages. We address each in turn.

First, although relevant to surviving a motion to dismiss, CCO's pleading does not evince that a harm will result from the rezoning. *See* N.C. R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial." (emphasis added))

Furthermore, to the extent that CCO asserts in its complaint that it will suffer a reduction in the value of the property, which would be adequate to establish standing according to *Jackson v. Guilford County Board of Adjustment*, it has failed to provide the trial court or this Court with any evidence in support of that assertion. In fact, Dr. Sylvia Bittle-Patton, designated CCO's 30(b)(6) representative, testified during her deposition that "I don't say we would lose tenants because of the [MAP Project] because people need affordable housing. And that's scarce in the city." Therefore, by CCO's own admission, it would not lose any tenants as a result of the MAP Project. Accordingly, we cannot conclude CCO has standing on this basis.

Second, Dr. Bittle-Patton's criticisms at the public hearing prior to Charlotte's meetings were limited to concerns about the height of the proposed building – then a projected 119 feet – as it surpassed the 100 foot height allowed by the PED overlay. That concern was rectified by lowering the proposed height of the building to a compliant 100 feet. Dr. Bittle-Patton at no point alleged that the rezoning risked increased noise, traffic, or parking. Therefore, Dr. Bittle-Patton's comments are not evidence of any special harm that CCO stands to suffer from the rezoning.

Third, in regard to its oral argument before the trial court, CCO specifically stated:

> Our folks have a piece of property that they own that is right next to the subdivision. So I think that they have satisfied the requirements of being an aggrieved party, an affected party that has standing to bring this claim. So I think that for those reasons that we've got the standing that we need to be here.

This assertion is also insufficient to prove that harm will ensue from rezoning because, as we already explained, owning property immediately adjacent to or in the vicinity of the subject property is inadequate in and of itself to establish special damages and, in turn, standing.

Finally, CCO points us towards pages 5, 16, 32 and 40 of the Documentary Exhibits. Page 5 of the Exhibits contains Dr. Bittle-Patton's testimony that "[CCO] absolutely [is]" impacted by the rezoning more than anyone else. Pages 16 and 32 contain testimony by Dr. Biddle-Patton describing the height of the Korean Herald building. Page 40 shows, as noted above, that Dr. Bittle-Patton testified on behalf of CCO as its 30(b)(6) representative.

CCO points to *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 710 S.E.2d 350 (2011), as precedent that adjacent-owner status, combined with loss of view and associated diminution in property value are enough to confer standing to challenge a land use decision. However, CCO misinterprets our holding in *Sanchez* as, in that case, we were dealing with a diminution of property value due to a loss of a historic waterfront view. *Id.* at 579, 710 S.E.2d at 353-54. Even considering the record in the light most favorable to CCO, it has forecasted no evidence of special damages due to diminution in the value of their property. The loss of the waterfront view in *Sanchez* was a portion of the loss in their land value, not a separate element on its own. CCO, on the other hand, points us to a *change* in its skyline view and presented no evidence of a loss in value. Simply stated, CCO's forecast of evidence of special damages consists of nothing more than conclusory, unsupported allegations that certain damages will ensue coupled with evidence that, at one point, the proposed development plan included a building that was taller than that which is permitted in the area. The latter point was rendered moot prior to CCO filing its complaint by MAP's decision to lower the height of its development to a compliant 100 feet.

Therefore, CCO has failed to point us to any record evidence to meet its burden of production at summary judgment that CCO will suffer special damages distinct from the rest of the community by rezoning, nor can we find any. Accordingly, we conclude that CCO has failed to establish it has standing to maintain its action for declaratory judgment.

We do not reach CCO's remaining contentions as it has not shown it has standing to raise them. *See*, *e.g.*, *Bigger v. Arnold*, 221 N.C. App. 662, 665, 728 S.E.2d 437, 439 (2012) ("Plaintiff lacks standing to appeal because he is not a party aggrieved by the trial court's order. Accordingly, we do not reach the other issues in the case."); *Estate of Apple ex rel. Apple v. Commercial Courier Exp., Inc.*, 168 N.C. App. 175, 180-181, 607 S.E.2d 14, 18 (2005) ("Finally, as we have concluded plaintiff does not have standing to contest the compromise and settlement agreement between defendants and the medical provider, we do not reach the issue of whether the Commission had to approve the settlement agreement

under the facts of this case."); *Matter of Ezzell*, 113 N.C. App. 388, 392, 438 S.E.2d 482, 484 (1994) ("Although Ezzell's argument may have merit, we do not reach the issue he attempts to raise because he does not have standing to raise the issue."); *Boone v. Boone*, 27 N.C. App. 153, 154, 218 S.E.2d 221, 222-23 (1975) ("We do not reach the questions raised by the assignments of error for the reason that defendant has no standing to raise the questions.") Therefore, we decline to reach the merits of CCO's appeal, and we dismiss this appeal for lack of subject matter jurisdiction.

Conclusion

For the foregoing reasons, we conclude that CCO lacks standing to prosecute its action for declaratory judgment. Accordingly, we modify and affirm the trial court's dismissal of CCO's claims.

MODIFIED AND AFFIRMED.

Judge DAVIS concurs in the result only.

Judge HUNTER, JR. concurs in separate opinion.

HUNTER, JR., Robert N., concurring in a separate opinion.

I write separately to concur in the result only.

Generally, the North Carolina Constitution grants standing to anyone who suffers harm. "All courts shall be open; [and] every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . ." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 642, 669 S.E.2d 279, 281-82 (2008) (quoting N.C. Const. art. I, § 18).

> The rationale of [the standing rule] is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Id. at 642, 669 S.E.2d at 282 (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)) (internal quotation

marks omitted). "[S]tanding relates not to the power of the court but to the right of the party to have the court adjudicate a particular dispute." *Cherry v. Wiesner*, ___ N.C. App. ___, ___, 781 S.E.2d 871, 876 (2016). "It is not necessary that a party demonstrate that injury has already occurred, but a showing of 'immediate or threatened injury' will suffice for purposes of standing." *Mangum* at 642-43, 669 S.E.2d at 282 (quoting *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990).

Here, the CCO filed an action seeking a "declaration pursuant to Rule 57 of the North Carolina Rules of Civil Procedure and the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.*, that the rezoning effectuated through the granting of the Rezoning Petition is invalid and unenforceable as an arbitrary and capricious act." The CCO also contends it has standing to bring this action pursuant to N.C. Gen. Stat. § 160A-393.

N.C. Gen. Stat. § 160A-393 (2016) provides:

> (d) **Standing.** – A petition may be filed under this section only by a petitioner who has standing to challenge the decision being appealed. The following persons shall have standing to file a petition under this section:
>
> . . . .
>
> (2) Any other person who will suffer special damages as the result of the decision being appealed.

It is necessary for a party to include allegations demonstrating why that party has standing in a particular case:

> Since the elements of standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Weisner at ___, 781 S.E.2d 871, 877 (quoting *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002)).

The CCO alleged:

> Petitioner is an aggrieved party who owns real property immediately adjacent to, or in close proximity to the subject property, and will suffer special damages in the form

> of increased noise, traffic and parking, decreased visibility due to the height of the proposed buildings, diminution in the peaceful residential character of the Cherry neighborhood, and a reduction in the value of Petitioner's real property if MAP is allowed to proceed as approved by the City Council. Accordingly, Petitioner's damages are distinct from the community at large.

Here, the CCO has alleged sufficient facts to assert standing to challenge the zoning amendment because it owns property immediately adjacent to the rezoned property and can potentially be adversely affected by the zoning amendment.

However, the CCO lost the summary judgment hearing because it failed to forecast competent evidence sufficient to support special damages, not because the CCO does not meet the status of an aggrieved party under the standing doctrine. This is clearly a justiciable issue capable of resolution by our Courts, and the CCO, in my opinion has only lost at the summary judgment level because of its failure to forecast evidence tending to show specifically how it will suffer harm by the Defendants in this case. Uncontroverted opinion is no longer sufficient evidence in North Carolina. *United Community Bank (Georgia) v. Wolfe*, ___ N.C. ___, ___, 799 S.E.2d 269, 272 (2017).

Furthermore, under N.C. Gen. Stat. § 1-257 (2016), a trial court may "refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding[.]" *See Farber v. N.C. Psychology Bd.*, 153 N.C. App. 1, 569 S.E.2d 287, *cert. denied*, 356 N.C. 612, 574 S.E.2d 679 (2002) (holding the trial court did not abuse its discretion in refusing to issue a declaratory judgment regarding the constitutionality of G.S. § 90-270.15(a)(10) where it decided further grounds for relief were unnecessary and would serve no useful purpose). Here, the trial court found "the City complied with all the law, with the Ordinances, their own law, the State law . . . and with the City Council's own procedures." The trial court further reasoned "I don't see how a different result could possibly have taken place had the thing gone back to the Planning Board and an additional 30 days been given."

From these facts I conclude the trial court did not abuse its discretion in this case.

FORD MOTOR CREDIT COMPANY LLC, PLAINTIFF
v.
KENNETH L. McBRIDE AND MARY A. McBRIDE, DEFENDANTS

No. COA17-720

Filed 6 February 2018

1. Appeal and Error—preservation of issues—waiver—no ruling below

Defendant waived appellate review of whether the trial court erred by failing to allow defendant to join necessary parties where defendant did not obtain a trial court ruling on the issue.

2. Pleadings—failure to state a claim—sale of defective car

Defendants' allegations in counterclaims in an action arising from the sale of a defective car, when taken as true, were sufficient to withstand plaintiff's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6), claims for breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, breach of express warranty, and revocation of acceptance of the non-conforming vehicle.

3. Pleadings—summary judgment—verified pleading—sale of defective car

The trial court erred by entering summary judgment for plaintiff in an action arising from the sale of a defective car where plaintiff argued that defendants failed to present any evidence to oppose its affidavit, but defendants' verified motions, answer, and counterclaims constituted an affidavit for purposes of summary judgment.

Appeal by defendants from order entered 23 March 2017 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 10 January 2018.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Christina McAlpin Taylor and Hannah D. Choe, for plaintiff-appellee.

The Law Group, by Michael P. Kepley, for defendant-appellants.

ARROWOOD, Judge.

Kenneth L. McBride and Mary A. McBride ("defendants") appeal from an order granting Ford Motor Credit Company LLC's ("plaintiff") motion to dismiss defendants' counterclaims and motion for summary judgment. For the reasons stated herein, we reverse the order of the trial court.

I. Background

On 25 February 2016, plaintiff filed a complaint against defendants for breach of contract. The complaint alleged that defendants had executed a contract with Randy Marion Incorporated ("Randy Marion") on 19 March 2015 to purchase a new 2015 Ford Transit Connect (the "vehicle"). Under the contract, defendants agreed to finance $24,953.52 at an annual percentage rate of 9.69%, for a total sale price of $34,385.12. Defendants agreed to make seventy-two monthly payments of $460.21. Sometime after defendants and Randy Marion entered into the contract, Randy Marion assigned the contract to plaintiff. Plaintiff further alleged that defendants defaulted on the contract by failing to pay plaintiff and "[a]fter giving credit for all payments received, for the proceeds from the sale of the vehicle, if any are due, and for any amounts received under any contract of insurance, the Defendants owe a balance of $7,709.67 as of August 21, 2015[.]"

On 10 June 2016, defendants filed a verified "Motions, Answer and Counterclaims[.]" Defendants moved to dismiss for failure to join a necessary and indispensable party pursuant to Rule 12(b)(7) of the North Carolina Rules of Civil Procedure, and in the alternative, moved to join Ford Motor Company and Randy Marion as defendants. Defendants alleged, in support of their affirmative defenses and counterclaims, as follows: On or about 19 March 2015, defendants purchased the vehicle for their personal use. The vehicle was sold to defendants by Randy Marion and Ford Motor Company as a new vehicle, with full warranties from Ford Motor Company, as the manufacturer of the vehicle. Within twenty-four hours of purchasing the vehicle, defendants noticed that the passenger seat continued to fall into a reclining position and would not remain upright "due to a fundamental defect in the design and manufacture of the vehicle." The defect was not apparent at the time of purchase. On 23 March 2015, defendants contacted Ford Motor Company to report the defect and were directed to take the vehicle back to Randy Marion for inspection and repair. Defendants went to Randy Marion that same day and Randy Marion refused to inspect the vehicle or to make any repairs. Defendants returned to Randy Marion on three additional dates: 24 March 2015, 26 March 2015, and 27 March 2015. On each occasion, defendants were turned away without Randy Marion making any inspections or repairs. Defendants rejected acceptance of the vehicle

by returning the vehicle to Randy Marion on 27 March 2015. Defendants advanced the following counterclaims: breach of implied warranty of merchantability; breach of implied warranty of fitness for a particular purpose; breach of express warranty; and revocation of acceptance of nonconforming goods.

On 11 August 2016, plaintiff filed a reply to defendants' motion and counterclaims.

On 21 November 2016, plaintiff filed a motion to dismiss defendants' counterclaims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and a motion for summary judgment.

On 23 March 2017, the trial court entered an order granting plaintiff's motion to dismiss and dismissing defendants' counterclaims with prejudice. The trial court also granted plaintiff's summary judgment motion, entering judgment against defendants in the amount of $7,709.67, with interest thereon at 9.69% per annum from 21 August 2015 until the date of judgment, interest at the statutory post-judgment rate from the date of judgment until paid in full, reasonable attorney's fees in the amount of $1,156.45, and court costs.

On 19 April 2017, defendants timely filed notice of appeal.

II. Discussion

A. Joining Necessary Parties

[1] In the first issue on appeal, defendants argue that the trial court erred by failing to allow defendants to join necessary parties to the action. Defendants contend that Randy Marion and Ford Motor Company are necessary parties.

On 10 June 2016, defendants filed a Rule 12(b)(7) motion, and in the alternative, a motion to join necessary parties. Upon thorough review, however, we can find nothing in the record before us that indicates that the trial court ruled on the merits of defendants' Rule 12(b)(7) motion or alternative motion to join necessary parties. In addition, neither plaintiff nor defendants can point us to a direct ruling. Thus, defendants have waived review of this issue by failing to obtain a ruling pursuant to N.C. R. App. P. 10(a)(1) (2018) ("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" and a party *must* "*obtain a ruling* upon the party's request, objection, or motion.") (emphasis added).

B. Motion to Dismiss for Failure to State a Claim

[2] In their second issue on appeal, defendants argue that the trial court erred by granting plaintiff's motion to dismiss defendants' counterclaims with prejudice under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We agree.

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

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

We first note that this case involves a "consumer credit sale" within the meaning of N.C. Gen. Stat. § 25A-2, and therefore, the provisions of Chapter 25A, entitled "Retail Installment Sales Act," are applicable. N.C. Gen. Stat. § 25A-2(a) (2017) ("a 'consumer credit sale' is a sale of goods or services in which (1) The seller is one who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit, (2) The buyer is a natural person, (3) The goods or services are purchased primarily for a personal, family, household or agricultural purpose, (4) Either the debt representing the price of the goods or services is payable in installments or a finance charge is imposed, and (5) The amount financed does not exceed seventy-five thousand dollars ($75,000)[.]").

N.C. Gen. Stat. § 25A-25 provides as follows:

> (a) In a consumer credit sale, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument or instruments of indebtedness, any claims or defenses available against the original seller, and the buyer may not waive the right to assert these claims or defenses in connection with a consumer credit sales transaction. Affirmative recovery by the buyer on a claim asserted against an assignee of the seller or other holder of the instrument of indebtedness

> shall not exceed amounts paid by the buyer under the contract.
>
> (b) Every consumer credit sale contract shall contain the following provision in at least ten-point boldface font:
>
> NOTICE
>
> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

N.C. Gen. Stat. § 25A-25(a)-(b) (2017). Based upon the plain language of N.C. Gen. Stat. § 25A-25, plaintiff, as an assignee of the seller, is subject to any of defendants' claims and defenses which might be asserted against Randy Marion. *See Commercial Credit Equipment Corp. v. Thompson*, 48 N.C. App. 594, 269 S.E.2d 286 (1980) (judgment on the pleadings was in error, where N.C. Gen. Stat. § 25A-25(a) applied, and the plaintiff, as assignee of the seller, was subject to the defendants' plea of fraud).

Defendants' first counterclaim was for breach of the implied warranty of merchantability. In order to recover for breach of the implied warranty of merchantability, a party must establish that:

> (1) a merchant sold goods, (2) the goods were not "merchantable" at the time of sale, (3) the [party] (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.

Ismael v. Goodman Toyota, 106 N.C. App. 421, 430, 417 S.E.2d 290, 295 (1992) (citations omitted).

In the present case, defendants alleged that the vehicle was sold to them by Randy Marion, a dealer engaged in the business of automobile sales; that the vehicle was not in merchantable condition at the time of sale or any time thereafter, as the passenger seat continued to fall into a reclining position and would not remain upright; the vehicle failed to provide safe and reliable transportation, proximately causing damages to defendants; and that four days after purchasing the vehicle, defendants returned to Randy Marion in an attempt to have the vehicle inspected

and defect repaired. These allegations, taken as true as is required when ruling on a 12(b)(6) motion, are sufficient to state a claim for breach of the implied warranty of merchantability.

Defendants' second counterclaim alleged a breach of the implied warranty of fitness for a particular purpose pursuant to N.C. Gen. Stat. § 25-2-315. N.C. Gen. Stat. § 25-2-315 provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [G.S. 25-2-316] an implied warranty that the goods shall be fit for such purpose.

N.C. Gen. Stat. § 25-2-315 (2017).

Defendants alleged that they informed agents of Randy Marion that "they were in the market for a vehicle for their personal use that could transport both Defendants at the same time." Randy Marion's agents told defendants that the vehicle "could safely transport both Defendants at the same time and that the vehicle was brand new with no mechanical issues." Defendants alleged that based on these assurances, they relied on Randy Marion's agents' skill and judgment to select a suitable vehicle for the intended purpose. Randy Marion's agents knew or had reason to know that defendants were relying on them. Furthermore, defendants alleged that the vehicle was not fit for defendants' purpose because the passenger seat would not remain upright, making transportation unsafe and unreliable. Taking defendants' allegations as true, they state a claim for which relief can be granted sufficient to survive a 12(b)(6) motion to dismiss.

In their third counterclaim, defendants alleged a breach of express warranty. N.C. Gen. Stat. § 25-2-313(1) provides:

> (1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

N.C. Gen. Stat. § 25-2-313(1)(a)-(b) (2017). The seller does not need to use formal words such as "warrant" or "guarantee," nor does he need to have a specific intention to make a warranty. N.C. Gen. Stat. § 25-2-313(2). Recovery under this claim requires proof of "(1) an express warranty as to a fact or promise relating to the goods, (2) which was relied upon by the plaintiff in making his decision to purchase, (3) and that this express warranty was breached by the defendant." *Harbour Point Homeowners' Ass'n v. DJF Enters., Inc.*, 206 N.C. App. 152, 162, 697 S.E.2d 439, 447 (2010) (citation and quotation marks omitted).

Defendants alleged that at the time of purchase, they informed agents of Randy Marion that they were "in the market for a vehicle that they both could ride in for their personal use." Randy Marion's agents stated that the vehicle "could safely transport both Defendants at the same time and that the vehicle was brand new with no mechanical issues." Defendants further alleged that they relied on this express warranty when purchasing the vehicle and would not have purchased it had Randy Marion's agents not represented to them that the vehicle was in "good working order and fit to transport" them both. Randy Marion's agents breached the express warranty when the vehicle was not in good working order. Defendants also alleged that Randy Marion and Ford Motor Company breached a written warranty which formed part of the basis of the bargain and upon which defendants relied. The written warranty had promised to repair or replace, free of charge, any vehicle parts found to be defective in materials or workmanship within thirty-six months or 36,000 miles. Defendants' allegations, treated as true, are sufficient to state a claim upon which relief can be granted.

In their final counterclaim, defendants alleged that they revoked their acceptance of the non-conforming vehicle. N.C. Gen. Stat. § 25-2-608(1)(a) provides that

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it . . . (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

N.C. Gen. Stat. § 25-2-608(1)(a)-(b) (2017). Moreover, "[r]evocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by

their own defects. It is not effective until the buyer notifies the seller of it." N.C. Gen. Stat. § 25-2-608(2).

Here, defendants alleged that the defect in the vehicle existed at the time of sale and substantially impaired the value of the vehicle to defendants. Defendants accepted the vehicle without having previously discovered the nonconformity because the defect was not apparent at the time of purchase and because of the assurances made by Randy Marion's agents. Defendants further alleged that they revoked acceptance of the vehicle by returning it to Randy Marion and informing Ford Motor Company that they no longer wanted the vehicle. Revocation was within a reasonable time after they discovered or should have discovered the non-conformity and there was no substantial change in the condition of the vehicle not caused by its own defects in its entirety. These allegations, taken as true, are sufficient to overcome plaintiff's 12(b)(6) motion to dismiss.

In conclusion, we hold that defendants' allegations set forth in the counterclaims, when treated as true, were sufficient to withstand plaintiff's 12(b)(6) motion to dismiss. Thus, the trial court erred by dismissing defendants' counterclaims.

C. Summary Judgment

[3] In their final argument, defendants contend that the trial court erred in granting summary judgment in favor of plaintiff on its claim. Defendants argue that there was a genuine issue of material fact as to the condition of the vehicle.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). "If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Allied Spectrum, LLC v. German Auto Center, Inc.*, __ N.C. App. __, __, 793 S.E.2d 271, 274 (2016) (citation and quotation marks omitted). The non-moving party "may not rely upon the bare allegations of

his complaint to establish triable issues of fact, but must, by affidavits or otherwise, as provided by Rule 56, set forth specific facts showing that there is a genuine issue for trial." *Id.* (citation and quotation marks omitted).

In support of its motion for summary judgment, plaintiff submitted the affidavit of Jennifer Axon ("Axon"), one of its employees. Axon's affidavit stated that she was a custodian of records for plaintiff and that those records indicated as follows: defendants executed a retail installment contract with Randy Marion on 19 March 2015 for the purchase of the vehicle; defendants agreed to pay the financed purchase price of $24,953.52 by making seventy-two monthly payments of $460.21; plaintiff was assigned the rights of Randy Marion under this contract; Randy Marion received a complaint from defendants regarding the passenger seat of the vehicle; Randy Marion investigated the complaint and found the seat was not defective; Ford Motor Company sent a field engineer to investigate defendants' complaint and found no defect; defendants defaulted on the payment of the retail installment contract; possession of the vehicle was retaken on 24 July 2015; and a deficiency balance of $7,709.67 remains due on the installment contract.

Plaintiff argues that defendants failed to submit any evidence to oppose its affidavit, and as such, plaintiff has proven that there are no genuine issues of material fact. We disagree. Defendants' verified 10 June 2016 "Motions, Answer and Counterclaims" "constitute an 'affidavit' for purposes of determining either party's right to summary judgment." *Whitehurst v. Corey*, 88 N.C. App. 746, 748, 364 S.E.2d 728, 729 (1988). "Rule 56(e) does not deny that a properly verified pleading which meets all the requirements for affidavits may effectively 'set forth specific facts showing that there is a genuine issue for trial.' " *Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 212-13 (1972).

Because there is a genuine issue of material fact as to the condition of the vehicle at the time of sale, we are unable to say that plaintiff has met its burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Thus, the trial court erred by granting summary judgment in favor of plaintiff.

The 23 March 2017 order, dismissing defendants' counterclaims with prejudice and granting summary judgment in favor of plaintiff, is reversed.

REVERSED.

Judges CALABRIA and ZACHARY concur.

HONEYCUTT v. WEAVER

[257 N.C. App. 599 (2018)]

TOMMY LEE HONEYCUTT, PLAINTIFF
v.
BRENDA HONEYCUTT HARRIS WEAVER, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF MARGARET L. HONEYCUTT, DEFENDANT

No. COA17-410

Filed 6 February 2018

1. Statutes of Limitation and Repose—distribution of deceased's assets—statute of limitations

Plaintiff did not bring claims for breach of fiduciary duty, constructive fraud, and declaratory judgment within the applicable 10-year statute of limitations in an action between a brother and a sister arising from the sister's transfer of real estate to herself under her mother's power of attorney. The doctrine of adverse possession was not relevant, and any such claim would be subject to the 7-year statute of limitations under N.C.G.S. § 1-38. The statute of limitations was not stayed by plaintiff's petition claiming that the sister had renounced her right to be executor because the claims were not related to the mother's will but to the conveyance of real property while the sister was acting as attorney-in-fact.

2. Statutes of Limitation and Repose—conversion—transfer of land by attorney-in-fact

Plaintiff did not cite any legal authority or set forth a cohesive argument for a conversion claim as an independent cause of action with its own statute of limitations where he relied entirely on his breach of fiduciary duty and constructive fraud claims in asserting a 10-year statute of limitations in his claims arising from the division of his mother's assets. His claims arising from the conveyance of real property were barred by the applicable statute of limitations, and his action for conversion of chattels and goods was not brought within the applicable three-year statute of limitations.

Appeal by plaintiff from order entered 11 January 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 20 September 2017.

Collins Price, PLLC, by Andrew S. Price; and Stafford R. Peebles, Jr., P.C., by Stafford R. Peebles, Jr., for plaintiff-appellant.

Craige Jenkins Liipfert & Walker, LLP, by William W. Walker, for defendant-appellee.

ELMORE, Judge.

Tommy Lee Honeycutt ("plaintiff" or "Tommy") appeals from an order dismissing his amended complaint against Brenda Honeycutt Harris Weaver ("defendant" or "Brenda") on the basis that his six claims for relief are either barred by the applicable statutes of limitation or are within the exclusive jurisdiction of the clerk of court. For the reasons stated herein, we affirm.

I.

This appeal arises out of a dispute between brother and sister regarding the distribution of their mother's assets both before and after her death.

On 15 August 2002, Margaret L. Honeycutt ("Margaret") executed a last will and testament providing that her daughter, Brenda, be appointed executor of her estate and that all of her property be divided equally between her two children, Tommy and Brenda.

On 10 December 2004, Margaret executed a durable power of attorney appointing Brenda as her attorney-in-fact. The statutory form included an authorization for Brenda to make gifts from Margaret to Brenda herself as the named attorney-in-fact, but only in accordance with Margaret's history of making or joining in the making of lifetime gifts.

On 2 June 2005, Brenda, acting as Margaret's attorney-in-fact, executed a general warranty deed conveying lots 48–53 on the map of Blueberry Hills Development ("the real property") from Margaret to Brenda herself. This conveyance was made for no taxable consideration, and the deed was signed by Brenda and recorded in the Forsyth County Registry.

Margaret died on 8 June 2010. According to Tommy, Margaret owned various items of personal property at the time of her death, including but not limited to household belongings and furnishings, bank accounts, a 1977 Midas motorhome, and a 1996 Chevrolet Blazer vehicle ("the personal property"), all of which should have been divided equally between Tommy and Brenda as prescribed by Margaret's will. However, Brenda did not apply to be appointed executor of Margaret's estate immediately following Margaret's death; instead, she submitted Margaret's will and death certificate for filing with the clerk of court, and she represented to the clerk that Margaret had no remaining assets to be divided and that no probate of Margaret's will would be necessary.

At an unspecified time after Margaret's June 2010 death, Tommy discovered that Brenda had used her power as Margaret's attorney-in-fact

in June 2005 to convey the real property from Margaret to Brenda. He also discovered that Brenda had taken possession of Margaret's personal property. Tommy alleges that, despite his repeated demands, Brenda refused to divide the property with Tommy.

On 20 June 2013, more than three years after Margaret's death, Tommy filed a petition with the clerk of court requesting that Brenda be deemed to have renounced her right to be executor of Margaret's estate. No executor of Margaret's estate had been appointed prior to Tommy's petition, nor was one appointed during the pendency of his petition.

On 25 April 2016, the clerk of court issued an order providing that Brenda would have until 28 April 2016 to file an application for probate and letters testamentary for Margaret's estate.

On 2 May 2016, the clerk of court issued letters testamentary appointing Brenda as executor of Margaret's estate.

On 20 September 2016, Tommy filed his initial complaint against Brenda in her individual capacity and as executor of Margaret's estate. In his complaint, Tommy alleged that Brenda's conveyance of the real property from Margaret to Brenda in June 2005 constituted an unlawful, self-dealing conveyance in violation of Brenda's fiduciary duty to Margaret as her attorney-in-fact. Tommy also alleged that Brenda's failure and refusal to divide Margaret's personal property after Margaret's death in June 2010 constituted conversion of personal property belonging to Margaret's estate and to Tommy, as well as an additional breach of Brenda's fiduciary duty to Margaret. As a result of Brenda's conduct, Tommy alleged compensatory damages in excess of $25,000.00 as well as entitlement to punitive damages in excess of $25,000.00.

On 2 November 2016, Brenda filed a motion to dismiss Tommy's complaint for failure to state a claim upon which relief could be granted. In her motion, Brenda alleged that Tommy's claims for self-dealing, violation of fiduciary duty, and conversion were barred by the applicable statutes of limitation. Brenda also alleged that Tommy's claim that Brenda had failed and refused to divide Margaret's personal property was an issue within the exclusive jurisdiction of the clerk of court and, therefore, should be dismissed for lack of subject matter jurisdiction.

On 9 December 2016, Tommy filed an amended complaint, which Brenda stipulates relates back to the initial filing date of 20 September 2016. Tommy's amended complaint was essentially the same as his initial complaint, but it enumerated six specific causes of action as follows: (1) request for declaratory judgment to void the real property conveyance,

(2) breach of fiduciary duty, (3) constructive fraud, (4) conversion, (5) unjust enrichment, and (6) punitive damages.

On 13 December 2016, Brenda filed a motion to dismiss Tommy's amended complaint, again alleging that Tommy's claims were barred by the applicable statutes of limitation or jurisdictional defect pursuant to Rules 12(b)(6) and 12(b)(1) of the Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1 (2015).

On 5 January 2017, the trial court held a hearing on Brenda's motion to dismiss Tommy's amended complaint. The court granted the motion and dismissed the complaint by order entered 11 January 2017 ("the dismissal order"). The dismissal order includes no findings of fact, stating only that

> After reviewing the Amended Complaint and the parties' briefs and supporting cases and statutes, and after hearing counsel's arguments, the Court concluded that Plaintiff's claims are barred by the applicable statutes of limitations, N.C. Gen. Stat. § 1-52(1) & (4) & 1-56, or are within the exclusive jurisdiction of the Clerk of Court, N.C. Gen. Stat. § 28A-2-4, and the Court therefore allowed the Motion.

Tommy filed timely notice of appeal from the dismissal order.

II.

On appeal, Tommy contends that the trial court erred in granting Brenda's motion to dismiss his amended complaint on the basis that his claims are barred by the applicable statutes of limitation.

First, Tommy argues that his claims for breach of fiduciary duty and constructive fraud are governed by the 10-year statute of limitations under N.C. Gen. Stat. § 1-56 (2015), and that the statute did not begin running until Tommy had knowledge of the real property conveyance from Margaret to Brenda. In the alternative, Tommy asserts that N.C. Gen. Stat. § 1-24 (2015) operated to stay the 10-year statute of limitations from 20 June 2013 to 2 May 2016 — while Tommy's petition was pending with the clerk of court and no executor had been appointed to Margaret's estate — such that his claims were instituted within the limitations period even if the statute began running, as Brenda contends, at the time of the June 2005 conveyance.

Next, Tommy argues that his request for declaratory judgment is governed by the 20-year statute of limitations for adverse possession under N.C. Gen. Stat. § 1-40 (2015) because the deed from Margaret to

Brenda did not pass color of title. In the alternative, Tommy argues that this claim is governed by the 10-year statute of limitations for actions upon an instrument of conveyance of an interest in real property under N.C. Gen. Stat. § 1-47(2) (2015), and he again asserts that N.C. Gen. Stat. § 1-24 operated to stay the limitations period for nearly three years.

As to his conversion claim, Tommy argues that this claim amounts to an additional breach of fiduciary duty and constructive fraud and, therefore, is governed by the 10-year statute of limitations applicable to those claims under N.C. Gen. Stat. § 1-56. Tommy fails to cite any legal authority in his brief for this particular contention; nevertheless, he summarily asserts that "[t]hese claims were instituted well within the 10 year statute of limitations as [Margaret] passed away on June 8, 2010 and [Brenda] was not appointed as executor of [Margaret's] estate until May 2, 2016." Brenda, however, maintains that Tommy's conversion claim is governed by the 3-year statute of limitations under N.C. Gen. Stat. § 1-52(4).

Lastly, Tommy contends that the trial court erred in concluding that any of his claims are within the exclusive jurisdiction of the clerk of court because under N.C. Gen. Stat. § 28A-2-4(c)(2) (2015), the clerk does not have such jurisdiction over "[a]ctions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence." Tommy argues that his assertion that Brenda has failed and refused to divide the personal property in accordance with Margaret's will is not an estate proceeding within the clerk's exclusive jurisdiction, but an element of his claim for breach of fiduciary duty, for which he seeks monetary damages.

We note that Tommy also brought claims against Brenda for unjust enrichment and punitive damages. In his brief, Tommy fails to address his unjust enrichment claim, which is therefore deemed abandoned on appeal. *See* N.C. R. App. P. 28(a). As to Tommy's claim for punitive damages, a plaintiff cannot maintain an action *only* to collect punitive damages; rather, he must first show that he is entitled to recover actual damages on an underlying claim. *See Ransom v. Blair*, 62 N.C. App. 71, 76, 302 S.E.2d 306, 309 (1983).

III.

Our standard to review the trial court's dismissal order is well established.

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the

> motion the allegations of the complaint must be viewed as admitted, and on that basis the [trial] court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

"[An affirmative] statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). The statute of limitations applicable to a particular claim begins running when that claim accrues, which generally occurs at the moment a complete and present cause of action exists to allow a plaintiff to file suit and obtain relief. N.C. Gen. Stat. § 1-15(a) (2015). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Horton*, 344 N.C. at 136, 472 S.E.2d at 780 (citations omitted).

Here, the dismissal order refers to the relevant statutes of limitation as N.C. Gen. Stat. §§ 1-52(1), 1-52(4), and 1-56. Although the order fails to specify which statute governs each particular claim, N.C. Gen. Stat. § 1-52(4) provides that a 3-year statute of limitations governs actions for conversion of goods or chattels. Likewise, "[a]llegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the [3]-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1)[.]" *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). Where such allegations do give rise to a claim of constructive fraud, that claim falls under the 10-year statute of limitations contained in N.C. Gen. Stat. § 1-56. *Id.* at 67, 614 S.E.2d at 335. N.C. Gen. Stat. § 1-56 provides that "[a]n action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued." Thus, where no other statute establishes the statute of limitations for a particular claim, the residual or "catch-all" period of 10 years set out in N.C. Gen. Stat. § 1-56 applies.

IV.

[1] Tommy contends, and Brenda stipulates, that the 10-year statute of limitations under N.C. Gen. Stat. § 1-56 applies to his claims for breach of fiduciary duty and constructive fraud insofar as those claims are based on Brenda's alleged self-dealing in executing the June 2005 deed from Margaret to Brenda.

As to his request for declaratory judgment, Tommy alleges — without presenting any authority in support of his position, other than a bare reference to two statutes — that because Brenda "knowingly exceeded her authority as attorney-in-fact" under N.C. Gen. Stat. § 32-A2 (2015) and "gifted herself the property . . . without providing any valuable consideration," the deed does not pass color of title. According to Tommy, Brenda's only claim to the property would therefore be by adverse possession, which Tommy asserts has a 20-year statute of limitations under N.C. Gen. Stat. § 1-40. We disagree with Tommy's argument on several grounds, the first being that the doctrine of adverse possession is at all relevant to the resolution of this matter.

In order to acquire title by adverse possession, an individual generally must possess the property "adversely to all other persons for 20 years," among other requirements. N.C. Gen. Stat. § 1-40. Challenges to an individual's possession "under color of title," however, are subject to a 7-year statute of limitations pursuant to N.C. Gen. Stat. § 1-38 (2015).

> Color of title may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it or the defective mode of conveyance which is used; and it would seem that it must not be so obviously defective that no man of ordinary capacity could be misled by it.

White v. Farabee, 212 N.C. App. 126, 132–33, 713 S.E.2d 4, 9 (2011) (citations and internal quotation marks omitted). "It is well established that a deed may constitute color of title to the land described therein." *Id.* "When the deed is regular upon its face and purports to convey title to the land in controversy, it constitutes color of title." *Id.*

Here, the premise of Tommy's argument that a 20-year statute of limitations applies to his request for declaratory judgment is that the deed purports to pass title to Brenda but does not in fact do so because of a defect in the method of conveyance. Notwithstanding the fact that Brenda does not claim to have acquired title by adverse possession or to have fulfilled the additional requirements for application of that

doctrine, Tommy's own argument demonstrates that the deed to Brenda passes the appearance or "color" of title, if not title in fact. Thus, a claim challenging Brenda's allegedly adverse possession of the real property would be subject to a 7-year statute of limitations under N.C. Gen. Stat. § 1-38, not a 20-year limitations period under N.C. Gen. Stat. § 1-40, as Tommy contends.

Tommy argues, in the alternative, that the 10-year statute of limitations under N.C. Gen. Stat. § 1-47(2) — a statute not cited in the dismissal order — applies to his request for declaratory judgment, while Brenda maintains that the claim is governed by the residual 10-year statute of limitations under N.C. Gen. Stat. § 1-56. Regardless of which 10-year limitation period is more appropriate, however, Tommy asserts that the period did not begin running as to his claims for breach of fiduciary duty, constructive fraud, and declaratory judgment until he had knowledge of Brenda's allegedly self-dealing conveyance. We disagree.

"An action for fraud accrues when *the aggrieved party* discovers the facts constituting the fraud, or when, in the exercise of due diligence, such facts should have been discovered." *Shepherd v. Shepherd*, 57 N.C. App. 680, 682, 292 S.E.2d 169, 170 (1982) (emphasis added). Where a confidential relationship exists between the parties, the aggrieved party "is under no duty to make inquiry until something occurs to excite his suspicions," so long as he does not purposefully remain ignorant of such facts. *Vail v. Vail*, 233 N.C. 109, 116–17, 63 S.E.2d 202, 208 (1951).

Between the signing of the deed in June 2005 and her death in June 2010, the aggrieved party here was Margaret, not Tommy. "She alone had the right to maintain an action for redress in her lifetime[.]" *Id.* at 118, 63 S.E.2d at 209. In filing his complaint, Tommy did not contend that Brenda concealed the deed from Margaret or that Margaret otherwise did not know about the deed,[1] nor did he allege that Margaret was ever incompetent such that she would have been unable to discover the allegedly fraudulent conveyance prior to her death. For these reasons, we hold that the 10-year limitation period applicable to Tommy's claims for breach of fiduciary duty, constructive fraud, and declaratory judgment began running in June 2005, when the conveyance was made.

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1. In his brief, Tommy states, "Upon information and belief, [Margaret] had no knowledge of this transfer." However, no such allegation is contained in the record on appeal. *See* N.C. R. App. P. 28(e); *see also Long v. City of Charlotte*, 306 N.C. 187, 190, 293 S.E.2d 101, 104 (1982) (appellate court considers only what appeared on record before the trial court).

Tommy could have sued Brenda between Margaret's death in June 2010 and the expiration of the statute of limitations in June 2015, but he did not file his complaint until September 2016. *See Holt v. Holt*, 232 N.C. 497, 501, 61 S.E.2d 448, 452 (1950) ("[I]f the cause of action still exists in the person making the conveyance at the time of his death, it passes to those who then succeed to his rights."); *see also Vail*, 233 N.C. at 118, 63 S.E.2d at 209 ("[W]hen the statute of limitations has started running against the ancestor, but at his death the action is not barred, the statute continues to run against the heir or devisee."). Nevertheless, Tommy argues that his claims are not barred by the statute of limitations because N.C. Gen. Stat. § 1-24 operated to stay the 10-year limitations period for nearly three years, during which time Tommy's petition to have the clerk of court deem that Brenda had renounced her right to be executor was pending. We are not persuaded by Tommy's effort to avoid dismissal.

N.C. Gen. Stat. § 1-24, titled "Time during controversy on probate of will or granting letters," provides as follows:

> In reckoning time when pleaded as a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there is an administrator appointed during the pendency of the action, and it is provided that an action may be brought against him.

It is apparent from the title and plain language of the statute that the purpose of its staying provisions are to assist an aggrieved party in a controversy regarding probate of a will or granting of letters testamentary, where his cause of action would be against the executor of an estate. Under such circumstances, if no executor has been appointed, the aggrieved party may be unable to bring an action within the applicable limitations period due to the simple fact that no executor exists for him to sue.

N.C. Gen. Stat. § 1-24 has no application here, where Tommy's claims are not related to the probate of Margaret's will, but to the conveyance of real property by Brenda while acting as Margaret's attorney-in-fact. We therefore hold that Tommy failed to bring his claims for breach of fiduciary duty, constructive fraud, and declaratory judgment within the applicable 10-year statute of limitations, which ran uninterrupted from June 2005 until June 2015.

V.

[2] The only issue remaining on appeal is whether the trial court erred in dismissing Tommy's conversion claim against Brenda.

In his complaint, Tommy made the following allegations in reference to Brenda's acts of conversion:

> 29. [Brenda], as appointed Executrix of the estate of [Margaret], unlawfully converted the personal property of [Margaret] for [Brenda's] own use and benefit. This unlawful conversion constituted constructive fraud.
>
> . . . .
>
> 32. [Brenda's] self dealing actions, as attorney-in-fact, in deeding to herself lots 48-53 of Blueberry Hills Development, constitute conversion of the property of [Margaret].
>
> 33. [Brenda's] self dealing actions in refusing to transfer to [Tommy] his share of the personal property of [Margaret] and keeping that personal property for her own uses constitutes conversion of the property of [Margaret].
>
> 34. [Brenda's] unlawful conversion of the property of [Margaret] for [Brenda's] own use, and her failure to divide said property as directed in [Margaret's will], constituted a breach of her fiduciary duty to [Margaret] and her estate, which includes [Tommy].

On appeal, Tommy's entire argument that his conversion claim is not barred by the applicable statute of limitations consists of a single paragraph, which reads as follows:

> As noted above, [Tommy] alleges that [Brenda] converted items of [Margaret's] personal property including household belongings, bank accounts, household furnishings, a 1977 Midas Motor home, and a 1996 Blazer vehicle. Further, [Tommy] alleges that [Brenda] refused to include in the estate of [Margaret] lots 48–53 on the map of the Blueberry Hills Development, despite the fact that those lots were improperly transferred. The failure to include the above items of property in [Margaret's] estate is the basis for [Tommy's] claims for breach of fiduciary duty and constructive fraud. These claims were instituted well within the 10 year statute of limitations as [Margaret] passed

> away on June 8, 2010 and [Brenda] was not appointed as executor of [Margaret's] estate until May 2, 2016.

Here, Tommy fails to cite any legal authority or to set forth a cohesive argument for his conversion claim as an independent cause of action with its own statute of limitations; rather, Tommy relies entirely on his breach of fiduciary duty and constructive fraud claims in asserting that the applicable statute of limitations is 10 years. We disagree.

First, we note that insofar as Tommy's claims relate to Brenda's conveyance of the real property, those claims accrued in June 2005 and are, therefore, barred by the applicable statute of limitations. Second, by his own admission, Tommy discovered that Brenda had taken possession of Margaret's personal property following Margaret's death in June 2010. After making repeated demands for Brenda to divide the property with Tommy, Tommy filed a petition with the clerk of court in June 2013 requesting that Brenda be deemed to have renounced her right to be executor of Margaret's estate. Third, from June 2010 until May 2016, Brenda was neither Margaret's attorney-in-fact nor the executor of Margaret's estate, and she therefore owed no fiduciary duty to Margaret, Margaret's estate, or Tommy during that time.

N.C. Gen. Stat. § 1-52(4) provides that a 3-year statute of limitations governs actions for conversion of goods or chattels. "As a general rule, the claim accrues, and the statute begins to run, when the unauthorized assumption and exercise of ownership occurs[.]" *Stratton v. Royal Bank of Can.*, 211 N.C. App. 78, 83, 712 S.E.2d 221, 227 (2011).

Here, Tommy's right to sue Brenda for conversion accrued upon Margaret's death in June 2010, but he did not file his complaint until 2016. We therefore hold that Tommy failed to bring his claim for conversion within the applicable 3-year statute of limitations under N.C. Gen. Stat. § 1-52(4).

VI.

Because Tommy's claims against Brenda for breach of fiduciary duty, constructive fraud, and declaratory judgment accrued with the conveyance of the real property in June 2005, we hold that Tommy failed to file those claims within the applicable 10-year statute of limitations period. Additionally, because Tommy's claim against Brenda for conversion of the personal property accrued with Margaret's death in June 2010, we hold that Tommy failed to file that claim within the applicable 3-year limitations period. Tommy's reliance on N.C. Gen. Stat. § 1-24 is misplaced, as that statute does not operate to stay the limitations period

where the underlying cause of action does not constitute a controversy on the probate of a will or granting of letters testamentary.

Lastly, because we hold that Tommy's claims for breach of fiduciary duty, constructive fraud, declaratory judgment, and conversion are barred by the applicable statutes of limitation, and because Tommy's claim for unjust enrichment has been abandoned on appeal, we do not address Tommy's contention that the trial court erred in concluding that any of his claims are within the exclusive jurisdiction of the clerk of court.

The order of the trial court granting Brenda's motion to dismiss Tommy's complaint is hereby:

AFFIRMED.

Judges STROUD and TYSON concur.

IN THE MATTER OF THE APPEAL OF LOWE'S HOME CENTERS, LLC
FROM THE DECISION OF THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW
CONCERNING THE VALUATION OF CERTAIN REAL PROPERTY FOR TAX YEAR 2013.

No. COA17-220

Filed 6 February 2018

Taxation—ad valorem assessment—erroneous

The decision of the N.C. Tax Commission concerning Forsyth County's ad valorem tax assessment of Lowe's Home Centers' real property was reversed and remanded where the County relied only on the cost approach to valuation and should have considered the income and comparable sales approaches to establish a true value; there was a substantial difference in value whichever assessment the County used; and the County abandoned the presumption of correctness afforded its initial assessment by abandoning that assessment in favor of the higher value given by its expert. The burden on the taxpayer was one of production of evidence that the County's valuation was arbitrary, not of persuasion.

Appeal by Lowe's Home Centers, LLC from a final decision entered 24 August 2016 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 21 August 2017.

Bell, Davis & Pitt, P.A., by John A. Cocklereece, Bradley C. Friesen, and Justin M. Hardy, for Appellant-Lowe's Home Centers, LLC.

Attorney for Forsyth County, by Assistant County Attorney B. Gordon Watkins III, for Appellee-Forsyth County.

BERGER, Judge.

Lowe's Home Centers, LLC ("Lowe's") appeals from the Final Decision of the North Carolina Property Tax Commission ("Commission") that affirmed the decision of the Forsyth County Board of Equalization and Review concerning Forsyth County's (the "County") *ad valorem* tax assessment of Lowe's real property located in Kernersville, North Carolina. Lowe's contends its evidence produced in the May 17-19, 2016 hearing before the Commission was sufficient to rebut the presumption of correctness for the County's assessment, thereby shifting the burden of proof to the County to prove that its method of assessing Lowe's property produced a true value of that property. We agree and therefore reverse the decision of the Property Tax Commission.

Factual and Procedural Background

The County assessed Lowe's commercial property at 145 Harmon Creek Road, Kernersville, North Carolina ("Property") at $14,572,900.00, or $107.43 per square foot as of January 1, 2013. The Property was constructed in 2001 with 135,652 gross leasable square footage on 19.6 acres of land. On December 2, 2013, Lowe's contested the County's valuation of the Property by appealing the valuation to and requesting a hearing before the Commission. Prior to Lowe's appeal, both parties conducted independent appraisals. The County's assessor reappraised the Property at $16,100,000.00 or $118.69 per square foot, while Lowe's appraisal was $6,340,000.00 or $46.74 per square foot. As a result of the County's higher appraisal, the County abandoned the former assessment of $14,572,900.00 and adopted its expert's latter appraisal of $16,100,000.00.

Lowe's was granted a hearing before the Commission in its appeal of the County's tax assessment. During the May 17-19, 2016 hearing, Lowe's introduced four expert witnesses who testified to factors used in the valuation process, as well as their valuation of the subject Property.

Lowe's first expert was David Lennhoff, a real estate appraiser and consultant, experienced in valuating 'big box' retail real estate. Lennhoff testified to the average price per square foot of other Lowe's properties in North Carolina, finding that the valuations per square foot ranged "from $18.48 a square foot to $39.34."

Lowe's second expert to testify was Charles Williamson, Director of Real Estate for Lowe's. He testified that the County's appraisal of $118.69 per square foot is the highest valuation of any Lowe's in the United States, the average valuation being $29.59 per square foot. Williamson also testified about deed restrictions placed on the resale of 'big box' properties and those restrictions' effect on valuation. His valuation of similar 'big box' properties ranged from $21.63 to $49.00 per square foot, well below the County's valuation.

Robert Meiers also testified on Lowe's behalf. Meiers has served as Lowe's Property Tax Manager for over twelve years. Meiers testified that Lowe's had previously contested tax appraisals in nineteen North Carolina counties, and that Forsyth County's assessment of $118.69 per square foot was more than double the average valuation of $56.13 per square foot. Meiers proffered tax assessment valuations of Lowe's stores in similarly situated North Carolina counties:

> Q: On this list looking at the demographics, which county is the closest to Forsyth in terms of population and the number of building permits pulled in 2013?
>
> A: Cumberland County.
>
> Q: And what is the assessed value – the average assessed value of Lowe's stores in Cumberland County?
>
> A: [$]7,309,600.
>
> Q: And what is that on a per square foot basis?
>
> A: $57.61 a square foot.
>
> Q: And which county is the most similar to Forsyth in terms of growth percentage between 2010 and [2014] and in terms of median household income?
>
> A: It would be Guilford, Guilford County.
>
> . . .
>
> Q: Which is growing faster in terms of percentage growth and building permits pulled?
>
> A: That would be Guilford County.
>
> . . .
>
> Q: What's the average assessed value of all the stores in Guilford County?

A: [$]9,595,160.

Q: And what is that on a per square foot basis?

A: $74.78 a square foot.

Finally, James Katon, a real estate appraiser from Charlotte, North Carolina, was hired by Lowe's to appraise the fair market value of a fee simple interest of the Property as of the County's valuation date. Katon testified that he appraised the Property using the uniform appraisal standards mandated by N.C. Gen. Stat. § 105-283. In valuing the Property, Katon did not consider the "investment value" of the Property, but "the value of the real estate to the general real estate market." Katon's valuation for the subject Property was $6,340,000.00, or $46.74 per square foot.

After Lowe's had concluded its presentation of evidence, the County moved to dismiss Lowe's appeal because Lowe's did not "present competent, material, and substantive evidence to rebut the presumption of correctness of the [County's valuation]." The Commission granted the County's motion to dismiss. On September 19, 2016, Lowe's timely appealed the Commission's decision to grant the County's motion to dismiss.

Analysis

This Court's standard of review of a decision of the Commission is governed by N.C. Gen. Stat. § 105-345.2, which states in pertinent part:

> (a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Property Tax Commission, not shown in the record, shall be considered under the rules of appellate procedure.
>
> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or
(2) In excess of statutory authority or jurisdiction of the Commission; or
(3) Made upon unlawful proceedings; or
(4) Affected by other errors of law; or
(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2 (2017).

This Court reviews questions of law *de novo*, where this Court will consider "the matter anew and freely substitutes its own judgment" in place of the Commission's. *In re Appeal of Westmoreland-LG&E Partners*, 174 N.C. App. 692, 696, 622 S.E.2d 124, 128 (2005) (citation omitted). Otherwise, this Court "shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 105-345.2(c) (2017). "The whole record test is not a tool of judicial intrusion; instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 393, 424 S.E.2d 212, 218 (citation and quotation marks omitted), *disc. review denied*, 333 N.C. 538, 429 S.E.2d 561 (1993). In determining "whether the whole record fully supports the Commission's decision, this Court must evaluate whether the Commission's judgment, as between two reasonably conflicting views, is supported by substantial evidence, and if substantial evidence is found, this Court is not permitted to overturn the Tax Commission's decision." *Id.* at 394, 424 S.E.2d at 218 (citations omitted).

"All property, real and personal, shall as far as practicable be appraised or valued at its true value in money." N.C. Gen. Stat. § 105-283 (2017).

> '[T]rue value' shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Id.

> It is also a sound and a fundamental principle of law in this State that ad valorem tax assessments are presumed to be correct. All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed. As a result of this presumption, when such assessments are attacked or challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous.

In re Appeal of Amp, Inc., 287 N.C. 547, 562, 215 S.E.2d 752, 761-62 (1975) (citations and quotation marks omitted).

"Of course, the presumption is only one of fact and is therefore rebuttable." *Id.* at 563, 215 S.E.2d at 762. "In attempting to rebut the presumption of correctness, the burden upon the aggrieved taxpayer is one of production and not persuasion. If the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values." *In re Appeal of Villas at Peacehaven, LLC*, 235 N.C. App. 46, 49, 760 S.E.2d 773, 776 (2014) (citations, quotation marks, and brackets omitted). Therefore,

> to rebut this presumption, the taxpayer must present competent, material, and substantial evidence that tends to show (1) either the county tax supervisor used an arbitrary or illegal method of valuation and (2) the assessment substantially exceeded the true value in money of the property. It is not enough for the taxpayer to merely show that the method used by the county tax supervisor was wrong; the taxpayer must additionally show that the result of the valuation is *substantially* greater than the true value in money of the property assessed.

In re Westmoreland, 174 N.C. App. at 697, 622 S.E.2d at 129 (emphasis added) (citations omitted).

First, we must determine the correct approach to valuation for the case *sub judice*. The Commission concluded that the sales comparison approach and the income approach that Lowe's had used "were shown to have weaknesses that limited the credibility of the value estimate." The cost approach, as used by the County, was determined by the Commission to be the appropriate method to determine the true value of the fee simple interest in the Property. However, "[t]he cost approach is better suited for valuing specialty property or newly developed property." *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 474, 458 S.E.2d

921, 924 (1995), *aff'd per curiam*, 342 N.C. 890, 467 S.E.2d 242 (1996). This Court has previously been critical of relying on the cost approach.

> For example, the cost approach's primary use is to establish a ceiling on valuation, rather than actual market value. It seems to be used most often when no other method will yield a realistic value. The modern appraisal practice is to use cost approach as a secondary approach because cost may not effectively reflect market conditions.

Id. (citations and quotation marks omitted).

Relying on only one method to establish valuation does not necessarily mean that the method was arbitrary or illegal.

> An illegal appraisal method is one which will not result in 'true value' as that term is used in N.C.G.S. § 105-283. Since an illegal appraisal method is one which will not result in true value as that term is used in N.C.G.S. § 105-283, it follows that such method is also arbitrary. In appraising the true value of real property, N.C.G.S. § 105-317 has been interpreted as authorizing three methods of valuing real property: the cost approach, the comparable sales approach, and the income approach. However, the general statutes nowhere mandate that any particular method of valuation be used at all times and in all places. The statute contemplates that the assessors and the Commission will consider which factors in N.C.G.S. § 105-317 apply to each specific piece of property in appraising its true value. N.C.G.S. § 105-317 expressly directs that consideration be given to the income producing ability of the property where appropriate. Obviously, this is an element which affects the sale of properties, the purpose of which is the production of income. To conform to the statutory policy of equality in valuation of all types of properties, the statute requires the assessors to value all properties, real and personal, at the amount for which they, respectively, can be sold in the customary manner in which they are sold. An important factor in determining the property's market value is its highest and best use. It is generally accepted that the income approach is the most reliable method in reaching the market value of investment property.

In re Appeal of Blue Ridge Mall, LLC, 214 N.C. App. 263, 269-70, 713 S.E.2d 779, 784 (2011) (emphasis, citations, quotation marks, and brackets omitted).

The Property at issue here is held by Lowe's to facilitate the production of income, and this is the Property's highest and best use. Relying on the cost approach to valuation may have established a ceiling on the Property's valuation, but consideration should have been given to the income and comparable sales approaches to establish a true value. Therefore, in substantially relying on the cost approach, the County used an arbitrary and illegal method of valuing the Property.

Lowe's must also show that the assessment substantially exceeded the true value in money of the property. The County's original assessment of the Property was for $14,572,900.00, and its subsequent assessment was for $16,100,000.00. Lowe's experts explained their valuation methods in detail and how they resulted in a valuation of $6,340,000.00. Whichever assessment the County adopts from their appraiser, those valuations are more than *double* the valuation determined, and substantiated, by Lowe's. Either difference is a substantial difference. Furthermore, by abandoning its assessed value in favor of the higher opinion of value given by its expert, the County has also abandoned the presumption of correctness afforded its initial *ad valorem* tax assessment.

Keeping in mind that the burden on the taxpayer is of production and not persuasion, Lowe's met its burden of producing competent, material, and substantial evidence tending to show that the County's valuation was arbitrary and illegal, and substantially exceeded the true value of the Property. We therefore reverse the Final Decision of the Commission and remand to address the valuation issue raised by the taxpayer.

Furthermore, because N.C. Gen. Stat. § 105-345.1 (2017) instructs this Court to remand cases so that the Commission can receive "evidence [that] has been discovered since the hearing before the Property Tax Commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case," the Commission should consider such competent and material evidence that has come to light since the time of its hearing on this matter.

Conclusion

For the foregoing reasons, we vacate the Final Decision of the North Carolina Property Tax Commission dismissing the appeal of Lowe's. We remand for a reevaluation of the 2013 decision of the Forsyth County Board of Equalization and Review consistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DIETZ concur.

IN RE D.E.M.

[257 N.C. App. 618 (2018)]

IN THE MATTER OF D.E.M.

No. COA17-755

Filed 6 February 2018

Termination of Parental Rights—willful abandonment—findings not sufficient

An order terminating respondent's parental rights was vacated and remanded where the father's parental rights were terminated for willfully abandoning his child but the findings did not specifically address the six-month period immediately before the filing of the petition, were not adequate to support the ultimate finding that the father's conduct was willful, did not address the efforts the father could have been expected to make while incarcerated, and improperly mixed factual findings with conclusions of law.

Appeal by respondent from order entered 26 April 2017 by Judge Laura Powell in Rutherford County District Court. Heard in the Court of Appeals 21 December 2017.

No brief for petitioner-appellee.

Anné C. Wright for respondent-appellant.

MURPHY, Judge.

Respondent ("Alberto")[1] appeals from an order terminating his parental rights. After careful review, we vacate and remand.

Alberto is the father of the juvenile D.E.M. ("Danny"). Petitioner ("Beryl") is Danny's mother. On 25 August 2015, Beryl filed a petition to terminate Alberto's parental rights. Beryl claimed that Alberto had no contact with Danny since February 2005, that Danny had resided exclusively with Beryl since his birth, and that Alberto had not provided consistent child support for Danny's care and maintenance. On 26 April 2017, the trial court entered an order terminating Alberto's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7) (2017). Alberto filed timely notice of appeal.

1. Pseudonyms are used to protect the identity of the juvenile and to promote ease of reading. *See* N.C. R. App. P. 3.1(b).

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

Every proceeding to terminate parental rights involves two distinct stages, the adjudication stage and the disposition stage. *In re D.H.*, 232 N.C. App. 217, 219, 753 S.E.2d 732, 734 (2014) (citation omitted). At "the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C.G.S. § 7B-1111(a)." *Id.* at 219, 753 S.E.2d at 734. N.C.G.S. § 7B-1111 sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support termination. *In re N.T.U.*, 234 N.C. App. 722, 733, 760 S.E.2d 49, 57 (2014). The standard of appellate review is whether the trial court's "findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, *appeal dismissed*, 353 N.C. 374, 547 S.E.2d 9 (2001)).

Pursuant to N.C.G.S. § 7B-1111(a)(7), the trial court may terminate parental rights where "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. The word willful encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (internal quotations and citations omitted). Factors to be considered include a parent's financial support for a child and "emotional contributions," such as a father's "display of love, care and affection for his children." *In re McLemore*, 139 N.C. App. 426, 429, 533 S.E.2d 508, 510 (2000) (citations omitted). "Although the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re D.M.O.*, ___ N.C. App. ___, ___, 794 S.E.2d 858, 861 (2016) (internal citations, quotation marks, and alterations omitted).

Here, the relevant six-month period was between 25 February and 25 August 2015. The trial court made the following findings of fact to support its conclusion that Alberto abandoned the juvenile:

> 4. [Alberto] has never provided any financial support for the minor child.

> 5. [Alberto] has had no contact with the minor child in many years.
>
> 6. Prior to the filing of the petition in this matter, [Alberto] has sent one letter to [Beryl] concerning the minor child. Since the filing of the Petition in this matter, [Alberto] has sent other letters to [Beryl] concerning the minor child.
>
> 7. [Alberto] has spent a significant portion of the minor child's life incarcerated.
>
> 8. There have been extended periods of time during the minor child's life, in which [Alberto] was not incarcerated, yet [he] had no contact, other than incidental contact, and no personal visitation nor overnight visitation, with the minor child during these times.
>
> 9. [Alberto] made the willful choice to commit the crimes for which he was incarcerated during the minor child's life.
>
> 10. [Alberto] made the willful choice during the minor child's life to have his probation revoked and serve active prison time, rather than to stay out of prison and continue on probation, when remaining on probation could have increased the likelihood and possible opportunities of his having a relationship with the minor child.
>
> 11. [Alberto] has, by his choices, willfully abandoned the minor child for at least six consecutive months immediately preceding the filing of this action.

Our review of the trial court's findings leads us to the determination that they are inadequate to support the court's conclusion that respondent willfully abandoned the juvenile. First, the trial court's findings do not specifically address Alberto's behavior within the relevant six-month period immediately preceding the filing of the petition as required to adjudicate willful abandonment. We note that none of the trial court's findings provide any dates. In particular, in finding number 6, the trial court found that Alberto sent Beryl a letter prior to her filing the petition, but the finding neglects to indicate whether this action occurred prior to or during the relevant six- month period.

Second, the trial court's findings are inadequate to support its ultimate finding that Alberto's abandonment of Danny was willful. Alberto notes that he was incarcerated throughout the relevant six-month period, and that Beryl refused to provide him with contact information

for herself or Danny. Thus, Alberto contends that his inability to contact Danny negates a conclusion of willfulness.

"Our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *Matter of M.A.W.*, ___ N.C. ___, ___, 804 S.E.2d 513, 517 (2017) (internal citations, quotation marks, and alterations omitted). Thus, a showing of incarceration alone is insufficient to prove willful abandonment. *In re Adoption of Maynor*, 38 N.C. App. 724, 726-27, 248 S.E.2d 875, 877 (1978). Although a parent's options for showing affection while incarcerated are greatly limited, a parent " *'will not be excused from showing interest in his child's welfare by whatever means available.*' " *In re J.L.K.*, 165 N.C. App. 311, 318-19, 598 S.E.2d 387, 392 (emphasis added) (quoting *Whittington v. Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2004)), *disc. review denied*, 359 N.C. 68, 609 S.E.2d 773 (2004). Nevertheless, "the circumstances attendant to a parent's incarceration are relevant when determining whether a parent willfully abandoned his or her child, and this Court has repeatedly acknowledged that the opportunities of an incarcerated parent to show affection for and associate with a child are limited." *D.M.O.*, ___ N.C. App. at ___, ___, 794 S.E.2d at 862-63.

Here, the trial court's findings demonstrate that Alberto was incarcerated for a significant portion of the juvenile's life, including the relevant six-month period preceding the filing of the petition, and he was still incarcerated at the time of the termination hearing. Alberto testified that he wrote the juvenile multiple letters while in prison, but the court's findings only state that Alberto had no contact with the juvenile and provided no financial support. Assuming the trial court rejected Alberto's testimony that he wrote Danny letters while in prison, the trial court's findings nevertheless do not address, in light of his incarceration, what other efforts Alberto could have been expected to make to contact Beryl and the juvenile. This was an error. In *D.M.O.*, the respondent-mother was also incarcerated during the determinative six-month period under N.C.G.S. § 7B-1111. *See id.* at ___, 794 S.E.2d at 864. We vacated and remanded the trial court's order terminating the parental rights of the respondent-mother in part because "the trial court here made no findings indicating that it considered the limitations of respondent-mother's incarceration, or that respondent-mother was able but failed to provide contact, love, or affection to her child while incarcerated." *Id.* at ___, 794 S.E.2d at 864.

There are further issues with the trial court's order, as it improperly mixes the court's factual findings with its conclusions of law in violation

of Rule 52 of the North Carolina Rules of Civil Procedure. N.C. R. Civ. P. 52. Under Rule 52, a trial court "must avoid the use of mixed findings of fact and instead, separate the findings of fact from the conclusion of law." *Pineda-Lopez v. N.C. Growers Ass'n*, 151 N.C. App. 587, 589, 566 S.E.2d 162, 164 (2002). Rule 52 applies to termination of parental rights orders. *In re T.P.*, 197 N.C. App. 723, 729, 678 S.E.2d 781, 786 (2009). Orders which do not follow Rule 52 are to be vacated and remanded "to the trial court to reissue its order in compliance with Rule 52(a)(1)." *Pineda* 151 N.C. App. at 590, 566 S.E.2d at 165.

Consequently, we conclude that the trial court failed to enter adequate findings of fact to demonstrate that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(7) to terminate Alberto's parental rights, and failed to list its Findings of Fact and Conclusions of Law in accordance with Rule 52. Accordingly, we vacate the trial court's order and remand to the trial court for further findings and conclusions to support the ground upon which it relied to terminate Alberto's parental rights, and to reissue those findings and conclusions in accordance with Rule 52. "We leave to the discretion of the trial court whether to hear additional evidence." *In re F.G.J.*, 200 N.C. App. 681, 695, 684 S.E.2d 745, 755 (2009). In light of our disposition, we decline to address respondent's remaining argument on appeal.

VACATED AND REMANDED.

Judges HUNTER, JR. and DILLON concur.

IN RE IVEY, A MINOR CHILD

No. COA17-264

Filed 6 February 2018

Adoption—revocation—time limit—original or copy of written consent

The time for a biological parent to revoke a consent to adoption of her child does not begin to run until the parent is provided an original or copy of a written consent signed by her. Construing the language of N.C.G.S. § 48-3-605 in pari materia with the revocation requirements in N.C.G.S. § 48-3-608, the content requirements of N.C.G.S. § 48-3-606, and the underlying purposes of the adoption regime set forth in N.G.G.S. § 48-1-100, demonstrates the intent

of the legislature that a biological parent consenting to adoption receive, as a matter of fact, an original or copy of the signed consent in order for it to be effectuated.

Appeal by petitioners from order entered 15 November 2016 by Judge Thomas G. Foster in Haywood County District Court. Heard in the Court of Appeals 5 September 2017.

C. Caleb Decker for respondent-appellee.

Frank G. Queen, Dempsey Law, PLLC, by Kelly Tillotson Dempsey, and The Law Office of Ann Hines Davis, PLLC, by Ann Hines Davis, for petitioner-appellants.

INMAN, Judge.

In this case of first impression, we hold that the time period for a biological parent to revoke a consent to adoption of her child, as allowed by North Carolina statute, does not begin to run until the parent is provided an original or copy of a written consent signed by her.

Petitioner-appellants George and Laura Ivey (the "Iveys") appeal from an order (the "Order") in a consolidated declaratory judgment action and adoption proceeding dismissing the Iveys' adoption proceeding and restoring custody of minor child A.M.S. (the "Baby") to respondent-appellee S.M.S. ("Mother").[1] After careful review, we affirm the trial court's order.[2]

I. Procedural and Factual History

The record discloses the following:

In early 2015, the Iveys, who wished to adopt a child, engaged an adoption agency social worker to perform a domestic pre-placement assessment in preparation for a private adoption proceeding. In the summer of 2016, the Iveys met the then-pregnant Mother, a 15-year old minor from Tennessee, who agreed to pursue an open adoption with the

1. Because both the Baby and Mother are minors, we refer to them by pseudonyms in the interest of privacy.

2. The Iveys' notice of appeal states that they also appeal from a second order denying their motion to stay or vacate the prior Order. However, the Iveys assert no argument in their briefs concerning the order on their motion to stay or vacate, and their appeal as to that order is therefore deemed abandoned. N.C. R. App. P. 28(a) (2015).

Iveys as the adoptive parents of the Baby. Consistent with that plan, the parties executed an Open Adoption Agreement and a Birth Plan setting forth visitation, birthing details, and other provisions establishing the level of care and contact the Iveys and Mother would exercise toward the Baby and each other during delivery and following the adoption of the Baby by the Iveys.

Mother gave birth to the Baby on 31 August 2016. On 1 September 2016, Mother met with Pam Smith, an attorney hired by the Iveys to represent Mother in the adoption of the Baby, and Samuel Hyde, a notary, at the hospital. Mother signed an Affidavit of Parentage and Consent to Adoption (the "Consent") in the presence of Ms. Smith and Mr. Hyde.[3] The Consent includes an acknowledgment by Mother that she had the opportunity to employ independent legal counsel and the recitation "[t]hat I understand that my Consent to the adoption of the minor may be revoked within 7 days following the day on which it is executed, inclusive of weekends and holidays." By the terms of the Consent, notice of revocation of the Consent was to be sent to the Haywood County Clerk of Superior Court. The final paragraph of the Consent contains the acknowledgment by Mother "[t]hat I understand that unless revoked in accordance with [N.C. Gen. Stat. §] 48-3-608, my Consent to Adoption is final and irrevocable and may not be withdrawn or set aside except under a circumstance set forth in [N.C. Gen. Stat. §] 48-3-609."

Mr. Hyde, who notarized the documents, also signed a certification attached to the Consent that "to the best of [his] knowledge and belief" Mother "read, or had read to . . . her, and understood the Consent; signed the Consent voluntarily; received an original or copy of . . . her fully executed Consent; and was advised that counseling services may be available through county departments of social services or licensed child-placing agencies." Ms. Smith, the attorney hired to counsel Mother, told Mother to contact her should she have questions. The Iveys then took the Baby home from the hospital.

After executing the Consent, Mother began to have second thoughts about the adoption. On Friday, 9 September 2016, eight days after signing the Consent, Mother called Ms. Smith regarding the Consent and, per a later letter to the Iveys' attorney, sought to "start this process [of

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3. While Mother is a minor, her age has no bearing on the enforceability or validity of the Consent; N.C. Gen. Stat. § 48-3-605(b) (2015) states "[a] parent who has not reached the age of 18 years shall have legal capacity to give consent to adoption and to release that parent's rights in a child, and shall be as fully bound as if the parent had attained 18 years of age."

revoking the Consent] . . . .” On 12 September 2016, the first business day following Mother’s call to her office, Ms. Smith contacted Mother. The following day, Mother retained attorney Caleb Decker to represent her in future attempts to regain custody of the Baby.

On 14 September 2016, the day after hiring Mr. Decker, Mother delivered a letter to the Iveys’ attorney stating that she: (1) was revoking the Consent; and (2) had never received a copy of that document. An affidavit attesting to these facts was delivered to the Iveys’ attorney on 19 September 2016. Mother’s father, as her guardian, filed a verified complaint on 21 September 2016 in district court seeking a declaratory judgment and injunction declaring the Consent invalid and returning custody of the Baby to her (the “DJ Action”).

Following the filing of the DJ Action, on 29 September 2016, Mother received a copy of the Consent from her medical file at the hospital. On 3 October 2016, the Iveys filed a petition for adoption of the Baby with the district court (the “Petition”). On 4 October 2016, Mother filed a revocation with the clerk of superior court. The DJ Action and Petition were consolidated by a *sua sponte* order of the district court.

Counsel for the parties presented evidence and arguments in a hearing before the district court on 7 November 2016. After taking the matter under advisement, the court entered its Order on 15 November 2016 dismissing the adoption proceeding. In the Order, the trial court found as facts:

> 47. That the Court cannot find that Ms. Smith left a copy of the signed consent with [Mother].
>
> . . .
>
> 49. That the Respondent Mother did not receive a copy of her signed consent until 29 September 2016.
>
> 50. That at no point after 1 September 2016 when Ms. Smith left [Mother’s] hospital room until 29 September 2016 did the [Mother] have a copy of her signed consent.
>
> 51. That the [Mother] filed a revocation within seven days of receiving her copy of the adoption documents, including the [Consent], and upon being properly noticed and informed of the person and location as to where to send notice of revocation as required by [N.C. Gen. Stat.] § 48-3-605, and further filed this revocation within the seven day period pursuant to [N.C. Gen. Stat.] § 48-3-608.

> 52. That the leaving of a copy of the signed consent with the consenting parent is required pursuant to N.C. Gen. Stat. § 48-3-605.

Based on these findings, the trial court concluded as a matter of law:

> 4. That the [C]onsent at issue was validly executed.
>
> 5. That [N.C. Gen. Stat.] § 48-3-605 requires that a copy of the executed consent be left with the consenting person in order for the consenting person to have notice of how to revoke consent, where to revoke consent, and with whom to give notice of the revoking of consent.
>
> . . .
>
> 8. That [Mother] filed a revocation with the proper party after receiving information as to who the party was for the purposes of revocation pursuant to [N.C. Gen. Stat.] §§ 48-3-607 and 608.

In addition to dismissing the Iveys' adoption petition, the trial court awarded legal and physical custody of the Baby to Mother and ordered the Iveys to immediately remit the Baby to her custody. The Iveys timely appealed.[4]

II. Analysis

The Iveys challenge findings 51 and 52 of the Order, arguing that the trial court erred as a matter of law in interpreting N.C. Gen. Stat. §§ 48-3-605 and 48-3-608 to provide that a consent to adoption is not deemed executed until a signed original or copy is delivered to the consenting party and that Mother filed a valid revocation of the Consent within 7 days of receiving a copy of the Consent. The Iveys leave unchallenged, however, the trial court's findings of fact 49 and 50, which established that Mother was not provided with a copy of the Consent at the time it was signed and that she received a copy for the first time less than seven days prior to filing her revocation. Those findings, therefore, are binding on appeal and dispositive of the issue before this Court.

Because we hold that N.C. Gen. Stat. § 48-3-605 requires (1) that an original or copy of a signed Consent to Adoption be provided to the biological parent who has signed the document and (2) that the time period

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4. The Iveys filed a motion to stay the Order pending appeal, which was denied by the trial court. Thus, it appears from the record that Mother has had custody of Baby since entry of the Order.

allowed by N.C. Gen. Stat. § 48-3-608 for revocation does not begin to run until the requirements of N.C. Gen. Stat. § 48-3-605 have been met, we affirm the trial court's order.

A. Standard of Review

We review issues of statutory construction *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute." *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1990) (citations omitted). "[A] statute [that is] clear on its face must be enforced as written." *Bowers v. City of High Point*, 339 N.C. 413, 419-20, 451 S.E.2d 284, 289 (1994) (citation omitted). Courts, in interpreting the "clear and unambiguous" text of a statute, "must give it its plain and definite meaning[,]" as "there is no room for judicial construction[.]" *Lemons v. Old Hickory Council*, *Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citation omitted). "This is especially true in the context of adoption, which is purely a creation of statute." *Boseman v. Jarrell*, 364 N.C. 537, 545, 704 S.E.2d 494, 500 (2010). In applying the language of a statute, and "[b]ecause the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't. of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009). Finally, "we must be guided by the 'fundamental rule of statutory construction that statutes in pari materia, and all parts thereof, should be construed together and compared with each other.' " *Martin v. N.C. Dep't of Health and Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (quoting *Redevelopment Comm'n v. Sec. Nat'l Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960)).

B. North Carolina's Adoption Statutes

North Carolina's procedures for adoption are codified in Chapter 48 of the General Statutes. N.C. Gen. Stat. §§ 48-1-100 (2015), *et seq.* Per Section 48-1-100, '[t]he primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents . . . ." N.C. Gen. Stat. § 48-1-100(b)(1)(i). Further, it is a "[s]econdary purpose[] of this Chapter . . . to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's adoption . . . ." N.C. Gen. Stat. § 48-1-100(b)(2). The statute goes on to direct that "[t]his Chapter shall be liberally construed and applied to promote its underlying purposes and policies." N.C. Gen. Stat. § 48-1-100(d).

Section 48-3-605 sets forth the procedures for the execution of a consent for adoption. N.C. Gen. Stat. § 48-3-605. Compliance with these procedures requires that the consent: (1) "be signed and acknowledged under oath before an individual authorized to administer oaths or take acknowledgments[;]" and (2) contain a certification by the notary that includes a statement that "to the best of the [notary's] knowledge or belief, the parent . . . executing the consent has . . . [b]een given an original or a copy of his or her fully executed consent." N.C. Gen. Stat. §§ 48-3-605(a) and (c).

Any consent containing the mandatory provisions of Section 48-3-606 and in accordance with the procedures set forth in Section 48-3-605 "may be revoked as provided in [N.C. Gen. Stat. §] 48-3-608. A consent is otherwise final and irrevocable except under a circumstance set forth in [N.C. Gen. Stat. §] 48-3-609." N.C. Gen. Stat. § 48-3-607.

A revocation of consent to adoption pursuant to Section 48-3-608 generally must be completed within seven days following the consent to adoption's execution,[5] while a consent may be voided pursuant to Section 48-3-609 if it is "established by clear and convincing evidence that it was obtained by fraud or duress[,]" the adoptive parents and consenting person agree to set aside the consent, the adoption petition is voluntarily dismissed with prejudice, or the adoption petition is dismissed and any rights to appeal the dismissal are either not exercised or exhausted. N.C. Gen. Stat. §§ 48-3-608 and 48-3-609.

C. Mother's Revocation Was Timely

The Iveys argue that the trial court erred as a matter of law in concluding that "[N.C. Gen. Stat.] § 48-3-605 requires that a copy of the executed consent be left with the consenting person" and, as a result, it erred in concluding that the revocation of the Consent was timely filed because it was filed within seven days of Mother's receipt of a copy of the Consent on 29 September 2016. We disagree.

Section 48-3-605 envisions the receipt of an original or copy of the signed consent to adoption by the person executing it. While the statute does not expressly require such receipt, the legislature's language anticipates just such a delivery by requiring the notary to certify that "to the best of the individual's knowledge . . . [the consenting party has b]een given an original or a copy of his or her fully executed consent." N.C. Gen. Stat. § 48-3-605(c)(3). Actual receipt of an original or copy of the

5. Section 48-3-608 provides for an alternative timeframe for revocation in certain factual situations that are not present in this appeal. N.C. Gen. Stat. § 48-3-608(b).

signed consent is further contemplated by Section 48-3-608(a), which requires that a written revocation be delivered "to the person specified in the consent." N.C. Gen. Stat. § 48-3-608(a). Additionally, Section 48-3-606 requires that the consent contain "[t]he name of a person and an address where any notice of revocation may be sent" so that the procedure for revocation in Section 48-3-608(a) may be accomplished. N.C. Gen. Stat. § 48-3-606. Construing the language of Section 48-3-605 *in pari materia* with the revocation requirements in Section 48-3-608, the content requirements of Section 48-3-606, and the underlying purposes of the adoption regime set forth in Section 48-1-100 demonstrates the intent of the legislature that a biological parent consenting to adoption receive, as a matter of fact, an original or copy of the signed consent in order for it to be effectuated.

Taking the provisions of Section 48-3-605 to mean that a consent is "executed" when it is signed by the consenting parent and certified and notarized by a notary, the Iveys further argue that Mother's revocation was time barred by Section 48-3-608 irrespective of when she received an original or copy of the Consent because the time for revocation is calculated from the date of execution, not receipt, of the written consent. We decline to adopt such a narrow interpretation of the word "executed" in this context. As recently reiterated by our Supreme Court:

> [W]here a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.

State v. Holloman, 369 N.C. 615, 628, 799 S.E.2d 824, 832-33 (2017) (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)) (internal quotation marks and citation omitted). Adopting the strict interpretation of the word "executed" advocated by the Iveys would create just such an absurd result, leaving a consenting parent who never received an original or copy of the signed consent without written notice as to whom to deliver the necessary written revocation. N.C. Gen. Stat. § 48-3-608(a). Such an interpretation would frustrate the very purpose of the revocation procedure, which is inseparable from the intent of the adoption scheme established by law. *See, e.g.*, *In re Adoption of P.E.P.*, 329 N.C. 692, 704, 407 S.E.2d 505, 511 (1991) ("The procedural safeguards provided in the adoption statutes are not mere window dressing—they serve to protect the interests of the parties, the child, and the public."). Keeping in mind the plain language of Sections 48-1-100, 48-3-605, and 48-3-608 as set forth *supra*, we reject a reading of

the relevant statutes that would lead to a result contrary to the legislature's intent. Rather, we hold that the time for revocation under Section 48-3-608(a) does not begin to run until an original or copy of the signed consent is actually delivered to the consenting parent consistent with the provisions and purposes of Section 48-3-605.

We recognize that another primary purpose of the adoption statutes is to "assur[e] the finality of the adoption." N.C. Gen. Stat. § 48-1-100(b)(1)(iv). However, the legislature's statement of multiple primary purposes of these statutes requires that all purposes be respected. Our interpretation of the statutes to require actual delivery of an original or copy of the consent to the consenting parent in order to trigger the time period for revocation does not run counter to this purpose because the professionals responsible for ensuring delivery are in a better position than the biological parent to establish proof of compliance. Nor does it enlarge or expand the timeframe in which a parent may revoke as a matter of law. It instead recognizes the legislature's intention that: (1) a consenting parent receive the necessary information in order to revoke her consent by receiving an original or copy; and (2) the consenting parent have seven days to revoke once such information is furnished in compliance with the law.

Applying the above understanding of the law to the facts of the case, we hold that the trial court did not err in concluding that Mother's revocation was timely. The trial court determined from the evidence that it could not find that Ms. Smith left a copy of the signed consent with Mother, and the trial court found that "Mother did not receive a copy of her signed consent until 29 September 2016." It further found that Mother submitted a notice of revocation within seven days of her receipt of a copy of the Consent. None of these findings was challenged by the Iveys on appeal. They are therefore conclusive. Because we hold that Section 48-3-605 requires actual delivery of an original or copy of the signed consent to the biological parent and the time for revocation in Section 48-3-608(a) does not begin to run until such delivery is accomplished, the trial court did not err in concluding Mother's revocation was timely.

The trial court's findings were supported by substantial evidence. Mother testified under oath that she did not receive an original or copy of the Consent at the time it was signed. Her former foster parent, who was with Mother at the hospital on the night the Consent was signed, also testified that Mother had not received an original or copy. Mother's attorney testified that she "believed" she left a copy of the Consent with Mother at the time it was signed based on her general practice, but she

could not testify with certainty that she had done so. The Iveys did not testify, nor did the notary who signed the certification attached to the Consent. In fact, the Iveys called no witnesses whatsoever, and the trial court only heard testimony from the above three witnesses. The judge, sitting as the finder of fact, had the opportunity to hear and evaluate fact witnesses within weeks of the event in question. After judging their credibility, he found that Mother, as a matter of unchallenged fact, did not receive an original or copy of the Consent at the time it was signed.

This case does not present the dilemma of a biological parent who first challenges an adoption months or years after consenting to relinquish a child. Mother first sought to revoke her consent just eight days after she signed the Consent and the Iveys took custody of the Baby, when Mother was still in the hospital. She filed a legal challenge to the adoption proceeding less than two weeks later. The trial court heard Mother's testimony and received other evidence less than three months after Mother signed the Consent.

The Iveys present a final argument that the trial court's order is contrary to the Notary Public Act, which provides that "[i]n the absence of evidence of fraud on the part of the notary, or evidence of a knowing and deliberate violation of this Article by the notary, the courts shall grant a presumption of regularity to notarial acts so that those acts may be upheld . . . ." N.C. Gen. Stat. § 10B-99(a) (2015). Specifically, the Iveys contend that the trial court's finding that Mother did not receive a copy of the Consent at the time it was signed despite the notary's certification that "to the best of [his] knowledge and belief . . . [Mother] received an original or copy of . . . her fully executed Consent" ignored Section 10B-99(a)'s presumption of regularity where there was no evidence of fraud or a knowing and willful violation. We disagree.

The notary certification required by Section 48-3-605 must state only that "*to the best of the [notary's] knowledge or belief*, the parent . . . executing the consent has . . . [b]een given an original or copy of his or her fully executed consent." N.C. Gen. Stat. § 48-3-605(c) (emphasis added). The certification provided by the notary in this case followed this statutory language. Thus, the notary did not certify to *actual* delivery of an original or copy of the Consent to Mother (or actual knowledge thereof), but instead that such delivery had occurred to "the best of [his] knowledge or belief." *See*, *e.g.*, *In re Yopp*, 217 N.C. App. 489, 493, 720 S.E.2d 769, 772 (2011) (noting that the phrase "to the best of my knowledge" in an affidavit is a " 'limitation to the affiant's personal knowledge' " (quoting *Faulk v. Dellinger*, 44 N.C. App. 39, 42, 259 S.E.2d 782, 784 (1979))). The trial court's finding that Mother did not, as a matter of fact, receive

an original or copy of the Consent at the time it was signed does not, therefore, contradict the certification by the notary. It is entirely possible that: (1) the notary believed or to the best of his knowledge thought an original or copy of the Consent had been left with Mother without any actual knowledge thereof; and (2) no such original or copy had, in fact, been delivered. Unlike Mother and her former foster parent, who both testified that Mother did not receive a copy of the Consent on the day she signed it, the notary did not testify before the trial court. Thus, it was entirely appropriate for the trial court to conclude that the notary's certification was valid and proper but that Mother did not receive an original or copy of the Consent, which it did in concluding that "the [C]onsent at issue was validly executed" but that "Mother did not receive a copy of her signed consent until 29 September 2016."

III. Conclusion

North Carolina statutes clearly contemplate that an original or copy of a signed consent to adoption must be delivered to the consenting parent to commence the time period within which the parent can revoke her consent. N.C. Gen. Stat. §§ 48-3-605(c)(3) and 48-3-606(5). We must vindicate this intention in interpreting and applying these statutes. In light of the purposes of the adoption statutes and the intention of the legislature evinced in the above statutes, the trial court did not err in concluding that the biological Mother's revocation of her consent to adoption was timely.

AFFIRMED.

Judges BRYANT and DAVIS concur.

IN RE M.J.S.M.

[257 N.C. App. 633 (2018)]

IN THE MATTER OF M.J.S.M.

No. COA17-688

Filed 6 February 2018

1. Termination of Parental Rights—neglect—probable repetition

There was sufficient support for terminating a mother's parental rights where a social worker's testimony, along with the trial court's findings about the mother's lack of significant progress on her case plan, provided sufficient support for the finding that there would be a probable repetition of neglect if the child was returned to her care. While the mother was correct that she did not completely fail to work on her case plan, that work was only sporadic and inadequate.

2. Termination of Parental Rights—no-merit brief—termination affirmed

The termination of a father's parental rights was affirmed where his counsel filed a no-merit brief and the termination order included sufficient findings of fact, supported by clear, cogent, and convincing evidence to conclude that at least one statutory ground for termination existed. The trial court made appropriate findings on each of the relevant dispositional factors and did not abuse its discretion in assessing the child's best interests.

Judge MURPHY concurring in part and concurring in the result in part.

Appeal by Respondent-Parents from order entered 18 April 2017 by Judge K. Michelle Fletcher in Guilford County District Court. Heard in the Court of Appeals 18 January 2018.

Mercedes O. Chut, for petitioner-appellee Guilford County Department of Health and Human Services.

Batch, Poore & Williams, PC Sydney Batch, for respondent-appellant mother.

Diepenbrock Law Office, by J. Thomas Diepenbrock, for respondent-appellant father.

K&L Gates LLP, by Hillary Dawe, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondent-Parents appeal from an order terminating their parental rights to their minor child, M.J.S.M. ("Mary").[1] On appeal, Respondent-Mother argues the trial court erred in terminating her parental rights on the grounds of neglect, willful failure to pay a reasonable portion of the cost of Mary's care, and dependency. Respondent-Father's counsel filed a no-merit brief, pursuant to North Carolina Rule of Appellate Procedure 3.1(d). N.C.R. App. P. 3.1(d) (2017). We affirm.

I. Factual and Procedural Background

On 13 April 2016, petitioner Guilford County Department of Health and Human Services ("DHHS") filed a juvenile petition alleging five-month-old Mary to be a neglected and dependent juvenile. The petition alleged DHHS received a Child Protective Services ("CPS") report after Respondent-Father choked, hit, and pushed on the stomach of Respondent-Mother, while she was pregnant with Mary. As a result of Respondent-Father's actions: (1) doctors performed an emergency caesarian section due to fetal distress; (2) Mary had no heartbeat; and (3) doctors had to resuscitate Mary for twenty minutes, immediately after she was born.

In late 2015 and early 2016, Respondent-Parents entered into case plans and agreed Respondent-Father would not have any contact with Respondent-Mother or Mary. On 13 April 2016, a DHHS social worker made an unannounced visit to Respondent-Mother's home and discovered Respondent-Father there. Additionally, Respondent-Mother "failed to comply with the terms of her treatment plan, including her failure to enroll in and attend domestic violence education[.]" Respondent-Father "refused to complete substance abuse counselor or drug screens and has avoided contact with [the social worker]."

Consequently, DHHS filed the petition and requested nonsecure custody of Mary "[d]ue to the ongoing substance abuse and domestic violence and the lack of family resources to provide care and supervision." On 13 April 2016, the court granted nonsecure custody of Mary to DHHS.

On 6 May 2016, Respondent-Mother entered into an out-of-home services agreement with DHHS, replacing her prior case plan. Respondent-Mother agreed to, *inter alia*: (1) submit to a psychiatric assessment and

1. The parties stipulated to this pseudonym for the minor child, pursuant to N.C.R. App. P. 3.1(b) (2017).

comply with any recommendations thereof; (2) complete domestic violence programs and "not have any contact with [Respondent-Father]"; (3) maintain safe, stable housing; (4) maintain stable employment; (5) submit to a substance abuse assessment; and (6) attend other DHHS programs/courses.

On 15 September 2016, the court held a pre-adjudication, adjudication, and dispositional hearing. In an order entered 25 October 2016, the court adjudicated Mary as a neglected and dependent juvenile.[2] Respondent-Mother failed to submit to a psychiatric assessment, maintained contact with Respondent-Father, lived in the same apartment complex as Respondent-Father, failed to attend multiple appointments or did not engage in therapy sessions, failed to maintain employment, and used drugs. Respondent-Father failed to submit to a parenting/psychological assessment, failed to enroll in domestic violence classes, maintained contact with Respondent-Mother, and tested positive for marijuana in a drug screen.

The court ordered Respondent-Parents to comply with their case plans and permitted Respondent-Mother to have supervised visitation with Mary, who remained in DHHS custody, twice per week. The court did not permit Respondent-Father to have any contact with Mary. The court set the primary permanent plan as reunification.

On 20 December 2016, the trial court entered a permanency planning review order.[3] The court found Respondent-Parents showed a "lack of compliance" with their case plans. The court changed the primary permanent plan to adoption, with a secondary plan of reunification. The court ordered DHHS to file a termination of parental rights petition within sixty days. The court also reduced Respondent-Mother's visitation to once per week.

On 27 January 2017, DHHS filed a motion seeking to terminate Respondent-Parents' parental rights to Mary on the grounds of neglect, willful failure to pay a reasonable portion of the cost of Mary's care, and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (3), (6) (2015). The court held a hearing for the motion on 20 March 2017.

On 18 April 2017, the trial court entered an order terminating Respondent-Mother's parental rights based upon all three grounds alleged

2. Respondent-Mother stipulated to the allegations in the DHHS petition and consented to the adjudication.

3. The court entered an amended permanency planning order on 17 January 2017, but this did not materially change the substance of the order.

by DHHS and Respondent-Father's parental rights based upon neglect and willful failure to pay a reasonable portion of the cost of Mary's care. Respondent-Parents entered timely notices of appeal.

II. Standard of Review

"The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984) (citation omitted). "If unchallenged on appeal, findings of fact are deemed supported by competent evidence and are binding upon this Court." *In re A.R.H.B.*, 186 N.C. App. 211, 214, 651 S.E.2d 247, 251 (2007) (internal quotation marks and citations omitted), *appeal dismissed*, 362 N.C. 235, 659 S.E.2d 433 (2008).

III. Analysis

A. Respondent-Mother's Appeal

[1] Respondent-Mother argues the trial court erred by concluding three grounds existed to terminate her parental rights. We disagree.

Pursuant to N.C. Gen Stat. § 7B-1111(a)(1), "[t]he trial court may terminate the parental rights to a child upon a finding that the parent has neglected the child." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (citing N.C. Gen. Stat. § 7B-1111(a)(1)). A neglected juvenile is defined, in relevant part, as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned[.]" N.C. Gen. Stat. § 7B-101(15) (2015).

"A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997 (citation omitted). However, when, as here, the child has been removed from her parent's custody such that it would be impossible to show the child is currently being neglected by their parent, "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984).

If a prior adjudication of neglect is considered, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232 (citation omitted). Thus, where:

> there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents.

In re Reyes, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted). A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect. *In re D.M.W.*, 173 N.C. App. 679, 688-89, 619 S.E.2d 910, 917 (2005), *rev'd per curiam per the dissent*, 360 N.C. 583, 635 S.E.2d 50 (2006).

In this case, Respondent-Mother concedes Mary was previously adjudicated a neglected juvenile. However, she disputes the evidence at the termination hearing demonstrated a likelihood of future neglect. The trial court made the following finding, with respect to repetition of neglect:

> 17. . . . c. There is a likelihood of the repetition of neglect by [Respondent-Mother], given her history of neglect, her failure to adequately address the issues that resulted in the removal of the juvenile (particularly her mental health), the fact that she continues to minimize the impact of the domestic violence between herself and the father, the fact that she was not truthful about contact between herself and the father since removal of the juvenile, and the fact that she is currently inconsistent with mental health medications and therapy.

Respondent-Mother contends this finding is not supported by competent evidence because she made some progress on various aspects of her case plan. Specifically, she argues there was evidence she: (1) obtained appropriate housing, (2) engaged in some domestic violence counseling, and (3) was taking her prescribed medication for her mental health disorders. While Respondent-Mother is correct she did not completely fail to work on her case plan, the evidence presented at the termination hearing shows this work was only sporadic and inadequate.

In its termination order, the trial court made specific findings regarding Respondent-Mother's progress on her case plan. These findings reflected, *inter alia*, Respondent-Mother: (1) submitted to two psychiatric evaluations, but failed to comply with their recommendations; (2) did not begin taking medication for her mental health issues until March 2017; (3) completed only five of twelve sessions in a domestic violence program; (4) continued to be seen with Respondent-Father and

downplayed his domestic abuse; (5) failed to find housing in a separate apartment complex from Respondent-Father; (6) failed to adequately furnish her apartment; (7) failed to complete her parenting classes; and (8) was fired from multiple jobs due to attendance issues. Moreover, most of the limited progress cited by the trial court in these findings did not occur until after DHHS filed its termination petition. Respondent-Mother does not challenge these findings.

The DHHS social worker also offered the following testimony during the termination hearing with respect to repetition of neglect:

> Q Now, would you advise the Court how the respective parents have contributed to the conditions that led to the removal of the child?
>
> A Engaging in domestic violence, not addressing the mental health and substance issues, failing to comply with the safety plan and services meant to address the risk to the child.
>
> Q And the conditions that led to removal, do they continue to exist at this time?
>
> A Yes.
>
> Q And if you would describe the impact that the parents[’] actions or inactions in this case have had on the juvenile?
>
> . . .
>
> A The mother’s continued denial of domestic violence, their continued meeting and minimizing the issues that brought the child into – into care continue to place the child at risk.
>
> Q So if the -- if the juvenile were to be returned to either parent today, would the abuse or neglect likely continue or be repeated?
>
> A Yes. If they can’t admit that there’s a problem, they can’t change the behavior.

The social worker’s testimony, when considered in conjunction with the court’s findings regarding Respondent-Mother’s lack of significant progress on her case plan, provided sufficient support for the trial court’s determination there would be a probable repetition of neglect if

Mary was returned to her care. Accordingly, the trial court properly terminated Respondent-Mother's parental rights on the ground of neglect.

Since we conclude termination on this ground was proper, we need not address Respondent-Mother's arguments regarding the remaining grounds found by the trial court. *See In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990) (citation omitted) (stating a finding of any of the separately enumerated grounds is sufficient to support termination). The portion of the trial court's order terminating Respondent-Mother's parental rights is affirmed.

B. Respondent-Father's Appeal

[2] Counsel for Respondent-Father filed a no-merit brief on his behalf, pursuant to N.C.R. App. P. 3.1(d), stating "[t]he undersigned counsel has conducted a conscientious and thorough review of the record on appeal. After this review, counsel concludes that the record contains no issue of merit on which to base an argument for relief and the appeal would be frivolous." Counsel asks this Court to conduct an independent review of the record for possible error. Additionally, counsel demonstrated he advised Respondent-Father of his right to file written arguments with this Court and provided him with the documents necessary to do so. Respondent-Father failed to file his own written arguments.

Consistent with the requirements of Rule 3.1(d), counsel directs our attention to the issue of whether the ground of neglect was sufficiently supported by the trial court's findings of fact. However, counsel acknowledges he cannot make a non-frivolous argument that Respondent-Father's parental rights should not be terminated on the ground of willful failure to pay a reasonable portion of the cost of Mary's care. As a result, his argument as to neglect does not provide a meritorious basis for appeal. *See Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34 (citation omitted).

After careful review, we are unable to find any possible prejudicial error by the trial court. As acknowledged by Respondent-Father's counsel, the termination order includes sufficient findings of fact, supported by clear, cogent, and convincing evidence, to conclude at least one statutory ground for termination existed. Moreover, the court made appropriate findings on each of the relevant dispositional factors and did not abuse its discretion in assessing the child's best interests. N.C. Gen. Stat. § 7B-1110(a) (2015). Accordingly, we affirm the portion of the trial court's order terminating Respondent-Father's parental rights.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order terminating Respondent-Parents' parental rights.

AFFIRMED.

Judge DILLON concurs.

Judge MURPHY concurring in part and concurring in the result in part.

MURPHY, Judge, concurring in part and concurring in the result in part.

I concur in the Majority's opinion as it relates to Respondent-Father, and I concur in the result as it relates to Respondent-Mother. The Majority correctly states that "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." However, I do not agree that the Respondent-Mother's actions after the initial finding of neglect indicate that she has failed to make progress. She made significant progress to improve her condition and express her love for her child, and the findings of fact do not support the conclusion that her parental rights should be terminated in accordance with N.C.G.S. § 7B-1111(a)(1). Further, given her limited income, her small payments of child support for Mary were not unreasonable and grounds do not exist to terminate her parental rights in accordance with N.C.G.S. § 7B-1111(a)(3).

The findings of fact, however, do support the trial court's conclusion that grounds existed to terminate Respondent-Mother's parental rights in accordance with N.C.G.S. § 7B-1111(a)(6).

> The court may terminate the parental rights upon a finding . . . [t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C.G.S.§ 7B-1111(a)(6)(2017).

Respondent-Mother continues to struggle with mental health issues that will not be corrected in the foreseeable future, and she is incapable of providing for the proper care and supervision of Mary, a dependent juvenile. She also lacks an alternative child care arrangement. The trial court's findings of fact support this conclusion of law. Therefore, I concur in the result reached by the Majority in affirming the termination of Respondent-Mother's parental rights to Mary.

ANTHONY V. MARTIN, AND WIFE, SHERRY H. MARTIN, PLAINTIFFS
v.
MACK DEVAUGHN POPE, DEFENDANT

No. COA17-389

Filed 6 February 2018

1. Appeal and Error—JNOV—directed verdict motion—not renewed at the close of all evidence

Defendant did not preserve for appellate review the denial of his motion for JNOV when he did not move for a directed verdict at the close of all the evidence.

2. Civil Procedure—Rule 59 motion—standard of review on appeal

The Court of Appeals reviewed the trial court's denial of plaintiff's motion for a new trial under an abuse of discretion standard rather than de novo, and concluded that the trial court did not abuse its discretion. The trial court made a reasoned decision that was not manifestly arbitrary or a substantial miscarriage of justice.

3. Appeal and Error—preservation of issues—judge's response to jury question—invited error

The invited error doctrine barred appellate review of the trial court's answer to a jury question during deliberations where defendant initially consented to the answer and objected only after the jury resumed deliberations.

4. Parties—motion to add—denied—no abuse of discretion

There was no abuse of discretion in the trial court's denial of defendant's motion to add parties where the rulings on these issues were the result of reasoned decisions. The trial court ruled that adding a third-party defendant would be futile because it would not

impact the claims and prejudicial because the motion was made too close to the scheduled start of the trial.

5. Appeal and Error—attorneys—motion to disqualify denied—no abuse of discretion

The trial court did not abuse its discretion by denying defendant's motion to disqualify plaintiffs' counsel where plaintiffs' attorney had represented defendant's ex-wife in an unrelated family law proceeding. The orders from that proceeding were public records, and there was no evidence that plaintiffs' counsel was aware of any information about defendant that would require disqualification.

6. Appeal and Error—preservation of issues—cross-appeal—argument included in appellee's brief

Plaintiffs' cross-appeal regarding attorney fees was deemed abandoned where they did not file an appellants' brief but included their argument in their appellee's brief. There was prejudice in that defendant was forced to respond in a 3,750-word reply brief while addressing plaintiffs' other claims on appeal, rather than in a 8,750-word appellee's brief.

Appeals by plaintiffs and defendant from judgment entered 27 July 2016 by Judge John W. Smith in Harnett County Superior Court. Heard in the Court of Appeals 1 November 2017.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr. and L. Lamar Armstrong, III, for plaintiffs-appellees.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, for defendant-appellant.

DIETZ, Judge.

Defendant Mack Pope appeals from a judgment finding him liable for concealing environmental contamination on property he sold to Plaintiffs Anthony and Sherry Martin.

As explained below, the bulk of Pope's arguments, which concern the statute of limitations and sufficiency of the evidence, are not preserved for appellate review because Pope failed to assert those issues in a directed verdict motion at the close of all the evidence at trial.

Pope's challenge to the trial court's answer to a jury question during deliberations likewise is barred because Pope initially consented to

that answer and only objected after the jury resumed deliberations. His objection is therefore barred by the invited error doctrine.

Pope's challenges to the denial of leave to assert third-party claims and to disqualify the Martins' counsel are reviewed for abuse of discretion. As explained below, we hold that the trial court's rulings on those issues were the product of reasoned decisions and thus within the trial court's sound discretion.

The Martins also cross-appealed, challenging the denial of their motion for attorneys' fees. But despite filing a cross-appeal, the Martins did not file an appellants' brief, instead including their argument in their appellees' brief. Because the lack of an appellants' brief prejudiced Pope, we deem this issue abandoned on appeal. Accordingly, we affirm the trial court's judgment.

Facts and Procedural History

The jury in this proceeding returned a verdict in favor of Plaintiffs Anthony and Sherry Martin and we therefore recite the relevant facts in the light most favorable to the Martins. We acknowledge that Defendant Mack Pope disputed many of these facts at trial.

In July 2004, Pope purchased property in Dunn from Royster-Clark, Inc. At the time, Pope received an environmental report of the property, which stated that the property had "recognized environmental conditions." Pope then leased the property to Agrium U.S. Inc.

In December 2007, Pope hired an environmental expert to conduct a limited environmental assessment, which did not include any groundwater testing. The report concluded that, "In review of the information as described herein regarding activities on and adjacent to the subject property, no physical evidence was discovered indicating ongoing negative environmental impacts to the subject property."

Between late 2007 and early 2008, Pope contracted to sell the property to a third party. The sale eventually fell through when the purchaser requested an extensive environmental report that included groundwater testing. That testing identified contaminants well above the legal limit.

In 2008, Anthony Martin expressed an interest in buying the property after learning that it was for sale. At a later meeting, in response to Mr. Martin's question regarding the current state of the property, Pope indicated that the property was "clean" and that it had no environmental risks or problems and provided Mr. Martin with a copy of the more limited 2007 environmental report. Pope did not provide Mr. Martin with

the 2008 report that found environmental contamination. On 20 March 2009, Pope sold the property to the Martins for $500,000.

In early 2013, the Martins agreed to sell the property to a new buyer for $800,000. Before the closing date, a loan officer for the purchaser discovered that the property was listed on a hazardous waste site list maintained by our State's environmental protection agency. After being advised of the status of the property, the Martins' attorney obtained a copy of the 2008 report and informed the buyer's attorney. The sale then fell apart.

The Martins later sued Pope for fraud and unfair and deceptive trade practices based on Pope's alleged concealment of the environmental contamination on the property. The jury returned a verdict in the Martins' favor on their claims and awarded both compensatory and punitive damages. The trial court later denied Pope's motion for JNOV or, alternatively, for a new trial. The trial court also denied the Martins' request for attorneys' fees. Pope timely appealed the judgment and the denial of his corresponding post-trial motions, and the Martins timely appealed the denial of their motion for attorneys' fees.

Analysis

We begin by addressing Pope's challenges to the verdict and various pre-trial and trial rulings. We then turn to the Martins' appeal from the denial of their request for attorneys' fees.

I. Denial of Pope's motion for JNOV

[1] We first address Pope's challenge to the denial of his motion for JNOV. Pope argues that the Martins' claims are barred by the statute of limitations and that there was insufficient evidence that he made any false representations; insufficient evidence that the Martins reasonably relied on those representations; and insufficient evidence that the Martins suffered any damages as a result. For all of these reasons, Pope argues that the trial court should have granted his JNOV motion and set aside the verdict as a matter of law.

We cannot address these arguments because Pope waived them. A JNOV motion is "essentially a renewal of a motion for directed verdict." *Barnard v. Rowland*, 132 N.C. App. 416, 421, 512 S.E.2d 458, 463 (1999). As a result, a JNOV motion "must be preceded by a motion for directed verdict at the close of all evidence." *Id.* Indeed, the official comment accompanying Rule 50 of our Rules of Civil Procedure, which governs the procedure for both directed verdict motions and JNOV motions, emphasizes that a directed verdict motion is an "absolute prerequisite" to a JNOV motion. N.C. Gen. Stat. § 1A-1, Rule 50, cmt.

Moreover, it is well-settled that to preserve the ability to assert a JNOV motion, a litigant must move for a directed verdict at the close of *all* the evidence, not merely at the close of the plaintiff's case. *Gibbs v. Duke*, 32 N.C. App. 439, 442, 232 S.E.2d 484, 486 (1977). This is so because, once defendants have presented their own case, the evidence in the trial record has changed. Although defendants during their own case in chief typically are focused on presenting evidence that disproves the plaintiff's allegations, through cross-examination or introduction of exhibits defendants may introduce the very evidence that renders the directed verdict improper.

For this reason, our Court repeatedly has held that "[b]y offering their own evidence, defendants waived their motion for a directed verdict made at the close of plaintiffs' evidence and, in order to preserve the question of the sufficiency of the evidence for appellate review, they were required to renew this motion at the close of all the evidence." *Cannon v. Day*, 165 N.C. App. 302, 305–06, 598 S.E.2d 207, 210 (2004). This rule also is followed by the federal courts and our sister states. *See*, *e.g.*, *Miller v. Premier Corp.*, 608 F.2d 973, 979 n.3 (4th Cir. 1979); *Mathieu v. Gopher News Co.*, 273 F.3d 769, 776 (8th Cir. 2001); *Kimbrough v. Commonwealth*, 550 S.W.2d 525, 529 (Ky. 1977); *State v. Hepburn*, 753 S.E.2d 402, 410 (S.C. 2013).

Here, Pope concedes that, although he moved for a directed verdict at the close of the Martins' case, he did not renew that motion at the close of all the evidence. We are bound by our precedent holding that a JNOV motion must be preceded by a motion for directed verdict at the close of *all* the evidence; thus, we must hold that Pope's JNOV arguments are waived on appeal.

We acknowledge that this is a harsh outcome. But our precedent contains many examples of litigants who sought to raise what they believed to be meritorious JNOV arguments on appeal, only to have those arguments deemed waived for failure to make an appropriate motion for directed verdict. *See Gibbs*, 32 N.C. App. at 442, 232 S.E.2d at 486; *Overman v. Products Co.*, 30 N.C. App. 516, 520, 227 S.E.2d 159, 162 (1976); *Plasma Ctrs. Of Am., LLC v. Talecris Plasma Res., Inc.*, 222 N.C. App. 83, 88, 731 S.E.2d 837, 841 (2012).

The public, and other jurisdictions that may be called on to recognize our State's court judgments, expect our courts to apply procedural rules uniformly to all litigants who appear before them. Thus, although we recognize that justice is best served when this Court reaches the merits of the underlying issues raised on appeal, we are obligated to

enforce this well-settled procedural rule and hold that Pope's JNOV arguments are waived.

II. Denial of Pope's motion for new trial

[2] Pope next argues that the trial court erred by failing to grant his motion for a new trial. Pope acknowledges that, ordinarily, we review the denial of a Rule 59 motion for abuse of discretion and "a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). But Pope argues that his Rule 59 motion involves questions of "law and legal inference" and that this Court should apply *de novo* review.

The cases on which Pope relies for asserting a *de novo* standard of review involve trial courts acting under a misapprehension of the law. *See, e.g.*, *Chiltoski v. Drum*, 121 N.C. App. 161, 165, 464 S.E.2d 701, 704 (1995). The task of determining whether Pope asserted arguments similar to those in *Chiltoski* is hamstrung by the fact that the key page of Pope's Rule 59 motion—the page containing most of the grounds on which he sought a new trial—is not in the record on appeal. From surrounding context, from the Martins' response to that Rule 59 motion, and the parties' arguments on appeal, it appears that Pope focused his new trial arguments on the sufficiency of the evidence presented at trial. "[A] motion for a new trial for insufficiency of the evidence pursuant to Rule 59(a)(7) is addressed to the discretion of the trial court." *Jones v. Durham Anesthesia Assocs., P.A.*, 185 N.C. App. 504, 508, 648 S.E.2d 531, 535 (2007). Accordingly, we reject Pope's request to review the trial court's ruling *de novo* and instead review for abuse of discretion.

Under this standard, the trial court's decision to deny the motion for new trial was within its sound discretion. Although we acknowledge that Pope disputes much of the evidence on which the jury apparently relied, our Supreme Court has cautioned us that we should not second guess trial courts when evaluating the sufficiency of the evidence under Rule 59. "Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case." *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605 (1982). As a result, "an appellate court should not disturb a discretionary Rule

59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* We recognize that this was not an easy case for the jury or the trial court. But our review of the appellate record convinces us that the trial court made a reasoned decision to deny the Rule 59 motion and that decision is not manifestly arbitrary or a substantial miscarriage of justice. Accordingly, we hold that the trial court did not abuse its discretion.

III. Challenge to the jury instructions

[3] Pope next argues that the trial court gave an erroneous and prejudicial answer in response to a question from the jury during deliberations. As explained below, Pope again failed to preserve this argument for appellate review.

During the jury charge, the trial court instructed the jury that, on the issue of the statute of limitations, the four-year limitations period began to run from the time the Martins "actually discovered or should have discovered the facts constituting the fraud." After deliberating for a time, the jury asked the trial court whether the Martins had to "satisfy both parts . . . as to the discovered or should have discovered the environmental issue." In other words, the jury appeared to be asking whether the Martins had to show both that they did not know *and* should not have known of the environmental contamination more than four years before filing suit.

The court discussed a proposed response to the question with the parties outside the jury's presence and ultimately gave the jury the following answer: "The burden is upon the plaintiffs to prove that they discovered or should have discovered. But not both." Pope concedes in his appellate brief that he discussed this proposed answer with the court before it was given and initially told the court that this answer "was correct." The trial transcript confirms this; after the jury retired with its answer, the court asked the parties, "Does that concur with what we discussed at the bench to the satisfaction of both sides?" Counsel for both parties replied, "Yes, sir."

Then, at some later point while the parties remained in the courtroom waiting on a jury verdict, counsel for Pope asked to approach the bench again. After a brief off-the-record discussion, the trial court stated on the record that Pope now objected to the court's answer. Pope's counsel explained to the court that "[w]e believe that is an incorrect statement" because the jury may mistakenly have interpreted the court's answer to mean that the Martins only had to prove that they did not

know *or* should not have known of the contamination more than four years before filing suit, rather than having to prove both that they did not know *and* should not have known.

After hearing from both parties, the trial court declined to call the jury back to change the answer, explaining that "I think it would be confusing and prejudicial at this stage."

In light of Pope's concession that he initially approved the trial court's proposed answer before it was given—a fact confirmed by the trial transcript—we hold that Pope has waived this argument on appeal. Our Supreme Court has long recognized that "under the doctrine of invited error, a party cannot complain of a charge given at his request." *Sumner v. Sumner*, 227 N.C. 610, 613, 44 S.E.2d 40, 41 (1947).

A trial court's answer to a jury question is treated as an instruction to the jury. *See State v. Farrington*, 40 N.C. App. 341, 345, 253 S.E.2d 24, 27 (1979); *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992); *State v. Smith*, 188 N.C. App. 207, 211, 654 S.E.2d 730, 734 (2008). Thus, to preserve an objection on this issue, Pope had to object and state the grounds for the objection *before* the court answered the jury's question and permitted them to retire for further deliberations. *See State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999). Because Pope did not object to the proposed answer until after the court read the answer to the jury and permitted the jury to continue deliberations, and because Pope concedes that he initially approved that proposed answer, Pope has failed to preserve his objection for appellate review. *State v. Gainey*, 355 N.C. 73, 106, 558 S.E.2d 463, 484 (2002).

IV. Motion to add third-party defendant

[4] Pope next argues that the trial court erred by denying his motion to add Agrium U.S. Inc.—the firm that leased the property from Pope—as a third-party defendant. Pope argues that "[t]o the extent that there is contamination on the property . . . it is possible that Agrium is partly responsible and partly liable."

Pope concedes that this Court reviews the trial court's refusal to grant leave to add Agrium for abuse of discretion. *See Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 489 (1972). Under this standard of review, we can reverse the trial court only if the court's ruling is "so arbitrary that it could not have been the result of a reasoned decision." *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 336, 626 S.E.2d 716, 723 (2006). Thus, in most cases, "[i]f the trial court articulates a clear reason for denying the motion . . . our review ends." *NationsBank*

of North Carolina, N.A. v. Baines, 116 N.C. App. 263, 268, 447 S.E.2d 812, 815 (1994).

The trial court's ruling was not an abuse of discretion under this standard. The court ruled that adding Agrium as a third-party defendant would be futile because, even if Agrium caused the contamination, it would not impact the Martins' claims, which were based on allegations that Pope knew of the contamination and concealed it from the Martins. The trial court also ruled that adding Agrium would be prejudicial because Pope's motion was made too close to the scheduled start of the trial. We hold that the trial court's analysis was the product of a reasoned decision, not an arbitrary one, and thus the court's refusal to permit Agrium to be added as a third-party defendant was well within its sound discretion.

V. Motion to disqualify counsel

[5] Finally, Pope argues that the trial court erred by denying his motion to disqualify the Martins' counsel. A motion to disqualify counsel "is discretionary with the trial judge and is not generally reviewable on appeal." *In re Lee*, 85 N.C. App. 302, 310, 354 S.E.2d 759, 764–65 (1987). This Court's review is limited to whether the court abused its discretion—which, again, means this Court can reverse only if we conclude that the decision was "so arbitrary that it could not have been the result of a reasoned decision." *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723.

The trial court's decision was within its sound discretion under this standard of review. The Martins' counsel also represented Pope's ex-wife in an unrelated family law proceeding. During the punitive damages phase of the trial, the Martins introduced into evidence a child support order and equitable distribution affidavit from that other proceeding. Pope moved to disqualify the Martins' counsel on the ground that counsel may be aware of confidential spousal communications that occurred during the marriage, and because the custody order and affidavit from the family law proceeding "very likely" came from Pope's ex-wife.

The trial court denied the motion to disqualify on the ground that the custody order and affidavit were public records and there was no evidence that the Martins' counsel was aware of any confidential information about Pope that would require disqualification in this lawsuit. The trial court's ruling was the result of a reasoned decision and not arbitrary. Accordingly, under the applicable standard of review, we hold that the trial court did not abuse its discretion by denying the motion to disqualify.

VI. The Martins' motion for attorneys' fees

[6] The Martins also challenge the trial court's judgment in this case, arguing that the court should have awarded them attorney's fees. The Martins concede that, although they filed a timely notice of appeal challenging the denial of their motion for attorneys' fees, they did not file an appellants' brief on this issue; instead, the Martins raised this issue in their appellees' brief after responding to Pope's arguments.

A party who files a notice of appeal must file an appellant's brief setting forth the reasons why the challenged order or judgment is infirm. *See Cherry, Bekaert & Holland v. Worsham*, 81 N.C. App. 116, 118, 344 S.E.2d 97, 99 (1986). Ordinarily, an appellant who fails to file an appellant's brief will be deemed to have abandoned any argument on those issues. *See* N.C. R. App. P. Rule 28(h) (2017). Applying that rule here, the Martins abandoned their attorneys' fees challenge by failing to submit an appellants' brief on that issue.

To be sure, the Martins presented their argument in their appellees' brief, so this Court understands the merits of their claim. And, we recognize that our Supreme Court has encouraged us to reach the merits of issues presented on appeal whenever possible, to ensure "fundamental fairness to litigants" and to "promote public confidence in the administration of justice in our appellate courts." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366 (2008).

But this case is a rare example of one in which fundamental fairness and public confidence in the administration of justice cut the other way. The bulk of the Martins' brief addresses Pope's failure to preserve his own arguments for appellate review. Were we to reach the merits of the Martins' attorneys' fees claim, while declining to address Pope's arguments because they were not preserved, the result would appear unfair and unjust. As a colleague on our State's federal bench once observed, "courts recognize that what is good for the goose is good for the gander." *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 233 (E.D.N.C. 2010).

Moreover, Pope was prejudiced by the sequencing of the Martins' arguments. Had the Martins filed an appellants' brief, Pope could have responded to the attorneys' fees issue in an 8,750-word appellee's brief. Instead, Pope was forced to respond to the Martins' attorneys' fees issue in a far shorter 3,750-word reply brief while also addressing the Martins' arguments concerning his own claims on appeal. Thus, we hold that the interests of justice are best served by deeming the Martins' attorneys' fees issue abandoned for failure to assert it in an appellants' brief.

Conclusion

For the reasons discussed above, we affirm the trial court's judgment.

AFFIRMED.

Judges ELMORE and INMAN concur.

THE NORTH CAROLINA STATE BAR, Plaintiff
v.
DAWN E. ELY, ATTORNEY, Defendant

No. COA17-546

Filed 6 February 2018

1. Attorneys—disciplinary order—adjudicatory portion—administrative suspension—violation of Rules of Professional Conduct—Rules 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c)

The Disciplinary Hearing Commission of the N.C. State Bar did not err by making certain challenged findings of fact to support its conclusions that defendant violated the N.C. Rules of Professional Conduct 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c) in the adjudicatory portion of the disciplinary order based on defendant's actions in holding herself out as a licensed attorney despite an administrative suspension, continued operation of a company despite an administrative suspension, solicitation of professional employment for pecuniary gain via electronic communications, and holding another unlicensed individual out as an attorney offering legal services on behalf of the company.

2. Attorneys—disciplinary order—dispositional phase—act with the potential to cause harm—acts of dishonesty, misrepresentation, deceit, or fabrication—multiple offenses—refusal to recognize wrongful nature of conduct

The Disciplinary Hearing Commission of the N.C. State Bar did not err by making its findings and conclusions during the dispositional phase enumerated in 27 N.C.A.C. 1B § .0114(w)(1), (2) and (3) of the Rules and Regulations of the State Bar that defendant intended to commit an act with the potential to cause harm; committed acts of dishonesty, misrepresentation, deceit, or fabrication; committed multiple offenses; and refused to recognize the wrongful nature of her conduct.

3. Attorneys—disciplinary order—five-year suspension—multiple instances of improper conduct

The Disciplinary Hearing Commission of the N.C. State Bar did not err by suspending defendant's license for five years where it sufficiently linked defendant's multiple instances of improper conduct to the potential for significant harm to the public and determined that a lesser sanction would fail to adequately address the severity of her misconduct. Defendant had an opportunity to reduce her suspension to two years if she complied with the requirements of her administrative suspension.

Appeal by defendant from order entered 24 August 2016 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 17 October 2017.

The North Carolina State Bar, *by Deputy Counsel David R. Johnson and Counsel Katherine Jean*, *for plaintiff-appellee.*

Crawford & Crawford, *PLLC*, *by Robert O. Crawford III*, *for defendant-appellant.*

DAVIS, Judge.

Dawn E. Ely appeals from an order of discipline entered by the Disciplinary Hearing Commission (the "DHC") of the North Carolina State Bar suspending her law license for a period of five years after determining that she had committed a number of violations of the North Carolina Rules of Professional Conduct. After a thorough review of the record and applicable law, we affirm.

Factual and Procedural Background

On 10 September 1993, Ely was admitted to the State Bar as an attorney licensed to practice law in North Carolina. In October 2006, she also became a licensed attorney in Georgia.

In 2005, Ely formed a business called Palladium Legal Services, LLC ("Palladium"), a limited liability company registered in Georgia. Palladium offers temporary or full-time in-house legal counsel for small to mid-sized businesses. In order to obtain its services, clients must first pay a fee to Palladium and are then matched with one of the company's attorneys, who are called "Chief Legal Officers" ("CLOs"). These CLOs receive from Palladium a portion of the fee paid to the company by the client. The CLOs do not receive any compensation directly from the client.

For several years, Ely served as the president of Palladium and as one of its CLOs. She is also the sole member of the limited liability company.

On 10 June 2011, Ely was administratively suspended by the State Bar from the practice of law in North Carolina for noncompliance with continuing legal education and dues requirements. On 1 July 2011, she was also suspended from practicing law in Georgia due to her failure to pay mandatory membership dues.

Despite these administrative suspensions, Palladium continued to operate, and Ely remained in her position as president. Her biographical information — including her previous legal experience — remained on Palladium's website on a webpage titled "Meet our CLOs."

In January 2008, Ely sent on behalf of Palladium a proposed employment contract to Henry Abelman, a North Carolina attorney whose license was inactive. Abelman did not sign the contract and never formally agreed to become a CLO. Ely nevertheless updated Palladium's website to list Abelman's biographical information and display his picture on the "Meet our CLOs" webpage.

In August and September 2012, mass-marketing emails were sent at Ely's direction targeting small business owners in North Carolina and informing them of the legal services offered by Palladium. One of the recipients of these emails was Tony Maupin, a North Carolina business owner, who received both an initial email and a follow-up email. At the bottom of the emails to Maupin, Ely signed her name as "Dawn Ely, Esq." Maupin subsequently filed a grievance against Ely with the State Bar regarding the emails.

On 6 September 2012, the Authorized Practice Committee of the State Bar sent Ely a letter informing her that she was "engaged in activities that may constitute the unauthorized practice of law in North Carolina." The record does not indicate that Ely ever responded to the letter. On 2 February 2015, the committee followed up on its 6 September 2012 letter with a Letter of Caution, informing her that the committee had "probable cause to believe that . . . [her] activities . . . violate[d] the unauthorized practice of law statutes." Once again, the record is devoid of any response from Ely.

On 30 July 2015, the Grievance Committee of the North Carolina State Bar issued a Notice of Admonition to Ely. Ely informed the State Bar on 9 September 2015 that she was "reject[ing] the allegations contained in th[e] Admonition."

On 4 January 2016, the State Bar filed a complaint with the DHC alleging violations of Rules 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c) of the North Carolina Rules of Professional Conduct based on Ely's (1) actions in holding herself out as a licensed attorney despite her administrative suspension; (2) continued operation of Palladium despite her administrative suspension; (3) solicitation of professional employment for pecuniary gain via electronic communications; and (4) actions in holding Abelman out as an attorney offering legal services on behalf of Palladium.

A hearing on the State Bar's complaint was held on 15 July 2016 before a panel of the DHC. On 24 August 2016, the DHC issued an Order of Discipline suspending Ely's license to practice law in North Carolina for five years. Ely filed a timely notice of appeal.

Analysis

On appeal, Ely challenges several of the DHC's findings of fact and conclusions of law made in connection with both the adjudicatory and dispositional phases of the hearing as well as the DHC's ultimate decision to suspend her law license. We first set out the standard of review applicable to orders of discipline from the DHC. Second, we address Ely's arguments as to the sufficiency of the DHC's findings of fact and conclusions of law in the adjudicatory phase. Third, we assess her contentions as to the findings and conclusions with regard to the dispositional phase. Finally, we consider Ely's challenge to the severity of her ultimate punishment.

I. Standard of Review

Pursuant to N.C. Gen. Stat. § 84-28, the DHC has the power to discipline any attorney admitted to practice law in the State of North Carolina upon determining that she has violated the North Carolina Rules of Professional Conduct. N.C. Gen. Stat. § 84-28(b)(2) (2017). A party may appeal to this Court from a final order of the DHC. N.C. Gen. Stat. § 84-28(h).

Disciplinary proceedings of the DHC are divided into two phases: At the "adjudicatory phase," the question is whether "the defendant commit[ed] the offense or misconduct[.]" *N.C. State Bar v. Talford*, 356 N.C. 626, 634, 576 S.E.2d 305, 311 (2003). At the "dispositional phase," the issue concerns "[w]hat is the appropriate sanction for committing the offense or misconduct?" *Id.*

In reviewing an order of discipline by the DHC, we apply the whole record test. This test

> requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law[.] Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion. The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn. Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear, cogent, and convincing. Ultimately, the reviewing court must apply all the aforementioned factors in order to determine whether the decision of the lower body, e.g., the DHC, has a rational basis in the evidence.

Id. at 632, 576 S.E.2d at 309-10 (internal citations, quotation marks, and brackets omitted).

In applying this test, we employ a three-pronged inquiry: "(1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions adequately support the lower body's ultimate decision?" *N.C. State Bar v. Sossomon*, 197 N.C. App. 261, 275, 676 S.E.2d 910, 920 (2009) (citation omitted). "This three-step process must be applied separately to each disciplinary phase[.]" *Id.* (citation omitted).

II. Adjudicatory Phase

A. Challenged Findings of Fact

[1] Ely first argues that the evidence at the hearing was inadequate to support several findings of fact made by the DHC in the adjudicatory phase. The DHC's findings of fact stated as follows:

> 1. Defendant, Dawn E. Ely ("Defendant"), was admitted to the North Carolina State Bar on September 10, 1993; and is, and was at all times referred to herein, an attorney at law licensed to practice in North Carolina, subject to the laws of the State of North Carolina, the

Rules and Regulations of the State Bar, and the Rules of Professional Conduct.

2. Defendant was administratively suspended by the North Carolina State Bar on June 10, 2011 for failure to comply with Continuing Legal Education requirements.

3. As of July 15, 2016, Defendant was still administratively suspended in North Carolina.

4. Defendant is also a licensed attorney in Georgia but has been administratively suspended since July 1, 2011 due to her failure to pay mandatory bar dues.

5. As of July 15, 2016, Defendant was still administratively suspended in Georgia.

6. Defendant operates a business registered in Georgia called Palladium Legal Services, LLC ("PLS") that functions under the trade name Palladium Chief Legal Officers ("PCLO").

7. Neither PLS nor PCLO is authorized to provide legal services in North Carolina.

8. Defendant describes herself as the "President and Founder" of PCLO.

9. Defendant advertises the services of PCLO via email solicitations and a website, www.palladiumclos.com.

10. According to the PCLO website and Defendant's email solicitations, PCLO offers to provide various businesses with legal services through a number of lawyers on the PCLO staff, including Defendant.

11. According to the PCLO website and Defendant's email solicitations, Defendant holds herself out to residents of North Carolina and Georgia as able to provide them with legal services through PCLO despite not being actively licensed in either state.

12. Defendant offers the services of PCLO to businesses and individuals in various states, including those in North Carolina and Georgia.

13. Defendant describes the legal services PCLO offers as "in-house" legal counsel services provided by "Chief Legal Officers."

14. Defendant offers to provide the legal services of attorneys under contract with PCLO to other businesses on a temporary or as needed basis.

15. To obtain the services of these attorneys, clients must retain and pay PCLO which will then instruct one of its attorneys to provide legal services to the client upon payment from PCLO.

16. PCLO attorneys are employees of PCLO and not the companies they serve.

17. Defendant makes all hiring and firing decisions regarding the attorneys who work for PCLO.

18. PCLO attorneys are not paid directly by the businesses they serve, but rather are paid by PCLO.

19. Defendant has sent solicitation emails to potential clients in North Carolina and other states representing that PCLO could provide them with legal services and advice.

20. In August and September of 2012, Defendant sent emails to Tony Maupin, a North Carolina resident and the owner of a North Carolina company, soliciting his business by offering to provide him with legal services through PCLO attorneys, including Defendant.

21. In Defendant's emails to Tony Maupin, she used the designation "Esq." after her name despite not being actively licensed to practice law in any state at the time.

22. The designation "Esq.," an abbreviation for "Esquire," has historically been used in the United States to indicate to others that someone is an attorney licensed to practice law. Defendant was using the designation "Esq." for this purpose.

23. In or around January 2008, Defendant sent a proposed employment contract to Henry Abelman ("Abelman"), a North Carolina licensed attorney who moved to inactive status in 1998, in an effort to hire him as an attorney employee of PCLO.

24. The contract Defendant sent to Abelman notes in one provision that Abelman "agrees to perform legal

counsel services on behalf of Company [PCLO] to third party companies retaining Company[.]"

25. Abelman did not agree to the provisions in the contract and did not agree to become an employee of Defendant's company.

26. Defendant nonetheless held out on her website that Abelman was an employee of PCLO and was able to provide legal services to North Carolina residents on behalf of the company.

27. The contract Defendant had clients of Palladium sign indicated in numerous places that Palladium was providing legal services to the clients:

> a. "This Attorney Engagement & Consulting Agreement for Services ("Agreement") is made and entered into effective as of the ___ day of ___, 2015, by and between Palladium Legal Services, a Georgia LLC d/b/a Palladium Chief Legal Officers ("Palladium" or "Company") with offices at 2625 Piedmont Rd., NE, Suite 56-117, Atlanta GA 30324 and _____, a _____ company with its principal offices located at _____ ("Client")."
>
> b. "Client hereby engages Company [Palladium], to provide in-house legal services for the term and compensation described herein. Company agrees to assign an appropriate Paladium [sic] Attorney, who at the time of execution of this Agreement shall be _____ ("Attorney") to perform the services specified in the "Description of Services" (the "Services") attached to this Agreement as Exhibit A and incorporated herein by reference."
>
> c. "Company [Palladium] warrants that it shall perform the Services utilizing at least the degree of skill and care exercised by diligent and prudent professionals performing similar services in accordance with best industry practices."

Although Ely challenges Finding Nos. 11, 22, and 26, the remainder of the above-quoted findings are unchallenged. Thus, these unchallenged findings are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a

finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."). We address each challenged finding of fact below.

1. Finding of Fact No. 11

Finding No. 11 states as follows:

> 11. According to the PCLO website and Defendant's email solicitations, Defendant holds herself out to residents of North Carolina and Georgia as able to provide them with legal services through PCLO despite not being actively licensed in either state.

Ely argues that she "did not provide legal services to anyone after being administratively suspended in North Carolina and Georgia and had not practiced law for several years before the suspensions." Moreover, she asserts that "[n]owhere on the website did she affirmatively state that she was actively licensed to practice law in North Carolina or that she was available to be a chief legal officer for any company."

During the adjudicatory phase of the 15 July 2016 hearing, the State Bar offered as evidence excerpts from Palladium's website. On the website's "Meet our CLOs" webpage, Ely was prominently listed as a CLO who could serve a client's legal needs. The webpage referenced Ely's previous legal experience (including her background serving as in-house counsel) and did not contain any statement or suggestion that she was not currently licensed to practice law in North Carolina.

The State Bar also provided evidence of the email correspondence between Ely and Maupin. In her email to Maupin, Ely stated that she wanted to discuss legal matters with him if he had time to speak to her. In this email, she made direct reference to Palladium's website by including a hyperlink to the "Meet our CLOs" webpage. Thus, had Maupin — or any other potential North Carolina client receiving this email — clicked onto this webpage link, he would have been under the false impression that Ely was licensed to provide legal services to clients in North Carolina. Thus, the DHC's finding that Ely falsely held herself out as being able to provide legal services was supported by clear, cogent, and convincing evidence.

2. Finding of Fact No. 22

Finding No. 22 states as follows:

> 22. The designation "Esq.," an abbreviation for "Esquire," has historically been used in the United States to indicate

> to others that someone is an attorney licensed to practice law. Defendant was using the designation "Esq." for this purpose.

Ely argues that Finding No. 22 was unsupported by evidence regarding her purpose in using the abbreviation "Esq." and the historical meaning of that term. The State Bar introduced evidence of Ely's first email to Maupin, which stated as follows:

> Hi Tony,
>
> Business executives complain about the high cost of legal services and the frustrating inaccessibility to legal expertise that can often compromise their business goals. In a quick 10 minute call I'd like to learn your areas of concern and explain how Palladium CLOs can provide you with answers and solutions – we are willing to provide you with information and see where we can help.
>
> Palladium Chief Legal Officers solve these problems by providing access to a cost-effective, part-time, in-house legal counsel who delivers extraordinary value to your company: Highly-experienced CLOs who understand business needs and have worked in your industry. Our fees are cost-effective with flat rates with zero infrastructure costs (vs. employee or hourly consultant model). Our service options are based on your legal needs and for less than your current legal fees, more work will get done, with the same level of expertise.
>
> Tony, are there 10 minutes in the upcoming weeks that I can call you to discuss these matters?
>
> Regards,
>
> Dawn Ely, Esq.
> President & Founder[1]

During Ely's cross-examination at the adjudicatory phase of the hearing, the following exchange occurred:

> [COUNSEL FOR STATE BAR:] And you indicate here at the bottom of both emails, you have your name and then you have "Esquire."

1. As noted above, the email contained a hyperlink that allowed the recipient to access Palladium's website.

[ELY:] Uh-huh (yes).

[COUNSEL FOR STATE BAR:] Why is that?

[ELY:] Well, because I have always, since I passed the bar, used that E-s-q as an identifier that I am a lawyer.

[COUNSEL FOR STATE BAR:] So it identifies that you are an attorney.

[ELY:] It identifies that I'm an attorney, but my role with the company is not as a chief legal officer, it is identified there in my signature block as president and founder.

[COUNSEL FOR STATE BAR:] But you included the esquire to identify to Mr. Maupin that you are an attorney.

[ELY:] An attorney that, frankly, because I am an attorney, I do understand all of these issues, I understand the needs, I understand the type of person that would be the right person for a particular role.

[COUNSEL FOR STATE BAR:] So you're indicating to him that your experience, which is also he [sic] could find on your website, and the legal services that you have provided to others in the past, which he could also find on your website, really adds some validity to Palladium.

[ELY:] I think it clarifies what my background and knowledge base is.

[COUNSEL FOR STATE BAR:] To what end?

[ELY:] To the fact that I have been there, I know what some of these issues are in terms of what a business needs, where a business can sometimes falter. I've had people, when they have a call with me, ask me, "Are you an attorney yourself?" and I say yes.

I've also have [sic] companies ask me if I can be their chief legal officer, and I say no.

[COUNSEL FOR STATE BAR:] *But you do say that you are an attorney.*

[ELY:] *Well, yes.*

(Emphasis added.)

She also stated the following in her testimony:

> [ELY:] Yeah. I want to make sure you understand the process. I, along with my business development drafter, drafted these emails. My business development director actually identified potential companies that fit the profile of company and executive that we have found typically is in the market for needing some part-time chief legal officer services. So I did not personally identify Tony Maupin, and the email was sent from my business development director, but the content of the email I approved.
>
> . . . .
>
> . . . I was wanting to clarify because it is being shown as being sent from me, but I do not hit the "Send" button, but I approved of the process for identifying target companies and executives that fit the profile of small/mid-size business that is large enough to potentially need somebody on an in-house basis, and so these emails go out to people from my business development director.
>
> . . . I take responsibility for them, but if your question is did I identify Tony Maupin, no, I didn't, but I identified the profile that he fits of the small/mid-size business size and senior executive that may have an interest in a part-time general counsel.

The DHC concluded — and we agree — that the clear implication from Ely's inclusion of the abbreviation "Esq." following her signature in the emails to Maupin, the hyperlink to Palladium's website, and her testimony on this subject at the hearing is that she intended to convey to recipients of the email that she was able to provide legal services as an attorney.[2] Moreover, while our courts have not previously had occasion to address this issue, courts in a number of other jurisdictions have determined that the use of the title "Esquire" by one not licensed to practice law constitutes the unauthorized practice of law. *See*, *e.g.*, *Fla. Bar v. Lister*, 662 So. 2d 1241, 1241-42 (Fla. 1995) (respondent engaged in unlicensed practice of law where he described himself as "Esquire" on correspondence and identified himself as an attorney in

2. Moreover, Ely's testimony supports the proposition that although she did not personally send the email to Maupin, she approved the content of the email and authorized it to be sent.

a phone conversation); *In re Contempt of Mittower*, 693 N.E.2d 555, 558 (Ind. 1998) (respondent engaged in unauthorized practice of law where he labeled himself "esquire," "general counsel," or "attorney-in-fact" on business cards, letterhead, and other documents available to general public); *Disciplinary Counsel v. Brown*, 121 Ohio St. 3d 423, 431, 905 N.E.2d 163, 171 (2009) (". . . [R]espondent's use of the term 'Esq.' induced clients to believe that he was a lawyer, a misunderstanding that he was aware of and failed to correct."); *In re V.I. Bar Ass'n Comm. on the Unauthorized Practice of Law*, 59 V.I. 701, 733 (2013) ("We hold that Campbell's general use of 'Esquire,' 'Esq.,' and 'Attorney' in emails and other correspondence, even when not issued in conjunction with a specific legal matter, constitutes hold[ing] oneself out as rendering any service which constitutes the unauthorized practice of law." (citations, quotation marks, and brackets omitted)).

3. Finding of Fact No. 26

Finding No. 26 states as follows:

> 26. Defendant nonetheless held out on her website that Abelman was an employee of PCLO and was able to provide legal services to North Carolina residents on behalf of the company.

Ely challenges the evidentiary support for Finding No. 26, contending that "[n]o representation was made on the website as to [Abelman's] licensure status in North Carolina or any other state." She also asserts that the mere presence of Abelman's name and biographical information on Palladium's website did not amount to holding him out as an attorney who was able to provide legal services on behalf of the company.

During the DHC hearing, the State Bar introduced evidence that (1) Abelman never signed an employment contract with Palladium; and (2) Abelman's license to practice law in North Carolina was inactive. Ely nevertheless listed him as a CLO whose credentials could be viewed on Palladium's website.

Furthermore, the email Ely sent Maupin — a North Carolina business owner — included a hyperlink to Palladium's website where Abelman's information was displayed. Thus, any visitor to the website would rationally conclude that Abelman was, in fact, a CLO of Palladium and thus capable of providing legal services to Palladium's clients. Moreover, a potential North Carolina client viewing the website would likewise assume that Abelman was authorized to provide legal services in North Carolina.

B. Challenged Conclusions of Law

We turn next to Ely's argument that the DHC improperly concluded that she violated Rules 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c) of the North Carolina Rules of Professional Conduct. We address in turn her arguments as to each of these rules.

1. Rule 5.5(b)(2)

Rule 5.5(b)(2) states as follows:

> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> . . . .
>
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

N.C. R. Prof. Cond. 5.5(b)(2).

The DHC's findings demonstrate that Ely violated Rule 5.5(b)(2) by (1) identifying herself as a CLO on Palladium's website; (2) providing her background as an attorney on the website with no indication of the current status of her license; and (3) emailing Maupin a link to the website and using the title "Esq." in the signature line of her email to him. By committing these acts, Ely held herself out as a lawyer who was admitted to practice law in North Carolina in violation of Rule 5.5(b)(2).

2. Rule 7.1(a)

Rule 7.1(a) states, in pertinent part, as follows:

> (a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

N.C. R. Prof. Cond. 7.1(a).

As previously stated, the DHC found that Ely (1) falsely implied she could serve as an attorney on behalf of Palladium; (2) listed herself as a CLO on Palladium's website; and (3) held herself out as an attorney to Maupin by emailing him a link to the website and using the title "Esq." in the signature line of her email. By taking these actions, Ely violated Rule 7.1(a).

Moreover, Ely violated Rule 7.1(a) by holding Palladium out as a company that could provide legal services and advice to Maupin when, in fact, at least two of the sixteen attorneys advertised on the website as CLOs (Ely and Abelman) were not licensed to practice law in North Carolina. Because the website's reference to both Ely and Abelman was misleading, she violated Rule 7.1(a) in this respect as well.

3. Rule 7.3(a)

Rule 7.3(a) states as follows:

> (a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
>
> (1) is a lawyer; or
>
> (2) has a family, close personal, or prior professional relationship with the lawyer.

N.C. R. Prof. Cond. 7.3(a).

The DHC's findings demonstrate that Ely violated the prohibition against soliciting professional employment via electronic contact as contained in Rule 7.3(a). She emailed Maupin for the express purpose of promoting Palladium's legal services, and therefore, increasing her opportunity to obtain pecuniary gain.

4. Rule 8.4(c)

Rule 8.4(c) states as follows:

> It is professional misconduct for a lawyer to:
>
> . . . .
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer[.]

N.C. R. Prof. Cond. 8.4(c).

The DHC's findings likewise support the conclusion that Ely violated Rule 8.4(c). She falsely represented on Palladium's website that Abelman could serve as an attorney on behalf of Palladium despite his status with the State Bar being "inactive" as well as the fact that he had never actually signed a contract with Palladium. She further included the hyperlink to the website in her emails to Maupin and the other recipients.

* * *

Thus, we are satisfied that the findings of fact contained in the DHC's order of discipline support its conclusions that Ely violated Rules 5.5(b)(2), 7.1(a), 7.3(a), and 8.4(c) and that those findings were supported by clear, cogent, and convincing evidence. Accordingly, we overrule Ely's arguments as to the adjudicatory phase of the DHC's order. *See N.C. State Bar v. Sutton*, __ N.C. App. __, __, 791 S.E.2d 881, 900 (2016) (upholding DHC's findings of fact and conclusions of law in adjudicatory portion of disciplinary order), *appeal dismissed*, 369 N.C. 534, 797 S.E.2d 296 (2017).

III. Dispositional Phase

[2] We next consider Ely's challenges to the DHC's findings and conclusions concerning the dispositional phase. The DHC may consider several factors in determining the appropriateness of a disciplinary measure. *See* 27 N.C. Admin. Code 1B.0114(w) (2016) (listing factors that DHC may find as meriting suspension, disbarment, or other disciplinary measures).[3]

However, it is well settled that

> [t]he DHC must support its punishment choice with written findings that are consistent with the statutory scheme of N.C. Gen. Stat. § 84-28(c). The order must also include adequate and specific findings that address how the punishment choice (1) is supported by the particular set of factual circumstances and (2) effectively provides protection for the public.

N.C. State Bar v. Adams, 239 N.C. App. 489, 495-96, 769 S.E.2d 406, 411 (2015) (internal citations omitted). Here, Ely challenges Conclusion No. 1 of the DHC's order, which states as follows:

> 1. The Hearing Panel considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(1), (2) and (3) of the Rules and Regulations of the State Bar, and concludes that the following factors are applicable:
>
> 27 N.C.A.C. 1B § .0114(w)(1)
>
> a. Factor (B), Intent of the defendant to commit acts where the harm or potential harm is foreseeable; and

3. Since the DHC's 24 August 2016 order, this regulation has since been removed from 27 N.C. Admin. Code 1B.0114(w) and is now contained in 27 N.C. Admin. Code 1B.0116(f).

b. Factor (I), Acts of dishonesty, misrepresentation, deceit, or fabrication.

27 N.C.A.C. 1B § .0114(w)(2)

a. Factor (A), Acts of dishonesty, misrepresentation, deceit, or fabrication.

27 N.C.A.C. 1B § .0114(w)(3)

a. Factor (G), Multiple offenses; and

b. Factor (O), Refusal to acknowledge wrongful nature of conduct.

We address Ely's arguments as to each challenged factor in turn.

A. Intent to Commit Acts Causing Potential Harm

Ely contends that the DHC erred by concluding that she intended to commit any act with the potential to cause harm. However, the DHC found that Ely (1) falsely held herself out as a CLO who was able to provide legal services despite her administrative suspension; (2) contacted a North Carolina business owner on behalf of her company seeking to provide legal services for her own pecuniary gain; and (3) advertised the services of Abelman despite his inactive status and lack of any employment contract with Palladium.

The DHC's findings support the notion that Ely's wrongful acts were not by mistake or accident but were instead intentionally committed. *See Sutton*, __ N.C. App. at __, 791 S.E.2d at 901 ("To the extent Defendant argues there is no evidence that he knew he was violating a rule or causing a disruption, it is axiomatic that one's state of mind is rarely shown by direct evidence and must often be inferred from the circumstances." (citation omitted)). Indeed, as previously discussed, Ely's own testimony reveals that she approved of her business development director sending emails on her behalf with the intent of targeting small businesses in need of legal services and that she intended to communicate to Maupin that she was an attorney. Thus, we cannot say that the DHC erred in concluding that she intended to commit acts creating the potential for foreseeable harm.

B. Acts of Dishonesty, Misrepresentation, Deceit or Fabrication

Ely also argues that the DHC erroneously concluded that she committed acts of dishonesty, misrepresentation, deceit, or fabrication. However, her argument on this issue is largely derivative of her previous arguments as to the DHC's findings in the adjudicatory phase. The DHC

concluded that Ely "made false or misleading statements" in violation of Rule 7.1(a) about both her and her company's ability to provide legal services and that she engaged in the unauthorized practice of law in violation of Rule 5.5(b)(2). As discussed above, these conclusions were supported by the DHC's findings of fact.

C. Multiple Offenses

Ely next asserts that the DHC's conclusion that she committed multiple offenses constituted error. Once again, Ely's arguments on this issue simply restate her previous challenges to the findings made in connection with the adjudicatory phase of the proceedings. The DHC properly concluded that Ely violated the North Carolina Rules of Professional Conduct by (1) holding herself out as legally able to provide legal services; (2) holding her company out on its website as authorized to provide legal services; (3) contacting Maupin via email; and (4) listing Abelman as an attorney employed by her company on its website. Thus, we reject Ely's contention that the DHC improperly found that she had committed multiple offenses.

D. Refusal to Acknowledge Wrongful Conduct

Finally, Ely argues that the DHC improperly concluded that she refused to recognize the wrongful nature of her conduct. The DHC found during the dispositional phase as follows:

> 2. Defendant has not acknowledged the wrongful nature of her conduct or indicated remorse.

During the 15 July 2016 hearing, Ely continually refused to accept the fact that her conduct was in violation of North Carolina's Rules of Professional Conduct. The DHC chairman repeatedly gave Ely opportunities to acknowledge her violations, but she was unwilling to do so. Accordingly, Finding of Fact No. 2 and the DHC's subsequent conclusion of law that Ely had "[r]efus[ed] to acknowledge the wrongful nature of [her] conduct" was supported by clear, cogent, and convincing evidence.

IV. Five-Year Suspension

[3] The only remaining question before us is whether the findings and conclusions of the DHC adequately support its ultimate disciplinary decision. *See Talford*, 356 N.C. at 639, 576 S.E.2d at 314. Ely contends that her five-year suspension constituted an excessive punishment because the DHC order fails to demonstrate that (1) there was a significant potential harm resulting from her actions; and (2) a lesser sanction would be inadequate to protect the public. In support of this argument,

Ely asserts that the DHC did not properly apply the test required by our Supreme Court in *Talford*.

In *Talford*, the DHC entered an order disbarring an attorney for mismanagement of a trust account. On appeal, the attorney argued that the DHC's findings of fact and conclusions of law from the dispositional phase of the hearing did not adequately explain the conclusion that his misconduct had resulted in a significant potential harm to clients or support the determination that a lesser sanction was inadequate to protect the public. *Id.* at 639, 576 S.E.2d at 314. Our Supreme Court agreed, stating as follows:

> . . . . None of [the DHC's] discipline-related findings of fact even address, much less explain, why disbarment is an appropriate sanction under the circumstances. . . . Certainly, none of the DHC's discipline-related findings and conclusions expressly identify a particular harm, resulting from [the attorney's] actions, that either impeded the administration of justice or was suffered by a client, the public, or the legal profession. The order also does not expressly address how [the attorney's] failure to maintain accurate financial records might result in potentially significant harm to any of the four entities. . . . [I]n order to justify the imposition of a more severe sanction, such as censure, suspension, or disbarment, the attorney's misconduct must show either significant harm or the *potential* for *significant* harm. The portion of the DHC order pertaining to discipline assuredly does not expressly link defendant's conduct with such potential, and our review of both the underlying evidence and the DHC's findings and conclusions fails to find support for an inference of such potential. For while we may recognize that an attorney's pattern of commingling account funds necessarily creates the potential for harm to his clients, our review of a specific transgression must also encompass its context, duration, and result.
>
> . . . .
>
> . . . [I]n order to impose a more severe sanction under the statute—censure, suspension, or disbarment—an attorney's misconduct must include attending circumstances that demonstrate: (1) a risk of *significant* potential harm, and (2) that the chosen sanction is necessary in order to

> protect the public. This Court has already determined that the attending circumstances of defendant's misconduct fail to evidence a risk of significant potential harm to clients. Thus, in our view, the expressed parameters of the statute preclude the DHC on the facts of this case from imposing on defendant any sanction that requires such a showing. . . .

Id. at 639-41, 576 S.E.2d at 314-15 (internal citations omitted).

In its analysis in *Talford*, the Supreme Court "undertook an exhaustive review of the various sanctions imposed on offending attorneys in the past" and determined that "the disbarment judgment imposed on defendant stands as an aberration . . . ." *Id.* at 641-42, 576 S.E.2d at 315 (citation and quotation marks omitted). Based on this determination, the Court concluded that there was no rational basis to support disbarment as an appropriate sanction. *Id.* at 642, 576 S.E.2d at 315.

This Court, however, has distinguished *Talford* in a number of disbarment and suspension cases in which the order of discipline at issue sufficiently demonstrated significant actual or potential harm and established the inadequacy of a lesser sanction. *See*, *e.g.*, *N.C. State Bar v. Livingston*, __ N.C. App. __, __, __ S.E.2d __, __, slip op. at 38 (filed 19 December 2017) (No. COA17-277) (DHC's imposition of five-year suspension with opportunity to petition for stay after two years was fully supported by harm shown); *Sutton*, __ N.C. App. at __, 791 S.E.2d at 896 (five-year suspension by DHC complied with requirements of N.C. Gen. Stat. § 84-28); *N.C. State Bar v. Adams*, 239 N.C. App. 489, 502, 769 S.E.2d 406, 415 (2015) (DHC's findings of fact and conclusions of law adequately supported four-year suspension of defendant's license); *N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 670, 657 S.E.2d 378, 388 (2008) (DHC's conclusion of law "declaring defendant's conduct posed significant harm to his client and the legal profession has a rational basis in the evidence" and supported disbarment); *N.C. State Bar v. Leonard*, 178 N.C. App. 432, 446, 632 S.E.2d 183, 191 (2006) (DHC's decision to disbar defendant had rational basis where "a determination that [defendant's] misconduct poses a *significant* potential harm to clients" was "[i]mplicit in a finding that [he] . . . violated Rule 8.4(b) and (c)"), *disc. review denied*, __ N.C. __, 641 S.E.2d 693 (2006).

In the present case, the DHC's order of discipline contained findings of fact and conclusions of law explaining why it believed a five-year suspension was the appropriate sanction for Ely. Its findings of fact included the following:

2. Defendant has not acknowledged the wrongful nature of her conduct or indicated remorse.

3. By attempting to practice law in North Carolina despite not being actively licensed here, Defendant caused significant potential harm to her company's clients and to the standing of the profession in the eyes of the public because it showed her disregard for one of the foundational duties of an attorney — practicing law solely within the bounds of licensure. Such erosion of public confidence in attorneys tends to sully the reputation of, and fosters disrespect for, the profession as a whole. Confidence in the legal profession is a building block for public trust in the entire legal system.

4. The Hearing Panel finds by clear, cogent, and convincing evidence any additional facts that may be contained in the conclusions regarding discipline set out below.

5. The Hearing Panel has carefully considered all of the different forms of discipline available to it, including admonition, reprimand, censure, suspension, and disbarment, in considering the appropriate discipline to impose in this case.

The DHC then made the following conclusions of law:

1. The Hearing Panel considered all of the factors enumerated in 27 N.C.A.C. 1B § .0114(w)(1), (2) and (3) of the Rules and Regulations of the State Bar, and concludes that the following factors are applicable:

27 N.C.A.C. 1B § .0114(w)(l)

a. Factor (B), Intent of the defendant to commit acts where the harm or potential harm is foreseeable; and

b. Factor (I), Acts of dishonesty, misrepresentation, deceit, or fabrication.

27 N.C.A.C. 1B § .0114(w)(2)

a. Factor (A), Acts of dishonesty, misrepresentation, deceit, or fabrication.

27 N.C.A.C. 1B § .0114(w)(3)

a. Factor (G), Multiple offenses; and

b. Factor (O), Refusal to acknowledge wrongful nature of conduct.

2. Although the Hearing Panel determined one of the factors under 27 N.C.A.C. 1B § .0114(w)(2) to be present, the Hearing Panel concluded that disbarment was not warranted in light of all of the circumstances of the case.

3. The Hearing Panel considered all of the disciplinary options available to it and determined that imposition of a suspension is appropriate and necessary.

4. The Hearing Panel concluded that Defendant, by unlawfully providing and offering to provide legal services to others through herself and her company, exposed the public to significant potential harm. Whenever attorneys engage in the unauthorized practice of law, there is the potential for significant harm, particularly when money exchanges hands, court appearances are made, and legal forms are drafted or filed on behalf of others. The risks of this type of arrangement include divided loyalties, fee splitting, inadequate representation, excessive fees, a lack of understanding sufficient to adequately represent and protect the interests of clients in a given jurisdiction, and criminal activity. There is also the inherent danger that someone other than a licensed North Carolina attorney will provide legal services to North Carolina citizens, thereby hampering the State Bar's ability to protect the public by regulating the practice of law in this state.

5. The Hearing Panel considered all lesser sanctions and concluded that discipline short of an active suspension would not adequately protect the public. Imposition of lesser discipline would fail to acknowledge the seriousness of the offenses Defendant committed and would send the wrong message to members of the Bar and the public regarding the conduct expected of members of the Bar of this State.

Based on the DHC's findings and conclusions, we cannot say that its decision to suspend Ely's license for five years exceeded its statutory

authority. The DHC's order sufficiently linked Ely's multiple instances of improper conduct to the potential for significant harm to the public. Furthermore, the DHC expressly weighed the other disciplinary options available to it before ultimately determining that a lesser sanction would fail to adequately address the severity of her misconduct. Finally, we note that the DHC's order provides Ely with an opportunity to reduce her suspension to two years if she complies with the requirements of her administrative suspension.

Thus, the DHC has established a rational basis for its decision, and Ely has failed to demonstrate that her suspension was contrary to applicable law. *See Ethridge*, 188 N.C. App. at 670, 657 S.E.2d at 389 (DHC's findings and conclusions had rational basis in evidence to support sanction imposed); *Leonard*, 178 N.C. App. at 446, 632 S.E.2d at 191 (DHC's decision to disbar defendant had rational basis in evidence).

Conclusion

For the reasons stated above, we affirm the DHC's 24 August 2016 order.

AFFIRMED.

Judges DILLON and INMAN concur.

RASHIA NORMAN, Plaintiff
v.
NORTH CAROLINA DEPARTMENT OF ADMINISTRATION, Defendant

No. COA17-328

Filed 6 February 2018

1. Employer and Employee—harassment and retaliation—summary judgment

The trial court did not err by granting summary judgment for defendant on a hostile working environment claim where plaintiff was aware of her employer's sexual harassment policy but failed to take advantage of corrective opportunities provided by her employer and there was no evidence that plaintiff was threatened with retaliation. Plaintiff could not impute the alleged misconduct to defendant, an essential element of her hostile work environment claim.

2. Employer and Employee—discrimination—quid pro quo harassment

Summary judgment was correctly granted for defendant on a claim for quid pro quo sexual harassment where plaintiff did not demonstrate a causal connection between her rejection of the advances and her dismissal, for which defendant offered legitimate, non-discriminatory reasons that were not refuted.

3. Employer and Employee—discrimination—termination—discharge—opposition to unlawful practice—summary judgment

The trial court did not err by granting summary judgment for defendant in a claim for retaliation for reporting unlawful conduct. Plaintiff did not engage in the protected conduct prior to the moment when an adverse employment action was taken against her.

Appeal by plaintiff from order entered 21 December 2016 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 20 September 2017.

Schiller & Schiller, PLLC, by David G. Schiller, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Ann Stone, for defendant-appellee.

ELMORE, Judge.

Rashia Norman ("plaintiff") appeals from an order granting summary judgment in favor of the North Carolina Department of Administration ("defendant" or "NCDOA") on plaintiff's Title VII employment discrimination and retaliation claims. On appeal, plaintiff argues that she has demonstrated at least two genuine issues of material fact, and that the trial court should not have granted summary judgment on any of her claims. After careful review, we disagree and hold that the trial court did not err in granting summary judgment in favor of defendant. Accordingly, we affirm the order of the trial court.

I. Background

On 23 February 2010, plaintiff began probationary employment as a parking booth attendant with the State Parking Division of the NCDOA. Plaintiff's immediate supervisor at the NCDOA was Mr. Derrick Moore, a parking operations manager. However, Mr. Moore was on family medical leave from 4 March 2010 until 1 June 2010, during which time plaintiff

was supervised by Ms. Catherine Reeve, a state parking director. Plaintiff read and signed the NCDOA's unlawful workplace harassment policy on 10 March 2010.

While under Ms. Reeve's supervision, plaintiff left her booth unattended on more than one occasion, and she had to be counseled by Ms. Reeve regarding the importance of remaining at her assigned post. Because plaintiff was still in the learning stages of her probationary employment, no formal disciplinary measures were taken against her at that time.

Mr. Moore returned to work in June 2010. According to plaintiff, between late June and July 2010, Mr. Moore made multiple inappropriate comments of a sexual nature toward plaintiff. For example, Mr. Moore told plaintiff that he liked how she walked and twisted her hips; that she had a "big butt" and "don't let nothing out"; and that he liked a woman "with meat on her bones." Additionally, over the course of several days in July 2010, Mr. Moore pulled on plaintiff's bag and arm, touched her hair, held her hand, and asked her to eat lunch with him in his office; plaintiff declined Mr. Moore's request and told him to stop his inappropriate behavior. On one occasion, when plaintiff told Mr. Moore that she needed booth supplies, Mr. Moore responded in a low, breathy voice, "What else do you need?" Mr. Moore also told plaintiff that "his good word" would get her a promotion.

In late July 2010, plaintiff told a co-worker about Mr. Moore's behavior, which the co-worker then relayed to Mr. Moore. Mr. Moore telephoned plaintiff at her booth and asked her why she treated him "like a stepchild" before he ultimately apologized for making her feel uncomfortable. At that time, plaintiff did not suspect Mr. Moore of attempting to have her dismissed, and she did not report his behavior to NCDOA management or personnel. Mr. Moore did not make further comments of a sexual nature to plaintiff, nor did he touch her, at any point after July 2010.

On 18 August 2010, plaintiff failed to properly log off from her fee computer, which caused two days of transactions to be included in the daily transaction report for 19 August 2010. Ms. Reeve summoned plaintiff to her office, where Mr. Moore was also present, and counseled her regarding the importance of logging off properly. In September 2010, plaintiff submitted a certificate of return to work form signed by her healthcare provider in which she admitted altering the date, and Ms. Reeve and Mr. Moore again counseled plaintiff regarding her work performance.

Plaintiff received a pre-disciplinary conference letter on 20 September 2010 indicating that she was being considered for dismissal. The letter set forth the specific reasons for dismissal as follows: (1) plaintiff's failure to communicate with her supervisor regarding the time needed for necessary appointments and repeatedly leaving the parking division without sufficient time to secure replacement personnel; (2) plaintiff's altering a certificate of return to work form; and (3) plaintiff's failure to follow defined work procedures by failing to log off her fee computer. The letter also informed plaintiff that a conference would be conducted by Ms. Reeve on 22 September 2010.

Both Ms. Reeve and Mr. Moore were present at plaintiff's pre-disciplinary conference. At the end of the meeting, Ms. Reeve asked plaintiff if she had any questions, and plaintiff responded by telling Ms. Reeve that Mr. Moore had been sexually harassing her. This was the first time that plaintiff had lodged a complaint against Mr. Moore with NCDOA management, and Ms. Reeve immediately reported the allegations to the human resources office. The Office of State Personnel subsequently conducted an investigation into the report and determined there was no sexual harassment or retaliation.

With the approval of the human resources office, Ms. Reeve made the ultimate decision to dismiss plaintiff from probationary employment on 23 September 2010. On 28 September 2010, plaintiff filed charges against the NCDOA with the Equal Employment Opportunity Commission ("EEOC") in which she alleged a violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e, *et seq.* ("Title VII"). Plaintiff received a right-to-sue letter from the EEOC on 3 February 2012 and filed an amended complaint against the NCDOA in Wake County Superior Court on 2 April 2015.[1] In her complaint, plaintiff alleged three claims in violation of Title VII as follows: (1) sexual harassment creating a hostile work environment, (2) sex discrimination resulting in *quid pro quo* harassment, and (3) sex discrimination resulting in retaliatory discharge.

On 3 March 2016, defendant filed a motion for summary judgment as to all of plaintiff's claims. The trial court held a hearing on the motion on 24 May 2016 and granted summary judgment in favor of defendant by order entered 21 December 2016. In its order, the court made three

1. Plaintiff filed her initial complaint, Wake County no. 12 CVS 6303, on 2 May 2012. Plaintiff voluntarily dismissed her complaint without prejudice on 3 April 2014, and she filed her amended complaint within the one-year period permitted by N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2015).

dispositive findings of fact, citing plaintiff's own deposition as evidence of each finding.

> The Plaintiff did not report supervisor Derrick Moore's alleged illegal behavior to Defendant agency's management until the September 22, 2010 pre-dismissal conference. [Plaintiff's Deposition, p. 35, lines 23–25, p. 36, lines 1–4] The Plaintiff did not report alleged illegal behavior to Defendant agency's personnel office until "days after the conference" [Plaintiff's Deposition, p. 36, lines 5–7] and Plaintiff did confirm the occurrence of events which were cited as legitimate non-discriminatory reasons given for her dismissal. [Plaintiff's Deposition, pp. 27–28, 29–30, 32–33]

The court then concluded "there is no genuine issue as to any material fact in the [p]laintiff's claims" and that "[d]efendant is therefore entitled to judgment as a matter of law." Plaintiff entered timely notice of appeal.

II. Discussion

On appeal, plaintiff argues that the trial court erred in granting summary judgment in favor of defendant because genuine issues of material fact exist regarding whether plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the NCDOA, and whether the legitimate, non-discriminatory reasons given for plaintiff's dismissal were mere pretext.

Defendant contends that summary judgment was proper because plaintiff cannot impute the alleged misconduct to the NCDOA, and because plaintiff cannot establish a causal connection between the alleged misconduct, or between her complaint regarding the alleged misconduct, and her dismissal.

Because plaintiff has failed to forecast sufficient evidence of each essential element of her three claims, we hold that summary judgment was proper.

A. Standard of Review

Summary judgment is appropriate when the "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 moving for summary judgment bears the initial burden of proof, which may be met "(1) by

showing an essential element of the opposing party's claim is nonexistent or cannot be proven, or (2) by showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 84, 590 S.E.2d 15, 18 (2004).

Upon a forecast of evidence tending to support the motion for summary judgment, the burden shifts to the non-moving party to likewise "produce a forecast of evidence demonstrating that [she] will be able to make out at least a prima facie case at trial." *Collingwood v. Gen. Electric Real Estate Equities, Inc.*, 324 N.C. 63, 66, 276 S.E.2d 425, 427 (1989) (citation omitted). The non-moving party survives the motion not by "rest[ing] upon the mere allegations" of her pleading, N.C. Gen. Stat. § 1A-1, Rule 56(e) (2015); rather, she "must come forward with specific facts showing a genuine issue for trial." *Beaver v. Hancock*, 72 N.C. App. 306, 310, 324 S.E.2d 294, 298 (1985) (citation omitted). In evaluating a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party, and all inferences of fact must be drawn in her favor. *In re Estate of Redding v. Welborn*, 170 N.C. App. 324, 329, 612 S.E.2d 664, 668 (2005). "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).

B. Sexual Harassment under Title VII

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[.]" 42 U.S.C. § 2000e-2(a)(1). Sexual harassment, which includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, "is a form of sex discrimination prohibited by Title VII." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986). For analytical purposes, employment discrimination in the form of sexual harassment is often categorized into two varieties: harassment that creates an offensive or "hostile" work environment, and *quid pro quo* harassment, where sexual consideration is demanded in exchange for job benefits. *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983). Here, plaintiff alleges that defendant subjected her to both varieties of sexual harassment by its employee supervisor, Mr. Moore.

i. *Hostile Work Environment*

[1] Because "an employee's work environment is a term or condition of employment, Title VII creates a hostile working environment cause

of action" in favor of individuals forced to work in a hostile workplace. *EEOC v. R&R Ventures*, 244 F.3d 334, 338 (4th Cir. 2001).

> To establish a hostile work environment based on sexual harassment under [Title VII], a plaintiff-employee must prove that (1) the conduct was unwelcome; (2) it was based on the plaintiff's sex; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer.

Crockett v. Mission Hosp., Inc., 717 F.3d 348, 354 (4th Cir. 2013) (citation omitted). As to the fourth element, an employer may "avoid strictly liability for a supervisor's sexual harassment of an employee if no tangible employment action was taken against the employee" in connection with the unwelcome conduct. *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 266 (4th Cir. 2001). "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 2268, 141 L. Ed. 2d. 633 (1998). If no such action was taken against the employee in relation to the misconduct, the employer has an affirmative defense to vicarious liability if (1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Matvia*, 259 F.3d at 266–67 (citations omitted).

In regard to her hostile work environment claim, plaintiff does not assert that she suffered a tangible employment action in connection with Mr. Moore's conduct, nor does she argue that defendant failed to exercise reasonable care to deter harassment in the workplace. Rather, plaintiff contends that a dispute of fact exists as to the second element of the employer-liability defense: that is, whether plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the NCDOA.

"If Title VII's prohibitions against sexual harassment are to be effective, employees must report improper behavior to company officials." *Id.* at 269 (citation omitted). Thus, "evidence that the plaintiff failed to utilize the [employer's] complaint procedure will normally suffice to satisfy [the employer's] burden under the second element of the defense." *Id.* (citation and internal quotation marks omitted). Here, however, plaintiff claims to have feared retaliation from Mr. Moore had she complained

to defendant about his conduct. Plaintiff cites two cases—one from the Fifth Circuit Court of Appeals and one from the Second Circuit—for the proposition that under such circumstances, an employee's decision not to report sexual harassment can be reasonable.

In *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512 (5th Cir. 2001), the plaintiff was a visiting professor from a foreign country who was sexually harassed by his supervisor. The supervisor told the plaintiff that the university would defend the supervisor against any type of harassment complaint, that it had done so in the past, and that the supervisor had previously helped remove from the university certain people whom he disliked, suggesting further that the plaintiff's immigration status could be jeopardized if he no longer worked at the university. *Id.* at 516. The court in *Mota* concluded that a rational jury could infer that the plaintiff's failure to take advantage of available remedies was not unreasonable given the supervisor's "repeated threats of retaliation" and "influence at the [u]niversity." *Id.* at 525–26.

In *Distasio v. Parkin Elmer Corp.*, 157 F.3d 55 (2nd Cir. 1998), the plaintiff was harassed by a co-worker and reported the conduct to her immediate supervisor. The supervisor first told the plaintiff she was crazy, then warned her not to report further conduct or she would lose her job. *Id.* at 59–60. As in *Mota*, the court in *Distasio* concluded that "the jury could find that [the plaintiff] . . . believed that she would lose her job if she reported further incidents to [the supervisor]" such that the plaintiff's failure to report was not unreasonable. *Id.* at 64–65.

The present case is readily distinguishable from both *Mota* and *Distasio*. Here, there is no evidence whatsoever that Mr. Moore ever threatened plaintiff such that she could reasonably have feared retaliation for reporting his conduct to management. Taking plaintiff's allegations as true, the harassment began in June 2010 and ended in July 2010, but plaintiff did not even begin to suspect Mr. Moore of attempting to have her dismissed until late August or September 2010.

Plaintiff was aware of the NCDOA's sexual harassment policy, yet she failed to take advantage of corrective opportunities provided by her employer. No rational jury could infer that this failure was reasonable due to fear of retaliation, as there is no evidence that Mr. Moore threatened to retaliate against plaintiff, either for denying his unwelcome advances or for reporting his conduct to management. Thus, plaintiff cannot impute the alleged misconduct to her employer—an essential element of her hostile work environment claim—and the trial court did not err in granting summary judgment as to that claim.

ii. Quid Pro Quo *Harassment*

[2] The second form of Title VII sex discrimination, known as *quid pro quo* sexual harassment, can be established by a five-element prima facie case as follows:

> 1. The employee belongs to a protected group.
> 2. The employee was subject to unwelcome sexual harassment.
> 3. The harassment complained of was based upon sex.
> 4. The employee's reaction to the harassment affected tangible aspects of [her] compensation, terms, conditions, or privileges of employment. *The acceptance or rejection of the harassment must be an express or implied condition to the receipt of a job benefit or cause of a tangible job detriment to create liability.* Further, as in typical disparate treatment cases, the employee must prove that she was deprived of a job benefit which she was otherwise qualified to receive because of the employer's use of a prohibited criterion in making the employment decision.
> 5. The employer . . . knew or should have known of the sexual harassment and took no effective remedial action.

Spencer v. Gen. Electric Co., 894 F.2d 651, 658 (4th Cir. 1990) (citations omitted) (emphasis added).

In order to satisfy the fourth element of her *quid pro quo* claim, plaintiff must show that her reaction to the harassment—that is, her acceptance or rejection of Mr. Moore's sexual advances—was an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment. To that end, plaintiff asserts that Mr. Moore attempted to influence her to accept his sexual advances by telling plaintiff that the only thing between plaintiff getting an office job (*i.e.* a job benefit) was "his good word." Plaintiff also contends that her dismissal constitutes a tangible job detriment for purposes of her *quid pro quo* claim. We disagree.

"An insulting or demeaning remark does not create a federal cause of action for sexual harassment merely because the 'victim' of the remark happens to belong to a class protected by Title VII." *Hartsell v. Duplex Products, Inc.*, 123 F.3d 766, 772 (4th Cir. 1997). While plaintiff claims on appeal to have interpreted Mr. Moore's "good word" comment as an attempt to influence her to reciprocate his conduct, there is no

indication that the comment was sexual in nature, and it appears to be a reflection of plaintiff's status as a probationary employee rather than her gender. Similarly, plaintiff has not demonstrated a causal connection between her rejection of Mr. Moore's advances in June and July 2010 and her September 2010 dismissal, for which defendant offered legitimate, non-discriminatory reasons that have not been refuted.

Because plaintiff has failed to establish that her reaction to Mr. Moore's harassment affected a tangible aspect of her employment, the trial court did not err in granting summary judgment on plaintiff's *quid pro quo* claim.

C. Retaliation under Title VII

[3] In addition to making certain employment practices themselves unlawful, Title VII also makes it unlawful for an employer "to discriminate against any of [its] employees . . . because [s]he has opposed any practice made an unlawful employment practice by this subchapter[.]" 42 U.S.C. § 2000e-3(a). Unlike plaintiff's *quid pro quo* claim, which includes an element of retaliation resulting from her refusal to acquiesce to her supervisor's sexual advances, the form of retaliation prohibited by this subsection refers to retaliation in response to an employee's engagement in a protected activity, such as reporting the unlawful conduct. Here, plaintiff alleges that defendant terminated her employment in retaliation for her complaint regarding the alleged sexual harassment by her supervisor, Mr. Moore.

> [A] prima facie showing of retaliatory discharge requires a plaintiff to show: (1) [s]he engaged in some protected activity, such as filing an EEO[C] 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).

Emp't Sec. Comm'n of N.C. v. Peace, 128 N.C. App. 1, 9, 493 S.E.2d 466, 471 (1997). As to the third element, "Title VII retaliation claims must be prove[n] according to traditional principles of but-for causation . . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, ___, 133 S. Ct. 2517, 2533, 186 L. Ed. 2d. 503 (2013). If the plaintiff establishes a prima facie case of retaliation, the defendant may rebut the showing with proof of a legitimate, non-discriminatory reason for the adverse action. *Beall v. Abbott Labs.*, 130 F.3d 614, 619 (4th Cir. 1997). The burden then shifts

back to the plaintiff to demonstrate that the reason given by the defendant is mere pretext by showing "that the reason was false, *and* that discrimination was the real reason for the challenged conduct." *Id.* (citation and internal quotation marks omitted).

Plaintiff argues that the trial court erred in dismissing her retaliation claim because a genuine issue of material fact exists as to whether the reasons given by defendant for her dismissal were mere pretext. However, plaintiff cannot prove the third essential element of this claim and has, therefore, failed to meet her initial burden of establishing a prima facie case of retaliatory discharge.

In her deposition, plaintiff admitted that she did not report the alleged unlawful conduct to NCDOA management until her predismissal conference, and she did not report the conduct to the NCDOA personnel office until several days after the conference. Because plaintiff did not engage in a protected activity at any time prior to the exact moment in which adverse employment action was being taken against her, plaintiff's reporting of the misconduct could not possibly have been a substantial or motivating factor in her dismissal. Even assuming, *arguendo*, that plaintiff has established a prima facie case of retaliation, she nevertheless confirmed the existence of legitimate, nondiscriminatory reasons for her dismissal. Thus, the trial court did not err in granting summary judgment on plaintiff's Title VII retaliation claim.

III. Conclusion

Because plaintiff has failed to forecast sufficient evidence of each essential element of her Title VII employment discrimination and retaliation claims, we hold that summary judgment was proper. The order of the trial court is hereby:

AFFIRMED.

Judges STROUD and TYSON concur.

CHRISTIAN G. PLASMAN, IN HIS INDIVIDUAL CAPACITY AND DERIVATIVELY FOR THE BENEFIT OF, AND ON BEHALF OF AND RIGHT OF NOMINAL PARTY BOLIER & COMPANY, LLC, PLAINTIFF

v.

DECCA FURNITURE (USA), INC.; DECCA CONTRACT FURNITURE, LLC; RICHARD HERBST; WAI THENG TIN; TSANG C. HUNG; DECCA FURNITURE, LTD.; DECCA HOSPITALITY FURNISHINGS, LLC; DONGGUAN DECCA FURNITURE CO. LTD.; DARREN HUDGINS; DECCA HOME, LLC; AND ELAN BY DECCA, LLC, DEFENDANTS, AND BOLIER & COMPANY, LLC, NOMINAL DEFENDANT

v.

CHRISTIAN J. PLASMAN A/K/A/ BARRETT PLASMAN, THIRD-PARTY DEFENDANT

No. COA17-151

Filed 6 February 2018

1. Civil Procedure—motion to dismiss—statement of claim—Rule of Civil Procedure 8

In a case involving the ownership and operation of a furniture company, the trial court did not abuse its discretion by dismissing a complaint for repeated violations of N.C.G.S. § 1A-1, Rule 8 where plaintiffs' claims were vague, misleading, or incorrect as to people or entities, the alleged conduct, the legal basis, and in some instances the specific claim or claims being alleged. Plaintiffs were on notice that defendants were seeking dismissal based on Rule 8 violations, and the trial court's order contained sufficient findings and conclusions, though not labeled as such, demonstrating that it had considered lesser sanctions before deciding to dismiss for violations of Rule 8.

2. Civil Procedure—dismissal—Rule of Civil Procedure 12(b)(6)

In a case involving the ownership and operation of a furniture company, the trial court did not err by dismissing plaintiffs' claims under N.C.G.S. § 1A-1, Rule 12(b)(6), as an alternate to dismissal under Rule 8, where none of plaintiffs' challenges to dismissal under Rule 12(b)(6) had merit.

Appeal by Plaintiff Christian G. Plasman and Third-Party Defendant Christian J. Plasman from order dated 21 October 2016 by Judge Louis A. Bledsoe, III, in Superior Court, Catawba County. Heard in the Court of Appeals 21 August 2017.

Nexsen Pruet, PLLC, by David S. Pokela; and Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for Plaintiff-Appellant and Third-Party Defendant Appellant.

McGuireWoods LLP, by Robert A. Muckenfuss and Jodie H. Lawson, for Defendants-Appellees.

McGEE, Chief Judge.

This matter was filed more than five years ago and has been considered by both state and federal courts. Multiple appeals have been filed from orders of the trial court to this Court and our Supreme Court, including appeals that have already been decided by this Court, *Bolier & Co., LLC v. Decca Furniture (USA), Inc.*, __ N.C. App. __, 792 S.E.2d 865 (2016) ("*Bolier I*"), *disc. review denied*, __ N.C. __, 799 S.E.2d 620 (2017); and *Plasman v. Decca Furniture (USA), Inc.*, __ N.C. App. __, 800 S.E.2d 761 (2017) ("*Bolier II*"). The following factual and procedural background is taken from the record before us, and from prior opinions of this Court.

Christian G. Plasman ("Plasman"), "in his individual capacity and derivatively for the benefit of, on behalf of and right of nominal party" Bolier & Company, LLC ("Bolier" or the "Company"), initiated the present action (the "Action") by filing a complaint in Superior Court, Catawba County, on 22 October 2012. The named Defendants ("Defendants") in that initial complaint were Defendant Decca Contract Furniture, LLC ("Decca China"), Decca Furniture (USA), Inc. ("Decca"), a wholly-owned subsidiary of Decca China, and Richard Herbst ("Herbst"), the president of Decca.[1] Plasman's son, Christian J. Plasman, a/k/a Barrett Plasman ("Barrett") (together with Plasman, "the Plasmans," together with Plasman and Bolier, "Plaintiffs"), is a third-party Defendant, who joins Plasman as an Appellant in this matter.[2]

I. Factual and Procedural Background

Bolier is a closely held North Carolina company in the business of selling furniture. Bolier was originally founded and owned by Plasman. Plasman and Decca entered into an operating agreement (the "Operating Agreement") on 31 August 2003, pursuant to which Plasman conferred a fifty-five percent ownership interest in Bolier to Decca while retaining

1. The named Defendants currently include Decca, Decca China, Herbst, Tsang C. Hung ("Tsang"), the chairman of Decca's board of directors, Wai Theng Tin ("Tin"), Decca Furniture, LTD ("Decca Furniture"), Decca Hospitality Furnishings, LLC ("Decca Hospitality"), Dongguan Decca Furniture Co., LTD, Darren Hudgins ("Hudgins"), and Decca Home, LLC. Bolier is also included as a "nominal party Defendant."

2. For this reason, we will be referring to Barrett, along with Plasman and Bolier, when we refer to "Plaintiffs," even though Barrett is technically a third-party defendant.

a forty-five percent interest for himself. In return, Decca agreed to supply Bolier with furniture for retail sale. The Operating Agreement also vested Decca with the authority to make all employment decisions related to Bolier. *Bolier II*, __ N.C. App. at __, 800 S.E.2d at 764. According to Plasman, prior to the execution of the Operating Agreement, Herbst and Tsang represented to him that while it was necessary for Decca to own a majority ownership interest in Bolier "on paper," due to certain rules of the Hong Kong Stock Exchange, Bolier would, in reality, be operated as a 50/50 partnership between Decca and Plasman. Plasman and Bolier entered into an employment agreement in November 2003 (the "Employment Agreement"), which provided, *inter alia*, that Plasman could be terminated without cause. *Id.*

Following execution of the Operating and Employment Agreements, Plasman served as Bolier's president and chief executive officer while Barrett worked as Bolier's operations manager. According to Decca, despite the significant investments of Decca and Decca China in Bolier's operations, Bolier sustained losses in excess of $2,000,000.00 between 2003 and 2012. As a result, Decca terminated the employment of Plasman and Barrett on 19 October 2012. *Id.* The Plasmans, however, refused to accept their terminations and continued to work out of Bolier's office space. During this time, the Plasmans set up a new bank account in Bolier's name, and they diverted approximately $600,000.00 in Bolier customer payments to that account. From these diverted funds, Plasman and Barrett paid themselves, respectively, approximately $33,170.49 and $17,021.66 in salaries and personal expenses. Plasman also wrote himself a $12,000.00 check, dated 5 December 2012, from the new account for "Bolier Legal Fees." *Id.* Decca eventually changed the locks to Bolier's offices, thereby preventing Plasman and Barrett from entering.

Plaintiffs filed the Action in Catawba County Superior Court on 22 October 2012, alleging claims for dissolution; breach of contract; fraud; constructive fraud; misappropriation of corporate opportunities; trademark, trade dress and copyright infringement; conspiracy to defraud; and unfair trade practices. The Action was designated as a mandatory complex business case on 24 October 2012, and assigned to the North Carolina Business Court. *Id.* Decca removed the Action to the United States District Court for the Western District of North Carolina on 29 October 2012. *Bolier I*, __ N.C. App. at __, 792 S.E.2d at 867. On that same date, Decca filed a motion for a temporary restraining order and preliminary injunction against the Plasmans pursuant to Rule 65 of the Federal Rules of Civil Procedure seeking, *inter alia*, to prohibit any additional diversion of Bolier funds and to recover the funds that had

already been diverted. *Id.* Decca moved to dismiss Barrett's counterclaims on 10 December 2012 and on that same date Defendants Decca, Decca China, and Herbst filed amended counterclaims, and Decca filed an amended third-party complaint, which included, *inter alia*, a request for a temporary restraining order and preliminary and permanent injunctive relief against the Plasmans. Plaintiffs moved to "supplement and amend [their] complaint" on 3 January 2013, and attached their "[P]roposed First Amended Complaint" thereto.

A hearing on Decca's motion was held before federal district court judge Richard L. Voorhees ("Judge Voorhees"). Judge Voorhees entered an order ("Judge Voorhees' Order") on 27 February 2013, granting Decca's motion by entering a preliminary injunction that barred the Plasmans from taking any further actions on Bolier's behalf, directed the Plasmans to return all diverted funds to Bolier within five business days, and provide an accounting of those funds to Decca. *Id.*

Plaintiffs filed a document entitled "Plaintiffs' and Third Party Defendant's Response to Court Order" on 6 March 2013. In this document, they represented that they had "fully complied to the best of their ability with the Court Order signed on February 27, 2013." In addition, they stated that "Plaintiffs[']response herein is intended to comply with the spirit of [Judge Voorhees' Order], and by complying herein, Plaintiffs are not waiving Plaintiffs' rights to request reconsideration or appeal." *Id.*

Plaintiffs never made any attempt to appeal Judge Voorhees' Order to the United States Court of Appeals for the Fourth Circuit. Nor did they file a motion for reconsideration of Judge Voorhees' Order. *Id.* Plaintiffs filed a "Renewed Motion to Amend Complaint to Include New Parties, Facts and Claims for Relief" on 6 November 2013, and included therein their "Second Proposed First Amended Complaint." Judge Voorhees allowed Plaintiffs motion to amend on 9 January 2014, and Plaintiffs filed their "First Amended Complaint" on 10 January 2014. Defendants filed a "Motion to Dismiss the First Amended Complaint" on 24 January 2014, and Plaintiffs filed a "Motion to Remand to Catawba County Superior Court" on 20 March 2014. Judge Voorhees heard these motions, and entered an order on 19 September 2014, dismissing Plaintiffs' federal copyright claims and declining to exercise supplemental jurisdiction over Plaintiffs' state law claims. As a result, the Action was remanded to our Business Court for consideration of "[a]ll remaining claims and motions[.]" *Id.*

Upon remand, Plaintiffs filed a "Motion to Amend Complaint" with the Business Court on 20 January 2015, which included Plaintiffs' "Draft

Proposed Second Amended Complaint." Defendants filed a "Motion to Strike Supplemental Pleadings and Motion to Dismiss Third-Party Defendant [Barrett's] Counterclaims" on 23 January 2015. Multiple additional motions were filed by Plaintiffs and Defendants, including Defendants' "Motion to Dismiss Petitioners' First Amended Complaint," Defendants' "Motion to Disqualify Counsel and Motion for Sanctions," Defendants' "Motion to Enforce Order, Motion for Contempt, and Motion for Sanctions," and "Plaintiffs' Motion to Amend Preliminary Injunction, to Dissolve Portions of the Preliminary Injunction and Award Damages, and Motion for Sanctions." The trial court entered an order on 26 May 2015 (the "May 2015 Order"), granting Plaintiffs' motion to amend their First Amended Complaint, and deciding multiple other matters before it.

The Plasmans filed notice of appeal from the May 2015 Order on 25 June 2015, based upon issues related to the injunction imposed by Judge Voorhees, *Bolier II*, __ N.C. App. at __, 800 S.E.2d at 765, and on that same day filed their revised Second Amended Complaint, as allowed by the May 2015 Order. Defendants filed a "Motion to Dismiss Plaintiffs' Second Amended Complaint" on 22 September 2015, and the trial court heard Defendants' motion on 17 December 2015. The trial court entered its fifty-eight page order dismissing the Second Amended Complaint with prejudice on 21 October 2016 (the "October 2016 Order"). Plaintiffs appeal.

II. Analysis

Plaintiffs argue on appeal that the trial court erred by dismissing their claims pursuant to Rule 8(a)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We disagree.

A. *Standard of Review and Relevant Law*

1. Rule 8 and Rule 41(b)

"Rule 41(b) of the Rules of Civil Procedure allows a court to dismiss an action '[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court[.]' N.C. Gen. Stat. § 1A–1, Rule 41(b) (2003)." *Lincoln v. N.C. Dep't of Health & Human Servs.* 172 N.C. App. 567, 572–73, 616 S.E.2d 622, 626 (2005). As a general proposition, "the trial court may dismiss for failure to comply with the Rules of Civil Procedure if it has first determined the appropriateness of lesser sanctions. '[T]he trial court must make findings and conclusions which indicate that it has considered . . . less drastic sanctions.' " *Wilder v. Wilder*, 146 N.C. App. 574, 577, 553 S.E.2d 425, 427 (2001) (citations omitted). " 'If the trial court undertakes this analysis, its resulting

order will be reversed on appeal only for an abuse of discretion.' " *Id.* (citation omitted).

Rule 8 of our Rules of Civil Procedure sets forth the "General rules of pleadings[.]" N.C. Gen. Stat. § 1A-1, Rule 8 (2015). Pursuant to Rule 8(a)(1):

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain [a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]

N.C.G.S. § 1A-1, Rule 8(a)(1).

Although North Carolina is a notice pleading state, our Supreme Court has cited with approval scholarly analysis that "under the directive of our Rule 8(a)(1) a complaint need not be as specific as under the former practice, but it must be 'to some degree more specific than the federal complaint.' " *Sutton v. Duke*, 277 N.C. 94, 100, 176 S.E.2d 161, 164 (1970) (citation omitted).

> "Under the notice theory of pleading a complainant must state a claim sufficient to enable the adverse party to understand the nature of the claim, to answer, and to prepare for trial." *Ipock v. Gilmore*, 73 N.C. App. 182, 188, 326 S.E.2d 271, 276 (1985) (citation omitted) (citing N.C. Gen. Stat. § 1A–1, Rule 8(a)(1)[.] "While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6)."

Piro v. McKeever, __ N.C. App. __, __, 782 S.E.2d 367, 370 (2016) (quotation marks and citations omitted). "Merely asserting a grievance is not enough to comply with . . . Rule 8(a). The first avenue by which a party may properly address the failure to state a claim is through Rule 12(b)(6) of the North Carolina Rules of Civil Procedure." *Westover Products, Inc. v. Gateway Roofing, Inc.*, 94 N.C. App. 63, 70, 380 S.E.2d 369, 374 (1989) (citation omitted).

Our Supreme Court and this Court have recognized that dismissal with prejudice for violations of the provisions of Rule 8 may be appropriate separate from a motion to dismiss pursuant to Rule 12(b)(6) for

failure to state a claim. *See Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 921–22 (1984); *Patterson v. Sweatt*, 146 N.C. App. 351, 357–59, 553 S.E.2d 404, 408–10 (2001); *Miller v. Ferree*, 84 N.C. App. 135, 136–37, 351 S.E.2d 845, 847 (1987). "Appellate courts should not disturb the trial court's exercise of discretion unless the challenged action is 'manifestly unsupported by reason.' " *Id.* at 137, 351 S.E.2d at 847.

2. Rule 12(b)(6)

Our Court has articulated the standard of review for a trial court's grant of a motion to dismiss for failure to state a claim as follows:

> "On appeal of a 12(b)(6) motion to dismiss for failure to state a claim, our Court conducts a *de novo* review[.]" "We 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.' " "The court must construe the complaint liberally and 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."
>
> "Dismissal is proper, however, 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."

Hinson v. City of Greensboro, 232 N.C. App. 204, 208, 753 S.E.2d 822, 826 (2014) (citations omitted).

B. *Rule 8*

[1] Plaintiffs argue that the trial court erred in dismissing the Second Amended Complaint for repeated violations of Rule 8. We disagree.

First, Plaintiffs allege that the Second Amended Complaint complied with Rule 8(a)(1) and, therefore, any dismissal on the basis of failure to comply with Rule 8(a)(1) constituted error. We have undertaken a thorough and laborious review of the Second Amended Complaint, and agree with the trial court that it "is generally imprecise, and the peculiarities of this pleading have made this consideration of Defendants' Motions exceedingly burdensome." Generally speaking, Plaintiffs' claims are vague, misleading, or incorrect with regard to (1) the alleged persons or entities involved – which Plaintiff is asserting the claim and which

Defendants are alleged to have engaged in any improper conduct; (2) the alleged conduct in support of the claim or claims; (3) the legal bases in support of the claim or claims; and (4), in some instances, which specific claim or claims are being alleged.

None of the issues upon which the trial court based its decision to dismiss the Second Amended Complaint pursuant to violations of Rule 8 should have come as a surprise to Plaintiffs. In the May 2015 Order, which resolved numerous motions filed by both Plaintiffs and Defendants, the trial court considered Defendants' motion to dismiss Plaintiffs' First Amended Complaint, alongside Plaintiffs' motion to amend Plaintiffs' First Amended Complaint. The trial court thoroughly addressed the deficiencies in Plaintiffs' First Amended Complaint, and plainly stated that those deficiencies had not been remedied in Plaintiffs' Proposed Second Amended Complaint. Nonetheless, the trial court ruled that it would, in its discretion, allow Plaintiffs yet another chance to remedy the deficiencies in the First Amended Complaint by granting Plaintiffs leave to further revise the First Amended Complaint and/or the Proposed Second Amended Complaint, and granted Plaintiffs the opportunity to file a corrected Second Amended Complaint. Therefore, the trial court, relevant to this appeal, denied Defendants' motion to dismiss Plaintiffs' First Amended Complaint. However, the trial court made clear that granting Plaintiffs' motion to amend their First Amended Complaint would be "without prejudice to Defendants' rights to move to dismiss the [S]econd [A]mended [C]omplaint, in whole or in part, as Defendants may deem appropriate."

The following portion of the May 2015 Order demonstrates some of the trial court's reasoning and direction to Plaintiffs:

> The [trial court] agrees with Defendants that Plaintiffs' First Amended Complaint and [P]roposed Second Amended Complaint reveal fatal deficiencies on their face.
>
> . . . .
>
> Plaintiffs current and proposed Complaints also fail to comply with the requirement under Rule 8 of the North Carolina Rules of Civil Procedure that a pleading contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and [a] demand for judgment for the relief to which he deems himself entitled." N.C. R.

> Civ. P. 8(a)(1)-(2) (2014). In particular, both Plaintiffs' First Amended Complaint and [P]roposed Second Amended Complaint fail to make clear which claims are brought by [] Plasman and which claims are purportedly brought by Bolier, and neither specifies against which Defendant or Defendants the alleged claims are asserted. Further, the current Complaint and [P]roposed Second Amended Complaint assert a number of claims for relief in a confusing, unfocused manner[.]
>
> . . . .
>
> Applying these considerations [addressed above in the 26 May 2015 order] to its review of Plaintiffs' First Amended Complaint and to Plaintiffs' Motion to Amend Complaint, the [trial court] concludes, in its discretion, that it is appropriate in these circumstances – where the action is still in its early stages in this forum, and Plaintiffs have sought to add parties, claims, and allegations based on conduct purportedly arising after the filing of the First Amended Complaint – to provide [] Plasman another chance to amend the operative complaint to attempt to state legally cognizable claims in this action.

In the October 2016 Order dismissing Plaintiffs' actions, the trial court discussed Plaintiffs' failure to cure these defects, despite having been given multiple opportunities to do so:

> 3. Plaintiff [] Plasman originally filed this action in October 2012, and Defendants subsequently removed the matter to the United States District Court for the Western District of North Carolina[.]
>
> 4. Upon remand [from the federal district court], the parties filed a number of substantive motions, which this [c]ourt resolved in [the May 2015 Order]. In that [order], the [c]ourt ruled on Plaintiff's Motion to Amend Complaint, [and] Defendants' Motion to Dismiss Plaintiff's First Amended Complaint[.]
>
> 5. This [c]ourt concluded in [the May 2015] Order that the "First Amended Complaint and [P]roposed Second Amended Complaint reveal[ed] fatal deficiencies on their face." The First Amended Complaint also asserted

claims "in a confusing, unfocused manner" by grouping claims together illogically and failing to make clear whether claims were brought individually or on Bolier's behalf and which Defendants were allegedly liable for which claims. Nevertheless, the [c]ourt, in the exercise of its discretion and under the specific circumstances in this case, determined that it was appropriate "to provide [] Plasman another chance to amend the operative complaint to attempt to state legally cognizable claims in this action." Therefore, the [c]ourt granted [] Plasman's Motion to Amend and denied in part as moot Defendants' Motion to Dismiss Plasman's First Amended Complaint. The [c]ourt also denied in part as moot Defendants' Motion to Dismiss Barrett['s] Counterclaims.

6. [] Plasman filed his Second Amended Complaint on June 25, 2015. Barrett [] filed his Supplemented and Amended Third Party Counterclaims on the same day.[3] In *lieu* of filing any answer, Defendants filed the present Motions[.]

. . . .

18. Defendants contend, and the [c]ourt agrees, that the Second Amended Complaint has failed to fully cure those defects identified in [the May 2015 Order]. The Second Amended Complaint still fails to "specify against which Defendant or Defendants the alleged claims are asserted" and "asserts a number of claims for relief in a confusing, unfocused manner." As an example of the former, Plaintiff captions his misappropriation of trade secrets claims as against Decca [], Decca China, Decca Contract, Decca Hospitality, and Decca Home, but the allegations in support of that claim for relief fail to identify any involvement by Decca Contract or Decca Hospitality and instead focus

3. "The [c]ourt did not technically grant Barrett [] leave to amend. Instead, the [c]ourt anticipated that Barrett [] would refile any counterclaims at a procedurally appropriate time, if Defendants elected to file any third-party claims after answering the Second Amended Complaint. . . . . Nevertheless, Defendants did not challenge the timeliness of Barrett['s] filing, and the [c]ourt elects to evaluate Barrett['s] pleading on the merits." [Footnote is included in the October 2016 Order].

on conduct by Defendants Tin and Hudgins.[4] As an example of the latter, the Second Amended Complaint groups together allegations under the heading "Seventh and Eight Claims for Relief: Self-Dealing and Misappropriation of Corporate Opportunities – Derivatively for the Benefit of Bolier and Directly on behalf of Plasman as Minority Member[.]" This convoluted method of grouping claims is exacerbated by the Second Amended Complaint's repeated failure to distinguish between harm suffered by Bolier and harm suffered by [] Plasman, despite the well-established rule that "shareholders . . . generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation."

19. In addition, the Second Amended Complaint has not fully cured its "fail[ure] to make clear which claims are brought by [] Plasman and which claims are purportedly brought by Bolier." For instance, while Plaintiff has separately captioned his individual and derivative breach of fiduciary duty claims, several of the allegations under each section state that various Defendants breached "fiduciary duties to Bolier and [] Plasman" without distinction.

20. As a whole, and despite its length, the Second Amended Complaint is generally imprecise, and the peculiarities of this pleading have made this consideration of Defendants' Motions exceedingly burdensome. The [c]ourt therefore concludes that the Second Amended Complaint is not "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing

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4. "As a further example, the Second Amended Complaint relies on broad allegations that the Plaintiff intends to hold most of the Defendants liable for most of the causes of action:"

> Herbst, Tin, Hudgins, and Tsang are officers and directors of one or more of Decca China, Decca [], Decca Contract, Decca Hospitality, Decca Home, Decca Classic, and Decca China Plant, and do not distinguish between actions taken by or for specific entities. For most of the allegations herein, each of the foregoing individuals and purported business entities are jointly and severally liable, and the actions and omissions of one or more of the named parties is attributable to one or more of the individuals and business entities because they act as agents and representatives of the other defendants. [Footnote is included in the October 2016 Order].

> that the pleader is entitled to relief." N.C. R. Civ. P. 8(a)(1). After having already afforded Plaintiff the opportunity to re-plead his claims and specifically identified the ways in which Plaintiff's First Amended Complaint and Proposed Second Amended Complaint were insufficient, the [c]ourt, in the exercise of its discretion, concludes that the Second Amended Complaint's noncompliance with Rule 8 provides an alternate basis for dismissal in addition to the grounds identified under Rule 12(b)(6). [Citations omitted].

Upon our review of the Second Amended Complaint, we affirm the trial court's determination that the Second Amended Complaint continued to violate Rule 8(a)(1). However, Plaintiffs argue:

> Rule 8 prescribes no penalty for violation of its terms, and dismissal can only occur under N.C. R. Civ. P. 41(b). N.C. R. Civ. P. 7(b)(1) requires that a motion "shall state with particularity the grounds therefor[.]" However, Defendants never moved for dismissal under Rule 41(b) as required under Rule 7(b)(1), and Appellants never had notice of same." Therefore, the trial court erred by dismissing the [Second Amended Complaint] without referencing Rule 41(b) and without a motion providing Appellants with **notice** they were subject to Rule 41(b) dismissal.

This Court has recognized in *Jones v. Boyce*, 60 N.C. App. 585, 299 S.E.2d 298 (1983), that

> Rule 8(a)(2) prescribes no penalty for violation of its proscription against stating the demand for monetary relief. Absent application of the Rule 41(b) provision for dismissal for violation of the rules, litigants could ignore the proscription with impunity, thereby nullifying the express legislative purpose for its enactment.
>
> The General Assembly thus must have intended application of the Rule 41(b) power of dismissal as a permissible sanction for violation of the Rule 8(a)(2) proscription.

Id. at 587, 299 S.E.2d at 300. We hold the same analysis applies to Rule 8(a)(1), as it also "does not identify a particular sanction that may be imposed" upon violation of its requirements. *Patterson*, 146 N.C. App. at 357, 553 S.E.2d at 409. Contrary to Plaintiffs' assertion in their brief, *Jones* does not hold that specific reference to Rule 41(b) is required,

only that Rule 41(b) serves as the vehicle for ordering sanctions for violations of Rule 8. In the present case, Defendants clearly indicated in their motion to dismiss the Second Amended Complaint that they were seeking dismissal in part based upon violations of Rule 8. Therefore, Plaintiffs were put on notice that Defendants were seeking dismissal based on Rule 8 violations through the only means available – Rule 41(b). *See Patterson*, 146 N.C. App. 351, 553 S.E.2d 404 (affirming dismissal of the plaintiff's action based upon violations of Rule 8 where the defendant's motion to dismiss did not reference Rule 41(b)).[5]

Finally, Plaintiffs argue that the trial court erred in dismissing the Second Amended Complaint "by not making findings of fact and conclusions of law which indicate that it had considered less drastic sanctions."

> Our [C]ourt [has] held that sanctions may not be imposed mechanically. Rather, the circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience. *[See] Daniels v. Montgomery Mut. Ins. Co.*, 81 N.C. App. 600, 344 S.E.2d 847 (1986) (in determining whether to dismiss a case for violation of motion in limine, trial court must determine the effectiveness of alternative sanctions). Once the trial court undertakes this analysis, its resulting order will be reversed on appeal only for an abuse of discretion.

Patterson, 146 N.C. App. at 357–58, 553 S.E.2d at 409 (citations omitted). Failure of the trial court to use the labels "finding of fact" or "conclusion of law" will not prevent this Court from reviewing the trial court's order to determine if it has appropriately considered and ruled upon the necessary issues. *See Brinn v. Weyerhaeuser Co.*, 209 N.C. App. 204, 707 S.E.2d 263 (2011) ("although the Commission did not label specific sentences as either 'findings of fact' or 'conclusions of law' within its order, the order was sufficient to allow us to review the Commission's reasoning").

As stated in the October 2016 Order, Plaintiffs were allowed to amend their complaint twice, including having been given two opportunities to draft their Second Amended Complaint in accordance with the requirements of Rule 8:

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5. We have reviewed the record in *Patterson* and take judicial notice of the fact that the relevant motion to dismiss in part pursuant to Rule 8 includes no mention of Rule 41(b).

> This [c]ourt concluded in [the May 2015] Order that the "First Amended Complaint and [P]roposed Second Amended Complaint reveal[ed] fatal deficiencies on their face." . . . . Nevertheless, the [c]ourt, in the exercise of its discretion and under the specific circumstances in this case, determined that it was appropriate "to provide [] Plasman another chance to amend the operative complaint to attempt to state legally cognizable claims in this action." Therefore, the [c]ourt granted [] Plasman's Motion to Amend[.]

Despite being given another opportunity to bring their complaint into compliance with Rule 8, and having been given specific direction concerning how to correct the deficiencies in their First Amended Complaint and their Proposed Second Amended Complaint, the trial court found "that the Second Amended Complaint has failed to fully cure those defects identified in the[c]ourt's prior order and opinion." The trial court then discussed the specific ways in which the Second Amended Complaint continued to violate Rule 8, and gave multiple examples from the complaint itself. As a result:

> The [c]ourt therefore conclude[d] that the Second Amended Complaint [wa]s not "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. R. Civ. P. 8(a)(1). After having already afforded Plaintiff the opportunity to re-plead his claims and specifically identified the ways in which Plaintiff's First Amended Complaint and Proposed Second Amended Complaint were insufficient, the [c]ourt, in the exercise of its discretion, concludes that the Second Amended Complaint's noncompliance with Rule 8 provides an alternate basis for dismissal in addition to the grounds identified under Rule 12(b)(6).

We hold that the trial court's order contains sufficient findings and conclusions, though not labeled as such, demonstrating that it had considered lesser sanctions before deciding to dismiss the Second Amended Complaint for violations of Rule 8. In fact, the trial court indicates that it had decided not to issue any sanctions for Plaintiffs' continuing Rule 8 violations in the May 2015 Order, despite its belief that it had sufficient grounds to do so. We hold that the trial court took "into account the severity of [Plaintiffs'] disobedience[,]" and "the effectiveness of

alternative sanctions" before deciding that dismissal of the Second Amended Complaint was warranted. *Patterson*, 146 N.C. App. at 357–58, 553 S.E.2d at 409.

Plaintiffs do not specifically argue that the trial court's dismissal of the Second Amended Complaint amounted to an abuse of discretion. However, to the extent that Plaintiffs arguments could be interpreted to include such an argument, we hold that the trial court did not abuse its discretion in dismissing the Second Amended Complaint, pursuant to its authority under Rule 41(b), in response to Plaintiffs' multitudinous and continued violations of Rule 8. We therefore affirm.

C. Rule 12(b)(6)

[2] Although our holding above is sufficient to affirm the trial court's order dismissing the Second Amended Complaint, we have decided to review the trial court's alternate basis for dismissal. The trial court also ruled that the Second Amended Complaint should be dismissed for failure to state a claim pursuant to Rule 12(b)(6).

We first hold that Plaintiffs' failure to state their claims with "sufficient[] particular[ity] to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[,]" N.C.G.S. § 1A-1, Rule 8(a)(1), warrant dismissal pursuant to Rule 12(b)(6). *Piro*, __ N.C. App. at __, 782 S.E.2d at 370 (quotation marks and citations omitted) (in order to conform with the dictates of Rule 8(a)(1), "a complaint must . . . state enough to give the substantive elements of a legally recognized claim or it may be dismissed under Rule 12(b)(6)"). In addition, we have methodically reviewed Plaintiffs' arguments on appeal, which number in excess of twenty, and hold that none of Plaintiffs' challenges to the dismissal of certain claims in the Second Amended Complaint, pursuant to Rule 12(b)(6), have merit.

We note that the disjointed condition of the Second Amended Complaint rendered this review exceedingly difficult and time consuming, and has resulted in unnecessary delay in the resolution of this appeal. For instance, the allegations that Plaintiffs, on appeal, contend support specific claims are often not directly associated with those claims in any coherent or organized manner. On appeal, Plaintiffs attempt to cobble together support for individual claims by directing this Court to allegations scattered throughout the Second Amended Complaint, even though the context surrounding many of those allegations make clear that they are inapplicable to the claims to which Plaintiffs now attempt to apply them. As an obvious example of this practice, in Plaintiffs'

brief they often cite to allegations that are made *after* the claim they are alleged to support. Although each new claim in the Second Amended Complaint includes the regular boilerplate language that "[t]he allegations alleged in all above paragraphs are alleged herein and incorporated herein by reference[,]" there is no such boilerplate purporting to incorporate allegations in "all 'below' or 'subsequent' paragraphs" of the complaint. Nonetheless, on appeal, Plaintiffs regularly cite to allegations made *following* a claim in an attempt to provide support for that claim that is otherwise lacking. As one additional example of the incoherent nature of the Second Amended Complaint, the first substantive allegation made in the Second Amended Complaint in support of Plaintiffs' *derivative* claim *on behalf of Bolier* for alleged breach of fiduciary duty states: "Decca [] breached fiduciary duties *owed to Plasman* by failing to follow [the] Operating Agreement, [and] terminating Plasman without Member or Manager meeting[.]"

After painstaking review of the Second Amended Complaint, we also affirm the trial court's dismissal of the Second Amended Complaint pursuant to Rule 12(b)(6) because, for each of Plaintiffs' claims, one or more of the following is true: "(1) the complaint on its face reveals that no law supports [P]laintiff[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 [P]laintiff[s'] claim." *Hinson*, 232 N.C. App. at 208, 753 S.E.2d at 826 (citation omitted).

AFFIRMED.

Judges DIETZ and BERGER concur.

RAYMOND v. RAYMOND

[257 N.C. App. 700 (2018)]

KIMBERLY G. RAYMOND, PLAINTIFF
v.
CHARLES G. RAYMOND, DEFENDANT

No. COA16-1179

Filed 6 February 2018

1. Appeal and Error—notice of appeal—timeliness

A notice of appeal from a 5 May 2016 order was timely in an equitable distribution case even though it was filed more than 30 days after the entry of the order, where the record did not include a certificate of service and the husband did not move to dismiss the appeal. The trial court would not assume that the husband served the 5 May order on the wife within three days, and her time did not begin to run until she received it.

2. Appeal and Error—notice of appeal—jurisdiction

A wife's brief was treated as a petition for certiorari in an equitable distribution action where timeliness was not raised by the parties and there was confusion over the nature of the underlying proceedings and whether the time for filing an appeal had been tolled.

3. Divorce—separation agreement—modifications—summary judgment

The trial court erred by granting summary judgment for the husband in a divorce action where the parties signed a separation agreement, the parties agreed to a change, the husband modified and signed the revised agreement, and the wife never signed or acknowledged the modified agreement. There was no evidence in the record that the wife and husband ever signed and notarized the same separation agreement; the revision was not the correction of a typographical error.

Appeal by plaintiff from orders entered 28 January 2016 and 5 May 2016 by Judge Matthew J. Osman in District Court, Mecklenburg County. Heard in the Court of Appeals 18 April 2017.

Dozier Miller Law Group, by Adam S. Hocutt and Robert P. Hanner, II, for plaintiff-appellant.

Hamilton Stephens Steele & Martin, PLLC, by Amy Simpson Fiorenza, for defendant-appellee.

STROUD, Judge.

Plaintiff Kimberly G. Raymond ("Wife") appeals from the trial court's orders granting summary judgment, a declaratory judgment, and attorney fees to Defendant Charles G. Raymond ("Husband"). These orders are based upon the trial court's conclusion that the parties had entered an enforceable separation agreement and property settlement agreement. Because the same version of the agreement was never signed and acknowledged by both parties, as required by N.C. Gen. Stat. § 52-10.1, the trial court erred in concluding that the agreement is enforceable, and we reverse both orders and remand for further proceedings.

I. Facts and Procedural Background

The parties were married on April 3, 1999, and separated on some date prior to November 2014. Husband contends that the parties separated in December 2013, while Wife contends that the parties initially separated in December 2013, reconciled in May of 2014, and finally separated in September of 2014.

Wife engaged the services of attorney Carolyn Woodruff, who drafted a separation agreement which she presented to Husband on 13 December 2013. The parties thereafter continued to negotiate the terms of their separation. On 21 January 2014, Wife signed and notarized a document captioned "Separation and Property Settlement Agreement" and forwarded it to Husband.

The parties then had the following exchange by email. On 22 January 2014, Wife sent the following to Husband:

> I mailed the papers to you today. 3 copies. Please get all 3 notarized and send 2 back to me. You can give to Darlene and she can bring them to me on Friday as she will be here then.

On 23 January 2014, Husband emailed the following to Wife:

> I have gone over the agreement and it is correct and acceptable with one exception. Your attorney slipped in a requirement to divide the Carlyle investment. This has never been raised and is inappropriate. Your choices are to rewrite the agreement, deleting clause Article II Property Settlement, Para 1 C i (Carlisle Funds), or I will line it out and initial it. You would then return an initialed copy to me. Your choice. You told me you were playing no

> games. . . . That's why I suspect your attorney put that in in error. Please advise.

On 23 January 2014, Wife emailed the following to Husband:

> Cross out that part and initial it on all 3 copies. Darlene will wait in [sic] you. Sorry for that!

On the same day, Wife also emailed the following to Husband:

> Had to make certain contract would still be legit and it will as long as you mark thru, initial lines and initial bottom and then sign docs. You can also next day air to me today if you don't want to bother Darlene.

Husband made the requested changes to the document, initialed the changes, notarized the document and then sent it to Wife. Wife received the document but never signed or initialed the revised document.

On 4 February 2015, Wife filed a complaint for post-separation support, alimony, equitable distribution, an interim distribution of marital assets, and attorney's fees. Husband filed an answer, motions to dismiss, affirmative defenses, and counterclaims on 17 April 2015. In his answer, Husband moved for, among other things: dismissal under Rule 12(b)(6), declaratory judgment, breach of contract, and attorney's fees based on the argument that the couple had a valid and enforceable separation agreement and that Wife had waived her rights to pursue the claims. Husband also sought an award of reasonable attorney's fees because of Wife's breach of their separation agreement. On 5 October 2015, Wife moved for summary judgment and declaratory judgment because the parties had no legally enforceable separation agreement.

After considering evidence, affidavits, and depositions by the parties, on 28 January 2016, the trial court entered an order granting summary judgment and a declaratory judgment in favor of Husband because the parties had entered into a legally enforceable separation agreement.

Wife moved to set aside the judgment and filed a motion for relief from judgment on 4 February 2016. Husband, on 8 March 2016, moved to dismiss Wife's motion to set aside judgment and filed a motion for relief from judgment; a motion for attorney's fees because her motion raised no justiciable issue, and a motion for a transfer of property under Rule 70 of the Rules of Civil Procedure of North Carolina regarding the Linville property owned by the parties which Wife had refused to deed to Husband under the Separation Agreement. The trial court found for Husband on all claims in an order entered on 5 May 2016. This order has

no certificate of service to show service upon Wife. Wife filed notice of appeal on 8 June 2016, appealing the trial court's 28 January 2016 and 5 May 2016 orders.

II. Timeliness of Appeal and Jurisdiction

A timely notice of appeal is required to confer jurisdiction upon this Court. *See*, *e.g.*, *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 321 (2000) ("In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure.").

A. 5 May 2016 Order

[1] Although neither party has addressed whether Wife's notice of appeal was timely filed for either order to confer jurisdiction upon this Court under N.C. R. App. P. Rule 3 to consider her appeal, we must raise issues of jurisdiction *sua sponte*. *See*, *e.g.*, *Kor Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008) ("[A]n appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*.").

> Under our North Carolina Rules of Appellate Procedure, Rule 3(c), "Time for Taking Appeal," states, in pertinent part, the following: In civil actions and special proceedings, a party must file and serve a notice of appeal: (1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or (2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period. The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal. Motions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal.

Wallis v. Cambron, 194 N.C. App. 190, 192-93, 670 S.E.2d 239, 241 (2008) (citations, quotation marks, and ellipses omitted).

The order granting summary judgment and a declaratory judgment was entered on 28 January 2016, but Wife did not file her notice of appeal until 8 June 2016, far more than 30 days after entry of that order. In addition, the notice of appeal was filed more than 30 days after entry of the 5 May 2016 Order. We will address the timeliness of the appeal of the 5 May 2016 order first.

> Rule 3(c)(1) of the Rules of Appellate Procedure provides that a party must file and serve notice of appeal within thirty days after entry of judgment if the party has been served a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure. Rule 58 provides that service and proof of service shall be in accordance with Rule 5. Rule 5(b) provides: "[a] certificate of service shall accompany every pleading and every paper required to be served and shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served.

Frank v. Savage, 205 N.C. App. 183, 186-87, 695 S.E.2d 509, 511 (2010) (citations, quotation marks, emphasis, ellipses, and brackets omitted).

The 5 May 2016 order has no certificate of service and our record does not indicate when Wife was served. Under N.C. R. App. P. 3(c)(2), "a party must file and serve a notice of appeal . . . (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period[.]" Under Rule 3, if Wife was properly served with the 5 May 2016 order, her notice of appeal would have been due on 6 June 2016.[1] Husband has not moved to dismiss the appeal, and neither party has addressed any concern regarding the timeliness of Wife's appeal.

In *Frank*, the order on appeal had a certificate of service but it did "not show the name or service address of any person upon whom the order was served." *Frank*, 205 N.C. App. at 187, 695 S.E.2d at 511. The appellees moved to dismiss the appeal because appellants' notice of appeal was filed 31 days after entry of the order; appellants contended that they actually received the order 4 days after its entry and the appeal was timely by their calculation. *Id.* at 186, 695 S.E.2d at 511. This Court placed the burden of showing that the order was properly served within three days upon the appellee who sought dismissal of the appeal, and since the certificate of service did not show the name or address of the parties served, held the appeal to be timely and denied the motion to dismiss the appeal. *Id.* at 187, 695 S.E.2d at 512.

> We faced a similar situation in *Davis v. Kelly*, 147 N.C. App. 102, 554 S.E.2d 402 (2001). Appellee in *Davis* argued

1. June 4 2016 fell on a Saturday, so the notice would have been due on the following Monday.

> that appellant "filed the notice of appeal more than 30 days after the judgment was entered and that her appeal should therefore be dismissed." *Id.* at 105, 554 S.E.2d at 404. The Court noted however that appellee "did not fully comply with the service requirements of Rule 58 of the Rules of Civil Procedure." *Id.* Under the applicable provisions of Rule 3, appellant had thirty days from the date she was properly served with the judgment. *Id.* The Court therefore denied appellee's Motion to Dismiss the appeal.
>
> We believe that Defendants' failure to comply with the service requirements of Rule 58 of the Rules of Civil Procedure in the present case requires us to apply Rule 3(c)(2) and not Rule 3(c)(1). We therefore hold that Plaintiffs' appeal is timely. Defendants' Motion to Dismiss Plaintiffs' appeal is denied.

Frank, 205 N.C. App. at 187, 695 S.E.2d at 511-12 (footnotes omitted).

Here, the record includes no certificate of service. Husband has not moved to dismiss the appeal. We will not assume that Husband served the 5 May 2016 Order on Wife within three days as required by Rule 3(c)(1), and thus her time to appeal did not begin to run until she received it, under Rule 3(c)(2). Her notice of appeal of the 5 May 2016 order is therefore timely, and this Court has jurisdiction to consider her appeal of that order.

B. 28 January 2016 Order

[2] Neither party has addressed the timeliness of Wife's appeal of the 28 January 2016 order either, but again, we have no jurisdiction to consider her appeal of this order without a proper notice of appeal. Wife apparently assumed that her Motion to Set Aside Judgment and for Relief from Judgment under Rules 52, 59, and 60 tolled the time for her notice of appeal, since she appealed both orders after entry of the trial court's order denying her motions. As the substance of her motion determines whether the time for appeal was tolled, we must consider the grounds for her motion. *See* N.C. R. App. P. Rule 3(c)(3) ("[I]f a timely motion is made by any party for relief under Rules 50(b), 52(b), or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).").

Wife's motion requested under Rule 52 that the trial court "amend its findings or make additional findings[,]" and under Rule 59(a)(7), she alleged that the order was "contrary to law." Under Rule 60(b)(1) and (6), Wife alleges "mistake" -- specifically, the trial court's legal error -- and "any other reason justifying relief from the operation of the judgment" -- also the trial court's legal error. The substance of Wife's motion alleges the trial court made a "legal error" by determining the separation agreement was valid. The motion also makes various allegations regarding cases addressing the validity of the separation agreement and argues that the trial court's ruling was contrary to those cases.

As noted above, a motion under Rule 60 does not toll the time for filing notice of appeal. *See Wallis*, 194 N.C. App. at 193, 670 S.E.2d at 241. But a motion under Rule 52(b) or 59 will toll the time for notice of appeal, if the motion actually presents a rationale for relief under one of these rules and is not simply " 'used as a means to reargue matters already argued[.]' " *Batlle v. Sabates*, 198 N.C. App. 407, 414, 681 S.E.2d 788, 794 (2009) (quoting *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997)).

> If a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order. As a result, the timeliness of Plaintiff's appeal from the 21 September 2007 order hinges upon whether Plaintiff's 5 October 2007 motion sufficiently invoked the provisions of N.C. Gen. Stat. § 1A-1, Rules 50(b), 52(b), or 59.
>
> . . . . [W]hile a request that the trial court reconsider its earlier decision granting the sanction may properly be treated as a Rule 59(e) motion, a motion made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, cannot be used as a means to reargue matters already argued or to put forward arguments which were not made but could have been made. Thus, in order to properly address the issues raised by Defendant's dismissal motion, we must examine the allegations in Plaintiff's motion to ascertain whether Plaintiff stated a valid basis for seeking to obtain relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 59.

Batlle, 198 N.C. App. at 413-14, 681 S.E.2d at 793-94 (citations, quotation marks, brackets, and footnote omitted).

The January 2016 order is entitled "Order Re: Cross-Motions for Declaratory/Summary Judgment." Although summary judgment orders should not include findings of fact, *see*, *e.g.*, *Tuwamo v. Tuwamo*, __ N.C. App. __, __, 790 S.E.2d 331, 336 (2016) ("Of course, neither an order for dismissal under Rule 12(b)(6) nor a summary judgment order should include findings of fact."), this order has extensive findings of fact. In addition, Wife filed a motion under Rule 52 requesting amended or additional findings of fact. But this Court has held that because summary judgment orders should not have findings of fact, and on appeal we may disregard any such findings, Rule 52 does not apply to summary judgment orders. *See*, *e.g.*, *Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147 (1978) ("The named plaintiffs requested that the trial court, in rendering summary judgment, find facts specifically and express its conclusions of law pursuant to G.S. 1A-1, Rule 52. A trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper. However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment." (citations omitted)), *overruled in part on other grounds as stated in Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987).

But this analysis assumes that the January 2016 order is in fact a *summary judgment* order, although it does not look much like one. This jurisdictional discussion has perhaps gone on too long primarily as a result of the way the parties and trial court dealt with the hearing of the matter and the extensive findings and conclusions in the trial court's order.[2] Instead of continuing to attempt to characterize the order, we dismiss Wife's appeal from the 28 January 2016 order as untimely, but then exercise our discretion to treat Wife's brief as a petition for certiorari, allow the petition, and review the 28 January 2016 order. *See* N.C. R. App. P. Rule 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]"); *In re Will of Durham*, 206 N.C. App. 67, 74, 698 S.E.2d 112, 119 (2010) ("Given the complete

2. We have also reviewed the entire transcript of the hearing to determine if the parties and trial court treated this hearing as a bench trial, and although they did not refer to it as such, from the arguments and discussion, it could likely be considered a bench trial.

absence of any showing in the record on appeal that Caveator appealed the sanctions order in a timely manner, we have no alternative except to dismiss Caveator's appeal from the sanctions order as untimely. We do, however, have the authority, in the exercise of our discretion, to treat the record on appeal and briefs as a petition for writ of certiorari pursuant to N.C. R. App. P. 21(a)(1), to grant the petition, and to then review Caveator's challenge to the sanctions order on the merits.").

III. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In Re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted).

As noted above, the trial court's summary judgment order includes "findings of fact." Since summary judgment is proper only where there is no genuine issue of material fact, summary judgment orders should not include findings of fact.

> The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact. This is not appropriate when granting a motion for summary judgment, where the basis of the judgment is 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.

War Eagle, Inc. v. Belair, 204 N.C. App. 548, 551, 694 S.E.2d 497, 500 (2010) (citations and quotation marks omitted). It is not uncommon for trial judges to recite uncontested facts upon which they base their summary judgment order, however when this is done "any findings should clearly be denominated as 'uncontested facts' and not as a resolution of contested facts." *Id.* In this case, all the material facts are uncontested so we will treat the "findings of fact" in the January 2016 order as "uncontested facts" for the purpose of evaluating the trial court's order for summary judgment.

> [I]n a declaratory judgment action where the trial court decides questions of fact, we review the challenged findings of fact and determine whether they are supported by competent evidence. If we determine that the challenged findings are supported by competent evidence, they are conclusive on appeal. We review the trial court's conclusions of law *de novo*.

Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 596-97, 632 S.E.2d 563, 571 (2006) (citations omitted). We will therefore review the order's legal conclusion of the enforceability of the agreement *de novo*.

IV. Analysis

Wife contends that the trial court erred by granting summary judgment and declaratory judgment for Husband. We agree.

A. Validity of Separation Agreements under N.C. Gen. Stat. § 52-10.1

[3] The law of North Carolina has long been that a married couple, upon deciding to separate, may memorialize their decisions governing their separation and property settlement in a legally enforceable separation agreement. A separation agreement is a contract, but unlike other types of contract, separation agreements must meet several statutory requirements. Specifically, under N.C. Gen. Stat. § 52-10.1 (2015), a married couple may execute a legally binding separation agreement if that agreement is 1) not against public policy, 2) in writing and 3) acknowledged by both parties before a certifying officer. N.C. Gen. Stat. § 52-10.1. Such a certifying officer may include a notary public. N.C. Gen. Stat. § 52-10(b) (2015). The courts of North Carolina have routinely held that a separation agreement is void and unenforceable unless it was "executed in the manner and form required by [N.C.G.S. § 52-10.1]." *Daughtry v. Daughtry*, 225 N.C. 358, 360, 34 S.E.2d 435, 437 (1945). Any modification of a separation agreement must also "be in writing and acknowledged, in accordance with the statute." *Jones v. Jones*, 162 N.C. App. 134, 137, 590 S.E.2d 308, 310 (2004). An attempt to orally modify a separation agreement is insufficient as a matter of law and fails to meet the standards of the statute. *See Greene v. Greene*, 77 N.C. App. 821, 823, 336 S.E.2d 430, 432 (1985).

Here, Wife contends there is no legally enforceable separation agreement between the parties because the statutory requirements were never met. There is no factual dispute that the parties each signed and acknowledged different versions of the agreement. Wife signed and notarized the original version of the couple's separation agreement and sent it to Husband. Husband then modified, signed, and acknowledged the revised separation agreement. Wife never signed or acknowledged the revised separation agreement after it was modified by Husband, and there is no evidence in the record that Wife and Husband ever signed and notarized the same separation agreement.

Husband "acknowledges the historical respect afforded the formal requirements given to separation agreements[,]" but argues that

"the parties' legal right should not hang up on a technicality that can be fixed[.]" He contends that Wife's email from 23 January 2014 is sufficient to modify the separation agreement under N.C. Gen. Stat. § 52-10.1 and create a separation agreement binding on both parties. He also contends that his change to the agreement was merely the correction of "what amounts to a clerical error in the Agreement" so it should not be "fatal to the enforceability." He cites no law to support his contention this was a "clerical error," most likely because his revision was not the correction of a typographical error or transposed letters or numbers.

This Court is not simply giving "historical respect" to the formal requirements of separation agreements. We must enforce the law as established by the General Assembly in N.C. Gen. Stat. § 52-10.1 and as interpreted consistently by our courts. And Husband's revision to the agreement was far more than correction of a clerical error. Husband's revision changed the distribution of the Carlisle Funds account from an equal division between the parties to a distribution solely to Husband. Husband concedes that Wife never signed or acknowledged the separation agreement after his modifications on 23 January 2014. Given the lack of signature or acknowledgment, Husband's argument is without merit.

B. Equitable Argument

Husband raises the argument that even if this Court should find the agreement void, Wife should not be allowed to avoid its effect based upon "equitable principles." The trial court's order also addressed this issue. The trial court found:

> 12. The Court finds that, given Plaintiff/Wife's direction to Defendant/Husband that he should strike the relevant paragraph and have it executed, that the Agreement is not void and valid.
>
> 13. Additionally, even if the Court would have found the Agreement was not executed in accordance with relevant statutory authority (which it does not), the Court does find that Plaintiff/Wife made the voluntary choice to recognize the Agreement by treating it as valid for more than a year without complaint and that she has been permitted to enjoy and has enjoyed all of the benefits of the Agreement.
>
> 14. Plaintiff/Wife *has ratified the Agreement* and *she is estopped* from making the legal argument that it was

> not validly executed and therefore unenforceable. *See Moore v. Moore*, 108 N.C. App. 656 (1993).

(Emphasis added).

Husband's argument mentions words such as "estoppel," "equitable estoppel," and "quasi-estoppel," although we are not entirely sure how these principles may apply to this case. The trial court's order cited to *Moore v. Moore*, 108 N.C. App. 656, 424 S.E.2d 673, *aff'd per curiam*, 334 N.C. 684, 435 S.E.2d 71 (1993), and Husband has addressed this case in his brief, so we will address it.

In *Moore*, the husband and wife signed the same agreement and the agreement was notarized. *Id.* at 657-58, 424 S.E.2d at 674-75. Both signed during a meeting at the wife's attorney's office and Ms. King, an employee in the office, was the notary. *Id.* at 658, 424 S.E.2d at 674-75. The couple signed several documents that day, and Ms. King was "in and out" of the room where they met "preparing additional paperwork" to be signed. *Id.* In seeking to avoid the agreement, the husband claimed that Ms. King was not actually present in the room at the moment when he signed the agreement, so she did not witness his signing. *Id.*, at 658, 424 S.E.2d at 675. Ms. King averred that she did witness both parties' signatures. *Id.* The trial court granted summary judgment to the wife, finding the agreement enforceable, and the husband appealed. *Id.* at 657, 424 S.E.2d at 674. On appeal, this Court affirmed the trial court. *Id.* at 658, 424 S.E.2d at 675. This Court stated that even if there was some factual issue regarding the notarization of the agreement, there was no genuine issue of material fact which would prevent summary judgment:

> Plaintiff's evidence does not overcome the presumption of legality of execution created by the notarization of the separation agreement. North Carolina recognizes a presumption in favor of the legality of an acknowledgment of a written instrument by a certifying officer. To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred.

Id. at 659, 424 S.E.2d at 675 (citation omitted).

In other words, the holding of *Moore* is entirely inapposite to this case, since the issue here is entirely different. In *Moore*, both parties signed the same agreement. *Id.* at 657, 424 S.E.2d at 674. Here, Husband and Wife each signed different versions of the agreement. Even under basic contract law -- N.C. Gen. Stat. § 52-10-1 notwithstanding -- where there is no meeting of minds on the essential terms of the agreement,

there is no contract. *See*, *e.g.*, *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001) ("For an agreement to constitute a valid contract, the parties' minds must meet as to all the terms. 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. . . . [G]iven the consensual nature of any settlement, a court cannot compel compliance with terms not agreed upon or expressed by the parties in the settlement agreement." (citations and quotation marks omitted)). Therefore, Husband's argument must be based primarily upon the *Moore* Court's concluding comments:

> [E]ven if the notarization could be deemed invalid due to the technical statutory violation, plaintiff is estopped from asserting its invalidity. The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result. The rule is grounded in the premise that it offends every principle of equity and morality to permit a party to enjoy the benefits of a transaction and at the same time deny its terms or qualifications. Having chosen to recognize the agreement by treating it as valid for two years without complaint, plaintiff has been permitted to enjoy the benefits of the agreement. He now pursues a course to overturn it. Equity dictates the result consistent with the trial court's judgment.

Moore, 108 N.C. App. at 659, 424 S.E.2d at 675-76 (citation omitted).

This portion of *Moore* is arguably dicta, since it was unnecessary for the decision. "Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." *Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985). In addition, this Court has recently held otherwise, in a case involving enforcement of an alleged amendment to a separation agreement which was not notarized:

> Plaintiff argues that, even if the 2003 Amendment is void, she may still recover based upon equitable theories, including estoppel and ratification, because Defendant had performed for eleven years under the terms of the 2003 Amendment with knowledge it had not been notarized. We disagree.
>
> It is well settled that a void contract cannot be the basis for ratification or estoppel. *See Bolin v. Bolin*, 246

> N.C. 666, 669, 99 S.E.2d 920, 923 (1957) ("A void contract will not work as an estoppel."); *see also Jenkins v. Gastonia Mfg. Co.*, 115 N.C. 535, 537, 20 S.E. 724, 724 (1894) ("[W]e have held that such contract, not being ... in compliance with the statute, and being executory in its nature, was void and incapable of ratification.").

Kelley v. Kelley, __ N.C. App. __, __, 798 S.E.2d 771, 777-78 (2017).

And in any event, even considering equitable principles, we see no "unfairness" to Husband based upon the record before us. He complains that he paid Wife $7,000.00 per month as post-separation support under the agreement until 4 February 2015, so she should not now be allowed to pursue her claims for post-separation support, alimony, and equitable distribution. But should the trial court ultimately grant the relief Wife seeks, the trial court can consider these payments in the final calculations. Husband may receive a credit for any payments he made under the void agreement toward any amount he may become obligated to pay based on Wife's claims – or Wife may have to repay to Husband any amount he paid in excess of his obligations as ultimately determined by the trial court.

V. Conclusion

For the reasons stated above, we reverse and remand this matter to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and DAVIS concur.

SMITH JAMISON CONSTRUCTION, PLAINTIFF
v.
APAC-ATLANTIC, INC., YATES CONSTRUCTION CO., INC., DEFENDANTS

No. COA17-761

Filed 6 February 2018

Arbitration and Mediation—motion to compel by non-signatory

The doctrine of equitable estoppel did not require that plaintiff Jamison be compelled to arbitrate claims against a third party, Yates, who was not a signatory to a contract which contained an arbitration clause. Jamison was not attempting to assert against Yates claims premised upon any contractual and fiduciary duties created by the contract containing the arbitration clause, but instead claims arising from legal duties imposed by North Carolina statutory or common law.

Appeal by defendant from order entered 13 April 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 8 January 2018.

Spilman Thomas & Battle, PLLC, by Bryan G. Scott, Matthew W. Georgitis and Steven C. Hemric, for plaintiff-appellee.

Tuggle Duggins, P.A., by J. Nathan Duggins III, Alan B. Felts, Benjamin P. Hintze and Jaye E. Bingham-Hinch, for defendant-appellant.

TYSON, Judge.

Yates Construction Company, Inc. ("Yates") appeals the superior court's order, which denied Yates' motion to compel Smith Jamison Construction to submit to binding arbitration and to stay all other proceedings in the dispute between these parties. We affirm the trial court's denial of Yates' motion asserting a right to demand arbitration.

I. Background

Smith Jamison Construction ("Jamison") is a concrete contractor based in Winston-Salem, North Carolina. In October 2012, Jamison entered into a contract (the "Subcontract") with APAC-Atlantic, Inc. ("APAC"), a general contractor, to construct catch basins, drop inlets,

concrete curbs, gutters, sidewalks, curb ramps, driveways, and concrete paved ditches along the Interstate 73 highway corridor.

Contained within section 22 of the Subcontract was a mandatory arbitration provision in which Jamison and APAC agreed to arbitrate claims arising out of or relating to the Subcontract as follows:

> All claims or controversies arising out of or related to this Subcontract shall be submitted to and resolved by binding arbitration by a single arbitrator in any County and State where the project is located. The American Arbitration Association ("AAA") shall conduct the arbitration unless the parties mutually agree to use an alternative arbitration service. Judgment upon any award made by the arbitrator may be entered in any court having jurisdiction thereof, if necessary.

Yates is a separate North Carolina corporation, which has engaged in construction work with APAC and Jamison on past projects. Yates is neither a party to nor a signatory of the Subcontract between Jamison and APAC.

Jamison alleges, although it was awarded the Subcontract for the concrete work on Interstate 73, the APAC Project Manager exchanged emails with Yates' vice president on multiple times concerning a subcontract approval form, under which Jamison would further subcontract to Yates the curb work previously assigned to Jamison's scope of work under the Subcontract. Jamison further alleges it did not request nor authorize Yates to be added to the project as a sub-subcontractor, but that, "Yates was expecting to perform [Jamison's] work as early as July 2013, due to such representations from APAC." Jamison further alleges APAC expressly requested Jamison to allow Yates to subcontract the curb and gutter scope of work, but Jamison refused. Jamison asserts that after it refused, APAC started sending it daily complaint emails. On 20 December 2013, the Department of Transportation approved APAC's request to terminate Jamison and replace them with Yates. Jamison was informed that the Subcontract had been terminated.

Jamison filed a complaint against APAC and Yates on 13 April 2016, alleging that APAC had terminated Jamison and replaced it with Yates. Jamison also asserted claims against Yates for: (1) fraudulent misrepresentation; (2) tortious interference with a contract; (3) civil conspiracy; and (4) unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1.

Yates filed an answer on 14 June 2016, denied all allegations of wrongdoing and asserted, in part, "the presence of a mandatory and binding arbitration clause in the subcontract between [Jamison] and Defendant APAC[.]"

The trial court entered a consent order compelling arbitration between Jamison and APAC and staying the claims against APAC on 30 December 2016. In the consent order, Jamison and APAC agreed to stay the action with respect to their claims and to submit those claims to binding arbitration, based upon the arbitration provision contained in the Subcontract between Jamison and APAC.

Yates filed a motion to compel arbitration and stay court proceedings on 24 March 2017. Yates sought the court to order Jamison to arbitrate its claims against it. The trial court denied Yates' motions by an order entered 13 April 2017. Yates filed timely notice of appeal.

II. Jurisdiction

Although an order denying a party's motion to compel arbitration is interlocutory, this Court has repeatedly held that "[it] is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citing *Sims v. Ritter Constr., Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983)); N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(1) (2017). Yates' interlocutory appeal is properly before us.

III. Standard of Review

"[The] trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court." *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). "Under *de novo* review, [this Court] consider[s] the matter anew and [is] free to substitute [its] judgment for that of the trial court." *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012).

IV. Analysis

Yates argues the trial court erred in denying its motion to compel arbitration and stay the action. Yates asserts Jamison is equitably estopped from asserting Yates, a nonsignatory, was not covered by the arbitration clause contained within the Subcontract between Jamison and APAC.

A. Duty to Arbitrate

This Court applies a two-pronged analysis to determine whether a dispute is subject to arbitration. *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003), *aff'd per curiam*, 358 N.C. 146, 593 S.E.2d 583 (2004). We must determine whether the specific dispute is covered by the "substantive scope of th[e] agreement[,]" and "whether the parties had a valid agreement to arbitrate[.]" *Id.* (citation omitted).

In the consent order compelling arbitration between Jamison and APAC, both parties to the Subcontract stipulated that the arbitration clause was valid, enforceable, and governed at least some of Jamison's claims against APAC. Because the applicability of the arbitration clause in the Subcontract is stipulated to cover the claims between Jamison and APAC, we must determine whether the arbitration clause also obligates Jamison to arbitrate its claims against Yates.

"The obligation and entitlement to arbitrate 'does not attach only to one who has personally signed the written arbitration provision.' Rather, '[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.' " *Washington Square Sec., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004) (quoting *Int'l. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 416-17 (4th Cir. 2000)) (alteration in original).

B. Equitable Estoppel

"[A] nonsignatory to an arbitration clause may, in certain situations, compel a signatory to the clause to arbitrate the signatory's claims against the nonsignatory despite the fact that the signatory and nonsignatory lack an agreement to arbitrate." *Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006). "One such situation exists when the signatory is equitably estopped from arguing that a nonsignatory is not a party to the arbitration clause." *Id.* "[E]stoppel is appropriate if in substance the signatory's underlying complaint is based on the nonsignatory's alleged breach of the obligations and duties assigned to it in the agreement." *Id.* at 628 (citation, internal quotation marks and brackets omitted).

"[E]quitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely upon the terms of the . . . agreement in asserting its claims against the nonsignatory." *Id.* at 626-27 (citations omitted). We examine Jamison's underlying claims in the complaint to determine whether equitable estoppel should apply. *See id.*

> Where the issue is whether the underlying claims are such that the party asserting them should be estopped from denying the application of the arbitration clause, a court should examine whether the plaintiff has asserted claims in the underlying suit that, either literally or obliquely, *assert a breach of a duty created by the contract containing the arbitration clause.*

Carter v. TD Ameritrade Holding Corp., 218 N.C. App. 222, 231, 721 S.E.2d 256, 263 (2012) (emphasis supplied) (internal quotation marks and citation omitted).

C. *Ellen v. A.C. Schultes of Maryland, Inc.*

In analyzing Yates' equitable estoppel argument, we find this Court's analysis in *Ellen v. A.C. Schultes of Maryland, Inc.*, 172 N.C. App. 317, 320, 615 S.E.2d 729, 732 (2005), is instructive. This Court in *Ellen* affirmed the trial court's denial of a motion to compel arbitration, which was based upon the defendants' contention that the plaintiffs were equitably estopped from refusing to arbitrate their claims. *Id.* at 320-23, 615 S.E.2d at 731-33.

As is analogous here, the plaintiffs in *Ellen* had brought claims for unfair and deceptive trade practices and tortious interference with prospective business advantages against the defendants. *Id.* at 322, 615 S.E.2d at 733. The plaintiffs had not asserted the defendants in *Ellen* breached or owed them any duties arising from the contract containing the arbitration clause. *Id.*

In affirming the denial of the motion to compel arbitration, this Court reasoned that while the contract containing the arbitration clause "[p]rovided part of the factual foundation for plaintiffs' complaint," the plaintiffs' claims were "dependent upon legal duties imposed by North Carolina statutory or common law rather than contract law." *Id.* at 322, 615 S.E.2d at 732-33.

Here, Jamison's claims against Yates consist of: (1) fraudulent misrepresentation; (2) tortious interference with a contract; (3) civil conspiracy; and (4) unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1. Jamison's claims, like the plaintiffs' claims in *Ellen*, are dependent upon legal duties imposed by North Carolina statutory and common law, rather than alleged breaches of duties arising from the terms of the Jamison and APAC Subcontract. *See id.*

Jamison's fraudulent misrepresentation claim arises from a common law duty not to intentionally harm others through deception. *See*

Marshall v. Keaveny, 38 N.C. App. 644, 647, 248 S.E.2d 750, 753 (1978) (recognizing "that an action for fraudulent misrepresentations inducing the plaintiff to enter into a contract is an action in tort and not an action in contract").

Jamison's civil conspiracy claim is premised upon allegations that Yates conspired with APAC to defraud Jamison and is not a separate cause of action, in and of itself. *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) (noting "that there is not a separate civil action for civil conspiracy in North Carolina").

Jamison's tortious interference with a contract claim arises from a common law duty of a third party not to interfere with another's right to freedom of contract or to enjoy the benefits thereof. *See Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 656 (1945) ("[U]nlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendant's own rights, but with design to injure the plaintiff, or gaining some advantage at his expense."); *see also*, *United Labs.*, *Inc. v. Kuykendall*, 335 N.C. 183, 189-90, 437 S.E.2d 374, 378-79 (1993) (labelling tortious interference with a contract as a common law claim).

Jamison asserts its unfair and deceptive trade practices claim against Yates pursuant to N.C. Gen. Stat. § 75-1.1, which establishes a statutory, and not contractual, basis for the action. *See Ellen*, 172 N.C. App at 322, 615 S.E.2d at 732 (treating an unfair and deceptive trade practices claim as a statutory-based claim); *see also United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 320, 339 S.E.2d 90, 93 (1986) ("[A]n action for unfair and deceptive trade practices is a distinct action separate from fraud, breach of contract, and breach of warranty.").

Jamison's claims against Yates are not premised upon any alleged breaches of duties created by the Jamison and APAC Subcontract, but rather upon alleged breaches of duties established by North Carolina common law or statutes. *See Carter*, 218 N.C. App. 222, 231, 721 S.E.2d 256, 263 ("[A] court should examine whether the plaintiff has asserted claims in the underlying suit that, either literally or obliquely, assert a breach of a duty created by the contract containing the arbitration clause.").

Yates asserts the case of *Carter v. TD Ameritrade Holding Corp.* is indistinguishable from the matter at bar. In *Carter*, the plaintiffs were investors who alleged their IRA investment accounts were transferred without their assent to the defendants via contracts bearing their allegedly forged signatures. *Carter*, 218 N.C. App. at 223-24, 721 S.E.2d at

258-59. This Court held, *inter alia*, the plaintiffs had ratified the contracts by manifesting their approval of the transfer by accepting tax benefits and administrative services provided by the defendants under their investment contracts, and by failing to repudiate their accounts after they became aware of the transfer. *Id.* at 230, 721 S.E.2d at 262.

The contracts contained binding arbitration clauses, which named the defendants' predecessor-in-interest. *Id.* at 224, 721 S.E.2d at 259. This Court presumed, *arguendo*, the plaintiffs had not signed the investment contracts, and held the plaintiffs were estopped from arguing they were not subject to arbitration against the defendants, because the plaintiffs' claims were premised on enforcing duties arising from the contracts. *Id.* at 230-33, 721 S.E.2d at 262-63. The claims brought by the plaintiffs included, *inter alia*:

> [B]reach of contract, alleging defendants breached their respective investment contracts with the plaintiffs; breach of fiduciary duty, alleging [] defendants were plaintiffs' broker-dealers with whom plaintiffs had a special relationship of trust who, by [t]he above-described conduct, breached their fiduciary duties; gross negligence, alleging [] defendants had a duty to properly supervise [plaintiff's investment representative] and that [t]he failure of these defendants to properly supervise [plaintiff's investment representative] constitutes gross negligence.

Id. at 233, 721 S.E.2d at 264 (internal quotation marks omitted).

The plaintiffs in *Carter* were attempting to assert the contracts containing arbitration clauses and naming the defendants' predecessor-in-interest were not binding upon them, because their signatures were allegedly forged, while at the same time asserting the defendants had breached the duties established by those same contracts. *Id.*

Here, unlike *Carter*, Jamison is not attempting to assert claims against Yates that are premised upon any contractual and fiduciary duties created by the contract containing the arbitration clause. The Subcontract between Jamison and APAC does not contemplate, name, or refer to Yates as a party to the agreement or in any other manner. We reject Yates' assertion that *Carter* is indistinguishable from the case at hand or compels a reversal of the trial court's order.

Although the existence of the Subcontract between Jamison and APAC "[p]rovide[s] part of the factual foundation for [Jamison's] complaint," Jamison's claims against Yates are "dependent upon legal duties

imposed by North Carolina statutory or common law rather than contract law." *Ellen*, 172 N.C. at 320, 615 S.E.2d at 732. We conclude that the doctrine of equitable estoppel does not require the Court, under these facts and allegations, to compel Jamison to arbitrate its asserted claims against Yates. *See id.* Yates' arguments are overruled.

V. Conclusion

Jamison's claims against Yates are premised upon duties created by North Carolina common law or statutes, and are not based upon the Subcontract duties or provisions between Jamison and APAC. Equitable estoppel does not apply to these claims to require the trial court to stay the action and compel Jamison to submit its claims against Yates to arbitration. The order denying Yates' motion to compel arbitration and to stay the action is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge DAVIS concur.

RICHARD B. SPOOR, DERIVATIVELY, ON BEHALF OF DEFENDANT JR INTERNATIONAL HOLDINGS, LLC, PLAINTIFF
v.
JOHN M. BARTH, JR., JOHN BARTH (SR.), AND JR INTERNATIONAL HOLDINGS, LLC, DEFENDANT

No. COA17-308

Filed 6 February 2018

1. Civil Procedure—relation-back provision of Rule 41(a)(1)—applies only to claims that were included in voluntarily dismissed complaint

Where plaintiff asserted a single derivative claim against defendant Barth Jr. for breach of fiduciary duty in his 2012 complaint, Rule of Civil Procedure 41(a)(1)'s relation-back provision did not apply to plaintiff's 2015 derivative claims against defendant Barth Sr. or to a 2015 derivative claim for breach of contract against defendant Barth Jr., and the trial court properly dismissed those claims pursuant to Rule 12(b)(6) as barred by the statute of limitations. Plaintiff's 2012 derivative claim, which realleged the allegations of the previous paragraphs of the 2012 complaint, did not incorporate all the individual claims he asserted in that complaint. But the trial

court did err by dismissing plaintiff's 2015 derivative breach of fiduciary duty claim against defendant Barth Jr., because that claim was brought in plaintiff's 2012 complaint and thus Rule 41(a)(1)'s relation-back provision applied to that claim.

2. Civil Procedure—15(a) motion to amend complaint—denied on futility grounds—barred by statute of limitations

The trial court did not abuse its discretion by denying on futility grounds plaintiff's Rule 15(a) motion to amend his 2015 complaint to add derivative claims against defendants for fraud and unfair and deceptive trade practices. Plaintiff's 2012 complaint never alleged those claims, so adding them to his 2015 complaint would be effectively barred by the statute of limitations.

Appeal by plaintiff from order entered 12 October 2016 by Judge Robert T. Sumner in Wake County Superior Court. Heard in the Court of Appeals 4 October 2017.

Barry Nakell, for plaintiff-appellant.

WilsonRatledge, PLLC, by Reginald B. Gillespie, Jr. and N. Hunter Wyche, Jr.; and Foley & Lardner LLP, by Michael J. Small, pro hac vice, for defendant-appellee John M. Barth.

Manning Fulton & Skinner, P.A., by Judson A. Welborn and J. Whitfield Gibson, for defendant-appellee John Barth, Jr.

ELMORE, Judge.

Richard B. Spoor (plaintiff), derivatively on behalf of JR International Holdings, LLC ("JR Holdings"), appeals from an order (1) dismissing under Rule 12(b)(6) his derivative claims against John Barth Sr. ("Sr.") and John Barth Jr. ("Jr.") (defendants) as barred by the statute of limitations and (2) denying his Rule 15(a) motion to amend his complaint to add additional derivative claims as futile. We affirm in part and reverse in part.

I. Background

This is Spoor's second appeal to our Court. While we address only the factual and procedural background relevant to address this appeal, a more thorough background of this case may be found in our prior decision. *See Spoor v. Barth*, ___ N.C. App. ___, ___, 781 S.E.2d 627, 629–32,

disc. rev. and cert. denied, ___ N.C. ___, 787 S.E.2d 38, *and disc. rev. and cert. denied*, ___ N.C. ___, 789 S.E.2d 4 (2016) ("*Spoor I*").

In 2012, Spoor filed his first amended complaint ("FAC") and second amended complaint ("SAC") (collectively, the "2012 Complaint") against Sr. and Jr., asserting several individual claims against both defendants and one derivative claim, on behalf of JR Holdings, against Jr. for breach of fiduciary duty. In response, Sr. moved for summary judgment on grounds that Spoor lacked standing and that his claims were barred by the statutes of limitation; Jr. moved for summary judgment on the ground that Spoor lacked standing. On 19 June 2014, the trial court granted summary judgment in defendants' favor as to Spoor's individual claims on the grounds asserted by defendants. On 17 September 2014, Spoor moved under Rule 41(a)(1) of our Rules of Civil Procedure to voluntarily dismiss his derivative claim. Spoor then appealed the summary judgment order, which we reversed. *See Spoor I*, ___ N.C. App. at ___, 781 S.E.2d at 637. We held that the statute of limitations issue as to Spoor's individual claims against Sr. raised a question of fact for the jury, and that Spoor had standing to sue defendants individually. *Id.* at ___, ___, 781 S.E.2d at 635, 637.

On 10 September 2015, within one year of his Rule 41(a)(1) dismissal, Spoor filed another complaint ("2015 Complaint"), asserting derivative claims against both defendants for breach of contract ("first 2015 derivative claim") and for breach of fiduciary duty ("second 2015 derivative claim"). On 7 October 2015, Spoor amended his 2015 Complaint as a matter of course under Rule 15(a) of our Rules of Civil Procedure "solely to change the style of the case to show that he is bringing the case derivatively only and not individually." On 2 November 2015, Spoor again moved under Rule 15(a) to amend his 2015 Complaint to add derivative claims for fraud and for unfair and deceptive trade practices ("UDTP") against both defendants. Relevant here, defendants moved under Rule 12(b)(6) to dismiss the 2015 Complaint, alleging that Spoor's first and second 2015 derivative claims were barred by the statutes of limitation, and that Rule 41(a)(1)'s one-year extension period did not apply to save those claims.

After these and other motions were consolidated and heard on 8 April 2016, the trial court entered an order on 12 October 2016. In relevant part, that order granted defendants' Rule 12(b)(6) motion on the ground that Spoor's derivative claims were barred by the statutes of limitation, thereby dismissing those claims with prejudice; and denied Spoor's Rule 15(a) motion to add the derivative fraud and UDTP claims in relevant part for futility, effectively ending Spoor's 2015 action. Spoor appeals.

II. Analysis

On appeal, Spoor contends the trial court erred by dismissing with prejudice his first and second 2015 derivative claims under Rule 12(b)(6). He contends the trial court erroneously concluded that his 2012 Complaint neither alleged (1) those derivative claims against defendants, nor (2) the derivative fraud and UDTP claims, on the ground that he effectively incorporated by reference those claims in his 2012 Complaint under Rule 10(c) of our Rules of Civil Procedure. Spoor further contends that the trial court erred by concluding (3) his derivative fraud and UDTP claims would not relate back to the date he filed his 2012 Complaint under Rule 15(c) of our Civil Procedure Rules and, therefore, that the trial court (4) abused its discretion by denying his Rule 15(a) motion to add those claims on the ground that his proposed amendment would be futile.

A. Rule 12(b)(6) Dismissal

[1] Spoor first contends the trial court erred in dismissing on statute-of-limitation grounds his first and second 2015 derivative claims against defendants. He argues the trial court erroneously concluded that he did not assert these claims in his 2012 Complaint, because, Spoor contends, he effectively "incorporat[ed] those claims in his derivative claim" under Rule 10(c). Thus, Spoor argues, Rule 41(a)(1)'s relation-back provision applied to interpose a filing date on those claims of the date his 2012 Complaint was filed and, therefore, his first and second 2015 derivative claims were asserted within the applicable statutory limitation periods. We disagree.

We review *de novo* a Rule 12(b)(6) dismissal order. *State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010). The scope of our review 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." *Id.* (citations and quotation mark omitted). Our "system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Wray v. City of Greensboro*, ___ N.C. ___, ___, 802 S.E.2d 894, 898 (2017) (citation and quotation mark omitted). But "[d]ismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim." *State Emps. Ass'n of N.C.*, 364 N.C. at 210, 695 S.E.2d at 95 (citation omitted). Claims asserted after the statutory limitation period has expired cannot survive. *See, e.g., Marzec v. Nye*, 203 N.C.

App. 88, 93, 690 S.E.2d 537, 541 (2010) ("[A] motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether the statutes of limitation bar [a] plaintiff's claims if the bar is disclosed in the complaint." (citation and quotation marks omitted)).

Rule 8(a)(1) of our Rules of Civil Procedure requires that complaints include "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief. . . ." N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2015). A complaint sufficiently states a claim upon which relief can be granted when

> it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and by using the rules provided for obtaining pretrial discovery to get any additional information he may need to prepare for trial.

Wray, ___ N.C. at ___, 802 S.E.2d at 898 (citation and quotation marks omitted).

Here, in his 2012 Complaint, Spoor advanced in relevant part the following individual claims: (1) a breach of contract as a third-party beneficiary claim against Sr., (2) a breach of fiduciary duty claim against Jr., (3) a fraud claim against both defendants, and (4) a UDTP claim against both defendants. After listing those claims, Spoor also advanced a single "DERIVATIVE CLAIM" in which he "reallege[d] the allegations of" every preceding paragraph of his 2012 Complaint, but specifically advanced only a derivative breach of fiduciary duty claim against Jr ("2012 derivative claim"). The 2012 derivative claim alleged in relevant part:

> 143. Plaintiff realleges the allegations of Paragraphs 1 through 142.
>
> 144. Barth, Jr. owes a fiduciary duty to JR International Holdings, LLC, and to Plaintiff.
>
> 145. Barth, Jr. has breached his fiduciary duty by failing to perform on his commitment to invest or contribute the sum of $8,000,000 to JR International Holdings, LLC.
>
> 146. This breach by Barth, Jr. was knowing, willful, wanton and grossly negligent.

> 147. Barth, Jr's breach has damaged JR International Holdings, LLC and Plaintiff in an amount in excess of $8,000,000.
>
> 148. Plaintiff has made several demands in and after October 2011 on Barth, Jr. that he fulfill his obligation to invest or contribute $8,000,000 into JR International Holdings, LLC, but Barth, Jr. has continued to fail and refuse to do so. On February 11, 2009, Plaintiff, through counsel, wrote to Barth, Jr., advising Barth, Jr. of his failure to make his contractual contribution of funds to JR International Holdings, LLC, and, demanded that Barth, Jr. remedy the situation by making his agreed payment of $8,000,000 to JR International Holdings, LLC. On October 5, 2011, Plaintiff filed his original Complaint in this action against Barth, Jr., in which he complained that Barth, Jr. had failed to fulfill his obligation to invest or contribute $8,000,000 into JR International Holdings, LLC, and demanded that Barth, Jr. remedy that situation by making his agreed payment of $8,000,000 to JR International Holdings, LLC.

In his 2015 Complaint, Spoor, on behalf of JR Holdings, advanced derivative claims against both defendants for breach of contract, the first 2015 derivative claim, and for breach of fiduciary duty, the second 2015 derivative claim.

Spoor argues on appeal that his 2012 derivative claim effectively incorporated by reference all of the individual claims he asserted in his 2012 Complaint under Rule 10(c) and, therefore, his first and second 2015 derivative claims were properly alleged in his 2012 Complaint. We disagree.

Rule 10(c) of our Rules of Civil Procedure provides: "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading. . . ." N.C. Gen. Stat. § 1A-1, Rule 10(c) (2015). However, even when construing a complaint liberally, Rule 10(c) does not permit courts to "engage in judicial amending or rewriting of pleadings." *FCX, Inc. v. Bailey*, 14 N.C. App. 149, 152, 187 S.E.2d 381, 382–83 (1972) (holding that a plaintiff did not effectively under Rule 10(c) incorporate by reference a breach of contract claim against one party, when it alleged a breach of contract claim against another party).

Even under our notice-pleading standard, we conclude that Spoor's 2012 derivative claim was alleged so specifically that it failed to put Sr. on notice of any derivative claims against him, or to put Jr. on notice of

a derivative breach of contract claim against him. Spoor was entitled under Rule 10(c) to incorporate factual allegations by reference into his 2012 derivative claim. But even under a liberal construction, to interpret the 2012 derivative claim as effectively incorporating by reference every other individual claim asserted in the 2012 Complaint would amount to impermissible "judicial amending or rewriting of pleadings." *FCX*, 14 N.C. App. at 152, 187 S.E.2d at 382–83.

Rule 41(a)(1) of our Rules of Civil Procedure provides that when a party voluntarily dismisses a claim without prejudice, "a new action based on the same claim may be commenced within one year after such dismissal . . . ." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2015). But Rule 41(a)(1)'s relation-back provision applies only to claims in a subsequent complaint that were included in the voluntarily dismissed complaint. *See Williams v. Lynch*, 225 N.C. App. 522, 523, 741 S.E.2d 373, 374 (2013) ("Although [the plaintiff] contends the causes of action in her second complaint were timely under Rule 41 because they arose out of the same facts and transactions as her first complaint, binding precedent requires that we look only at whether the claims in the second complaint were included in the first complaint.").

Because the only derivative claim Spoor advanced in his 2012 Complaint was one for breach of fiduciary duty against Jr., the trial court properly concluded that Rule 41(a)(1)'s relation-back provision did not apply to the first or second 2015 derivative claims against Sr., or to the first 2015 derivative claim against Jr. Since those claims were first brought in the 2015 Complaint, after the applicable limitation periods had expired, the trial court properly dismissed those claims under Rule 12(b)(6) as barred by the statutes of limitation. However, because Spoor brought a derivative breach of fiduciary duty claim against Jr. in his 2012 Complaint, Rule 41(a)(1)'s relation-back provision applied to the second 2015 derivative claim against Jr., interposing a filing date of 14 February 2012, when Spoor filed his FAC.

Typically, "[b]reach of fiduciary duty claims accrue upon the date when the breach is discovered and are subject to a three year statute of limitations." *Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 501, 764 S.E.2d 203, 219 (2014) (citation omitted). However, "[t]he provisions of a written contract may be modified or waived . . . by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived." *Whitehurst v. FCX Fruit & Vegetable Serv., Inc.*, 224 N.C. 628, 636, 32 S.E.2d 34, 39 (1944) (citations omitted).

In *Spoor I*, we specifically addressed whether Spoor's individual claims against Sr. were subject to a summary judgment dismissal on statute-of-limitation grounds. ___ N.C. App. at ___, 781 S.E.2d at 633. We held that Spoor's 2012 Complaint raised a factual question as to when those claims actually accrued due to Sr. and Jr.'s repeated reassurances that they would deliver on their promised $8,000,000 contribution. *Id.* at ___, 781 S.E.2d at 634–35. Reviewing the allegations of Spoor's 2012 Complaint, we explained:

> The complaint also alleged that on 17 August 2009, Junior submitted to AmerLink's bankruptcy attorney an e-mail purporting to be from Senior which committed to providing "money necessary to purchase the AmerLink loan from NCB. I understand that this may be $8.2M. This loan will be made upon plan confirmation." The following day on 18 August 2009, Senior notified AmerLink's bankruptcy attorney that he was not the source of the 17 August 2009 e-mail and that "he has no intention to provide any financing in connection with the AmerLink Chapter 11."

Id. at ___, 781 S.E.2d at 631. Thus, we reasoned:

> A jury could determine that plaintiff's causes of action did not accrue until 18 August 2009 when Senior notified AmerLink's bankruptcy attorneys that Senior had no intention of financing AmerLink's Chapter 11 bankruptcy, contrary to the assurances made by Junior. Therefore, plaintiff's first amended complaint filed 14 February 2012 that included Senior as a defendant would have been commenced within the three-year statute of limitations for the breach of contract and fraud claims . . . .

Id. at ___, 781 S.E.2d at 635. Accordingly, we reversed the trial court's summary judgment ruling on the statute-of-limitation grounds. *Id.*

Under the law-of-the-case doctrine,

> when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.

Hayes v. City of Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681–82 (1956) (citations omitted). While this case presents a question as to when Spoor's derivative breach of fiduciary duty claim against Jr. accrued for purposes of a Rule 12(b)(6) dismissal, the same facts are present, and we see no analytical difference between this question and the question we decided in *Spoor I* under the more stringent summary judgment review standard. Spoor's 2012 Complaint does not contain allegations establishing that the statute of limitations has run as to the derivative breach of fiduciary duty claim based on Jr.'s failure to perform on his commitment to invest $8,000,000 to JR Holdings. Liberally construing the allegations in Spoor's 2012 Complaint similarly raises a factual question as to when a derivative breach of fiduciary duty claim against Jr. actually accrued. Therefore, Spoor's second 2015 derivative claim against Jr. was improperly dismissed under Rule 12(b)(6) as barred by the statute of limitations, and we reverse the trial court's ruling on this claim.

In summary, we affirm the trial court's Rule 12(b)(6) ruling to the extent that it dismissed Spoor's first 2015 derivative claim against Sr. and Jr., and his second 2015 derivative claim against Sr., as these claims were barred by the statute of limitations. But we reverse the trial court's ruling to the extent that it dismissed Spoor's second 2015 derivative claim against Jr. on statute-of-limitation grounds.

B. Rule 15(a) Denial

[2] Spoor next contends that the trial court abused its discretion by denying on futility grounds his Rule 15(a) motion to amend his 2015 Complaint to add derivative claims against defendants for fraud and UDTP. He contends the trial court improperly concluded that he failed to allege these claims in his 2012 Complaint for the same reason advanced above—that is, that Spoor effectively incorporated by reference these individual claims into his derivative claim under Rule 10(c). Therefore, Spoor argues, these claims should have related back to the filing of his 2012 Complaint under Rule 15(c) of our Rules of Civil Procedure. We disagree.

Rule 15(a) of our Rules of Civil Procedure provides that where, as here, a party has previously amended his pleading once as a matter of course, "a party may amend his pleading only by leave of court . . . and leave shall be freely given when justice so requires. . . ." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2015). But justice does not so require when an amendment would be futile. *See*, *e.g.*, *Smith v. McRary*, 306 N.C. 664, 671, 295 S.E.2d 444, 448 (1982) ("The facts [the plaintiff] attempts to add[ ] . . . are insufficient to state a second claim for relief; therefore

[the] plaintiff's proposed amendment could not withstand a motion to dismiss for failure to state a claim. Because to grant his motion to amend would be a futile gesture, the denial of his motion was not error." (citations omitted)); *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 347–48, 451 S.E.2d 358, 364 (1994) ("Reasons which might justify . . . a [Rule 15(a)] denial include the futility of a proposed amendment. Where the facts alleged in a proposed amendment would not state a claim for relief, it is not error to deny the motion to amend." (citations omitted)). "A motion to amend under Rule 15(a) is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion." *Smith*, 306 N.C. at 671, 295 S.E.2d at 448 (citations and internal quotation marks omitted).

Rule 15(c) of our Rules of Civil Procedure governs the relation back of Rule 15(a) amendments and provides:

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

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2015).

Spoor contends that his 2012 Complaint gave defendants sufficient notice of the derivative fraud and UDTP claims he proposed adding to his 2015 Complaint and, therefore, under Rule 15(c), those claims should relate back to the 2012 Complaint and be interposed with the FAC's 14 February 2012 filing date. We disagree.

Having concluded above that Spoor's 2012 Complaint only advanced a single derivative claim for breach of fiduciary duty against Jr., and that his individual claims were not incorporated by reference into his derivative claim under Rule 10(c), Rule 15(c)'s relation-back provision does not apply to these claims. Since adding these claims to his 2015 Complaint would interpose a filing date after the applicable limitation periods had expired, the trial court properly denied Spoor's Rule 15(a) motion to amend on futility grounds. In light of this conclusion, we decline to address Spoor's remaining Rule 15(a) arguments. *Cf. Yarbrough*, 117 N.C. App. at 347, 451 S.E.2d at 364 ("[W]e cannot determine the trial court's reason for denying the [Rule 15(a)] motion. This, however, will not preclude our examining any apparent reasons for the denial." (citation omitted)); *see also Dobias v. White*, 240 N.C. 680, 688, 83 S.E.2d 785, 790 (1954) ("[T]here is sound authority to the effect that

where the court below has reached the correct result, the judgment may be affirmed even though the theory on which the result is bottomed is erroneous." (citations omitted)).

III. Conclusion

Because Spoor's 2012 Complaint only advanced a single derivative claim for breach of fiduciary duty against Jr., we affirm the trial court's Rule 12(b)(6) dismissal of Spoor's first 2015 derivative claim against both defendants, and his second 2015 derivative claim against Sr., as barred by the statutes of limitation. However, because Spoor's 2012 Complaint asserted a derivative breach of fiduciary duty claim against Jr., Rule 41(a)(1)'s one-year saving provision applied to interpose a 14 February 2012 filing date on the second 2015 derivative claim against Jr. The allegations of Spoor's 2012 Complaint do not definitively establish that this claim was barred by the statute of limitations. Rather, as in *Spoor I*, liberally construing Spoor's 2012 Complaint raises a factual question as to when this claim accrued and, thus, whether it was timely asserted. Therefore, we reverse the trial court's dismissal of the second 2015 derivative claim against Jr. on statute-of-limitation grounds. Additionally, because Spoor's 2012 Complaint never alleged derivative fraud and UDTP claims against defendants, adding those claims to his 2015 Complaint would be effectively barred by the statutes of limitation. Accordingly, the trial court did not abuse its discretion in denying Spoor's Rule 15(a) motion for futility.

AFFIRMED IN PART; REVERSED IN PART.

Judges DIETZ and INMAN concur.

STATE OF NORTH CAROLINA
v.
STEPHANIE BRIDGES, DEFENDANT

No. COA17-579

Filed 6 February 2018

Drugs—possession of methamphetamine—identity of substance—defendant's out-of-court admission

In defendant's trial for possession of methamphetamine, the State satisfied its burden of proof for the element that defendant in fact possessed a controlled substance, even though it offered no empirical evidence of the substance's chemical composition. A police officer testified at trial, without objection, that defendant admitted to him that "she had a baggy of meth hidden in her bra," and the State admitted the crystal-like substance found in defendant's bra as an exhibit.

Appeal by Defendant from judgment entered 12 October 2016 by Judge Robert G. Horne in Swain County Superior Court. Heard in the Court of Appeals 28 November 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 the Defendant.

DILLON, Judge.

Stephanie Bridges ("Defendant") appeals the trial court's judgment entered upon a jury verdict finding her guilty of multiple drug-related offenses. Defendant challenges her conviction for possession of methamphetamine, arguing that the State failed to present evidence of the chemical nature of the substance found on her person. Because Defendant admitted the contraband nature of the substance to the arresting officer, we hold there was no error.

I. Background

The evidence at trial tended to show the following:

Police investigated a parked car and discovered a "white crystalline substance" in the passenger compartment. Police then arrested Defendant, who had been sitting in the driver's seat of the car, and

transported her to a detention center. On the way, Defendant admitted to a detective that she had "a baggy of meth hidden in her bra." Once Defendant arrived at the center, an officer found a bag of a "crystal-like" substance in Defendant's bra during a search.

One of the arresting officers testified at trial, without objection, to Defendant's statement regarding the methamphetamine in her bra: "[Defendant] told me that she had a baggy of meth hidden in her bra." The State admitted the crystal-like substance found in Defendant's bra as an exhibit. However, the State did not present any testimony empirically describing the chemical composition of the substance.

Defendant moved to dismiss all charges based on the insufficiency of the State's evidence, which was denied by the trial court. The jury ultimately convicted her of possession of methamphetamine. Defendant appeals.

II. Analysis

Defendant contends that the trial court erred in denying her motions to dismiss the charge of possession of methamphetamine. Specifically, Defendant argues that the State failed to satisfy its burden of proof by failing to offer any evidence establishing the chemical identity of the substance. Although the State offered no empirical evidence of the contraband nature of the substance, we must disagree with Defendant's contentions based on controlling jurisprudence from our Supreme Court.

"To survive a motion to dismiss for insufficient evidence, the State must present substantial evidence of all the material elements of the offense charged and that the defendant was the perpetrator of the offense." *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015).

Crimes for possession of a controlled substance, such as methamphetamine[1], require proof that (1) the defendant, in fact, possessed a *controlled substance*; and (2) the defendant *knew* the substance she possessed was a controlled substance. *See State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015). Regarding the proof sufficient to establish the presence of the first element, our Supreme Court has held that "some form of scientifically valid chemical analysis is required" unless "the State establishes before the trial court that another method of identification is sufficient to establish *the identity* of the controlled substance beyond a reasonable doubt[.]" *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010) (emphasis added).

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1. Methamphetamine is a schedule II controlled substance. *See* N.C. Gen. Stat. § 90-90(3)(c) (2015).

Here, Defendant argues that her alleged admission to the arresting officer may be evidence that she *believed* she was possessing methamphetamine, thus satisfying the second element, but that the State did not present sufficient evidence to prove the first element, that the substance Defendant believed she possessed was, in fact, methamphetamine. The only evidence offered by the State to prove that the substance was, in fact, methamphetamine was (1) the testimony from the arresting officer that Defendant stated that she had "meth" in her bra and (2) an exhibit consisting of the actual "crystal-like" substance retrieved from the bra. Defendant contends that, based on our Supreme Court's 2010 holding in *Ward*, this evidence was not sufficient to prove the first element, that the substance Defendant possessed was *in fact* methamphetamine.

In 2011, the year following *Ward*, our Supreme Court established an exception to the evidentiary rule laid down in its 2010 *Ward* decision. Specifically, the Court held that "when *a defense witness's* testimony characterizes a putative controlled substance as a controlled substance, the defendant cannot on appeal escape the consequences of the testimony in arguing that his motion to dismiss should have been allowed." *State v. Nabors*, 365 N.C. 306, 313, 718 S.E.2d 623, 627 (2011) (emphasis added); *see also State v. Williams*, 367 N.C. 64, 69, 744 S.E.2d 125, 128 (2013) (holding that the defendant's trial testimony which admitted that the substance was cocaine was sufficient to prove the identity of the substance). Defendant argues that *Nabors* does not apply in the present case because Defendant's identification of the substance as methamphetamine was admitted through the testimony elicited by the State from a witness for the State.

We, however, are persuaded by our Supreme Court's opinion in *State v. Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156 (2013), decided two years after *Nabors*, in which that Court concluded that the arresting officer's testimony offered without objection during the State's evidence concerning the defendant's out-of-court statement that (s)he was in possession of an illegal substance was sufficient to meet the State's burden of proof with respect to the first element of the crime of possession. Specifically, the *Ortiz-Zape* case involved a defendant who was arrested for possessing cocaine shortly after he purchased a white powdery substance. At trial, the State offered (1) evidence of a chemical lab analysis which identified the substance as cocaine; (2) the testimony of the arresting officer, who stated on direct examination, without objection, that the defendant had admitted to him that the substance was cocaine, and (3) the testimony of this same arresting officer, both on direct and cross-examination, that the substance appeared to him to be cocaine. *Id.* at 14, 743 S.E.2d at 164-65.

On appeal to our Supreme Court, the defendant argued that the evidence of the chemical lab analysis was inadmissible because the testifying expert was not the same person who had performed the chemical lab analysis, in violation of the Confrontation Clause. *Id.* at 2, 743 S.E.2d at 157.

In a 4-2 decision, our Supreme Court upheld the defendant's conviction. Though the Court was divided, all of the justices agreed that the testimony of the arresting officer during the State's direct examination concerning the defendant's out-of-court admission was sufficient to meet the State's burden as to the first element of possession.[2]

For instance, the majority in *Ortiz-Zape* – in an opinion written by Justice (now Chief Justice) Martin – held that the expert testimony regarding the chemical lab analysis was properly admitted. *Id.* at 13, 743 S.E.2d at 164. The majority, though, further stated that even if the admission of the expert testimony concerning the chemical lab report was error, the error was harmless beyond a reasonable doubt since other evidence was admitted concerning the identity of the drug in two different forms: (1) the arresting officer's testimony, which was not objected to, regarding defendant's out-of-court admission, and (2) the officer's own opinion concerning the drug's identity *during the defendant's cross-examination*:

> Even assuming admission of [the] expert's opinion violated defendant's rights under the Confrontation Clause, the alleged error was harmless, providing a separate, adequate, and independent state law ground for the judgment of the Court. . . .
>
> The arresting officer testified that when he found the plastic baggy containing a white substance, he picked it up and asked defendant, "What's this?" The officer further testified that defendant acknowledged it was his cocaine [that he had just purchased]. . . . Defense counsel elicited a statement from the arresting officer that the substance

2. Neither the majority nor the dissent state whether the defendant's out-of-court statement to the arresting officer was *competent* to prove the identity of the substance. However, like in the present case, the officer's testimony concerning the defendant's out-of-court statement came in without any objection from the defendant. *See* Transcript of Trial at 223, *Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156. And in determining the *sufficiency* of the State's evidence to get to the jury on an issue, our Supreme Court has instructed that a trial court "must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State[.]" *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

> "appears to be powder cocaine." *Under these facts, in which defendant told a law enforcement officer that the substance was cocaine and defense counsel elicited testimony that the substance appeared to be cocaine, any possible error in allowing the expert opinion was harmless.*

Id. at 13-14, 743 S.E.2d at 164-65 (emphasis added).[3] In sum, the majority suggests that (1) a defendant's out-of-court admission offered through the testimony of a State's witness (at least where there is no objection lodged) is sufficient to meet the State's burden, (2) an officer's own opinion concerning the substance's identity *elicited by the defendant* on cross-examination is sufficient to meet the State's burden, and (3) both statements, taken together, render any error in admitting the expert testimony concerning the chemical lab report harmless beyond a reasonable doubt.

Likewise, the dissenting opinion in *Ortiz-Zape* – authored by Justice Hudson – suggests a view that the arresting officer's testimony concerning the defendant's out-of-court admission was sufficient to prove the first element, at least where the defense does not object to such testimony. These justices dissented, though, because they believed that the admission of the chemical lab report testimony was error *and* that the officer's testimony, though sufficient to get to the jury, was not so overwhelming to deem the admission of the chemical lab report harmless beyond a reasonable doubt:

> [Without the testimony of the expert witness concerning the chemical lab report,] all that remains is an uncorroborated assertion by an officer on the witness stand that defendant agreed the substance was cocaine. Yet defendant also testified and denied that he had said the substance was cocaine. Here the credibility of all those statements must be weighed by the jury, by contrast to the sufficiency analysis in *Nabors* [where the only issue was whether the evidence was sufficient to go to the jury]. The officer's testimony cannot be considered overwhelming under the constitutional harmless error standard we apply here.

Id. at 27-28, 743 S.E.2d at 172-73.

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3. The Supreme Court so held even though the defendant in that case testified at trial that he never admitted to the arresting officer that the substance was cocaine. *Ortiz-Zape*, 367 N.C. at 28, 743 S.E.2d at 173.

One could argue that the majority's view in *Ortiz-Zape* is mere *dicta*, and is therefore not binding, since the majority expressly held that the chemical lab report testimony was admissible, thus satisfying the standard set forth in *Ward*. However, it could also be argued that the Supreme Court was expressing alternate bases for its holding, one of which being its view that the officer's testimony, alone, also met the State's burden. In either case, we feel it appropriate, as the Court of Appeals, to follow the unanimous sentiment expressed by all the justices in *Ortiz-Zape* just five years ago on the same issue which confronts us today.

We further conclude that Defendant's argument that her admission to the officer that she possessed "meth" was insufficient based on the doctrine of *corpus delicti* lacks merit. The doctrine of *corpus delicti* as it currently stands in North Carolina states that, before considering whether the State has presented sufficient evidence to survive a motion to dismiss, we must ensure that the State has presented evidence to show that the crime in question actually occurred. *State v. Cox*, 367 N.C. 147, 152, 749 S.E.2d 271, 275 (2013). To that effect, "an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime." *Id.* 151, 749 S.E. 2d at 275.

To satisfy the *corpus delicti* rule in North Carolina, an extrajudicial confession must be supported by "substantial independent evidence tending to furnish strong corroboration of essential facts contained in defendant's confession so as to establish trustworthiness of the confession." *State v. Trexler*, 316 N.C. 528, 531-32, 342 S.E.2d 878, 880-81 (1986). However, "[t]he [*corpus delicti*] rule does not require the State to logically exclude every possibility that the defendant did not commit the crime." *Cox*, 367 N.C. at 152, 749 S.E.2d at 275. The State need only present independent evidence concerning the "body of the crime," such as the body in a homicide case, or the controlled substances themselves in a possession case.

Here, we conclude that the *corpus delicti* rule does not apply because Defendant's out-of-court statement that she possessed "meth" in her bra is corroborated by the physical object of the crime. The police found a crystal-like substance in Defendant's bra and offered the substance as an exhibit at trial. Additionally, police investigation revealed that the individual from whom Defendant admitted to purchasing the substances had been under surveillance for drug-related activity.

We note what seems to be a subtext of Defendant's argument is that the two elements of possession of a controlled substance are being

conflated by our holding here and prior holdings of our courts, such as in *Nabors*, *Williams* and *Ortiz-Zape*, all cited above. That is, a defendant's statement (whether in court or out of court) as to the identity of a substance in her possession only tends to prove the second element of the crime of possession, that the defendant *believed* the substance she possessed was a controlled substance; it does not prove that the substance possessed was, in fact, a particular controlled substance. And, so the argument goes, the State should not be able to rely on a defendant's statement to prove the first element, even where its admission was not objected to or is offered by the defendant, since such evidence would generally be admissible anyway to prove the second element, and, therefore, any objection to its admission would properly be overruled.

However, the counterargument is that our Supreme Court's jurisprudence is consistent in instructing that a defendant's admission received into evidence relieves the State of any burden to otherwise provide scientifically reliable evidence because such admission by the defendant or a defense witness is "sufficient to establish *the identity* of the controlled substance beyond a reasonable doubt[.]" *State v. Ward*, 364 N.C. at 147, 694 S.E.2d at747 (emphasis added).

In any case, we must follow our Supreme Court's jurisprudence. In the present case, evidence was admitted that Defendant stated her belief that she possessed "meth" in her bra and that a "meth"-like substance was actually found in her bra and was admitted as an exhibit at trial. Therefore, we conclude that the trial court did not err by allowing the matter to go to the jury.

NO ERROR.

Judges BRYANT and DIETZ concur.

STATE v. CAMPBELL

[257 N.C. App. 739 (2018)]

STATE OF NORTH CAROLINA
v.
THOMAS CRAIG CAMPBELL, DEFENDANT

No. COA13-1404-3

Filed 6 February 2018

1. Appeal and Error—Rule of Appellate Procedure 2—discretionary review—conviction unsupported by evidence

On remand from the Supreme Court, the Court of Appeals exercised its discretionary authority under Rule of Appellate Procedure 2 to consider defendant's argument concerning the sufficiency of the evidence to support his larceny conviction. The Court of Appeals explained a number of reasons for allowing discretionary review: The Supreme Court had previously suggested that fatal variances of the type in this case are sufficiently serious to justify review under Rule 2; allowing a conviction unsupported by evidence to stand would result in manifest injustice; and the exercise of discretionary authority under Rule 2 should be uniform and consistent from case to case.

2. Larceny—indictment alleged two owners of stolen property—evidence of only one owner—fatal variance

On remand from the Supreme Court, the Court of Appeals adopted the analysis from its previous opinion on the issue of whether the trial court erred by failing to dismiss defendant's larceny charge due to a fatal variance between the indictment and the evidence on the ownership of the stolen property. Because the larceny indictment alleged that the stolen property belonged to "Andy Stevens and Manna Baptist Church" and the evidence showed that the stolen property belonged only to the church, the Court of Appeals vacated defendant's larceny conviction.

3. Larceny—insufficient evidence—opportunity to take property

Having vacated defendant's larceny conviction, the Court of Appeals, in the interest of judicial economy, considered defendant's remaining arguments and concluded in the alternative that the evidence was insufficient to support the larceny conviction. At most, the State's evidence showed that he was present in the church and had the opportunity to take the stolen property.

4. Appeal and Error—argument not considered—conviction vacated based on other argument

Having vacated defendant's larceny conviction based on a fatal variance between the evidence and the indictment, the Court of Appeals did not need to address defendant's argument regarding a disjunctive jury instruction.

Judge BERGER dissenting.

Upon remand from the Supreme Court of North Carolina for further review of an appeal by defendant from judgment entered on or about 12 June 2013 by Judge Linwood O. Foust in Superior Court, Cleveland County. Originally heard in the Court of Appeals on 7 May 2014, with opinion filed 1 July 2014. An opinion reversing the first decision of the Court of Appeals and remanding for consideration of issues not previously addressed by this Court was filed by the Supreme Court of North Carolina on 11 June 2015. On remand, a second Court of Appeals opinion was filed on 20 October 2015. On discretionary review, the Supreme Court of North Carolina filed an opinion on 9 June 2017 reversing and remanding the matter to the Court of Appeals once again so the Court could independently and expressly determine whether to exercise its discretion under Rule 2 to suspend the appellate rules and consider the merits of defendant's claim.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison A. Angell and Assistant Attorney General Teresa M. Postell, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jason Christopher Yoder, Assistant Appellate Defender Barbara S. Blackmon, and Assistant Appellate Defender Hannah Hall Love, for defendant-appellant.

STROUD, Judge.

This is now the third time this appeal has been considered by this Court. To briefly recap, defendant Thomas Craig Campbell ("defendant") appealed from a judgment entered on a jury verdict finding him guilty of breaking or entering a place of religious worship with intent to commit a larceny therein and larceny after breaking or entering. Defendant raised six issues in his appeal, arguing that (1) the indictment for larceny was fatally defective because it failed to allege that Manna Baptist Church

was an entity capable of owning property; (2) insufficient evidence supports his conviction for breaking or entering a place of religious worship with intent to commit a larceny therein; (3) he was deprived of effective assistance of counsel, because his counsel failed to object to the admission of evidence that defendant had committed a separate breaking or entering offense; (4) the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the property; (5) insufficient evidence supports his larceny conviction; and (6) the trial court violated his constitutional right to a unanimous jury verdict regarding the larceny charge.

Issues (1) and (2) were addressed in our first opinion and the Supreme Court's reversal of that decision on discretionary review. *State v. Campbell*, 234 N.C. App. 551, 759 S.E.2d 380 (2014) ("*Campbell COA I*"), *rev'd and remanded*, 368 N.C. 83, 772 S.E.2d 440 (2015) ("*Campbell SC I*"). On remand, in our second unanimous opinion, this Court disagreed with defendant on Issue (3) but agreed with defendant on Issue (4). *State v. Campbell*, __ N.C. App. __, 777 S.E.2d 525 (2015) ("*Campbell COA II*"), *review allowed in part*, 368 N.C. 904, 794 S.E.2d 800 (2016) ("*Campbell SC review of COA II allowed*"), *and rev'd and remanded*, __ N.C. __, 799 S.E.2d 600 (2017) ("*Campbell SC II*"). On discretionary review, the Supreme Court once again remanded the matter to this Court, not on any substantive grounds but rather "for an independent assessment of whether that court need and should invoke its discretion under Rule 2 of the North Carolina Rules of Appellate Procedure in order to reach the merits of one of defendant's substantive issues on appeal." *Campbell SC II*, __ N.C. at __, 799 S.E.2d at 601.

In this opinion, as the Supreme Court directed, we reiterate why we have once again chosen to invoke our discretion under Rule 2 to address defendant's arguments regarding Issue (4). In invoking our discretion under Rule 2 to reach the merits of defendant's arguments regarding Issue (4), we hold that the trial court erred in failing to dismiss the larceny charge due to a fatal variance between the indictment and evidence regarding ownership of the missing property. We also address Issues (5) and (6) in the interest of judicial economy.

I. Background

i. Factual Background

Because the Supreme Court remanded the matter to this Court on procedural grounds and no additional factual background is needed, we directly quote the underlying facts as stated in our prior opinions:

On 8 October 2012, defendant was indicted for breaking or entering a place of religious worship and larceny after breaking or entering. The larceny indictment alleged that on 15 August 2012 defendant "willfully and feloniously did steal, take, and carry away a music receiver, microphones, and sounds [sic] system wires, the personal property of Andy [Stevens] and Manna Baptist Church, pursuant to a breaking or entering in violation of N.C.G.S. 14-54.1(a)." Defendant pled not guilty and proceeded to jury trial.

At trial, the State's evidence tended to show that Pastor Andy [Stevens] of Manna Baptist Church, located on Burke Road in Shelby, North Carolina, discovered after Sunday services on 19 August 2012 that a receiver, several microphones, and audio cords were missing. The cords were usually located at the front of the church, by the sound system, or in the baptistery changing area. It appeared that the sound system had been opened up and items inside had been moved around. Pastor [Stevens] found a wallet in the baptistery changing area that contained a driver's license belonging to defendant.

Pastor [Stevens] testified that when the church secretary arrived on Thursday morning earlier that week, she had noticed that the door was unlocked. She assumed that it had been left unlocked after Wednesday night services, which had ended around 9 p.m. Although the front door is normally locked at night, on cross-examination, Pastor [Stevens] admitted that the church door had been left unlocked overnight before. Pastor [Stevens] said that the secretary did not notice anything amiss on Thursday morning.

After Pastor [Stevens] realized that the audio equipment was missing he called the Cleveland County Sheriff's Office. Deputy Jordan Bowen responded to the scene. The deputy examined the premises but found no signs of forced entry. He recovered defendant's wallet from the pastor.

Investigator Jessica Woosley went to speak with defendant at the Cleveland County Detention Center, where he was being held on an unrelated breaking or entering charge. When Investigator Woosley introduced herself, defendant said, "[T]his can't possibly be good. What have

I done now that I don't remember?" Investigator Woosley read defendant his *Miranda* rights and defendant invoked his right to counsel. Investigator Woosley tried to end the interview, but defendant continued talking.

Defendant admitted that he had been to Manna Baptist Church on the night in question, but stated that he could not remember what he had done there. He explained that he had mental issues and blacked out at times. Defendant claimed to be a religious man who had been "on a spiritual journey." He said that he remembered the door to the church being open, but that he did not remember doing anything wrong.

After speaking with defendant, Investigator Woosley searched through a pawn shop database for any transactions involving items matching those missing from the church but did not find anything. The missing items were never recovered.

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court denied the motion. Defendant then elected to present evidence and testify on his own behalf. Defendant testified that he was a [fifty-one-year-old] man with a high school education and one semester of college. He said that on 15 August 2012, he had been asked to leave the home he was living in, so he packed his possessions in a duffel bag and left. He started walking toward a friend's house but dropped the bag in a ditch because it was too heavy to carry long-distance.

Around midnight, defendant arrived at his friend's house, but his friend's girlfriend asked him to leave, so he did. Defendant continued walking down the road until he came upon the church. He noticed that the door was cracked slightly and a "sliver of light" was emanating from within. Defendant explained that after all his walking, he was thirsty and tired, so he went into the church looking for water and sanctuary. He said that while he was inside, he got some water, prayed, and slept. He claimed that he did not intend to take anything and did not take anything when he left around daybreak.

After leaving the church, defendant began walking down the road again. He soon began having chest pains

and called 911. Defendant explained that he was on a variety of medications at the time, including powerful psychotropic medication. An ambulance arrived and took him to Cleveland Memorial Hospital.

Calvin Cobb, the Emergency Medical Technician (EMT) who responded to defendant's call, also testified on defendant's behalf. Mr. Cobb said that they received a dispatch call around 6:30 a.m. When they arrived at the intersection of Burke Road and River Hill Road, they saw defendant near an open field, sitting on the back of a fire truck that had been first to respond. Defendant told Mr. Cobb that he had been wandering all night. Mr. Cobb noticed that defendant looked disheveled and worn out, and that defendant had worn through the soles of his shoes. Mr. Cobb did not see defendant carrying anything and did not find anything in his pockets.

After defendant rested his case, the State called another officer in rebuttal. The State wanted to offer his testimony regarding defendant's prior breaking or entering arrest. The trial court asked the State to explain the relevance of the prior incident. The State argued that it contradicted part of defendant's testimony regarding what happened before he got to the church, but did not elaborate on how it contradicted defendant's testimony and did not otherwise explain its relevance. The trial court excluded the rebuttal testimony under [North Carolina Rule of Evidence 403]. At the close of all the evidence, defendant renewed his motion to dismiss all charges, which the trial court again denied.

The jury found defendant guilty of both charges. The trial court consolidated the charges for judgment and sentenced defendant to a split sentence of 13-25 months [of] imprisonment, suspended for 24 months of supervised probation, and an active term of 140 days in jail. Defendant gave timely written notice of appeal.

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 527-28 (quoting *Campbell COA I*, 234 N.C. App. at 552-55, 759 S.E.2d at 382-83 (first alteration in original)).

ii. Procedural Background on Remand

We first note that this Court has not requested new briefs since this case was originally heard on 7 May 2014. New briefs were filed both times this case was considered by our Supreme Court. Defendant and the State jointly filed a motion with this Court to consider the Supreme Court briefs on remand or to allow supplemental briefing. Because the Supreme Court briefs and prior briefs with this Court sufficiently address the issues at hand, we have granted the motion in part, to consider the Supreme Court briefs, and denied in part as to supplemental briefing.

As noted above, this is the third time this appeal has been considered by this Court. After this Court's opinion in the first appeal, *Campbell COA I*, the Supreme Court on discretionary review overruled a line of cases from this Court which in the first opinion we had been required to follow:

> [We] hold that alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a "company" or "incorporated," signifies an entity capable of owning property, and the line of cases from the Court of Appeals that has held otherwise is overruled. *See*, *e.g.*, *State v. Patterson*, 194 N.C. App. 608, 614, 671 S.E.2d 357, 361 (holding that indictment naming "First Baptist Church of Robbinsville" was fatally defective), *disc. rev. denied*, 363 N.C. 587, 683 S.E.2d 383 (2009); *State v. Cathey*, 162 N.C. App. 350, 353-54, 590 S.E.2d 408, 410-11 (2004) (holding that indictment naming "Faith Temple Church of God" was fatally defective). Accordingly, the larceny indictment here is valid on its face even though it does not specify that Manna Baptist Church is an entity capable of owning property, and the Court of Appeals erred in vacating defendant's conviction for larceny on that basis.

Campbell SC I, 368 N.C. at 87, 772 S.E.2d at 444.

The Supreme Court therefore reversed this Court's first opinion and

> held that (1) the larceny indictment was valid on its face even though it did not specify that Manna Baptist Church was an entity capable of owning property; and (2) sufficient evidence supported defendant's conviction for breaking or entering a place of religious worship with intent to commit a larceny therein. *State v. Campbell*,

> 368 N.C. 83, __, 772 S.E.2d 440, 444-45 (2015). The North Carolina Supreme Court remanded the case to this Court for consideration of any remaining issues. *See id.* at __, 772 S.E.2d at 445.

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 526-27.

Defendant originally raised six issues on appeal, and the Supreme Court's first opinion resolved defendant's first two issues. Thus, on remand to this Court "for consideration of any remaining issues on appeal[,]" *Campbell SC I*, 368 N.C. at 88, 772 S.E.2d at 445, we noted defendant's remaining Issues (3), (4), (5), and (6). On these issues,

> Defendant contends . . . (3) he was deprived of effective assistance of counsel, because his counsel failed to object to the admission of evidence that defendant had committed a separate breaking or entering offense; (4) the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the property; (5) insufficient evidence supports his larceny conviction; and (6) the trial court violated his constitutional right to a unanimous jury verdict with respect to the larceny charge.

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 526.

In *Campbell COA II*, we determined that defendant had not shown ineffective assistance of counsel, resolving Issue (3). *Id.* at __, 777 S.E.2d at 530. We decided, in our discretion, to allow review under Rule 2 of Issue (4), and in accord with *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976), and *State v. Hill*, 79 N.C. 656 (1878), we held that "a fatal variance exists because the evidence showed that the stolen property belonged to the church only." *Campbell COA II*, __ N.C. App. at __, 777 S.E.2d at 534. We therefore vacated defendant's conviction for larceny. *Id.* at __, 777 S.E.2d at 534. Because of our ruling on Issue (4), we did not address Issues (5) and (6).

Once again, the Supreme Court granted discretionary review, but only "as to whether the Court of Appeals erred in invoking Rule 2 of the North Carolina Rules of Appellate Procedure under the circumstances of this case." *Campbell SC review of COA II allowed*, 368 N.C. at 904, 794 S.E.2d at 800. In its second opinion, the Supreme Court did not address the substantive issues, but remanded for this Court to "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 Rule 10(a)(1),and consider the merits of defendant's fatal variance

argument." *Campbell SC II*, __ N.C. at __, 799 S.E.2d at 603. The Supreme Court stated:

> Here, the Court of Appeals did not reach the merits of defendant's fatal variance argument after an independent determination of whether the specific circumstances of defendant's case warranted invocation of Rule 2, but rather, based upon a belief that "this type of error" automatically entitles an appellant to review via Rule 2. *See Campbell*, __ N.C. App. at __, 777 S.E.2d at 530. The court thus acted under the erroneous belief that, because defendant presented a fatal variance argument, the court lacked the ability to act otherwise than to reach the merits of defendant's contention. In doing so, the lower court failed to recognize its discretion to refrain from undertaking such a review if it so chose. Because the Court of Appeals proceeded under this misapprehension of law, it failed to exercise the discretion inherent in the "residual power of our appellate courts." *See Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300.
>
> Accordingly, we reverse and remand this case to the Court of Appeals so that it may 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 Rule 10(a)(1), and consider the merits of defendant's fatal variance argument. The remaining issue addressed by the Court of Appeals is not before this Court, and that court's decision as to that matter remains undisturbed.

Campbell SC II, __ N.C. at __, 799 S.E.2d at 603. We will therefore, for the second time, "independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise [our] discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure, suspend Rule 10(a)(1), and consider the merits of defendant's fatal variance argument." *Campbell SC II*, __ N.C. at __, 799 S.E.2d at 603.

We first respectfully note this Court did not act under "the erroneous belief" that we were required to "reach the merits of defendant's contention" on his fatal variance argument, nor did we "fail[] to recognize [our] discretion to refrain from undertaking such a review if [we] so

chose." *Id.* at __, 799 S.E.2d at 603. Our opinion noted that review under Rule 2 is discretionary and that we had the authority to deny this review, which is why the opinion stated that we would "*exercise our discretion* under Rule 2 to review this issue." *Campbell COA II*, __ N.C. App. at __, 777 S.E.2d at 530 (emphasis added). Yet we also appreciate the Supreme Court's concern that discretionary review under Rule 2 be granted only in the appropriate cases and understand that we should fully explain our rationale for allowing discretionary review.

II. N.C. Rule of Appellate Procedure Rule 2 Analysis

i. Discretion Under Rule 2

[1] Discretion is an essential concept in judicial decision-making. Determining how and when to exercise its discretion is a crucial part of any court's role. Black's Law Dictionary defines "judicial discretion" as "[t]he exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right." Discretion, Black's Law Dictionary (9th Ed. 2009). To determine what is "fair under the circumstances," usually courts are "guided by the rules and principles of law," *id.*, since if a court acted without consideration of "rules and principles of law," including prior cases from the same court or a higher court whose opinions are binding upon the lower court, litigants similarly situated and with similar cases may be treated differently. In the United States, we normally consider such different treatment as unfair, if there are no other extenuating circumstances to justify such disparate treatment. Even a small child has a sense of fairness and believes that he has been treated unfairly if he gets the smaller piece of cake while his brother gets the larger piece. Individual judges and courts have discretion in many areas of law and our legal system is considered "fair" only where that discretion is exercised thoughtfully, carefully, and to the extent possible, in the same manner for cases and issues of the same sort.

Scholars who study how courts exercise discretion have described two types of judicial discretion: primary and secondary.

> When an adjudicator has the primary type, he has decision-making discretion, a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process. When the law accords primary discretion in the highest degree in a particular area, it says in effect that the court is free to render the decision it chooses;

> that decision-constraining rules do not exist here; and that even looser principles or guidelines have not been formulated. In such an area, the court can do no wrong, legally speaking, for there is no officially right or wrong answer.
>
> The other type of discretion, the secondary form, has to do with hierarchical relations among judges. It enters the picture when the system tries to prescribe the degree of finality and authority a lower court's decision enjoys in the higher courts. Specifically, it comes into full play when the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision. In this sense, discretion is a review-restraining concept. It gives the trial judge a right to be wrong without incurring reversal.
>
> . . . .
>
> One source of confusion in treating the subject is that courts tend to use the two types of discretion indiscriminately, interchangeably and without marking the distinction.

Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L.Rev. 635, 637-38 (1971).

As an appellate court, we have the secondary form of discretion, and although it is a "review-restraining concept," our Supreme Court has given us guidance in how to exercise our discretion under Rule 2. As explained by the Supreme Court in *State v. Hart*:

> Fundamental fairness and the predictable operation of and predictably operating the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority. Furthermore, inconsistent application of the Rules may detract from the deference which federal habeas courts will accord to their application. Although a petitioner's failure to observe a state procedural rule may constitute an adequate and independent state ground barring federal habeas review, a state procedural bar is not "adequate" unless it has been consistently or regularly applied. Thus, if the Rules are not applied consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules are not an adequate and independent state ground barring

> review. Therefore, it follows that our appellate courts must enforce the Rules of Appellate Procedure uniformly.

State v. Hart, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007) (citations, quotation marks, and brackets omitted) (emphasis added).

ii. Cases Addressing Rule 2 Review of Fatal Variance Issues

In our last opinion we briefly addressed our decision to allow review under Rule 2:

> Defendant next contends that the trial court erred in failing to dismiss the larceny charge due to a fatal variance between the indictment and the evidence as to the ownership of the stolen property. Defendant's trial counsel failed to raise this issue at trial, so defendant requests that we invoke North Carolina Rule of Appellate Procedure 2, or, alternatively, that we review this issue for ineffective assistance of counsel. N.C. R. App. P. 2 ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]"). In *State v. Gayton-Barbosa*, this Court invoked Rule 2 to review a similar fatal variance argument and held that this type of error is "sufficiently serious to justify the exercise of our authority under [Rule 2]." 197 N.C. App. 129, 134, 676 S.E.2d 586, 589-90 (2009). Accordingly, *we exercise our discretion under Rule 2 to review this issue.*

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 530 (emphasis added).

We regret we did not explain our deliberative process, but we were, and still are, well aware of this Court's discretion to decline to review defendant's fatal variance argument under Rule 2. As directed by the Supreme Court, we will explain why we now exercise our discretion to review defendant's argument under Rule 2.

Our discretion is guided in large part by other similar cases decided by this Court and the North Carolina Supreme Court, although clearly the result itself does not depend upon the result in any prior case. As directed by *Hart*, we have taken care to exercise our discretion in applying Rule 2 "consistently and uniformly." *Hart*, 361 N.C. at 317, 644 S.E.2d at 206. On remand, we have attempted to survey every North Carolina case, published and unpublished, which has addressed whether to grant discretionary review under Rule 2 of an argument based upon a fatal

variance.[1] We have found that in many cases which have granted discretionary review, this Court determined that the defendant raised a meritorious fatal variance argument, so his conviction on the particular crime would have to be reversed, but for this determination. *See*, *e.g.*, *State v. Hill*, __ N.C. App. __, __, 785 S.E.2d 178, 180 (2016) ("[W]e conclude that one of these fatal variance arguments is meritorious and exercise our discretion under Rule 2 to suspend the appellate preservation rules and consider that argument[.]"); *State v. Gayton-Barbosa*, 197 N.C. App. 129, 135, 676 S.E.2d 586, 590 (2009) ("[G]iven the peculiar facts of this case, it is appropriate to address defendant's variance-based challenge on the merits."); *State v. Langley*, 173 N.C. App. 194, 199, 618 S.E.2d 253, 257 (2005) ("[W]e hold that there was a fatal variance between the indictment and the evidence. Accordingly, we vacate defendant's conviction for possession of a firearm by a felon."). Since failure to grant discretionary review would be a "manifest injustice" to the defendant, the court has granted discretionary review. *See*, *e.g.*, *Gayton-Barbosa*, 197 N.C. App. at 135, 676 S.E.2d at 590 ("[I]t is difficult to contemplate a more 'manifest injustice' to a convicted defendant than that which would result from sustaining a conviction that lacked adequate evidentiary support[.]"); *Langley*, 173 N.C. App. at 197, 618 S.E.2d at 255 ("We believe it necessary to apply Rule 2 and consider the merits of defendant's argument in order to prevent manifest injustice."). *See also State v. Johnson*, 214 N.C. App. 195, 714 S.E.2d 530 (Aug. 2, 2011) (No. COA10-1031) (unpublished).

There are also cases in which this Court elected to invoke Rule 2 -- because those cases involved situations similar to others where we had invoked Rule 2 -- but then ultimately concluded that a fatal variance had not actually occurred under those facts and circumstances. *See*, *e.g.*, *State v. McNair*, __ N.C. App. __, __, 799 S.E.2d 631, 643, 644 (exercising Rule 2 discretionary review and comparing to *Gayton-Barbosa*, where "we invoked Rule 2 to review a similar fatal variance argument that had not been adequately preserved for appellate review[,]" but ultimately concluding "we cannot say that a variance existed between the charge alleged in the indictment and the evidence at trial."), *disc. review denied*, __ N.C. __, 803 S.E.2d 394 (2017); *State v. Everette*, 237 N.C. App. 35, 40, 764 S.E.2d 634, 638 (2014) (electing to review

1. Although citation of unpublished cases is disfavored under N.C. R. App. P. 30(e)(3) and such cases do not constitute controlling legal authority, we have reviewed both published and unpublished cases in the interest of understanding this Court's approaches to these cases and uniformity of treatment of similarly-situated cases. We are not citing unpublished cases as binding precedent.

defendant's argument "in our discretion pursuant to Rule 2" but concluding that the defendant "has not shown a variance between the indictment and the evidence presented."). *See also State v. Jefferies*, __ N.C. App. __, __, 776 S.E.2d 872, 878-79 (2015) (invoking Rule 2 but finding no fatal variance); *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (1996); *State v. Holloway*, __ N.C. App. __, 799 S.E.2d 466 (May 16, 2017) (No. COA16-940) (unpublished); *State v. Tomlinson*, 230 N.C. App. 146, 752 S.E.2d 258 (Oct. 15, 2013) (No. COA13-398) (unpublished); *State v. Maberson*, 225 N.C. App. 267, 736 S.E.2d 648 (Jan. 15, 2013) (No. COA12-227) (unpublished); *State v. Wilkes*, 188 N.C. App. 848, 656 S.E.2d 735 (Feb. 19, 2008) (No. COA07-395) (unpublished).

Where this Court has *not* granted discretionary review, the Court has typically determined there was no fatal variance and thus no need to consider the issue -- which is tacitly a determination of the issue -- because it would make no difference in the result if we allowed review. *See*, *e.g.*, *State v. Mostafavi*, __ N.C. App. __, __, 802 S.E.2d 508, 510 ("Defendant has failed to demonstrate the 'exceptional circumstances' necessary . . . for us to invoke Appellate Rule 2."), *temporary stay allowed*, __ N.C. __, 800 S.E.2d 419 (2017); *State v. Pender*, __ N.C. App. __, __, 776 S.E.2d 352, 358 (2015) ("Because this case does not involve exceptional circumstances, we, in our discretion, decline to invoke Rule 2."). Failure to grant review causes no injustice since it would not change the result. *See*, *e.g.*, *Pender*, __ N.C. App. at __, 776 S.E.2d at 358 ("Even assuming, without deciding, that defendant's trial counsel's performance was deficient, defendant cannot show the requisite prejudice since, even if the alleged variances were made the basis for his motion to dismiss, the motion should have in any event been denied."). *See also State v. Joyner*, 227 N.C. App. 650, 745 S.E.2d 375 (June 4, 2013) (No. COA12-1244) (unpublished); *State v. Velasquez*, 204 N.C. App. 597, 696 S.E.2d 924 (June 15, 2010) (No. COA09-1274) (unpublished) ("As the evidence tends to show that there was no fatal variance between the indictment and the evidence presented at trial, we conclude that the facts in this case do not present such 'exceptional circumstances' that Rule 2 need be invoked to avoid 'manifest injustice.' "). By considering the potential merit of the fatal variance argument and determining that no fatal variance existed, these opinions imply that the Court may have granted review under Rule 2 if the case involved an actual fatal variance which could have changed the result on the merits.

In other cases, both this Court and the Supreme Court have avoided addressing directly whether or not to apply Rule 2 and instead taken the approach of assuming for argument's sake that the argument was

properly preserved for appeal, but then concluding nevertheless that the asserted fatal variance argument would fail, so it is not worth addressing further. *See*, *e.g.*, *State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) ("[A]ssuming *arguendo* that defendant has preserved this argument for review, we hold that the asserted variance does not constitute error in this case."); *State v. Frazier*, 228 N.C. App. 568, 749 S.E.2d 112 (Aug. 6, 2013) (No. COA13-5) (unpublished). Just as in the cases above where the Court did not grant Rule 2 review because no fatal variance existed, by considering *arguendo* the fatal variance issue, these opinions also imply that the Court may have granted review under Rule 2 if the case involved an actual fatal variance which could have changed the result on the merits.

But there are also, in contrast, a limited number of cases where this Court has simply declined -- without evaluating the merits of the argument -- to exercise its discretion to review a fatal variance argument simply because no argument was raised to the trial court of such fatal variance. *See*, *e.g.*, *State v. Hooks*, __ N.C. App. __, __, 777 S.E.2d 133, 139 ("Defendant seeks for the first time on appeal to argue the trial court erred by denying his motion to dismiss due to a fatal variance between the indictment and the State's proof at trial. Defendant failed to raise or make this argument in support of his motion to dismiss at trial. Because Defendant failed to properly preserve this issue, he has waived his right to appellate review on this issue. We decline to address the issue and dismiss this issue." (citation omitted)), *disc. review denied*, 368 N.C. 605, 780 S.E.2d 561 (2015); *see also State v. Hester*, 224 N.C. App. 353, 358, 736 S.E.2d 571, 574 (2012), *aff'd per curiam*, 367 N.C. 119, 748 S.E.2d 145 (2013); *State v. Curry*, 203 N.C. App. 375, 385-86, 692 S.E.2d 129, 138 (2010). Since the Supreme Court has remanded this case to us with the direction to "independently and expressly determine whether, on the facts and under the circumstances of this specific case," *Campbell SC II*, __ N.C. at __, 799 S.E.2d at 603, we believe it would be inappropriate in this particular case to simply allow or reject review under Rule 2 with no further explanation in our opinion.

As directed by the Supreme Court in *Hart*, one of our considerations is to exercise our discretionary authority under Rule 2 uniformly and consistently from case to case, so we treat all parties in cases similarly situated and present similar issues the same, to the extent this is possible. In *State v. Hargett*, our Court recognized the injustice of either granting or denying discretionary review in a manner inconsistent with the treatment in other similar cases:

> However, to address the merits of Hargett's appeal, despite his failure to recognize and comply with longstanding case law both at trial and in his brief to this Court, would not prevent manifest injustice. Rather, we believe it would be an injustice to the numerous other defendants who have had their appeals dismissed by application of the holding of *Oglesby*. *See*, *e.g.*, *State v. Bryant*, __ N.C. App. __, 753 S.E.2d 397 (2013) (unpublished); *State v. Berrier*, 217 N.C. App. 641, 720 S.E.2d 459 (2011) (unpublished); *State v. Black*, 217 N.C. App. 196, 719 S.E.2d 255 (2011) (unpublished); *State v. Gause*, 201 N.C. App. 447, 688 S.E.2d 550 (2009) (unpublished); *State v. Toler*, 189 N.C. App. 212, 657 S.E.2d 446 (2008) (unpublished); *State v. Sullivan*, 186 N.C. App. 681, 652 S.E.2d 71 (2007) (unpublished). Hargett has not convinced this panel that invocation of Rule 2 is appropriate here. Accordingly, his appeal is dismissed.

State v. Hargett, 241 N.C. App. 121, 128, 772 S.E.2d 115, 121, *appeal dismissed*, *disc. review and cert. denied*, __ N.C. __, 776 S.E.2d 191 (2015).

In our prior opinion, when we compared defendant's situation to the facts and legal issue in *Gayton-Barbosa*, 197 N.C. App. at 135, 676 S.E.2d at 590, we considered this case to be so similar to *Gayton-Barbosa* we erroneously thought it unnecessary to present further explanation beyond that already apparent from the facts, procedural history, and issues presented. But we did not engage in an extended discussion of how we made our independent determination this case was so similar to *Gayton-Barbosa* and others that we believed we should allow review under Rule 2. Our dissenting colleague seeks to distinguish the two cases based upon the "gravity" of the offenses, but the defendant in *Gayton-Barbosa* was, like defendant here, charged with several felonies, and one of those charges was felony larceny, the same crime we are considering here. *Id.* at 131, 676 S.E.2d at 588. We cannot distinguish the "gravity" of the charge of felony larceny here from the *same charge* in *Gayton-Barbosa*, either by its effect on the defendant or on society, since it was the same crime. The same legal argument was addressed in both cases as well. *Id.* at 133-35, 676 S.E.2d at 589-90. After review of all of this Court's prior opinions on this subject, we seek to exercise our discretion in accord with this Court's prior treatment of similar cases. The Supreme Court did express approval for the analytical framework in *Gayton-Barbosa*, so we will use that approach and describe our independent determination to allow review under Rule 2.

iii. Application of *Gayton-Barbosa* Approach to Rule 2 Review

We first note the procedural and legal stance of defendant's request for Rule 2 review by this Court on first remand from the Supreme Court. Besides its factual, legal, and procedural history, this case presented the additional extraordinary element of the Supreme Court's opinion in *Campbell I*'s appeal, *which overruled an entire line of cases*. *Campbell SC I*, 368 N.C. at 87, 772 S.E.2d at 444. The law as established in *Campbell SC I* affected the legal issue defendant had presented for discretionary review under Rule 2. *See id.* ("Therefore, we hold that alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a 'company' or 'incorporated,' signifies an entity capable of owning property, and the line of cases from the Court of Appeals that has held otherwise is overruled. Accordingly, the larceny indictment here is valid on its face even though it does not specify that Manna Baptist Church is an entity capable of owning property, and the Court of Appeals erred in vacating defendant's conviction for larceny on that basis." (citations omitted)).

The Supreme Court's ruling in *Campbell SC I* essentially created the law which gave defendant's Issue (4) such strength it could be outcome-determinative and could cause manifest injustice to defendant if not reviewed, since it changed the result on defendant's first issue. We noted as much in our second opinion:

> Based upon our Supreme Court's opinion in this case on discretionary review, Manna Baptist Church was an entity capable of owning property. *Campbell*, 368 N.C. at __, 772 S.E.2d at 444 ("[W]e hold that alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a "company" or "incorporated," signifies an entity capable of owning property, and the line of cases from the Court of Appeals that has held otherwise is overruled."). The evidence showed that Manna Baptist Church owned the property, but no evidence suggests that Pastor Stevens individually had any sort of ownership interest in the property. Additionally, the fact that Pastor Stevens is an employee of Manna Baptist Church, the true owner of the property, does not cure the fatal variance.

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 533.

Since our Supreme Court, in *Campbell SC II*, overruled none of the many prior cases of this Court or the Supreme Court which granted

discretionary review of fatal variance issues under Rule 2 under the same of analysis as used in *Gayton-Barbosa*, we are still bound by those cases. Although we are not bound to reach the same result -- to allow review under Rule 2 or not -- we will consider the same factors and use a similar analysis in making this discretionary decision. The decision to allow review under Rule 2 is discretionary, but not arbitrary or based upon the whim of a particular panel or judge. Since the Supreme Court specifically expressed approval for the analysis in *Gayton-Barbosa*, we will use a similar analysis here. *See Campbell SC II*, __ N.C. at __, 799 S.E.2d at 603, n.3 ("Notably, the Court of Appeals panel in *Gayton-Barbos*a, the case cited by the *Campbell II* panel, employed exactly such an individualized analysis in deciding to invoke Rule 2. *Gayton-Barbosa*, 197 N.C. App. 129, 135 & n. 4, 676 S.E.2d 586, 590 & n. 4 (discussing the specific circumstances and then determining that, '*given the peculiar facts of this case*, it is appropriate to address [the] defendant's variance-based challenge on the merits' (emphasis added)).").

Just as in *Gayton- Barbosa*, the issue before us is, "the extent, if any, to which the Court is entitled to address this variance-based challenge to defendant's felonious larceny conviction on the merits despite the absence of a contemporaneous objection at trial." 197 N.C. App. at 134, 676 S.E.2d at 589. As summarized in *Gayton-Barbosa*, we first consider "the Supreme Court's decision" in *State v. Brown*, 263 N.C. 786, 787-88, 140 S.E.2d 413, 413 (1965), where

> the Supreme Court granted relief on appeal as the result of a fatal variance relating to the ownership of allegedly stolen property despite the fact that no dismissal motion had been made at trial and that the variance issue had not been the subject of an assignment of error on appeal. Even so, the Supreme Court decided this issue on the merits under its general supervisory authority over the trial courts. The general supervisory authority under which the Supreme Court acted in *Brown* is currently embodied in N.C. R. App. P. Rule 2, which authorizes "either court of the appellate division" to "suspend or vary the requirements or provisions of any of these rules. . . ." Although N.C. R. App. P. Rule 2 is available to prevent "manifest injustice," the Supreme Court has stated that this residual power to vary the default provisions of the appellate procedure rules should only be invoked rarely and in exceptional circumstances.

Gayton-Barbosa, 197 N.C. App. at 134, 676 S.E.2d at 589 (citations and quotation marks omitted).

The *Gayton-Barbosa* Court noted that "the Supreme Court's decision in *Brown* suggests that fatal variances of the type present here are sufficiently serious to justify the exercise of our authority under N.C. R. App. P. 2." *Gayton-Barbosa*, 197 N.C. App. at 134, 676 S.E.2d at 590. The same issue is presented here, and it is also "sufficiently serious to justify the exercise of our authority" under Rule 2. *Id.*

The *Gayton-Barbosa* Court noted a second factor, which is that

> a variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction. The Supreme Court and this Court have regularly invoked N.C. R. App. P. 2 in order to address challenges to the sufficiency of the evidence to support a conviction. *State v. Booher*, 305 N.C. 554, 564, 290 S.E.2d 561, 566 (1982) ("Nevertheless, when this Court firmly concludes, as it has here, that the evidence is insufficient to sustain a criminal conviction, even on a legal theory different from that argued, it will not hesitate to reverse the conviction *sua sponte*, in order to 'prevent manifest injustice to a party.' " (quoting N.C. R. App. P. 2))[.]

Gayton-Barbosa, 197 N.C. App. at 134-35, 676 S.E.2d at 590 (citations omitted). This law applies here as well. Defendant's challenge is based upon the premise that the evidence is insufficient to support his conviction, since the State presented no evidence that Pastor Stevens had any ownership interest in the property and that he was simply an employee of Manna Baptist church. Defendant has presented a viable argument of a fatal variance and insufficiency of the evidence to support his conviction.

The third, and final, factor discussed by the *Gayton-Barbosa* Court was the potential for manifest injustice to the defendant if the court upheld a conviction without adequate evidentiary support:

> Finally, it is difficult to contemplate a more "manifest injustice" to a convicted defendant than that which would result from sustaining a conviction that lacked adequate evidentiary support, particularly when leaving the error in question unaddressed has double jeopardy implications. Thus, given the peculiar facts of this case, it is appropriate to address defendant's variance-based challenge on the merits.

Id. at 135, 676 S.E.2d at 589-90. Here, the exact same is true. Defendant's argument is that there was not sufficient evidence to show that Pastor

Stevens had any ownership interest in the property, and defendant is correct. It would be manifestly unjust for defendant's conviction to be sustained where the State did not present evidence that Pastor Stevens had an ownership interest in the stolen property under the fatal variance law as it stands and which this Court is bound to follow.

We therefore consider this to be an unusual and extraordinary case in which Rule 2 review is appropriate to exercise our discretionary authority consistently and fairly, and because our failure to do so would cause manifest injustice to a party, the defendant. *See Hart*, 361 N.C. at 315-16, 644 S.E.2d at 205 ("The text of Rule 2 provides two instances in which an appellate court may waive compliance with the appellate rules: (1) to prevent manifest injustice to a party; and (2) to expedite decision in the public interest. While it is certainly true that Rule 2 has been and may be so applied in the discretion of the Court, we reaffirm that 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." (citations, quotation marks, and brackets omitted)). In our discretion, we also considered the application of the fatal variance rule in this case to present a "significant issue[] of importance," *id.*, particularly given the Supreme Court's ruling -- overruling a line of precedents from this Court -- in *Campbell SC I*. *Campbell SC I*, 368 N.C. at 87, 772 S.E.2d at 444.

We also know that we could exercise our discretion differently and make a different determination on review under Rule 2 than we did in our last opinion. In fact, had we simply exercised our discretion to decline to review Issue (4), our work would have been much easier and this opinion much shorter. But we have attempted to fulfill the Supreme Court's directions on remand, and in doing so, we have independently determined to exercise our discretionary authority in accord with *Hart*, *Gayton-Barbosa*, and our Court's prior treatment in similar cases, since our refusal to do so would result in manifest injustice to defendant.

III. Fatal Variance as to Ownership of the Stolen Property

[2] Since we have elected to allow discretionary review of defendant's Issue (4), our next task on remand is to consider the same issue as we considered in our last opinion -- whether the trial court erred in failing to dismiss the larceny charge due to a fatal variance between the indictment and the evidence on the ownership of the stolen property. While there have been cases which have addressed fatal variance since our prior opinion was filed, *see*, *e.g.*, *State v. Bacon*, __ N.C. App. __, __,

803 S.E.2d 402, 406, *temporary stay allowed*, __ N.C. __, 802 S.E.2d 460 (2017); *State v. Fink*, __ N.C. App. __, __, 798 S.E.2d 537, 542 (2017); *Hill*, __ N.C. App. at __, 785 S.E.2d at 182; there has been no major change to case law in this area, so we adopt the same analysis as we did in *Campbell COA II*[2]:

ii. Analysis

> Defendant contends that the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the stolen property. Defendant specifically argues that a fatal variance occurred "because the State never proved the property was owned by both Andy Stevens and Manna Baptist Church." Defendant relies on *State v. Hill* for the proposition that where an indictment alleges multiple owners, the State must prove that there were in fact multiple owners. *See* 79 N.C. 656, 658-59 (1878).
>
> In *Hill*, the indictment alleged that the stolen property belonged to "Lee Samuel and others," but the evidence at trial showed that the stolen property belonged to Lee Samuel alone. 79 N.C. at 658. Our Supreme Court held that this inconsistency constituted a fatal variance. *Id.* at 658-59. Hill has been consistently cited and followed as binding precedent by North Carolina courts since 1878. *See*, *e.g.*, *State v. Albarty*, 238 N.C. 130, 131-32, 76 S.E.2d 381, 382 (1953); *State v. Hicks*, 233 N.C. 31, 34, 62 S.E.2d 497, 499 (1950); *State v. Williams*, 210 N.C. 159, 161, 185 S.E. 661, 662 (1936); *State v. Corpening*, 191 N.C. 751, 753, 133 S.E. 14, 15 (1926); *State v. Harbert*, 185 N.C. 760, 762,

2. We also note we are bound to follow the cases from the Supreme Court (as cited in our prior opinion and quoted here) which hold that where a larceny indictment identifies two owners of the stolen property, the State must present evidence that both of the alleged owners had an ownership interest or special property interest in the stolen property. We agree that this requirement may be an "unnecessary technicality," as our dissenting colleague notes, but we have no choice but to follow precedent set by the North Carolina Supreme Court. If there is no facial invalidity of the indictment which identifies two owners of the stolen property, as is true here, there seems to be no reason to require dismissal of a case if the State presents evidence that at least one of the alleged owners did own the property, even if the other did not. It would appear that defendant would be protected from double jeopardy by the fact that he had already been tried for larceny of the property from both alleged owners, even if only one of the alleged owners owned the property. But we are bound to follow the law, going back to at least 1878.

118 S.E. 6, 7 (1923). Most recently, our Supreme Court cited *Hill* in *State v. Ellis*, __ N.C. __, __, 776 S.E.2d 675, 678 (2015). The Court did not overrule *Hill* or suggest that its holding is no longer binding precedent in the fatal variance context, as is the case here. *Id.* at __, 776 S.E.2d at 678. In fact, in *Ellis*, our Supreme Court carefully distinguished between cases raising the issue like the one addressed by *Ellis*, the "facial sufficiency of the underlying criminal pleading" and the issue raised here, whether "a fatal variance exist[s] between the crime charged in the relevant criminal pleading and the evidence offered by the State at trial[.]" *Id.* at __, 776 S.E.2d at 678. Our Supreme Court discussed *Hill* as part of its explanation of this distinction:

> According to defendant, this Court's decisions establish that, where a criminal pleading purporting to charge the commission of an injury to personal property lists two entities as property owners, both entities must be adequately alleged to be capable of owning property for the pleading to properly charge the commission of the crime. Although defendant cites numerous cases in support of this position, each decision on which he relies involves a claim that a fatal variance existed between the crime charged in the relevant criminal pleading and the evidence offered by the State at trial, rather than a challenge to the facial sufficiency of the underlying criminal pleading. For example, in *State v. Greene*, 289 N.C. 578, 585-86, 223 S.E.2d 365, 370 (1976), this Court held that there was no fatal variance between the indictment and the evidence in a case in which both men listed as property owners in the indictment were shown to have an ownership interest in the property. Similarly, we concluded in *State v. Hill*, 79 N.C. 656, 658-59 (1878), that a fatal variance did exist in a case in which the indictment alleged that the property was owned by "Lee Samuel and others" while the evidence showed that Lee Samuel was the sole owner of the property in question. Finally, in *State v. Burgess*, 74 N.C. 272, 272-73 (1876), we determined that a fatal variance existed in a case in which the indictment alleged that the property was owned by Joshua Brooks while the evidence tended to show that the property in question was owned by both Mr. Brooks and an individual named Hagler. *Id.* at __, 776

S.E.2d at 678. Thus, if the State fails to present evidence of a property interest of some sort in both of the alleged owners, there is a fatal variance between the indictment and the proof. *See id.* at __, 776 S.E.2d at 678.

This Court recently summarized the types of property interest that constitute a "special property interest," which, if proven, are consistent with a larceny indictment's allegation of ownership:

According to well-established North Carolina law, "the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest." *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976). "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). In other words, "the allegation and proof must correspond." *Id.* "A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." [*State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971).] "In indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal." *State v. Mason*, 35 N.C. 341, 342 (1852).

However, if it can be shown that the person named in the indictment, though not the actual owner of the stolen item, had a "special property interest" in the item, then the defect in the indictment will not be fatal. *State v. Craycraft*, 152 N.C. App. 211, 213, 567 S.E.2d 206, 208 (2002) ("The State may prove ownership by introducing evidence that the person either possessed title to the property or had a special property interest. If the indictment fails to allege the existence of a person with title or special property interest, then the indictment contains a fatal variance." (citation omitted)).

Our Courts have evaluated circumstances in which a special property interest has been established. *See e.g.*

State v. Adams, 331 N.C. 317, 331, 416 S.E.2d 380, 388 (1992) (spouses have a special property interest in jointly possessed property, though not jointly owned); *State v. Schultz*, 294 N.C. 281, 285, 240 S.E.2d 451, 454-55 (1978) (a "bailee or a custodian" has a special property interest in items in his or her possession); *State v. Salters*, 137 N.C. App. 553, 555-56, 528 S.E.2d 386, 389 (2000) (parents have a special property interest in their children's belongings kept in their residence, but "that special interest does not extend to a caretaker of the property even where the caretaker had actual possession")[, *cert. denied*, 352 N.C. 361, 544 S.E.2d 556 (2000)]; *State v. Carr*, 21 N.C. App. 470, 471-72, 204 S.E.2d 892, 893-94 (1974) (where a car was registered to a corporation, the son of the owner of that corporation had a special property interest in the car because he was the sole user of the car and in exclusive possession of it).

Conversely, our Courts have established situations in which a special property interest does not exist. *See e.g. State v. Eppley*, 282 N.C. 249, 259-60, 192 S.E.2d 441, 448 (1972) (owner of a residence did not have a special property interest in a gun kept in his linen closet, but owned by his father); *State v. Downing*, 313 N.C. 164, 167-68, 326 S.E.2d 256, 258-59 (1985) (the owner of a commercial building did not have a special property interest in items stolen from that building as the items were actually owned by the business that rented the building); *Craycraft*, 152 N.C. App. at 214, 567 S.E.2d at 208-09 (landlord did not have a special property interest in furniture he was maintaining after evicting the tenant-owner).

Gayton-Barbosa, 197 N.C. App. at 135-36, 676 S.E.2d at 590-91 (brackets omitted).

Here, the larceny indictment alleges that the stolen property belonged to "Andy Stevens and Manna Baptist Church[.]" But the evidence at trial simply does not demonstrate that Pastor Stevens held title to or had any sort of ownership interest in the stolen property. All of the evidence tends to show that he dealt with the property only in his capacity as an employee of Manna Baptist Church. Pastor Stevens testified that he was employed as the pastor of Manna Baptist Church and lived on the

church property, and the entirety of the evidence relevant to his interest in the property, if any, was as follows:

[Prosecutor:] On August 19th of 2012, did you arrive at the church for Sunday services?

[Pastor Stevens:] I did.

[Prosecutor:] And upon entering the church that day, what did you observe?

[Pastor Stevens:] We had normal services in the morning. It wasn't until at the end of the service that we were aware that some of the equipment was missing.

[Prosecutor:] Okay. And how was it that you became aware of that?

[Pastor Stevens:] The sound man was trying to record the message and had to divert back to the pulpit [microphone] because the lapel [microphone] was not picking up and at the close of the service, we found that the receiver was missing.

[Prosecutor:] Okay. Were there any other items besides the receiver that were missing?

[Pastor Stevens:] Yes, sir. There were some microphones and some audio cords.

[Prosecutor:] Where are those generally stored in your church?

[Pastor Stevens:] Usually at the front. The cords are usually at the front or in the baptistery changing area in the back and there are also a couple by the sound system.

[Prosecutor:] And how many microphones and cords were missing?

[Pastor Stevens:] I know that there [were] three -- three, maybe four microphones and probably a similar amount of cords.

[Prosecutor:] Do you know what the value or have an estimate as to what the value of those items were?

[Pastor Stevens:] We estimated about five hundred dollars.

. . . .

[Prosecutor:] Were you able to recover any of the items that were taken?

[Pastor Stevens:] No, sir.

[Prosecutor:] Has the church had to replace those items?

[Pastor Stevens:] We have. We replaced the receiver.

Pastor Stevens testified that "we" had the church service, discovered the missing items, reported this to the police, estimated the value of the items, and replaced the receiver. He does not state who is included in the term "we," although from context he seems to be referring to the entire congregation in regard to having the church service, to himself and the "sound man" in regard to discovering the missing items, and probably to himself and various other persons as to the estimation of value and the replacement of the receiver. In any event, he never identifies any sort of special property interest in the items stolen and he clearly identifies himself as an employee of Manna Baptist Church.

Based upon our Supreme Court's opinion in this case on discretionary review, Manna Baptist Church was an entity capable of owning property. *Campbell*, 368 N.C. at __, 772 S.E.2d at 444 ("[W]e hold that alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a "company" or "incorporated," signifies an entity capable of owning property, and the line of cases from the Court of Appeals that has held otherwise is overruled."). The evidence showed that Manna Baptist Church owned the property, but no evidence suggests that Pastor Stevens individually had any sort of ownership interest in the property. Additionally, the fact that Pastor Stevens is an employee of Manna Baptist Church, the true owner of the property, does not cure the fatal variance. In *State v. Greene*, our Supreme Court quoted *State v. Jenkins*, 78 N.C. 478, 479-80 (1878), in support of the rule that an employee in possession of property on behalf of the employer does not have a sufficient ownership interest in the property:

"The property in the goods stolen must be laid to be either in him who has the *general* property or in him who has a *special* property. It must [in] all events be laid to be in some one [sic] who has a *property* of some kind in the article stolen. It is not sufficient to charge it to be the property of one who is a mere servant, although he may have had actual possession at the time of the larceny; because having no *property*, his possession is the possession of his master."

The Court then gave the following example:

"A is the general owner of a horse; B is the special owner, having hired or borrowed it, or taken it to keep for a time; C grooms it and keeps the stable and the key, but is a mere servant and has no property at all; -- if the horse be stolen, the property may be laid to be either in A *or* B; but not in C although he had the actual possession and the key in his pocket." (Emphasis added). *State v. Jenkins*, *supra* at 480. *Accord*, *State v. Allen*, 103 N.C. 433, 435, 9 S.E. 626, 627 (1889).

Greene, 289 N.C. at 584, 223 S.E.2d at 369 (brackets omitted). Based upon the example given by our Supreme Court in *Jenkins*, Pastor Stevens was in the position of C, the groom who cared for the horse, while Manna Baptist Church is in the position of A, the owner. Even if Pastor Stevens had actual possession of the property, he had no ownership interest in it. *See id.*, 223 S.E.2d at 369.

In *Greene*, the indictment alleged that the defendant stole "one Ford Diesel Tractor and one set of Long Brand Boggs of one Newland Welborn and Hershel Greene[.]" *Id.*, 223 S.E.2d at 369 (ellipsis omitted). But the evidence showed that "Welborn had legal title to the tractor and that Greene had legal title to the disk boggs and had loaned them to Welborn, who was using them on his tractor for his farming." *Id.*, 223 S.E.2d at 369. The defendant argued that there was a fatal variance because "alleging a property interest in both Greene and Welborn automatically means that the allegation is that they are joint owners." *Id.* at 585, 223 S.E.2d at 370. Our Supreme Court rejected this argument because the State's evidence showed that both alleged owners had either legal title or a special ownership interest in the property: "Welborn was the bailee or special owner of the disk boggs, and Greene had legal title to them." *Id.* at 585-86, 223 S.E.2d at 370. Our Supreme Court also noted that in the indictment, "the order in which the property was listed corresponded to the order that the title holders of the respective pieces of property were listed"; that is, Welborn owned the tractor, and Greene owned the disk boggs. *Id.* at 586, 223 S.E.2d at 370.

> In this case, the State's evidence did not show that Pastor Stevens had any special property interest in the stolen items. As noted above, the evidence showed that they belonged solely to Manna Baptist Church and Pastor Stevens dealt with the property only as an employee of the church. Although both *Jenkins* and *Hill* are very old cases, they have been followed by our courts for many years, and this Court is not at liberty to disregard them. Based upon these binding precedents, the State must demonstrate that both alleged owners have at least some sort of property interest in the stolen items. In addition, possession by an employee or servant of the actual owner is not a type of special property interest which will support this indictment.
>
> Following *Greene* and *Hill*, we hold that a fatal variance exists because the evidence showed that the stolen property belonged to the church only. *See id.* at 584, 223 S.E.2d at 369; *Hill*, 79 N.C. at 658-59.
>
> III. Conclusion
>
> We . . . . vacate defendant's conviction for larceny after breaking or entering. Because the trial court consolidated these convictions for sentencing, we remand this case to the trial court for resentencing.

Campbell COA II, __ N.C. App. at __, 777 S.E.2d at 530-34.

IV. Additional Issues

In the interest of judicial economy, we will also address defendant's two remaining issues. Defendant contends that (5) insufficient evidence supports his larceny conviction; and (6) the trial court violated his constitutional right to a unanimous jury verdict regarding the larceny charge. *Campbell COA II*, __ N.C. App. at __, 777 S.E.2d at 528.

i. (5). Sufficiency of the evidence

[3] "The essential elements of larceny are: (1) the taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Barbour*, 153 N.C. App. 500, 502, 570 S.E.2d 126, 127 (2002). Defendant argues that the trial court erred by denying his motion to dismiss the larceny charge because the "State failed to present sufficient evidence that [defendant] took the missing items."

> When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Miller, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009) (citations and quotation marks omitted).

> Evidence that raises only a strong suspicion without producing any incriminating circumstances does not reach the level of substantial evidence necessary for the denial of a motion to dismiss. Just as in [a prior case], the most the State showed was that defendant had been in an area where he could have committed the crime charged.

State v. Hamilton, 145 N.C. App. 152, 158, 549 S.E.2d 233, 237 (2001) (citations, quotation marks, and brackets omitted).

The State's evidence showed that Manna Baptist Church had Wednesday evening services on 15 August 2012 which ended at about 9:00 pm. The next morning, the church secretary discovered the church had been left unlocked, and she locked it before she left. On the next Sunday, 19 August 2012, Pastor Stevens discovered that some audio equipment was missing from the church. The missing items were 4 microphones, one set of sound system wires, a music receiver, and one pair of headphones. Some of the computer equipment had been moved around. There were no signs of forced entry to the church. No fingerprints or DNA evidence were taken from the computer equipment or the cabinet in which the sound equipment had been stored. However, one officer found a wallet in the baptistery changing area and defendant's license was in the wallet. None of the stolen equipment was ever

located, either outside near the church or through checking with local pawn shops.

Two days later, Detective Jessica Woosley looked up the name on the driver's license and discovered that it was defendant and that he was incarcerated in Cleveland County on an unrelated matter. She met with him at the Cleveland County jail. When he entered the interview room, defendant said, "[T]his can't possibly be good. What have [I] done now that I don't remember?" Detective Woosley read defendant his *Miranda* rights, and he asked for an attorney but continued to speak to her. He saw the name of Manna Baptist Church on a folder and told her he had been at the church and he had "done some things" that night but did not recall all of what he had done. He recalled that the door to the church was open and he went in to get a drink of water.

Defendant's evidence showed that at the time of the alleged crimes, he was almost 51 years old and was on two heart medications, a medicine for stress disorder, a medicine for diabetes, and "high psychotropic drug[s]" for bipolar condition. On the night of 15 August 2012, defendant had been living with Ms. Deaton. She asked him to leave, so he left, taking a duffel bag of his clothing which he later "dumped . . . in a ditch" because it was too heavy. He arrived at a friend's house at about 10:00 pm, but around midnight, he was asked to leave that house as well. He left, still walking, and around 2:00 am he walked down Burke Road and saw Manna Baptist Church. He testified that he saw a "sliver of light" coming from the church because the door was not fully closed. He went in to get a drink of water and to pray. He left the church around dawn. He started to have chest pains and called 911; he met the ambulance at the Shanghai Fire Department.

Emergency medical technician Calvin Cobb responded to the call. He testified that he found defendant sitting on the back of a responding vehicle from the fire department. He was very sweaty and asked for a ride to town. He told Mr. Cobb he had been removed from Ms. Deaton's house and wandered all night. Mr. Cobb determined that defendant's medical condition was not critical but he needed medical care and he was transported to Cleveland Regional Medical Center. Defendant was not carrying a backpack or duffel bag and he had nothing in his pockets. Defendant's evidence neither helps nor hurts the State's case. At the most, "[i]t simply explains [defendant's] presence at the scene[.]" *State v. Minor*, 290 N.C. 68, 73, 224 S.E.2d 180, 184 (1976).

The State's evidence shows that defendant entered Manna Baptist Church at the relevant time and that items were stolen from the church

sometime between Wednesday, 15 August and Sunday, 19 August 2012. The stolen items were never found. Defendant argues that the State's case relies entirely upon circumstantial evidence of defendant's opportunity to take the items, since the evidence shows only that he was in the church. The State's evidence fails to show a motive for defendant to take the sound equipment. It fails to show how defendant could have carried or disposed of these rather large items during the night of August 15 while he was walking down the road. *See*, *e.g.*, *Minor*, *id.* at 75, 224 S.E.2d at 185 ("The most the State has shown is that defendant had been in an area where he could have committed the crimes charged. Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do. The trial judge should have allowed the motion for judgment as of nonsuit at the close of defendant's evidence.").

In *Minor*, the defendant was convicted of "possession of a controlled substance, to-wit, marijuana, for the purpose of distribution, and with manufacturing and growing marijuana." *Id.* at 68, 224 S.E.2d at 181. Both Minor and a co-defendant, Ingram, were charged with various crimes based upon marijuana plants growing in an isolated corn field. *Id.* at 68-69, 224 S.E.2d at 181-82. When they were stopped and arrested near the field, Minor was riding a car owned and driven by Ingram. *Id.* at 69, 224 S.E.2d at 182. Police found two guns, some wilted marijuana leaves and some grains of fertilizer in the car; only Ingram was charged for possession of the weapons but both defendants were charged regarding the marijuana. *Id.* Ingram had secured the consent of the landowner to use the field where the marijuana was growing. *Id.* The State's evidence also showed that Minor had assisted in preparing the land for "a garden" in the same area. *Id.* at 70, 224 S.E.2d at 182. The Supreme Court summarized the evidence against Mr. Minor:

> About all our evidence shows is (1) that defendant Minor had been a visitor at an abandoned house leased or controlled by co-defendant Ingram; (2) that the marijuana field was 100 feet away from the house but obscured by a wooded area; (3) that the marijuana field was accessible by three different routes; (4) that on the date of Minor's arrest he was on the front seat of a Volkswagen automobile owned and operated by Ingram, where some wilted marijuana leaves were found on the left rear floorboard and one marijuana leaf was found in the trunk.

Id. at 74-75, 224 S.E.2d at 185.

The State seeks to distinguish *Minor* by arguing that "the facts in this case are distinguishable from *State v. Minor*. *Minor* involved actual or constructive possession of narcotics." The State is correct that the defendant in *Minor* was charged with possession of narcotics, but that factual difference is not controlling. In *Minor*, the State was relying solely upon evidence that the defendant was in a particular place at a particular time to show he possessed marijuana; here, the State is relying solely upon evidence that defendant was in Manna Baptist Church during a four-day time period when the stolen items were taken to show he possessed those items and removed them. The evidence against the defendant in *Minor* was stronger than here, since Mr. Minor was at least in a vehicle where some fresh marijuana was found, and he was riding with the person with control of the property upon which the marijuana was growing. *Id.* at 69, 224 S.E.2d at 182. Here, the State is relying on defendant's presence alone to show he took and carried away the sound equipment, since the "elements of larceny are that defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300 (1985.) Like *Minor*, the State's evidence shows that defendant was "in an area where he could have committed the crimes charged," but beyond that, we also must "sail in a sea of conjecture[.]" *Minor*, 290 N.C. at 75, 224 S.E.2d at 185.

In *Campbell SC I*, the Supreme Court held that "the State presented sufficient evidence of defendant's criminal intent to sustain a conviction for felony breaking or entering a place of religious worship [with intent to commit a larceny therein.]" *Campbell SC I*, 368 N.C. at 88, 772 S.E.2d at 444-45. In so concluding, the Supreme Court explained:

> Defendant was charged under N.C.G.S. § 14-54.1(a) with wrongfully breaking or entering Manna Baptist Church *with intent to commit a larceny therein*. To meet its burden, the State must offer substantial evidence that defendant broke or entered the building with the requisite criminal intent. In *State v. Bell* we explained:
>
> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. "The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the [building]. . . . However, the fact that a felony was actually committed after the [building] was entered is not necessarily proof

> of the intent requisite for the crime of [larceny]. It is only evidence from which such intent at the time of the breaking and entering may be found. Conversely, actual commission of the felony . . . is not required in order to sustain a conviction of [larceny]."
>
> 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) (second alteration in original) (citations omitted).
>
> Here evidence showed that defendant unlawfully broke and entered Manna Baptist Church late at night. *See State v. Sweezy*, 291 N.C. 366, 383, 230 S.E.2d 524, 535 (1976) ("It is well established that the mere pushing or pulling open of an unlocked door constitutes a breaking."). Defendant did not have permission to be inside the church and could not remember what he did while there, and Pastor Stevens found defendant's wallet near the place where some of the missing equipment previously had been stored. Considered in the light most favorable to the State, this evidence was sufficient to take the case to the jury on the question of defendant's intent to commit larceny when he broke and entered Manna Baptist Church. Therefore, the trial court properly denied defendant's motion to dismiss the breaking or entering charge for insufficient evidence.

Campbell SC I, 368 N.C. at 87-88, 772 S.E.2d at 444.

Our Supreme Court's holding in *Campbell SC I* does not preclude our conclusion that there was insufficient evidence of larceny, as the Supreme Court's holding does not go to the element at question, whether there was sufficient evidence that defendant took and carried away the property of another -- the sound equipment. While our determination of this issue is unnecessary since we have concluded that defendant's conviction for larceny must be vacated due to a fatal variance between the indictment and evidence, we note this determination in the alternative and to resolve the remaining issues in this case.

ii. (6.) Unanimous verdict

[4] Defendant's last argument is that the trial court erred by instructing the jury it could find the defendant guilty of larceny if it determined he "took property belonging to another." Defendant contends that since he was charged with larceny of property belonging to "Andy Stevens and Manna Baptist Church," the instruction was disjunctive because the jury could have found

> four possible verdicts: 1) guilty of larceny of the property of Andy Stevens; 2) guilty of larceny of the property of Manna Baptist Church; 3) guilty of larceny of the property of both Andy Stevens and Manna Baptist Church; or 4) guilty of larceny of the property of Andy Stevens in the view of some jurors, while guilty of larceny of the property of Manna Baptist Church in the view of others.

The State simply argues that the instructions were not disjunctive since they did not identify an alleged owner of the properly taken, but only instructed general that larceny is taking property of "another." But Defendant's argument on a disjunctive verdict addresses essentially the same problem as his argument above, in Issue (4), that there was a fatal variance between the evidence presented and the indictment. We need not address this issue further since we have ruled in defendant's favor on Issue (4) and vacated the larceny conviction.

V. Conclusion

We have elected to invoke our discretion under Rule 2 to address defendant's arguments regarding fatal variance for the reasons above, and we hold that the trial court erred in failing to dismiss the larceny charge due to a fatal variance between the indictment and the evidence presented regarding ownership of the property. We remand for entry of judgment in accord with this opinion and resentencing solely on the remaining breaking and entering offense.

VACATED AND REMANDED.

Judge ARROWOOD concurs.

Judge BERGER dissents in separate opinion.

BERGER, Judge, dissenting in separate opinion.

Because Rule 2 is not a mechanism to right all perceived wrongs, but instead, a tool to be used only in rare circumstances, there was substantial evidence of Defendant's guilt, and Defendant has not demonstrated that the larceny instruction had a probable impact on the jury's verdict, I respectfully dissent.

Rule 2 states:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate

> division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2.

The North Carolina Supreme Court provided straightforward direction for this Court to conduct a proper assessment of whether we should invoke Rule 2 in this case to determine if a variance existed between the indictment for larceny after breaking or entering, and the evidence presented at trial. *State v. Campbell*, 369 N.C. 599, 799 S.E.2d 600 (2017). In remanding this case, our Supreme Court emphasized Rule 2 should only be utilized "*in exceptional circumstances*." *Id.* at 603, 799 S.E.2d at 602. (emphasis in original). In determining whether this Court should exercise its discretion under Rule 2, we were instructed to look at "the *specific circumstances of individual cases and parties*," including, but not limited to, whether substantial rights are affected, the "*gravity of the offense*[]," and the penalty imposed. *Id.* at 603, 799 S.E.2d at 602-03 (emphasis in original) (citations omitted). Significantly, our Supreme Court stated that "precedent cannot create an automatic right to review." *Id.* at 603, 799 S.E.2d at 603.

The majority, however, delves into an exhaustive discussion of "Cases Addressing Rule 2 Review of Fatal Variance Issues," and bases its decision on the purported similarities of this case to *State v. Gayton-Barbosa*, 197 N.C. App. 129, 676 S.E.2d 586 (2009). While the Supreme Court cited *Gayton-Barbosa* as a case that engaged in an appropriate Rule 2 analysis, the majority has declined to engage in the individualized, case-specific analysis directed by *Campbell*.

The question is not whether a "defendant has presented a viable argument of a fatal variance and insufficiency of the evidence" as the majority has stated. The fact that there may be a variance is not determinative. The majority places the cart before the horse: because there is a variance, we must invoke Rule 2. Under the majority's analysis, there would never be a case in which a variance existed and this Court could decline to exercise its discretion. Such a result seems contrary to the text of Rule 2, and the Supreme Court's view of Rule 2 as a rare and exceptional judicial tool.

In *Campbell*, the Supreme Court set forth three factors for us to consider when determining whether or not we should use our discretion and invoke Rule 2: (1) whether substantial rights are affected, (2) the

"gravity of the offense," and (3) the penalty imposed. Each of these factors is addressed below.

While a deficient indictment certainly may affect substantial rights of a defendant, "contemporary criminal pleading requirements have been designed to remove from our law unnecessary technicalities which tend to obstruct justice." *State v. Williams*, 368 N.C 620, 623, 781 S.E.2d 268, 271 (2016) (citation and quotation marks omitted).

An indictment must set forth

> [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.

N.C. Gen. Stat. § 15A-924(a)(5) (2017). "An indictment . . . is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense[,] . . . protect[s] him from subsequent prosecution for the same offense[, and] . . . enable[s] the court to know what judgment to pronounce in the event of conviction." *State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984) (citations omitted). An indictment is "sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." N.C. Gen. Stat. § 15-153 (2017).

This is not a case in which Defendant is alleging a jurisdictional defect in the indictment. Further, Defendant has not asserted that the indictment failed to allege information sufficient to enable him to prepare a defense, or afford him double jeopardy protection. In essence, Defendant complains that the indictment sets forth too much information based upon the State's evidence at trial.

Moreover, "a variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction." *Gayton-Barbosa*, 197 N.C. App. at 134, 676 S.E.2d at 590. It is important to note that in *Gayton-Barbosa*, the case so heavily relied on by the majority, the defendant was charged with two felony assaults, felony breaking or entering, felony larceny, first degree kidnapping, and possession of a firearm by a convicted felon. *Id.* at 131, 676 S.E.2d at 588. The indictment

for felony larceny incorrectly named the owner of the stolen firearm, but the defendant failed to adequately preserve the issue for appellate review. This Court stated that "it is difficult to contemplate a more 'manifest injustice' to a convicted defendant than that which would result from sustaining a conviction that *lacked adequate evidentiary support*, particularly when leaving the error in question unaddressed has double jeopardy implications." *Id.* at 135, 676 S.E.2d at 590 (emphasis added).

Here, it is uncontroverted that the larceny indictment alleged ownership of the stolen property in Manna Baptist Church along with a second purported owner, Pastor Andy Stevens, while the evidence presented only established ownership in Manna Baptist Church. Defendant's complaint over what boils down to an indictment-related issue involves "less serious defects," *State v Brice*, ___ N.C. ___, ___, 806 S.E.2d 32, 36 (2017), and not substantial rights. One could argue it is one of those "unnecessary technicalities which tend to obstruct justice." *Williams*, 368 N.C. at 623, 781 S.E.2d at 271 (citation and internal quotation marks omitted).

The indictment charging Defendant with larceny after breaking or entering does not implicate jurisdictional concerns, lack of adequate notice, or double jeopardy exposure. The evidence at trial showed that a purported owner listed in the indictment was the actual owner of the property stolen. Defendant's substantial rights were not affected, thus the invocation of Rule 2 is not warranted based on this factor.

Similarly, the second and third factors do not support a Rule 2 review by this Court. After a Cleveland County jury found Defendant guilty of breaking or entering a house of worship and larceny after breaking or entering, the trial court consolidated the charges for judgment, and Defendant was sentenced to a presumptive-range sentence that included special probation. Larceny-related offenses cause serious, negative impacts to our communities, and a single felony conviction can be detrimental for defendants. However, it cannot be said that the "gravity" of this offense and the punishment involved are such that we should suspend appellate rules. Therefore, pursuant to the facts and circumstances of this case, I would not employ Rule 2 to suspend the appellate rules in order to reach the merits of this case.

Additional Issues

The majority finds that the trial court erred in denying Defendant's motion to dismiss and in instructing the jury. Both arguments involve the larceny after breaking or entering conviction. I respectfully disagree on both issues.

Evidence presented at trial tended to show that Pastor Andy Stevens arrived at Manna Baptist Church on the morning of August 19, 2012. At the end of service that day, he noticed some of the sound equipment was missing. Stevens estimated the value of the equipment was approximately $500.00. While looking through the building, a wallet was located with various sound equipment near the front of the church. The wallet contained Defendant's social security card and North Carolina driver's license. The incident was investigated by the Cleveland County Sheriff's Department.

Defendant was incarcerated in the Cleveland County Detention Center on an unrelated charge at the time the initial report was received by the detective division. Detective Jessica Woosley went to the jail to interview Defendant, and as he was being escorted to meet the detective, Defendant stated, "[T]his can't possibly be good. What have [I] done now that I don't remember?" Detective Woosley read Defendant his *Miranda* rights, and he requested an attorney. Detective Woosley ceased questioning, but Defendant pointed to her "Manna Baptist Church" case file that was on the desk, and stated that he remembered being there while on a spiritual journey, but could not remember what had taken place.

Defendant testified at trial that he entered Manna Baptist Church on the night the incident occurred and took a bottle of water. Defendant admitted that he had a black duffle bag with him that night, but he dumped the duffle bag in a ditch because it was "too heavy and just too cumbersome . . . to carry all the way to where [he] was going."

A Cleveland County jury found Defendant guilty of breaking or entering a house of worship and larceny pursuant to breaking or entering. As stated above, Defendant received a sentence of Special Probation.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. J. 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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 913, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. L. 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 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) (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, quotation marks, and brackets omitted).

A defendant may be properly convicted of larceny where the evidence establishes that the defendant has taken the property of another, carried it away, without consent of the owner, and with the intent to deprive the owner of the property permanently. *State v. Barbour*, 153 N.C. App. 500, 502, 570 S.E.2d 126, 127 (2002) (citation omitted). When viewed in the light most favorable to the state, there was substantial evidence that Defendant committed larceny pursuant to breaking or entering Manna Baptist Church. Defendant admitted he was in the church at or near the time the property was stolen, and could not recall what had taken place while he was there. Further, the jury could reasonably infer that he left either in haste, or while preoccupied, because his wallet was found in the church in an area where some of the sound equipment was located. Also, Defendant admitted to abandoning a duffle bag around the time the incident occurred because it was too heavy and too cumbersome. This circumstantial evidence, together with Defendant's statements at the jail facility that "this can't possibly be good" and "[w]hat have [I] done now that I don't remember," allowed the trial court to determine that there was in fact a reasonable inference of Defendant's guilt, and it was for the jury to determine if Defendant was guilty. Thus, I would find no error as there was sufficient evidence of larceny.

Finally, Defendant asserts that the trial court's disjunctive instruction was erroneous because it violated jury unanimity. The majority

declines to address this argument, stating that "Defendant's argument on a disjunctive verdict addresses essentially the same problem as his argument . . . that there was a fatal variance[.]" While I agree with this statement, I disagree with the result.

"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, stating distinctly that to which objection is made and the grounds of the objection . . . ." N.C.R. App. P. 10(a)(2). "To have an alleged error reviewed under the plain error standard, the defendant must specifically and distinctly contend that the alleged error constitutes plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation and quotation marks omitted). *See also State v. Boyd*, 222 N.C. App 160, 730 S.E.2d 193 (2012), *rev'd for the reasons stated in the dissenting opinion*, 366 N.C. 548, 742 S.E.2d 798 (2013) (per curiam) (plain error review applies to an unpreserved error concerning a jury instruction for which there was no evidence).

To establish plain error,

> a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (citation and quotation marks omitted). Defendant here has not argued prejudice, and cannot establish prejudice.

The trial court instructed the jury that in order to find Defendant guilty of felony larceny,

> the State must prove six things beyond a reasonable doubt.
>
> First, that the defendant took *property belonging to another*;
>
> Second, that the defendant carried away the property;
>
> Third, that *the victim did not consent* to the taking and carrying away of the property;
>
> Fourth, that at the time of the taking, the defendant intended to deprive *the victim* of its use permanently;
>
> Fifth, that the defendant knew he was not entitled to take the property;

> And sixth, that the property was taken from a building after a breaking or entering.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant took and carried away *another person's property* without the *victim's* consent from the building after a breaking or entering – and in this case, [] an entry – knowing that he was not entitled to take it and intending at the time of the taking to deprive the *victim* of its use permanently, it would be your duty to return a verdict of guilt.
>
> If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphasis added).

Even if we assume there was an error in the instruction, Defendant has not and cannot demonstrate "that, absent the error, the jury probably would have returned a different verdict. . . . In addition, the error in no way seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335. The inclusion of 'Andy Stevens' in the indictment along with the purported error in jury instructions, "under the facts of this particular case, make no difference at all in the result." *Boyd*, 222 N.C. App at 173, 730 S.E.2d at 201. Manna Baptist Church was listed on the indictment, and the evidence at trial showed it was the owner of the property.

Conclusion

For the reasons stated herein, Rule 2 is a tool to be used only in rare circumstances, and should not be invoked in this case. Furthermore, there was substantial evidence of Defendant's guilt, and Defendant has failed to demonstrate that the larceny instruction had a probable impact on the jury's verdict. Defendant received a fair trial free from prejudicial error, and the jury's verdict should be upheld.

STATE OF NORTH CAROLINA
v.
ROBERT LINDSEY COLEY, JR.

No. COA17-470

Filed 6 February 2018

1. Appeal and Error—notice of appeal after verdict but before entry of judgment—writ of certiorari

Where defendant gave oral notice of appeal in open court after the jury returned its verdict but before the entry of judgment by the trial court, his right to appeal was lost based on his failure to comply with Rule of Appellate Procedure 4(a). In its discretion, the Court of Appeals granted defendant's petition for writ of certiorari and considered the merits of his argument.

2. Drugs—possession with intent to sell or deliver marijuana—11.5 grams packaged in 2 sandwich bags, digital scale, and loose sandwich bags—issue for jury

The evidence in defendant's trial for possession with intent to sell or deliver marijuana—which established that defendant's vehicle contained 11.5 grams of marijuana packaged in two sandwich bags, a digital scale, and 23 other loose sandwich bags—was sufficient for the trial court to deny defendant's motion to dismiss and submit the issue to the jury.

Appeal by defendant from judgment entered 12 September 2016 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 2 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Laura H. McHenry and Assistant Attorney General Kristen Jo Uicker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

DAVIS, Judge.

In this appeal, we once again address the quantum of proof necessary for a defendant to be lawfully convicted of possession with intent to sell or deliver marijuana. The evidence at trial established that the defendant's vehicle contained 11.5 grams of marijuana packaged in

two sandwich bags, a digital scale, and 23 other loose sandwich bags. Because we conclude that the evidence — when viewed in the light most favorable to the State — was sufficient for a reasonable juror to have found him guilty of this offense, we affirm the defendant's convictions.

Factual and Procedural Background

The State introduced evidence at trial tending to establish the following facts: On 29 May 2015, Officer Miles Costa of the Nashville Police Department was driving his patrol vehicle on the east side of Nashville, North Carolina when he noticed expired tags on a car being driven by Robert Lindsey Coley, Jr. ("Defendant"). After verifying that the vehicle's registration was expired, Officer Costa pulled over Defendant's car and approached the driver's side.

Defendant told Officer Costa that he did not have his driver's license with him and that he could not find his registration card. While speaking to Defendant, Officer Costa smelled the odor of marijuana and asked him to exit the vehicle. Officer Costa then asked Defendant if he had any marijuana in the car, and Defendant responded that there was some in the glove compartment. Defendant was placed in handcuffs while Officer Costa conducted a search of the vehicle. He found a sandwich bag containing 8.6 grams of marijuana in the glove compartment. Upon returning to his patrol vehicle to weigh the marijuana, Officer Costa was informed by Defendant that there was also a digital scale in the center console of the car.

By this time, another officer had arrived on the scene, and the two officers searched the vehicle together. They found a digital scale, another sandwich bag containing 2.9 grams of marijuana, and two partially smoked marijuana cigars in the center console. Thirteen Dutch Masters cigar wrappers, along with one unopened package of cigars, were discovered elsewhere in the car. The officers found a box of sandwich bags in the backseat that had been opened along with 23 loose sandwich bags strewn throughout the vehicle.

Defendant also had over $800 in cash on his person. He informed the officers that he had just cashed his paycheck, and Officer Costa found a pay stub in the vehicle.

Defendant told the officers that he kept the scale in his car to ensure that he actually received from his sellers the precise amount of marijuana that he had purchased so as to avoid being "ripped off." He further stated that the sandwich bags were in his vehicle because "his drug dealers were cheap and . . . [h]e had to provide his own bags."

Defendant was indicted by a Nash County grand jury on 5 October 2015 on the charges of possession with intent to sell and deliver marijuana and possession of marijuana paraphernalia. A jury trial was held beginning on 29 August 2016 before the Honorable Quentin T. Sumner.

Officer Costa testified on direct examination, in pertinent part, as follows:

> [PROSECUTOR]: Now, I want to talk about your law enforcement experience and training. You testified that this substance was marijuana. Have you had any particular training in the identification of marijuana?
>
> [OFFICER COSTA]: Yes, ma'am.
>
> [PROSECUTOR]: Please explain that training for us.
>
> [OFFICER COSTA]: We -- we go through a -- we go to a control room, controlled area, controlled classroom and marijuana's presented to us in big amounts, small amounts. And the smell, we're allowed to smell it. We're allowed to touch it. We're allowed to feel it. Everything like that.
>
> . . . .
>
> [PROSECUTOR]: . . . Are you familiar with how marijuana is commonly sold?
>
> [OFFICER COSTA]: Yes, ma'am.
>
> [PROSECUTOR]: Tell me about that.
>
> [OFFICER COSTA]: Marijuana is, majority of the time, commonly sold in your nickel bags or your dime bags.
>
> [PROSECUTOR]: Tell me what exactly is a nickel bag?
>
> [OFFICER COSTA]: A nickel bag is .5 grams of marijuana. Usually costs, depending on the grade of marijuana, $5. A dime bag would be $10 and that is a -- that's one gram of marijuana.
>
> [PROSECUTOR]: And in selling those quantities, how are they typically packaged? Or how is the marijuana typically packaged?
>
> [OFFICER COSTA]: They're packaged in a sandwich bag.

. . . .

[PROSECUTOR]: Tell me why you chose to charge the Defendant with possession with intent to sell or deliver versus just possessing the marijuana?

[OFFICER COSTA]: Yes, ma'am; the -- with the amount of marijuana and the two individual bags, normally if somebody is going to have a large amount of marijuana, they're going to have it one [sic] bag. The two - - two separate bags, the amount of marijuana, the sandwich bags all over the vehicle, the drug scale[.]

. . . .

[PROSECUTOR]: Now, you said that you took the amount, the way it was divided and packaged and the sandwich bags and the scale as factors that went towards your charging. Now, [Defendant] offered an explanation that [Defendant's counsel] has presented to the jury. Was that explanation not sufficient enough to deter you from charging the possession with intent to sell or deliver?

[OFFICER COSTA]: Yes, ma'am. The explanation did not make any sense to me. I've never heard it before coming from anybody else. Normally, people who have marijuana inside of the vehicle do not have several sandwich bags inside of the vehicle.

At the close of the State's evidence, Defendant moved to dismiss the charge of possession of marijuana with intent to sell or deliver based on insufficiency of the evidence. The trial court denied his motion.

During Defendant's case-in-chief, the following exchange occurred between Defendant and his attorney:

[DEFENDANT'S COUNSEL]: What's the deal with the sandwich bags?

[DEFENDANT]: The dealers who I was dealing with they just wouldn't have them, they wouldn't supply them. They would say they don't want to risk having them and stuff like that. They just wouldn't have them, so I would use it to what I would pick a week [sic] to put them into the bag.

. . . .

[DEFENDANT'S COUNSEL]: Now, why did you have -- also found in your car was a scale. Why did you have the scale?

[DEFENDANT]: To make sure I was getting what I was purchasing. I mean, people that I'm dealing with, it's not like it's a pre-packaged product where I'm going to know exactly what I'm getting is what they're telling me. So I would check it to make sure that it is what they say it is, the amount wise.

. . . .

[DEFENDANT'S COUNSEL]: Why did you have two bags?

[DEFENDANT]: One of them I actually had forgotten about. . . .

[DEFENDANT'S COUNSEL]: Why -- how did you forget about a bag of marijuana?

[DEFENDANT]: It just wasn't good quality and I ended up buying something else and I guess I just forgot it was in there.

Defendant renewed his motion to dismiss at the close of all the evidence, and the trial court once again denied his motion. On 30 August 2016, the jury convicted him of both charges. The trial court consolidated the convictions and sentenced Defendant to a term of imprisonment between 6 and 17 months, suspended the sentence, and placed him on supervised probation for 18 months. Defendant gave oral notice of appeal in open court prior to the entry of the judgment.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must determine whether we possess jurisdiction over this appeal. Rule 4(a) of the North Carolina Rules of Appellate Procedure states, in pertinent part, as follows:

(a) Manner and time. 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 . . . .

N.C. R. App. P. 4(a).

Here, Defendant gave oral notice of appeal in open court after the jury returned its verdict but prior to the entry of judgment by the trial court. Thus, because he did not give notice of his appeal following entry of the judgment, his right to appeal has been lost based on his failure to comply with Rule 4(a). *See State v. Robinson*, 236 N.C. App. 446, 448, 763 S.E.2d 178, 179 (2014) (right of appeal lost where Defendant "gave notice of appeal in open court following the jury's verdict, but failed to give notice of appeal following entry of the trial court's final judgment"), *aff'd as modified*, 368 N.C. 402, 777 S.E.2d 755 (2015).

Defendant has filed a petition for writ of *certiorari* requesting appellate review of his convictions in the event that his notice of appeal is deemed by this Court to be defective. Pursuant to Rule 21(a)(1) of the Appellate Rules, this Court may, in its discretion, grant a petition for writ of *certiorari* and review an order or judgment entered by the trial court "when the right to prosecute an appeal has been lost by failure to take timely action. . . ." N.C. R. App. P. 21(a)(1).

Here, the State does not contend that it was misled by Defendant's defective notice of appeal and acknowledges that it is within this Court's discretion to allow the petition. *See State v. Springle*, __ N.C. App. __, __, 781 S.E.2d 518, 521 (2016) ("[A] defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake." (quotation marks, ellipsis, and citation omitted)).

In our discretion, we elect to grant Defendant's petition for writ of *certiorari* and proceed to address the merits of his argument. *See Robinson*, 236 N.C. App. at 448, 763 S.E.2d at 180 (granting defendant's petition for *certiorari* where oral notice of appeal was given after jury verdict but prior to entry of judgment).

II. Denial of Motion to Dismiss

[2] Defendant's sole argument on appeal is that the trial court erred in denying his motion to dismiss the possession with intent to sell or deliver marijuana charge. His primary contention is that the quantity of marijuana found in his vehicle was too small to allow this charge to be submitted to the jury.

"A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, __ N.C. App. __, __, 785 S.E.2d 175, 177

(citation omitted), *disc. review denied*, 369 N.C. 40, 792 S.E.2d 508 (2016). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's 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). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Pursuant to N.C. Gen. Stat. § 90-95, "the offense of possession with intent to sell or deliver has three elements: (1) possession; (2) of a controlled substance; with (3) the intent to sell or deliver that controlled substance." *State v. Blakney*, 233 N.C. App. 516, 519, 756 S.E.2d 844, 846 (citation omitted), *disc. review denied*, 367 N.C. 522, 762 S.E.2d 204 (2014). We have held that 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." *State v. Wilkins*, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809 (2010) (brackets, quotation marks, and citation omitted). Such intent "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." *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (citation omitted), *disc. review denied*, 359 N.C. 640, 617 S.E.2d 286 (2005). Although the "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." *Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 810 (quotation marks and citation omitted).

It is instructive to examine prior cases from our appellate courts on this issue. In *Blakney*, the defendant's vehicle contained 84.8 grams of marijuana packaged in a number of containers, including "two sandwich bags, four 'dime bags,' and five other types of bags." *Blakney*, 233 N.C. App. at 520, 756 S.E.2d at 847. Additionally, a box of sandwich bags, a digital scale, and a "large amount of cash" were discovered in the car. *Id.* at 517, 756 S.E.2d at 845. We held that the evidence was sufficient to survive a motion to dismiss, concluding as follows:

> [T]he manner in which the marijuana was packaged (such as four "dime bags") raised more than an inference that defendant intended to sell or deliver the marijuana. Further, the presence of items commonly used in packaging and weighing drugs for sale — a box of sandwich bags and [a] digital scale[ ] — along with a large quantity of cash in small denominations provided additional evidence that defendant intended to sell or deliver marijuana, as opposed to merely possessing it for his own personal use[.]

Id. at 520, 756 S.E.2d at 847.

State v. Williams, 71 N.C. App. 136, 321 S.E.2d 561 (1984), involved 27.6 grams of marijuana recovered from the defendant's jacket. *Id.* at 139, 321 S.E.2d at 564. The marijuana "was packaged in seventeen separate, small brown envelopes known in street terminology as 'nickel or dime bags.' " *Id.* at 140, 321 S.E.2d at 564. The defendant in that case argued that the amount of marijuana at issue was too small to raise an inference that he intended to sell or deliver the drugs. *Id.* at 139, 321 S.E.2d at 564. In ruling that the evidence was sufficient to survive a motion to dismiss, we stated that the "[d]efendant's argument would be persuasive except for the evidence of how the 27.6 grams of marijuana was packaged." *Id.* at 139-40, 321 S.E.2d at 564.

Similarly, in *State v. Yisrael*, __ N.C. App. __, 804 S.E.2d 742 (2017), we held that sufficient evidence supported a possession with intent to sell or deliver charge where the defendant possessed a total of 10.88 grams of marijuana packaged in three separate baggies — one "dime bag" and two larger bags. *Id.* at __, 804 S.E.2d at 743. The defendant in Yisrael was also carrying $1,504 and in possession of a stolen handgun. *Id.* at __, 804 S.E.2d at 745-46.

We determined that "[t]his quantity of illegal drugs and its packaging . . . ; the large amount of unsourced cash on [the defendant's] person; and the stolen and loaded handgun [are] sufficient to support a reasonable inference that [the defendant] intended to sell or deliver the marijuana he admittedly possessed . . . ." *Id.* at __, 804 S.E.2d at 747; *see also State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974) (holding that "[t]he jury could reasonably infer an intent to distribute from the amount of the substance found, the manner in which it was packaged and the presence of other packaging materials" where 219 grams of marijuana were packaged in 16 small envelopes and 28 empty envelopes were found nearby).

Conversely, in *Wilkins* and *Nettles* we held that small quantities of drugs unaccompanied by evidence that the substances were packaged for sale were insufficient to raise an inference of intent to sell or deliver. The defendant in *Wilkins* possessed 1.89 grams of marijuana contained in three small bags and $1,264 in cash. *Wilkins*, 208 N.C. App. at 730, 703 S.E.2d at 809. Regarding the packaging, this Court stated that "[w]hile 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." *Id.* at 732, 703 S.E.2d at 810. We concluded as follows:

> Had defendant possessed more than 1.89 grams of marijuana, or had there been additional circumstances to consider, we may have reached a different conclusion; however, given the fact that neither the amount of marijuana nor the packaging raises an inference that defendant intended to sell the drugs, the presence of the cash as the only additional factor is insufficient to raise the inference.

Id. at 733, 703 S.E.2d at 810 (citation omitted).

Nettles involved the discovery of four to five crack cocaine rocks weighing 1.2 grams in the defendant's vehicle. *Nettles*, 170 N.C. App. at 105, 612 S.E.2d at 175. The police also seized a safety pin from the defendant's living room. *Id.* at 102, 612 S.E.2d at 173. Although "officers testified that a safety pin typically is utilized by crack users to clean a crack pipe, there were no other drugs or drug paraphernalia typically used in the sale of drugs found on the premises." *Id.* at 107, 612 S.E.2d at 177. In ruling that there was insufficient evidence of an intent to sell or deliver, we noted the absence of any 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. Ultimately, we concluded that even "[v]iewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller." *Id.* at 107, 612 S.E.2d at 177.

Thus, in ruling upon the sufficiency of evidence in cases involving the charge of possession with intent to sell or deliver, our courts have placed particular emphasis on the amount of drugs discovered, their method of packaging, and the presence of paraphernalia typically used to package drugs for sale. Moreover, our case law demonstrates that this is a fact-specific inquiry in which the totality of the circumstances in each case must be considered unless the quantity of drugs found is so substantial that this factor — by itself — supports an inference of

possession with intent to sell or deliver. With these principles in mind, we now turn to the evidence in the present case.

As noted above, Defendant's vehicle contained a total of 11.5 grams of marijuana contained in two sandwich bags. Additionally, a digital scale and an open box of sandwich bags were found along with 23 loose sandwich bags. Viewed in isolation, the relatively small quantity of marijuana discovered in the vehicle would not be enough to support an inference that Defendant possessed the drugs with the intent to sell or deliver. *See State v. Wiggins*, 33 N.C. App. 291, 294, 235 S.E.2d 265, 268 (holding that discovery of 215.5 grams of marijuana was, by itself, insufficient to survive a motion to dismiss), *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977). However, given the additional presence of the digital scale and the large number of sandwich bags found in Defendant's vehicle, we are satisfied that the State's evidence was sufficient to create a question for the jury. Despite Defendant's testimony that he only utilized the scale and sandwich bags in connection with his own personal marijuana use, a rational jury could have found his explanation to lack credibility.

Even assuming that this case can be characterized as a close one, we have held that "[i]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *Yisrael*, __ N.C. App. at __, 804 S.E.2d at 747 (brackets, quotation marks, and citation omitted). Accordingly, we hold that the trial court did not err in denying Defendant's motion to dismiss.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges ZACHARY and BERGER concur.

STATE OF NORTH CAROLINA
v.
DARYL LEE CROMARTIE, DEFENDANT

No. COA17-350

Filed 6 February 2018

1. Evidence—hearsay—explaining subsequent conduct—identity and motive

Where the trial court admitted an officer's testimony, for the purpose of explaining the officer's subsequent conduct, concerning defendant's alleged assault of his girlfriend, and then later instructed the jury that the testimony could be considered evidence of motive and identity, the error in admitting the testimony as evidence of defendant's identity and motive was harmless. In light of the ample evidence to convict defendant, there was not a reasonable possibility of a different outcome.

2. Constitutional Law—double jeopardy—lesser-included offenses from same facts

Entry of judgment on defendant's convictions for common law robbery and the lesser-included offenses of non-felonious larceny and simple assault, which arose out of the same facts as the robbery, violated defendant's right to be free from double jeopardy. Defendant received the lowest possible sentence in the mitigated range, so the Court of Appeals did not remand for resentencing but did arrest judgment on his convictions for non-felonious larceny and simple assault so as to avoid any collateral consequences.

3. Indictment and Information—resisting a public officer—"by running away on foot"

There was no fatal variance between the indictment charging defendant with resisting a public officer—which specified that defendant resisted "by running away on foot"—and the evidence at trial, which tended to show that defendant fled on a stolen moped from pursuing officers, went behind a Dollar General Store, and was found approximately 15 to 20 feet from the moped when an officer regained sight of him.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 7 September 2016 by Judge Phyllis M. Gorham in Duplin County Superior Court. Heard in the Court of Appeals 17 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christina S. Hayes, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for Defendant.

MURPHY, Judge.

Daryl Lee Cromartie ("Defendant") appeals from judgment entered upon his convictions for attaining habitual felon status, common law robbery, misdemeanor larceny, fleeing to elude arrest, resisting a public officer, and simple assault. Defendant argues the trial court erred by: (1) admitting Deputy Snyder's prejudicial and inadmissible hearsay into evidence; (2) failing to arrest judgment for the larceny and assault convictions; and (3) failing to dismiss the charge of resisting an officer where no evidence satisfied the allegation in the indictment. For the reasons discussed, we hold the trial court did not commit prejudicial error in allowing Deputy Snyder's testimony into evidence, and did not err by denying Defendant's motion to dismiss the resisting a public officer charge. The trial court, however, did err by failing to arrest judgment on Defendant's convictions for non-felonious larceny and simple assault.

I. Background

Defendant was arrested on 14 December 2015 and indicted by a Duplin County Grand Jury on 21 March 2016 on charges of misdemeanor fleeing to elude arrest with a motor vehicle, resisting, obstructing or delaying a public officer, common law robbery, felony larceny, and simple assault. A Duplin County Grand Jury additionally indicted Defendant for attaining habitual felon status on 31 May 2016.

Defendant's trial began on 6 September 2016. The evidence at trial tended to show that after assaulting his girlfriend on 14 December 2015, Defendant stopped a man on a moped, pulled the man off the moped and assaulted the man, and then drove away on the man's moped. Responding law enforcement officers quickly located Defendant, who then fled from the officers on the moped. During the pursuit, Defendant drove the moped behind a Dollar General store and out of the view of a pursuing sheriff's deputy. When the Deputy regained sight of Defendant, Defendant was standing approximately 15 to 20 feet from the moped, which was overturned and lying in a ditch. Defendant was arrested.

On 7 September 2016, the jury returned verdicts finding Defendant guilty of misdemeanor fleeing to elude arrest, resisting, obstructing, or delaying a public officer, common law robbery, non-felonious larceny, and simple assault. Following the jury verdicts, Defendant pleaded guilty to attaining habitual felon status. The trial court consolidated all of the offenses and entered a single judgment sentencing Defendant in the mitigated range to a term of 58 to 82 months imprisonment. Defendant gave notice of appeal in open court.

II. Analysis

A. Hearsay

[1] On appeal, Defendant first contends the trial court erred in admitting testimony from Deputy Sheriff Steven Snyder over his objections. Defendant claims the challenged testimony was inadmissible hearsay and that its admission was prejudicial to his case. We disagree that Defendant was prejudiced by the challenged testimony.

"When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011). But, even if the trial court admits hearsay in error, "[t]he erroneous admission of hearsay testimony is not always so prejudicial as to require a new trial, and the burden is on the defendant to show prejudice." *State v. Allen*, 127 N.C. App. 182, 186, 488 S.E.2d 294, 297 (1997) (citations omitted); *see* N.C.G.S. § 15A–1443(a) (2015). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) (citation omitted).

Under the North Carolina Rules of Evidence, "[h]earsay is not admissible except as provided by statute or by [the] rules." N.C.G.S. § 8C-1, Rule 802 (2015). " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c). "When evidence of such statements by one other than the witness testifying is offered for a proper purpose other than to prove the truth of the matter asserted, it is not hearsay and is admissible." *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990).

The testimony at issue in this case concerned Defendant's alleged assault of his girlfriend prior to the events giving rise to the charges in this case. Deputy Snyder testified that he was on a dayshift patrol on 14 December 2015 when a female at a gas station flagged him down.

Deputy Snyder recalled that the woman ran to his car, crying hysterically, and told him that she had just been assaulted. Defendant objected to the testimony, claiming it was hearsay. The trial court, however, overruled Defendant's objection and instructed the State to "[l]ay a foundation for the purpose of the call in reference to the stop." Deputy Snyder then continued to explain the situation. When the State inquired whether the woman identified her assaulter to Deputy Snyder, Defendant objected on hearsay grounds. Over Defendant's objection, Deputy Snyder was allowed to testify that the woman told him the name of her assaulter. The name she gave Deputy Snyder was Defendant's name. Deputy Snyder also testified that he asked the woman where Defendant was heading when Defendant left the gas station. Overruling another hearsay objection by Defendant, the trial court allowed Deputy Snyder to testify that the woman told him "[Defendant] flagged down a white pickup and was heading North on 117." When local units arrived at the gas station, Deputy Snyder left heading north on the lookout for Defendant.

Defendant now admits that it initially appeared the testimony was elicited to explain Deputy Snyder's subsequent conduct, which Defendant recognizes to be a valid purpose. Indeed, "[w]e have held statements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as nonhearsay evidence." *State v. Golphin*, 352 N.C. 364, 440, 533 S.E.2d 168, 219 (2000) (quotation omitted). Yet, Defendant contends the trial court ultimately admitted the evidence for substantive purposes when it instructed the jury that the testimony could be considered evidence of motive and identity. The trial court's instructions were as follows:

> Evidence has been received tending to show that [D]efendant assaulted his girlfriend at the time that the crime was committed in this case. This evidence was received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed, and that [D]efendant had a motive for commission of the crime charged in this case. If you believe this evidence, you may consider it but only for the limited purpose for which it was received. You may not consider it for any other purpose.

Upon review of the jury instructions, it appears the trial court was attempting to limit the consideration of the evidence in accordance with N.C.G.S. § 8C-1, Rule 404(b), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

However, in doing so, the trial court changed the nature of the evidence from nonhearsay, when the testimony is considered solely to explain Deputy Snyder's subsequent conduct, to hearsay, when the testimony is considered as proof of identity and motive. That is because in order for the jury to consider the challenged testimony as evidence of identity and motive, the jury would have to consider the testimony for the truth of the matter asserted, even though the testimony did not directly concern the crimes charged in this case. Thus, while the challenged testimony was admissible to explain Deputy Snyder's subsequent conduct, it was error for the trial court to admit the testimony as evidence of Defendant's identity and motive. When the testimony is considered for the truth of the matter asserted, it is hearsay.

Nevertheless, the trial court's admission of the challenged testimony for purposes of proving identity and motive was harmless error. To show prejudice, Defendant must show that "there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed." *State v. Hickey*, 317 N.C. 457, 473, 346 S.E.2d 646, 657 (1986) (citations omitted).

Defendant contends the challenged testimony was "highly prejudicial" in this case because the crux of his defense was that the State failed to provide sufficient evidence of his intent in taking the moped. Defendant asserts that, absent the testimony, there was no evidence of his motivation for taking the moped or that he intended to keep the moped. Defendant further asserts that the jury was much less likely to doubt that he intended to permanently deprive the victim of the moped after learning that he assaulted his girlfriend and was running away from her. We disagree.

Absent the challenged testimony, there was ample evidence for the jury to convict Defendant of the charged offenses. Specifically, evidence was presented that the victim, the owner of the moped, was stopped by a man standing in the road blocking his way. The man approached the victim and grabbed hold of the front of the moped. The victim testified that the man began to ask him questions about the moped and stated, "I like that scooter[ ]" and "I need to get me one." When the victim attempted

to back up to go around the man, the man, who still had hold of the front of the moped, reached over the handlebars, grabbed the victim by the coat collar, and pulled the victim off of the moped. The moped fell to the ground and the man beat the victim and slung him around on the road. A struggle ensued. Eventually, the man was able to break free from the victim and took off on the moped. When asked to describe what the man looked like, the victim identified Defendant, pointing to him in the courtroom and stating, "[t]hat's him right there[.]" Furthermore, testimony was given that deputies spotted Defendant on the moped shortly thereafter and pursued Defendant until he crashed the moped in a ditch.

Given the ample evidence in this case, there is not a reasonable possibility of a different outcome even if the challenged testimony had not been admitted at trial. Thus, the trial court did not commit prejudicial error when it admitted the testimony as evidence of Defendant's identity and motive.

B. Double Jeopardy

[2] Defendant also argues the trial court erred by failing to arrest judgment on his convictions for non-felonious larceny and simple assault. Defendant now contends this error amounts to a violation of his right to be free from double jeopardy.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). Yet, "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted). "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1) (2017). Particularly relevant to this case, this Court has stated that,

> [t]he constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived. To avoid waiving this right, a defendant must properly raise the issue of double jeopardy before the trial court. Failure to raise this issue at the trial court level precludes reliance on the defense on appeal. Simply put, double jeopardy protection may not be raised on appeal

> unless the defense and the facts underlying it are brought first to the attention of the trial court.

State v. White, 134 N.C. App. 338, 342, 517 S.E.2d 664, 667 (1999) (quotation marks and citations omitted).

In this case, Defendant moved to dismiss all charges at the close of the State's evidence, only specifically arguing against the resisting a public officer charge. Defendant then renewed "the same motions to dismiss for the same reasons[ ]" at the close of all of the evidence. Defendant also later moved to set aside the verdicts on the basis that they were "against the greater weight of the evidence." Defendant, however, never argued a double jeopardy violation to the trial court. As the double jeopardy issue was never raised to the trial court, Defendant has not preserved the issue for review on appeal.

Nevertheless, recognizing his possible error below, Defendant asserts on appeal that, if the issue was not preserved for appeal, we should invoke Rule 2 to reach the merits of the issue or we should determine whether he received ineffective assistance of counsel. To prevent manifest injustice to Defendant in this case, we choose to invoke Rule 2 and address the merits of Defendant's argument. *See* N.C. R. App. P. Rule 2 ("To prevent manifest injustice to a party, . . . either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.").

"Under the Double Jeopardy Clause, when one offense is a lesser-included offense of another, the two offenses are considered the same criminal offense." *State v. Schalow*, __ N.C. App. __, __, 795 S.E.2d 567, 579 (2016) (citations omitted), *disc. review allowed*, __ N.C. __, 796 S.E.2d 791 (2017). This Court has held that larceny is a lesser included offense of common law robbery. *State v. White*, 322 N.C. 506, 517 n.1, 369 S.E.2d 813, 819 n.1 (1988) (reaffirming the Court's prior holding that larceny is a lesser included offense of common law robbery) (citing *State v. Young*, 305 N.C. 391, 393, 289 S.E.2d 374, 376 (1982)). Likewise, assault is a lesser included offense of common law robbery. *See State v. White*, 142 N.C. App. 201, 204, 542 S.E.2d 265, 268 (2001) ("Our appellate courts have stated several times that the crime of common law robbery includes an assault on the person."). Upon review, it is clear the trial court erred in sentencing Defendant for the non-felonious larceny and simple assault convictions in this case because those offenses arose out of the same facts as the common law robbery. As a result, the

entry of judgment on the common law robbery conviction and the lesser included non-felonious larceny and simple assault convictions violated Defendant's right to be free from double jeopardy.

The State does not contest that the convictions do not violate double jeopardy, and in fact concedes that larceny and assault are lesser included offenses of common law robbery. Instead, the State, assuming there was a double jeopardy violation, argues Defendant was not prejudiced by the violation because all convictions were consolidated for judgment and Defendant received a single sentence. In fact, Defendant received the lowest possible sentence that he could have received in the mitigated range. Therefore, although typically "[w]hen the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing," *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015), we do not remand for resentencing where Defendant has already received the lowest possible sentence because remanding when one of the convictions of a consolidated sentence is in error is based on the premise that multiple offenses probably influenced the defendant's sentence. *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) (remanding for resentencing when one or more, but not all, of the convictions consolidated for judgment have been vacated because conviction for two or more offenses influences adversely to a defendant the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment). We would only remand after arresting judgment if "we were unable to determine what weight, if any, the trial court gave to each of the separate convictions. . . ." *See State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990). Here, Defendant received the lowest possible sentence and we need not remand for resentencing.

Nevertheless, the State's argument ignores the collateral consequences of the judgment. Our Supreme Court has stated, "[t]hat the offenses were consolidated for judgment does not put to rest double jeopardy issues, because the separate convictions may still give rise to adverse collateral consequences." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (citations omitted). The proper recourse in this case is for us to arrest judgment on Defendant's convictions for non-felonious larceny and simple assault so as to avoid any collateral consequences. *See State v. Jaynes*, 342 N.C. 249, 276, 464 S.E.2d 448, 465 (1995) (arresting judgment on two lesser included larceny convictions), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). We arrest judgment on the larceny and assault convictions.

C. Motion to Dismiss

[3] In his last argument on appeal, Defendant argues the trial court erred in denying his motion to dismiss the resisting a public officer charge because of a fatal variance between the indictment and the evidence. We disagree. In the light most favorable to the State, the direct and circumstantial evidence demonstrates that Defendant continued to elude Deputy Boyette on foot after the moped overturned.

"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). "In ruling on a motion to dismiss, the evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387-88 (1984) (citation omitted). "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witnesses' credibility . . . . Ultimately, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Blizzard*, 169 N.C. App. 285, 289-90, 610 S.E.2d 245, 249 (2005) (quotation omitted).

"The elements of resisting an officer are that a person 'willfully and unlawfully resisted, delayed or obstructed a public officer in discharging or attempting to discharge a duty of his office." *State v. Shearin*, 170 N.C. App. 222, 223, 612 S.E2d 371, 380 (2005) (quoting N.C.G.S. § 14-223). We have "previously recognized that an indictment for the charge of resisting an officer must: 1) identify the officer by name, 2) indicate the official duty being discharged, and 3) indicate generally how [the] defendant resisted the officer." *State v. Henry*, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102-103 (2014), *disc. review denied*, __ N.C. __, 775 S.E.2d 852 (2015) (quotation omitted).

Here, the indictment for resisting an officer specified that Defendant resisted "by running away from Cody Boyette on foot." The evidence at trial tended to show that Deputy Boyette was in hot pursuit of Defendant when Defendant went behind the Dollar General. At some point between when Defendant went behind the store and when Deputy Boyette arrived behind the store, Defendant traversed approximately 15 to 20 feet from the stolen and overturned moped. It is a reasonable inference that Defendant covered this distance on foot. Therefore, contrary to the analysis set forth in the dissent, there was sufficient evidence presented to the jury to find that Defendant ran away from Deputy Boyette on foot, as alleged in the indictment. The trial court did not err by denying Defendant's motion to dismiss for a fatal variance.

III. Conclusion

For the reasons discussed, we hold the trial court did not commit prejudicial error in allowing Deputy Snyder's testimony into evidence, and did not err by denying Defendant's motion to dismiss the resisting a public officer charge. The trial court, however, did err by failing to arrest judgment on Defendant's convictions for non-felonious larceny and simple assault.

NO ERROR IN PART, ARRESTED IN PART.

Judge BRYANT concurs.

Judge ARROWOOD concurs in part and dissents in part.

ARROWOOD, Judge, concurring in part, dissenting in part.

I concur in that portion of the majority opinion that holds that the trial court did not commit prejudicial error in allowing Deputy Snyder's testimony into evidence. I also concur in the finding that the trial court committed error by failing to arrest judgment on defendant's convictions for non-felonious larceny and simple assault.

I dissent from that portion of the majority opinion that finds that the trial court did not err in denying defendant's motion to dismiss the charge of resisting a public officer. I believe that there is a fatal variance between the charge alleged in the indictment and the State's evidence at trial, thus, I vote to reverse the conviction for resisting a public officer.

"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). Furthermore,

> [i]t is well established that "[a] defendant must be convicted, if at all, of the particular offense charged in the indictment" and that "[t]he State's proof must conform to the specific allegations contained" therein. *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985). Thus, "a fatal variance between the *allegata* and the *probata*" is properly the subject of a motion to dismiss for insufficiency of the evidence to sustain a conviction. *State v. Nunley*, 224 N.C. 96, 97, 29 S.E.2d 17, 17 (1944). The rationale for this rule is "to insure that the defendant is able to prepare his defense against the crime with which

> he is charged, and to protect the defendant from another prosecution for the same incident." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). However, not every variance is fatal, because "[i]n order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *Id.* (citation omitted). This Court has previously recognized that "an indictment for the charge of resisting an officer must: 1) identify the officer by name, 2) indicate the official duty being discharged, and 3) indicate generally how [the] defendant resisted the officer." *State v. Swift*, 105 N.C. App. 550, 553, 414 S.E.2d 65, 67 (1992).

State v. Henry, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102-103 (2014), *disc. review denied*, __ N.C. __, 775 S.E.2d 852 (2015).

Defendant moved to dismiss all charges at the conclusion of the State's evidence and specifically argued that the charge of resisting a public officer should be dismissed because the evidence of how defendant resisted the officer was "completely different from the indictment[.]" This is the same argument presented on appeal relating to the third essential element of the offense.

The indictment in this case alleged that defendant resisted a sheriff's deputy "by running away from [the deputy] on foot[]" while the deputy was attempting to arrest defendant for larceny. A review of the record, however, reveals no evidence that defendant ran away from the deputy on foot. The sheriff's deputy named in the indictment, Cody Boyette, testified that as he was pursuing defendant, defendant pulled into a Dollar General store parking lot and went behind the business. Deputy Boyette lost sight of defendant for three or four seconds and when he regained sight of defendant, "[Deputy Boyette] saw the moped was overturned close to a ditch and [defendant] was *standing* approximately 15 to 20 feet away from it." (Emphasis added). Deputy Boyette then got out of his vehicle, drew his firearm and pointed it at defendant, and told defendant to get on the ground several times. After Deputy Boyette instructed him to get on the ground five or six times, defendant complied. Deputy Boyette then approached defendant and placed handcuffs on him.

Both the State and the defense elicited additional testimony from Deputy Boyette to clarify defendant's movements after he crashed the moped in the ditch. In response to the State's initial questioning, Deputy Boyette reiterated that "[defendant] was standing 15 to 20 feet away

[from the moped], and that's where he was at whenever I arrived from the pursuit." The following exchange took place:

> Q. So did he leave from the moped and got to that 15 to 20 feet and then he stopped; is that correct?
>
> A. Whenever I actually got out and drew my firearm, he had come to a complete stop.
>
> Q. But before then he had not?
>
> A. Yeah. By the time I laid eyes on him, he never moved any further or any less from the time I got there. He was looking for somewhere else to go.
>
> Q. So he fled on foot from that up until that 15 to 20 feet before you drew your weapon; is that correct?
>
> A. Yes, ma'am.

During cross-examination by the defense, Deputy Boyette again testified about the end of his pursuit of defendant. The following exchange took place:

> Q. And when you exited your patrol vehicle, where was -- where was [defendant]?
>
> A. If the -- let's see, he was -- from the point of the moped, he was probably about 10 or 15 feet east of the moped.
>
> Q. Okay. And was he walking?
>
> A. He was standing still at that point in time.
>
> Q. Okay. And then what happened?
>
> A. Like I said, I got out of my vehicle, I drew my firearm on Mr. Cromartie, and was commanding him to get down on the ground.
>
> Q. So after you got out, he didn't move?
>
> A. He was standing still, but he was looking around as if he was trying to find somewhere else to run to. It was a big, open spot in the back of Dollar General. It was a parking lot and a ditch.
>
> Q. So once you got out of the vehicle, he didn't move?
>
> A. Well he was standing still and he was looking for somewhere to go. Reason I drew any firearm, he had

just robbed somebody and stole something, based off the traffic I heard. And there was also people around from where they heard us coming through town, so for my own safety and the safety of others, that's why I had my firearm out.

Q. Did he run away from you?

A. No, sir.

. . . .

[Q.] You also supervised or gave the magistrate information about the resisting a public officer, and it said that he did resist, delay, and obstruct Boyette, a public officer by running away from deputy on foot.

A. He had got off the moped and started to run and stopped once I actually approached him.

Q. Okay. So once you ordered him to stop, he stopped?

A. Yes.

During redirect-examination by the State, Deputy Boyette added that "[defendant] had already traveled away from the moped and he was standing in the area, but he was moving. He wasn't proceeding to any other location, but he was looking around trying to find somewhere else to go." In response to the defense's question on recross-examination as to how defendant was standing in one area and moving, Deputy Boyette explained that "[defendant] was standing still but moving his body."

I believe it is clear from the evidence that defendant did not run away from Deputy Boyette once Boyette regained sight of defendant behind the Dollar General. The evidence is that defendant was standing still approximately 15 feet from the moped. In response to defendant's argument that this creates a fatal variance with the indictment, which states defendant "[ran] away from Cody Boyette on foot[,]" the State does not assert there is any direct evidence of defendant running from Deputy Boyette on foot. Instead, the State argues that viewing the evidence in the light most reasonable to the State, the evidence that defendant was approximately 15 feet away from the moped supports an inference that defendant ran from Deputy Boyette after crashing the moped in the ditch. Given the testimony from Deputy Boyette, the State's only witness on this charge, I do not think such an inference may be reasonably inferred.

Because an indictment from resisting an officer must "indicate generally how [the] defendant resisted the officer[,]" *Henry*, 237 N.C. App. at 322, 765 S.E.2d at 103, I would find that there is a material variance between the State's proof and the indictment. Therefore, I vote to reverse the conviction for resisting a public officer by running away from him on foot.

THE STATE OF NORTH CAROLINA
v.
KENNETH VERNON GOLDER, DEFENDANT

No. COA16-987

Filed 6 February 2018

1. Indictment and Information—couched in language of statute—unlicensed bail bonding—exact manner of violation

The indictment charging defendant with unlicensed bail bonding in violation of N.C.G.S. § 58-71-40 was couched in the language of the statute and therefore was sufficient to confer jurisdiction upon the trial court. There was no requirement that the indictment specify the exact manner in which defendant violated section 58-71-40.

2. Appeal and Error—waiver of appellate review—no motion to dismiss

Defendant waived appellate review of his argument that the evidence of aiding and abetting was insufficient to sustain his convictions stemming from the falsification of court records because he failed to make the appropriate motion to dismiss at trial.

3. Appeal and Error—waiver—narrow objection at trial—broadened on appeal

Where defendant made a narrow objection at trial to the sufficiency of the evidence of obtaining property by false pretenses (that the dollar amount attributed to the thing of value obtained was less than alleged in the indictment), he could not broaden his argument on appeal to say that the evidence was insufficient because he did not obtain anything of value. He waived the new theory by not arguing it before the trial court.

4. Crimes, Other—unlicensed bail bonding—discussing cases with court clerk—false entries of motions to set aside bond forfeitures

The State presented sufficient evidence to support defendant's conviction for unlicensed bail bonding in violation of N.C.G.S. § 58-71-40. Defendant admitted at trial that he was not a licensed bondsman, and a former clerk of the Wake County Clerk's Office testified that defendant sent him a list of defendant's clients' names and case information and paid him to enter false information into the electronic court files to create the illusion that motions to set aside bond forfeitures had been filed.

Appeal by defendant from judgments entered 12 October 2015 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 March 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Anne Bleyman, for defendant-appellant.

BERGER, Judge.

Kenneth Vernon Golder II ("Defendant") appeals the trial judgments of obtaining property by false pretenses, accessing a government computer, altering court records, and unlicensed bail bonding. Defendant has challenged both the indictment and sufficiency of the evidence for his unlicensed bail bonding conviction, as well as the sufficiency of the evidence for the aiding and abetting theory of criminal liability and the obtaining property by false pretenses conviction. After careful review of Defendant's assignments of error, we find Defendant received a fair trial free from error.

Defendant has also petitioned this Court for a writ of certiorari seeking review if we were to find service of his notice of appeal to be deficient, and we see no need to grant this petition. It is the *filing* of the notice of appeal that confers jurisdiction upon this Court, not the *service* of the notice of appeal. *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 100, 693 S.E.2d 684, 688 (2010) (citation omitted). The State has entered no objection to any lack of service and has participated in this appeal, thereby waiving service of Defendant's notice of appeal. *See Hale v. Afro-American Arts International*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993).

Factual & Procedural Background

In September 1999, Kelvin Ballentine ("Ballentine") joined the Wake County Clerk's Office ("Clerk" or "Clerk's Office") where he was employed in various capacities until 2013. Ballentine was the Bond Forfeiture Clerk from 2006 until 2008, when he joined the estates division of the Clerk's Office. As Bond Forfeiture Clerk, Ballentine worked with the bail bondsmen in Wake County and, in agreement with several bondsmen, began a scheme in 2006 by which he would use his access to the State's automated Civil Case Processing System ("VCAP") to enter false data into the system in exchange for cash. Specifically, Ballentine agreed to enter data into VCAP that would show motions to set aside bond forfeitures had been filed with the Clerk, even though no motions were in fact filed.

When a defendant fails to appear on their court date, any posted bond is considered forfeited and is recorded as such by the clerk. After notification of forfeiture from the Clerk, the bondsman has 150 days to either bring the defendant client into custody or dispute liability for the bond.

Monies collected from bond forfeitures go to the county board of education. A motion to set aside a bond forfeiture must be filed with the Clerk and served upon the school board. The board has twenty days to file an objection to the motion, otherwise it is automatically granted and the bondsman is relieved of liability for the bond. Ballentine knew that the Wake County School Board ("School Board"), if no physical set aside motion was filed, would have "no way of knowing" it should contest the motion and the bondsman's liability would be relieved automatically.

In 2007, Ballentine met with Defendant at his bonding company office to discuss this scheme. The two men reached an agreement where Defendant would provide a list of cases, with case numbers, names of the defendant clients and bond amounts, and then Ballentine would enter fictitious motions to set aside into the VCAP system. For these fictitious entries, Ballentine would be paid between $500.00 and $2,000.00 in cash.

This scheme continued from 2007 until November 2012. During that time, Defendant would send his case list through text message to Ballentine. Defendant would then generally drop an envelope of cash into Ballentine's vehicle through a window left cracked for this purpose, although Defendant occasionally paid Ballentine in person.

In 2012, Ballentine decided he could no longer assist Defendant and ended their scheme. In 2013, the Clerk received information regarding irregularities in several bond forfeiture cases and, in conjunction with the Administrative Office of the Courts, the State Bureau of Investigation and the Wake County District Attorney's Office, began an investigation. Many of the questionable cases had no physical set aside motions in the Clerk's files, and neither the State, nor the School Board, had copies of the motions and notices that should have been in their files.

Ballentine could only make entries into VCAP through his username, thereby leaving digital fingerprints showing a pattern of unauthorized entries of set aside motions with no corresponding physical copies. Ballentine was confronted, relieved of his duties with the Clerk's Office, and he eventually made a full disclosure to the State Bureau of Investigation. Of at least 300 cases impacted by Ballentine's fictitious entries, 137 were associated with Defendant and these had an aggregate value of $480,100.00.

On February 25, 2014, Defendant was indicted for the felonies of obtaining property by false pretenses worth $100,000.00 or more, in violation of N.C. Gen. Stat. § 14-100; unlawfully accessing a government computer, in violation of N.C. Gen. Stat. § 14-454.1; and unlawfully altering court records, in violation of N.C. Gen. Stat. § 14-221.2. Defendant was also indicted for the misdemeanors of a bail bonding violation, pursuant to N.C. Gen. Stat. § 58-71-95; and unlicensed bail bonding, pursuant to N.C. Gen. Stat. § 58-71-40. Defendant was tried before a jury in Wake County Superior Court starting on October 5, 2015. The trial court dismissed the bail bond violation during trial.

On October 12, 2015, the jury found Defendant guilty of obtaining property valued below $100,000.00 by false pretenses, unlawfully accessing a government computer, unlawfully altering court records, and unlicensed bail bonding. Defendant was sentenced to individual terms of imprisonment running consecutively totaling from thirty-five months to forty-three months, including forty-five days imprisonment for the unlicensed bail bonding conviction, and $480,100.00 in restitution for the obtaining property by false pretenses conviction. Defendant filed written notice of appeal on October 21, 2015, but this notice was not served on the State. As discussed above, the State waived the required service of Defendant's notice by participating in this appeal without objection.

Analysis

Defendant has asserted two classifications of assignments of error in this appeal. His first classification contests the validity of the indictment

charging Defendant with unlicensed bail bonding, a misdemeanor. In his second classification of assignment of error, Defendant argues that the State did not introduce sufficient evidence at trial to sustain the convictions. Defendant asserts that the trial court erred in failing to dismiss (1) the charges of obtaining property by false pretenses, accessing a government computer, and altering court records because the State failed to present sufficient evidence that Defendant aided and abetted Ballentine; (2) the charge of obtaining property by false pretenses because the State failed to show Defendant obtained anything of value; and (3) the charge of unlicensed bail bonding because the State failed to show Defendant acted in the capacity of a bail bondsman. We will take each in turn.

I. Indictment

[1] Defendant was indicted, tried, and convicted for unlicensed bail bonding in violation of N.C. Gen. Stat. § 58-71-40. Defendant argues that the indictment charging him with unlicensed bail bonding was fatally defective, and that the trial court erred in failing to grant Defendant's motion to dismiss that charge based upon the faulty indictment. Defendant specifically argues that count of the indictment was fatally defective because (1) no definite acts of unlicensed bail bonding were alleged in the indictment, and because (2) this count of the indictment did not assert facts supporting every element of a criminal offense, and Defendant's commission thereof, with sufficient precision to apprise Defendant of the conduct that was the subject of the accusation. We disagree.

"Where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time . . . ." *State v. Collins*, 221 N.C. App. 604, 610, 727 S.E.2d 922, 926 (2012) (citation, quotation marks, and brackets omitted). "On appeal, we review the sufficiency of an indictment *de novo*." *Id.* (citation and quotation marks omitted).

In North Carolina, a criminal pleading must generally contain, in pertinent part: (1) the identification of the defendant; (2) a "separate count addressed to each offense charged"; (3) the county in which the offense took place; (4) the date, or range of dates, during which the offense was committed; (5) a "plain and concise factual statement in each count" that supports every element of the offense and the defendant's commission thereof; and (6) the "applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated." N.C. Gen. Stat. § 15A-924(a)(1)-(6) (2015). For an indictment charging the offense to be valid, it

> must charge all the essential elements of the alleged criminal offense. If the charge is a statutory offense, the indictment is sufficient when it charges the offense in the language of the statute. The two purposes of an indictment are to make clear the offense charged so that the investigation may be confined to that offense, that proper procedure may be followed, and applicable law invoked; and to put the defendant on reasonable notice so as to enable him to make his defense.

Collins, 221 N.C. App. at 610, 727 S.E.2d at 926 (citations, quotation marks, brackets, and ellipses omitted).

In the case *sub judice*, the count of the indictment here at issue stated:

> And the jurors for the State upon their oath present that on or about and between January 2, 2008 through and until November 21, 2012, in Wake County, the Defendant named above unlawfully and willfully did *act in the capacity of, and performed the duties, functions, and powers of a surety bondsman and runner, without being qualified and licensed* to do so. This act was done in violation of N.C.G.S. 58-71-40.

(Emphasis added).

"As a general rule, an indictment couched in the language of the statute is sufficient to charge the statutory offense." *State v. Lucas*, 353 N.C. 568, 584, 548 S.E.2d 712, 724 (2001), *overruled on other grounds by State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) (citation and quotation marks omitted). The indictment here charged a violation of N.C. Gen. Stat. § 58-71-40, which states in relevant part that "[n]o person shall *act in the capacity of* a professional bondsman, surety bondsman, or runner or *perform any of the functions, duties, or powers prescribed for professional bondsmen, surety bondsmen, or runners* under this Article *unless that person is qualified and licensed* under this Article." G.S. § 58-71-40(a) (2015) (emphasis added). The language of the indictment is plainly couched in the language of the statute. It is sufficient to clearly identify the crime being charged, apprise Defendant of this charge against him allowing preparation for trial, and preclude the State from putting Defendant in jeopardy more than once for the same crime. *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981) (citation omitted).

Although Defendant contends in his brief that this indictment was fatally defective based upon the fact that it failed to specify the exact manner in which he allegedly violated Section 58-71-40, Defendant has failed to cite any authority establishing the existence of such a requirement, and we have been unable to identify any such authority in our own research. *See State v. Miranda*, 235 N.C. App. 601, 606-07, 762 S.E.2d 349, 353-54 (2014) (finding no requirement that allegations of the exact manner in which a statute was violated be included in an indictment charging a statutory offense). Therefore, the indictment was not fatally defective, but gave the trial court jurisdiction to charge the jury, record the verdict, and enter judgment on Defendant's violation of Section 58-71-40.

II. Sufficiency of the Evidence

In Defendant's second classification of assignment of error, he asserts that the State introduced insufficient evidence to sustain Defendant's convictions. First, he argues that the evidence of his aiding and abetting Ballentine was insufficient to sustain the convictions of obtaining property by false pretenses, accessing a government computer, or altering court records. Second, he argues that the evidence was insufficient to sustain the obtaining property by false pretenses conviction because Defendant allegedly received no property or thing of value. And third, he argues that the evidence of Defendant acting in the capacity of a bail bondsman was insufficient to sustain his unlicensed bail bonding conviction. We take each assignment of error in turn, and ultimately find Defendant's arguments unavailing. We affirm the judgment of the trial court because not only did Defendant fail to preserve his right to appellate review of the alleged error, but also sufficient evidence was introduced to sustain the convictions for which appellate review was preserved.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *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).

A. Aiding & Abetting

[2] Defendant has challenged the sufficiency of the evidence used to convict him of several felonies because the State allegedly failed to prove he aided and abetted Ballentine in the commission of these felonies. A defendant is guilty of a crime based upon an aiding and abetting theory if the State proves beyond a reasonable doubt that "(i) the crime was committed by some other person; (ii) the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citation omitted).

Aid or active encouragement, or the communication of the intent to assist, in the commission of the crime is sufficient to show aiding and abetting. *Id.* (citation omitted). "The communication or intent to aid does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *Id.* (citation omitted). "When there is evidence that the individual knew about and aided in the offense, or shared the intent and was in a position to aid and encourage, the matter should go to a jury." *State v. Sink*, 178 N.C. App. 217, 221, 631 S.E.2d 16, 19, *writ denied*, *disc. review denied*, 360 N.C. 581, 636 S.E.2d 195 (2006) (citation omitted).

However, Defendant has argued a theory on appeal that was not argued before the trial court, and "where a theory argued on an appeal was not raised before the trial court, the argument is deemed waived on appeal." *State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013) (citations, quotation marks, and brackets omitted). "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (citing N.C.R. App. P. 10(b)(1)). "[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) (2017). Defendant made no motion to dismiss for this count, whether a general objection to the sufficiency of the evidence or a specific objection to the State's 'aiding and abetting' theory of criminal liability.

"[I]f a defendant fails to move to dismiss the action, . . . defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged." *Id.* Therefore, "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). Defendant has not argued plain error.

"[M]atters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005) (citations and quotation marks omitted). Because Defendant made several specific arguments when moving the trial court to dismiss certain charges, but did not challenge the State's aiding and abetting theory, he has waived appellate review of this alleged error. We therefore do not reach the merits of Defendant's argument on this issue, and his assignment of error is overruled.

B. Obtaining Property by False Pretenses

[3] Defendant has challenged the sufficiency of the evidence for his obtaining property by false pretenses conviction. "Obtaining property by false pretenses is defined as (1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another

person pursuant to N.C. Gen. Stat. § 14-100(a)." *State v. Barker*, 240 N.C. App. 224, 229, 770 S.E.2d 142, 146 (2015) (citation and brackets omitted). If the value of what is obtained is greater than $100,000.00, then the violation is a Class C felony; if less, then a Class H felony. N.C. Gen. Stat. § 14-100(a) (2015).

As stated above, arguments made before the trial court as the basis for a motion to dismiss must be consistent with arguments made on appeal, because "where a theory argued on an appeal was not raised before the trial court, the argument is deemed waived." *Hernandez*, 227 N.C. App. at 608, 742 S.E.2d at 829 (citations, quotation marks, and brackets omitted). Furthermore, a "specific reference to one element of the offense [will] remove[ ] the other elements of the offense from the trial court's consideration, and therefore from this Court's consideration, because the consideration of the sufficiency of the evidence on those other elements was no longer 'apparent from the context.' " *State v. Walker*, ___ N.C. App. ___, ___, 798 S.E.2d 529, 531, *disc. review denied*, 369 N.C. 755, 799 S.E.2d 619 (2017) (quoting N.C.R. App. P. 10(a)(1) (2015)).

In *Walker*, this Court explained further that

> [a] specific reference to one element contrasts with cases in which a defense counsel makes a more generalized motion to dismiss for insufficiency of the evidence. *See, e.g.*, *State v. Glisson*, [___ N.C. App. ___, ___,] 796 S.E.2d 124, 127, [(2017)] (holding that the defendant's challenge to the sufficiency of the evidence was preserved because the trial court referred to the challenge as a "global" and "prophylactic" motion to dismiss, thereby making apparent that the trial court considered the sufficiency of the evidence as to all elements of each charged offense); *State v. Pender*, ___ N.C. App. ___, ___, 776 S.E.2d 352, 360 (2015) (holding that while the defense counsel presented a specific argument addressing only two elements of two charges, counsel also asserted a general motion to dismiss which "preserved [the defendant's] insufficient evidence arguments with respect to all of his convictions"); *State v. Mueller*, 184 N.C. App. 553, 559, 647 S.E.2d 440, 446 (2007) (holding that the trial counsel's presentation of a specific argument addressed only five charges, but the general motion to dismiss preserved the arguments regarding the other charges on appeal). A general motion to dismiss requires the trial court to consider the sufficiency of

> the evidence on all elements of the challenged offenses, thereby preserving the arguments for appellate review.

Id.

Here, Defendant's argument on appeal specifically focuses on element four, whether Defendant obtained property or anything of value. It must be noted initially that Defendant was paying Ballentine $500.00 or more to alter court records. From this it can be inferred, and it was for the jury to decide, that what was obtained had value, at least to Defendant. However, this was not the objection made to the trial court.

At the close of all evidence, Defendant made a narrow objection to the sufficiency of the evidence to support this charge by arguing "that essentially the numbers are off." This is the same objection Defendant made at the close of the State's evidence, although Defendant also argued before he introduced his own evidence that elimination of contingent future interest in property does not fulfill the obtaining 'property' requirement. However, all that our law requires is that "the defendant obtain[ ] or attempt[ ] to obtain anything of value." *Barker*, 240 N.C. App. at 229, 770 S.E.2d at 146 (citation and brackets omitted). 'Anything' is the most broad term one can use to define the class of valuable items that could satisfy this element, and that factual determination was for the jury.

When Defendant argued at the close of all evidence that the dollar amount attributed to the thing of value obtained was less than alleged in the indictment, he narrowed the scope of his objection, and that objection is all that would be reviewable by this Court. As in *Walker*, Defendant "failed to broaden the scope of his motion when he renewed it following the close of all the evidence," and therefore "failed to preserve the issue[ ] of the sufficiency of the evidence as to the other elements of the charged offense[ ] on appeal." *Walker*, ___ N.C. App. at ___, 798 S.E.2d at 532.

The indictment alleged a value of $480,100.00, to which Defendant objected and argued that the "total dollar amount is $63,000.00." It would appear from the record that Defendant was attempting to have the crime charged in the indictment reduced from a Class C felony to a Class H felony. The jury convicted Defendant of the latter Class H felony.

Defendant cannot now argue that the evidence was insufficient because there was *no* thing of value. Similar to our review of Defendant's argument on the sufficiency of the State's aiding and abetting evidence, Defendant's failure to argue the specific theory on appeal that was

argued to the trial court has waived his right to appellate review on this issue.

C. Unlicensed Bail Bonding

[4] Defendant has challenged the sufficiency of the evidence for his conviction for unlicensed bail bonding. Section 58-71-40 states that "[n]o person shall [(1)] act in the capacity of a professional bondsman, surety bondsman, or runner or perform any of the functions, duties, or powers prescribed for professional bondsmen, surety bondsmen, or runners under this Article[,] [(2)] unless that person is qualified and licensed under this Article." N.C. Gen. Stat. § 58-71-40(a) (2015). This same Article 71 makes any violation of any provision under this Article, unless otherwise provided, a Class 1 misdemeanor. N.C. Gen. Stat. § 58-71-185 (2015).

Here, Defendant admitted in his testimony at trial, and does not challenge in this appeal, that he would not be qualified to be licensed and has never applied to be licensed as a bondsman in North Carolina. He contests whether there was sufficient evidence that he "acted in the capacity of" or "performed the functions, duties, or powers" of a bondsman.

"[T]he Commissioner of Insurance has the 'full power and authority to administer the provisions' of Article 71, [which regulates] 'Bail Bondsmen and Runners.' " *Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, 230 N.C. App. 317, 319, 749 S.E.2d 469, 472 (2013), *appeal dismissed, disc. review denied*, 367 N.C. 532, 762 S.E.2d 461 (2014) (quoting N.C. Gen. Stat. § 58-71-5 (2011)). At trial, the Compliance Section Supervisor of the Agent Services Section of the Department of Insurance ("Department") testified on behalf of the State. She explained that the Department has interpreted Article 71, the governing statutes, to prohibit an unlicensed person from, *inter alia*, screening potential bond clients; negotiating the terms of and receiving the initial premium paid for a bond; discussing motions and petitions with court staff that relate to a bond forfeiture; relaying messages regarding these same motions and petitions to court staff on behalf of the bondsman; and apprehending, or even being present or assisting in apprehending, a defendant client who has missed a required court appearance.

Although "an agency's interpretation is not binding," "[w]e give great weight to an agency's interpretation of a statute it is charged with administering[.]" *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (citations and quotation marks omitted). In line with the interpretation of the Department, the trial court instructed the jury that "a bail bondsman or runner may discuss motions to set aside [a bond forfeiture] with court staff while an

unlicensed employee of a bail bondsman may not." It went on to instruct that if the jury found from the evidence that Defendant had acted in the capacity of a bail bondsman without being qualified or licensed to do so, it would be the jury's duty to return a verdict of guilty.

Ballentine testified that he knew Defendant from working as the clerk overseeing bond forfeitures for the Wake County Clerk's Office. He further testified that Defendant would send him a list of defendant-clients' names, along with their case information and bond amounts being forfeited, and place an envelope of cash in Ballentine's vehicle. The evidence showed that Ballentine was being compensated for entering false information into the electronic court files to create the illusion that motions to set aside bond forfeitures had been filed. This was done to relieve Defendant's liability for bonds forfeited due to his defendant-clients' failures to appear in court. The electronic file systems would automatically grant these motions to set aside if no objection was filed by the State or the county Board of Education. Neither the State nor the Board of Education would receive notice, and, therefore, have no opportunity to object because no physical motions were ever filed. Each fictitious motion to set aside about which Ballentine and Defendant communicated was granted automatically, and Defendant's liability was released. Sufficient relevant and direct evidence, that a reasonable mind might accept as adequate, was introduced at trial from which the conclusion that Defendant had acted in the capacity of a bondsman without being licensed to do so could be reached.

Defendant has argued that, although Ballentine was court staff, he and Defendant were not discussing *actual* motions to set aside, merely discussing *false entries* that motions to set aside had been filed. This argument is unconvincing because the crime focuses on the matter being addressed and whether whomever is addressing that matter is licensed to do so. Therefore, whether or not the motions to set aside were real or fictitious has no bearing on whether the Defendant discussed a specific bond with a member of the Clerk's Office, thereby acting in the capacity of a bail bondsman. The trial court did not err in denying Defendant's motion to dismiss, and this assignment of error is overruled.

Conclusion

We have carefully reviewed Defendant's assignments of error and have found that either Defendant waived appellate review for the alleged error, or that no error was committed. Defendant's indictment charging the statutory offense of unlicensed bail bonding had no errors, and sufficient evidence was introduced to allow Defendant's guilt for this charge

to be decided by the jury. Defendant's failure to object waived review of the sufficiency of the aiding and abetting theory evidence because no motion to dismiss was made. Defendant's motion to dismiss the obtaining property by false pretenses charge was based upon a substantially different argument in the trial court than the argument made here, and Defendant thereby waived our review of this charge. Therefore, we find no error in the judgment of the trial court.

NO ERROR.

Judges CALABRIA and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
STEPHEN PAUL GOMOLA, DEFENDANT

No. COA17-438

Filed 6 February 2018

Homicide—involuntary manslaughter—failure to give instruction—self-defense—defense of others—unlawful act

The trial court erred in an involuntary manslaughter case by declining to include a jury instruction on self-defense/defense of others because it deprived the jury of the ability to decide whether defendant's participation in an altercation was lawful.

Appeal by Defendant from judgment entered 26 February 2016 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 17 October 2017.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for the Defendant-Appellant.

DILLON, Judge.

Stephen Paul Gomola ("Defendant") appeals from judgment entered upon a jury verdict finding him guilty of involuntary manslaughter on the

theory that he committed an unlawful act which proximately caused the death of Stephen Johnson (the "Decedent"). Defendant argues that the trial court committed reversible error by refusing to give a jury instruction on "defense of others" as an affirmative defense to the unlawful act Defendant allegedly committed. We agree and order that the judgment be vacated and remand this matter for a new trial.

I. Background

In July 2013, Defendant was at a waterfront bar with friends in Morehead City. Defendant was involved in an altercation with approximately eight other individuals at the bar, including the Decedent. The altercation lasted only a few seconds, but resulted in the death of the Decedent.

A surveillance video shows a partial view of the bar where the altercation took place. The video shows several individuals positioned along a railing at the bar overlooking a marina. The video shows Defendant standing next to his friend Jimmy. Jimmy is shown holding a drink in each hand and engaging in conversation with one or more individuals who were off-camera. Jimmy testified that the conversation began after he saw a patron throw a beer bottle over the railing into the water and that when he politely asked the patron not to do it again, the Decedent shoved Jimmy. The video shows Jimmy being pushed backwards by someone off-camera and then Defendant and another individual moving past Jimmy toward the person off-camera who had shoved Jimmy. The video does not show the rest of the altercation. Approximately 6-8 seconds later, the video shows patrons trying to locate the Decedent, who had fallen into the water.

There was conflicting evidence regarding the role Defendant and other patrons played in the altercation. Several patrons testified that during the portion of the altercation which took place off-camera, Defendant "shoved," "pushed," or "flipped" the Decedent over a railing into the water. Other testimony suggested that Defendant's role in the altercation was limited to an initial shove right after his friend Jimmy was shoved and that the Decedent fell over the railing or was pushed over the railing by a different individual.

In any event, the Decedent did not resurface. An autopsy revealed that the Decedent had a blood alcohol concentration of .30 or more at the time of his death. The stated cause of death was drowning while incapacitated due to head trauma, with alcohol intoxication as a contributing factor.

The trial court instructed the jury that it could find Defendant guilty of involuntary manslaughter if it found beyond a reasonable doubt that (1) Defendant acted unlawfully, and that (2) Defendant's unlawful act proximately caused the victim's death. The trial court further instructed the jury that the underlying "unlawful act" allegedly committed by Defendant was the crime of participating in an "affray," defining this crime as "a fight between two or more persons in a public place so as to cause terror to the public." *In re May*, 357 N.C. 423, 426, 584 S.E.2d 271, 274 (2003) (citing *State v. Wilson*, 61 N.C. 237, 237-38 (1867)). Defendant requested an additional instruction on self-defense or defense of another in order to negate the "unlawful act" element of the offense. The trial court declined to give the requested instruction.

The jury convicted Defendant of involuntary manslaughter, and the trial court sentenced him to 16-29 months imprisonment and fined him $10,000. Defendant timely appealed.

II. Analysis

On appeal, Defendant contends that the trial court erred when it refused his request to give the jury a "defense of others" instruction. We agree.

Our Supreme Court defines involuntary manslaughter as "the unintentional killing of a human being, without malice, proximately caused by [either] (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Wingard*, 317 N.C. 590, 600, 346 S.E.2d 638, 645 (1986) (quoting *State v. Hill*, 311 N.C. 465, 471, 319 S.E.2d 163, 167 (1984)).

In the context of involuntary manslaughter, our Supreme Court has held that a defendant's unlawful or negligent act is *a proximate cause* of the victim's death if the act "is a cause that produced the result in continuous sequence and without which [the death] would not have occurred." *State v. Cole*, 343 N.C. 399, 416, 471 S.E.2d 362, 370 (1996) (citation omitted). Our Supreme Court has further explained that a defendant is criminally culpable even if his unlawful act "[is] not [] the immediate cause of death. [A defendant] is legally accountable if the direct cause is the natural result of the criminal act. [Even though] [t]here may be more than one proximate cause[,] . . . criminal responsibility arises when the act complained of caused or directly contributed to the death." *State v. Cummings*, 301 N.C. 374, 377-78, 271 S.E.2d 277, 279 (1980) (citations omitted).

Here, the jury was instructed that it could convict Defendant of involuntary manslaughter if the jury determined that Defendant committed

the unlawful act of "affray" and that Defendant's act was a proximate cause of the Decedent's death. The jury was correctly instructed on the crime of "affray," as defined by our Supreme Court, as "a fight between two or more persons in a public place so as to cause terror to the public." *May*, 357 N.C. at 426, 584 S.E.2d at 274 (citing *Wilson*, 61 N.C. at 237 (1867)). And the jury was correctly instructed that Defendant's act was a "proximate cause" of the Decedent's death if the jury determined that the act was "a cause without which the [Decedent's] death would not have occurred . . . [and] th[at] [D]efendant's act need not have been the only cause, nor the last nor nearest cause[,] [but that it] is sufficient if [Defendant's act] occurred with some other cause acting at the same time which in combination with caused the death of the [Decedent]."

We conclude that the above instructions were warranted as there was evidence from which the jury could conclude that Defendant unlawfully participated in an affray and that his participation was a proximate cause of the death of the Decedent.

However, Defendant argues that the trial court committed reversible error by refusing to give *his* requested instruction on self-defense or "defense of others" as an affirmative defense to the crime of affray.[1] Defendant contends that the evidence, *when viewed in the light most favorable to him*, shows that his participation in the fight was limited to a single shove. Defendant further contends that his single shove was legally justified because he was defending his friend, and the shove was therefore not "unlawful," though it may have resulted in others becoming aggressive and resulted in another person directly forcing the Decedent into the water. For the reasons stated below, we must agree. Specifically, it is *reasonably possible* that the jury determined that Defendant participated in the affray; that his participation was a proximate cause – though maybe not the final cause – of the Decedent's death; and that, if given the opportunity, the jury would have determined that Defendant's participation was lawful because he acted reasonably in defense of his friend Jimmy. Indeed, the video evidence only shows Defendant deliver a single shove immediately after his friend Jimmy was shoved; the video does not show the rest of the affray.

Our Supreme Court has previously sanctioned the use of self-defense by a defendant as an appropriate defense when the defendant has been accused of unlawfully participating in an affray, stating as follows:

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1. Specifically, defense counsel stated that Defendant sought an "instruct[ion] on self-defense or defense of another as far as the misdemeanor instruction [on the crime of affray] goes."

> If a person be without fault in bringing on an affray, he may [act] in self-defense if it is necessary, or appears to him to be necessary[.] . . . The reasonableness of his apprehension is for the jury to determine from the circumstances as they appeared to him. This defense cannot be invoked when a person aggressively and willingly enters into a fight without legal excuse or provocation. And in exercising the right of self-defense one can use no more force than was or reasonably appeared necessary under the circumstances[.]

State v. Wynn, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971), *overruled on other grounds by State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986) (citations omitted). And our General Assembly has provided that a person "is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself *or another* against the other's imminent use of unlawful force," N.C. Gen. Stat. § 14-51.3(a) (2013) (emphasis added), and that a person who uses force as permitted by N.C. Gen. Stat. § 14-51.3(a) is "justified in using such force and is immune from civil or criminal liability for the use of such force[.]" N.C. Gen. Stat. § 14-51.3(b).

Accordingly, where, as here, the State prosecutes a defendant for involuntary manslaughter based on the theory that the defendant committed an "unlawful" act – rather than based on a theory that the defendant committed a "culpably negligent" act – the defendant is entitled to all instructions supported by the evidence which relate to the unlawful act, including any recognized affirmative defenses to the unlawful act. *See Calhoun v. Highway Comm'n*, 208 N.C. 424, 424, 181 S.E. 271, 272 (1935) (noting that a defendant is entitled to a specific jury instruction if it is a correct statement of the law and is supported by the evidence presented at trial).

In determining whether the instruction is supported by the evidence, the evidence must be viewed in the light most favorable *to the defendant*. *See State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010) (holding that in determining whether an instruction on self-defense must be given, "the evidence is to be viewed in the light most favorable to the defendant"). Further, our Supreme Court has instructed that "[w]hen supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case[.]" *State v. Deck*, 285 N.C. 209, 215, 203 S.E.2d 830, 834 (1974).

Here, there was conflicting evidence as to how the Decedent ended up in the water and the level to which Defendant participated in the affray. Indeed, when viewed in the light most favorable to the State, the evidence shows that Defendant unlawfully assaulted the Decedent, knocking the Decedent into the water. However, other evidence *supports* Defendant's argument that instruction on defense of others was warranted: For example, there was evidence that Jimmy "absolutely felt threatened" when the Decedent shoved him; that Defendant immediately advanced toward the Decedent in response to the Decedent's shove; that the Decedent punched and kicked Defendant; that another person pushed Defendant into the Decedent, "who eventually fell into the water"; and that Defendant only struck the Decedent one time.

Taking the evidence in the light most favorable to Defendant, as we *must* do, we conclude that Defendant was entitled to the "defense of others" instruction to supplement the "affray" instruction. Specifically, based on the evidence *viewed in the light most favorable to Defendant*, the jury could have determined that Defendant's participation in the affray was limited to one or a few pushes or blows at the beginning, thrown merely to protect his friend Jimmy who had just been assaulted by the Decedent. The jury could have determined that Defendant's push was a proximate cause in the chain that resulted in the Decedent going over the railing 6-8 seconds later. And based on these determinations, the jury would still have been bound to convict Defendant based on the instructions as given: Defendant engaged in a fight that involved a number of people and his participation was a proximate cause leading to the Decedent's death. However, had the jury also been given the "defense of others" instruction, the jury may have determined that Defendant's involvement in the affray – though a proximate cause of the Decedent's death – was lawful because Defendant merely used the force necessary to protect his friend from an ongoing assault. *See In re Wilson*, 153 N.C. App. 196, 198, 568 S.E.2d 862, 863 (2002) (citing *State v. Herrell*, 107 N.C. 944, 946-47, 12 S.E. 439, 440 (1890) ("A claim of self-defense may be used to defeat a charge of affray where the [] defendant is without fault in provoking, engaging in, or continuing a difficulty with another.").

We take no position as to whether Defendant did, in fact, act lawfully. Again, there was considerable evidence in the record showing that Defendant acted unlawfully. Specifically, several witnesses testified to their individual recollections of the event: "[Defendant was] punching [the Decedent] until he fell over the side [into the water]"; "I saw [Defendant] hit the [Decedent] five or six times"; "[I] saw [Defendant] punch another man multiple times in the face and the chest or stomach

and then grab him by the knees and throw him over the railing into the water"; Defendant was the person who pushed the Decedent into the water; and Defendant "flip[ped] somebody over the railing[.]" However, when Defendant's evidence, taken as true, is sufficient to show that he acted lawfully in self-defense or in defense of another, the instruction "must be given even though the State's evidence is contradictory." *Moore*, 363 N.C. at 796, 688 S.E.2d at 449; *see also State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) ("Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence.").

Accordingly, we hold that the evidence presented at trial, viewed in the light most favorable to Defendant, was sufficient to warrant the instruction of the jury on the issue of defense of others. Thus, the trial court's failure to give the instruction was error. We further hold that there is a reasonable possibility that had this error not been committed, a different result would have been reached at trial. *See Dooley*, 285 N.C. at 166, 203 S.E.2d at 820 ("[T]he trial court's failure to include [an instruction on self-defense] in its final mandate to the jury was prejudicial error [that] entitle[d] defendant to a new trial."). There were contradictory witness accounts of the altercation, the first trial ended with a deadlocked jury, and the prosecutor argued in closing that self-defense/defense of others was irrelevant.

We note the State's argument that self-defense is not a defense to involuntary manslaughter based on *State v. Ray*, 299 N.C. 151, 261 S.E.2d 789 (1980). However, the State's argument is misplaced. The issue in the present case is *not* whether self-defense/defense of others is necessarily an affirmative defense to the crime of involuntary manslaughter, but rather whether it is an affirmative defense to the crime of affray – the "unlawful act" that the State used as the basis for the involuntary manslaughter charge. In any event, the Supreme Court in *Ray* specifically provided that the result in that case "should not be read as casting any doubt on the validity of earlier decisions of . . . the Court of Appeals[,]" and limited its holding to an issue involving erroneous submission of lesser included offenses to the jury. *Ray*, 299 N.C. at 167, 261 S.E.2d at 799. In *Ray*, our Supreme Court highlighted two cases from our Court which illustrate the relationship between self-defense and involuntary manslaughter: *State v. Walker*, 34 N.C. App. 485, 238 S.E.2d 666 (1977) and *State v. Spinks*, 39 N.C. App. 340, 250 S.E.2d 90 (1979). Both *Walker* and *Spinks* involved situations where the trial court submitted the charge of involuntary manslaughter to the jury based on an "unlawful act" of the defendant.

In *Spinks*, the defendant was convicted of involuntary manslaughter based on the unlawful act of pointing a gun. Our Court recognized that "an intentional pointing of a gun violates the statute only if it is done without legal justification," concluding that "if the jury found that the defendant acted in self-defense they *could not have found her guilty of involuntary manslaughter*[.]" *Spinks*, 39 N.C. App. at 343, 250 S.E.2d at 93 (emphasis added). Our Court acknowledged that the trial court erred when it instructed the jury that the "defendant's act was unlawful," because it took the opportunity away from the jury to decide whether the defendant's pointing of the gun was, in fact, lawful. *Id.*

In *Walker*, our Court found no error where the trial court instructed the jury that the defendant's act was unlawful because it was clear from the form of the jury charge that the jury had specifically considered and rejected the defendant's theory of self-defense – and had therefore determined that the defendant's act was unlawful – *before* considering the charge of involuntary manslaughter. *See Walker*, 34 N.C. App. at 487, 238 S.E.2d at 667.

Thus, these two cases, which we once again emphasize were left undisturbed by the Supreme Court in *Ray*, demonstrate that *Ray* was not intended to prevent a defendant from asserting a recognized affirmative defense to an underlying unlawful act when charged with involuntary manslaughter in order to show that he, in fact, acted lawfully.

We also note our holding in *State v. Alston* that "self-defense, as an *intentional act*, [cannot] serve as an excuse for the negligence or recklessness required for a conviction of involuntary manslaughter" under the culpable negligence prong. *See State v. Alston*, 161 N.C. App. 367, 375, 588 S.E.2d 530, 536 (2003). However, this holding is inapposite to the present case because here, the theory of the State's case is that Defendant *intentionally* committed an unlawful act by participating in an affray. And certainly self-defense/defense of others may serve as an excuse for intentionally participating in a fight. Therefore, one whose participation in a fight proximately causes the death of another is not guilty of involuntary manslaughter unless his participation was unlawful.

III. Conclusion

We hold that, in this case, the lack of a self-defense/defense of others instruction deprived the jury of the ability to decide the issue of whether Defendant's participation in the altercation was lawful. A determination by the jury that Defendant's participation was lawful would have negated the "unlawful act" element of involuntary manslaughter

and would have compelled the jury to return a verdict of "not guilty." Therefore, because the trial court failed to include an instruction on self-defense/defense of others in its final mandate to the jury, Defendant is entitled to a new trial.

NEW TRIAL.

Judges DAVIS and INMAN concur.

STATE OF NORTH CAROLINA
v.
FALECIA ANN RICHMOND McCASTER

No. COA17-816

Filed 6 February 2018

Probation and Parole—probation revocation—lack of jurisdiction—notice of hearing—violation report

The trial court lacked jurisdiction to revoke defendant's probation without proper prior statutory notice of a hearing and a statement of the violations alleged, pursuant to N.C.G.S. § 15A-1345(e).

Appeal by defendant from judgment entered 23 May 2017 by Judge G. Wayne Abernathy in Alamance County Superior Court. Heard in the Court of Appeals 22 January 2018.

Attorney General Joshua H. Stein, by Associate Attorney General Cara Byrne, for the State.

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

TYSON, Judge.

Falecia Ann Richmond McCaster ("Defendant") appeals the trial court's order revoking her probation. The trial court erred in revoking Defendant's probation under these facts. We vacate the order and remand.

I. Background

On 2 November 2015, a jury found Defendant guilty of assault on a law enforcement officer. Defendant was sentenced to five to fifteen

months in prison. Due to her lack of prior record level points and the classification of the offense, Defendant's active sentence was suspended, and she was placed on probation for twelve months. Defendant appealed.

The day after judgment was entered, the trial judge filed an affidavit and petition for involuntary commitment, due to Defendant's behavior in court. The trial court stated that after the judgment was entered, "Defendant refused to complete the intake process," begging the court to allow her to serve her time. She became "hysterical," alleging "a conspiracy against her by law enforcement, judges, the DA, and, at time [sic] her attorney."

On 4 April 2017, this Court issued an opinion finding no error at trial and denying Defendant's motion for appropriate relief. *State v. McCaster*, __N.C. App. __, 797 S.E.2d 711, 2017 WL 1276071 (unpublished). The mandate from that appeal was issued to the Alamance County Superior Court on 24 April 2017.

The Alamance County District Attorney's office sent Defendant a letter on 3 May 2017, ordering her to appear in court on 22 May 2017 for imposition of judgment. Defendant appeared at the hearing, repeatedly refused to accept probation supervision, and asked for time to get her affairs in order prior to reporting to prison. The trial court asked her to meet with the probation officer prior to making any decisions regarding actively serving a prison term.

Later that day, Defendant's counsel reported to the court that Defendant had not met with the probation officer, as instructed. Defendant allegedly "cursed the courtroom" and threw spices and garlic upon the floor. At around 5:00 that evening, Defendant was sitting in the courtroom, without her attorney. The trial court instructed Defendant to report to the probation officer by 9:30 the next morning, and if she was not there, the court would issue an order for her arrest. Defendant told the judge a warrant would not be necessary, as she would report to the sheriff.

On 23 May 2017, Defendant timely appeared in court, and the matter was held over until her attorney arrived. Once her counsel arrived, Defendant again refused to be placed on probation supervision multiple times. She again alluded to a possible conspiracy against her, stating "You want me – for Mr. Barber to take my money and they beat me. I'm a widow." After Defendant continued to refuse probation, the trial court revoked her probation.

The trial court's written order stated: "The Defendant refused to be processed for probation and stated that she did not want to be on

probation in open court, therefore [sic] was violated and probation revoked." The order also indicated the revocation was based upon Defendant's "willful violation of the condition(s) that [she] not commit any criminal offense . . . or abscond from supervision."

On 24 May 2017, the trial court filed a supplement to its previous order, and made the following findings of fact:

> 4. The Court reviewed the judgment with the defendant at 10:38 and ordered defendant to report to the probation office (in the courthouse). The defendant did not report. The court advised the defendant if she refused probation, she would have to serve her active sentence.
>
> 5. At 12:04 defendant's attorney, Jeff Connolly, returned to the courtroom without the defendant and reported defendant is refusing to serve probation.
>
> 6. Defendant appeared in court on May 23, 2017, about 10:38. The Court advised defendant it was in a jury trial and to report at 12:15. Defendant's counsel was present. The Court reiterated to defendant that if she refused probation, the active sentence would be imposed.
>
> 7. At 12:33 the defendant appeared and affirmed she did not report to probation and said, "You can put me in jail." The Court again asked her if she was certain she did not want to be on probation and she said "I have refused probation a hundred times and I am refusing it now."
>
> 8. It being obvious that the defendant was refusing to serve probation, the active sentence was instituted.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court lacked jurisdiction to revoke her probation and violated her right to due process by revoking her probation without providing notice of a scheduled hearing or a filed violation report. Defendant also asserts her right to counsel was violated and that the trial court erred by not holding a competency hearing prior to her revocation hearing.

IV. Standard of Review

"A trial court must have subject matter jurisdiction over a case in order to act in that case." *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citing *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007)). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citation and quotation marks omitted).

"Further, an appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review." *Satanek*, 190 N.C. App. at 656, 660 S.E.2d at 625. We review subject matter jurisdiction as a question of law, *de novo*. *State v. Taylor*, 155 N.C. App. 251, 260, 574 S.E.2d 58, 65 (2002).

V. Revocation of Probation

Defendant first argues the trial court lacked jurisdiction to conduct a probation revocation hearing because it failed to provide Defendant with adequate notice, including a written statement of the violations alleged. Under these facts, we agree.

A defendant's consent is not required for the court to suspend an active sentence and to order a convicted defendant to undergo probation supervision instead. N.C. Gen. Stat. § 15A-1341(c) (1995), *repealed by* 1995 N.C. Sess. Laws 429, secs. 1, 5 (effective 1 January 1997) (eliminating a defendant's right to elect to serve a prison sentence in lieu of submitting to probation). Because Defendant had zero prior record level points, and was convicted of a Class I felony, the court was only authorized to sentence her to community punishment, which it correctly did when her active sentence was suspended and she was placed on probation. N.C. Gen. Stat. §§ 14-34.7(c)(1), 15A-1340.17(c) (2017).

As is required by statute, prior to revocation of probation, a court must hold a hearing, unless waived by probationer, and must provide prior "notice of the hearing and its purpose" at least twenty-four hours in advance, unless waived. N.C. Gen. Stat. § 15A-1345(e) (2017). This statutory notice must also include a statement of the violations alleged. *Id.* "The purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a

second probation violation hearing for the same act." *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 390, 393 (2009) (citation omitted).

The State argues Defendant waived her right to prior statutory notice by voluntarily appearing before the court and participating in her revocation hearing. *See State v. Gamble*, 50 N.C. App. 658, 660, 274 S.E.2d 874, 875 (1981). However, unlike the probationer in *Gamble*, Defendant had not been and was not served with an order for arrest prior to her hearing. *See id.*

Defendant re-appeared in court as instructed by the judge the previous day. While Defendant's multiple and repeated objections to probation are documented, the court did not indicate the purpose of the hearing was to revoke Defendant's probation, nor provide her with notice of any statement of her alleged violations, or seek her waiver of same, contrary to the mandate of N.C. Gen. Stat. § 15A-1345(e).

Without prior and proper statutory notice and a statement of violations provided to Defendant, the trial court lacked jurisdiction to revoke her probation. In light of our holding, it is not necessary to address Defendant's other issues on appeal.

VI. Conclusion

Absent jurisdiction, a court is without authority to act. *Satanek*, 190 N.C. App. at 656, 660 S.E.2d at 625. The State failed to provide prior and proper statutory notice to Defendant to revoke her probation. Without proper notice, it lacked jurisdiction to do so and its order must be vacated. "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. Crawford*, 167 N.C. App. 777, 779, 606 S.E.2d 375, 377 (2005) (citation and quotation marks omitted).

While the trial court had no authority to conduct a revocation hearing under these facts, it was not without recourse to compel a recalcitrant defendant. A violation report could have been filed and an arrest warrant could have been issued, to provide Defendant with proper notice. *See State v. Brown*, 222 N.C. App. 738, 739-40, 731 S.E.2d 530, 531 (2012) (violation report filed for absconding after defendant failed to report to probation officer after initial sentence).

Alternatively, the trial court could have found Defendant in contempt of court pursuant to N.C. Gen. Stat. § 5A-11(a)(3) (2017) ("[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution) or N.C.

Gen. Stat. § 5A-11(a)(9a) ("[w]illful refusal by a defendant to comply with a condition of probation").

Regardless of Defendant's statements and protests, the trial court could have simply ordered Defendant be accompanied by a law enforcement or probation officer to register and implement probation supervision.

The trial court erred by revoking Defendant's probation without proper prior statutory notice of a hearing and without a violation report filed. Without proper jurisdiction to hear Defendant's probation revocation, the trial court's order is vacated. *See Crawford*, 167 N.C. App. at 779, 606 S.E.2d at 377. This cause is remanded for further proceedings not inconsistent with this opinion. *It is so ordered.*

VACATED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
WILLOUGHBY HENEREY MUMMA

No. COA17-481

Filed 6 February 2018

1. Criminal Law—first-degree murder—aggressor doctrine—control—no visible injuries—text message

The trial court did not commit plain error in a first-degree murder case by instructing the jury on the aggressor doctrine where there was sufficient evidence presented at trial that defendant sent multiple text messages to a friend saying he was going to kill his wife, gained control of a knife and started stabbing his wife, and had no visible injuries aside from a few scratches.

2. Evidence—inflammatory photographs—decedent's body—harmless error if any

The trial court did not err in a first-degree murder case by sending alleged inflammatory photographs of decedent wife's body to the jury deliberation room over defendant's objection. Defendant failed to establish that he was prejudiced in light of the overwhelming evidence of his guilt, including at least 170 or more photographic exhibits admitted into evidence without objection, a pathologist's

testimony that the victim was struck in a defensive posture, and defendant's text messages to his friend stating that he was going to kill his wife.

3. Criminal Law—prosecutor's argument—failure to intervene ex mero motu—prosecutor's personal opinion—inconsistencies in defendant's testimony

The trial court did not err in a first-degree murder case by declining to intervene ex mero motu during the State's closing argument, where defendant contended on appeal that the prosecutor injected his personal beliefs, appealed to the jury's passion, and led the jury away from the evidence. The challenged portions of the prosecutor's argument, when taken in context of his entire argument, drew reasonable inferences based on defendant's inconsistent statements. Further, the prosecutor's statement that he would "respectfully disagree" if the jury found that defendant acted in self-defense was not so grossly improper as to render the trial and conviction fundamentally unfair.

Judge ARROWOOD dissenting.

Appeal by defendant from judgment entered 10 June 2016 by Judge Marvin P. Pope, Jr., in Swain County Superior Court. Heard in the Court of Appeals 31 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri H. Lawrence, for the State.

Meghan Adelle Jones for defendant-appellant.

BRYANT, Judge.

Where there was sufficient evidence presented at trial that defendant was the aggressor, the trial court did not err in instructing the jury on the aggressor doctrine. Assuming *arguendo* the trial court erred in allowing the jury to review photographs of the deceased victim during jury deliberations over defendant's objection, this error was harmless where defendant has not established that he was prejudiced thereby. Lastly, where the prosecutor's closing argument was not so grossly improper as to render defendant's trial and conviction fundamentally unfair, the trial court did not err when it declined to intervene *ex mero motu* during the prosecutor's closing argument, and we find no prejudicial error in the judgment of the trial court.

On 9 November 2011, defendant Willoughby Mumma was with his wife Amy Chapman at their home in Bryson City, North Carolina. Amy's twenty-year-old son, Christopher Robinson, who lived with Amy and defendant, came home around 5:30 p.m. that evening where he encountered defendant and Amy, drinking and taking pills.

At around 8:00 p.m., Amy drove to a store where she purchased six alcoholic beverages. She returned home within twenty to twenty-five minutes.

While Amy was gone, defendant and his friend, Dewayne Bradley, had the following conversation via text message:

> 8:11 p.m., defendant: "I'm goin 2 kil her."
>
> 8:11 p.m., defendant: "I'm goin 2 kil her."
>
> 8:12 p.m., Bradley: "Please don't."
>
> 8:13 p.m., defendant: "Im going 2 I cant take."
>
> 8:13 p.m., Bradley: "Man just walk down the road."
>
> 8:13 p.m., defendant: "Do you have ne lime?"
>
> 8:14 p.m., Bradley: "Noooooo, just chill."
>
> 8:15 p.m., defendant: "No im over it I can't take no more I luv u bro."
>
> 8:16 p.m., Bradley: "Please lessen to me"
>
> 8:17 p.m., defendant: "Im sorry I have 2"
>
> 8:20 p.m., Bradley: "Man ill come and get 2morr, my word"
>
> 8:21 p.m., defendant: "Line will get rid of the body"

Around 9:45 p.m., defendant and Amy began arguing over an alarm clock radio. Robinson went into the bedroom and told them to stop arguing. According to defendant, Amy was intoxicated and "got meaner as the night went on."

At 11:16 p.m., defendant called Bradley multiple times and repeatedly called Bradley into the early morning hours of 10 November 2011. At 11:52 p.m., defendant texted Bradley duplicate text messages stating, "I need u 2 call me now GD."

At 9:30 a.m. the next morning, Robinson woke up and walked past defendant sitting on the couch in the living room, texting on his cell phone. Robinson went into the bedroom to look for Amy and get a cigarette. Robinson saw blankets all over the bedroom floor and a quarter-sized spot of blood on the bed. Robinson initially thought Amy may have hit defendant; she would get angry when she drank, and he had seen

Amy hit defendant before. Defendant told Robinson to get out of the room. Robinson asked where Amy was, and defendant told him she was at work. Defendant was pacing back and forth from the living room to the kitchen, acting "like things [were not] right."

Defendant told Robinson to get ready for school. Bradley and his wife arrived to pick up Robinson for school. Bradley went into the house while Robinson got in the car. Defendant showed Bradley Amy's body on the closet floor. Bradley left immediately, got in his car, and told his wife and Robinson to lock the car doors. Defendant tried to get in the car with them, but Bradley ordered him out of the car. As they drove away, defendant ran into the woods. Bradley told Robinson that his mother was dead. He pulled into a driveway down the street, called 911, and waited for the police to arrive.

Law enforcement responded to the 911 call and discovered Amy's body in the bedroom closet. At some point later that day, Jennifer Jones, Bradley's ex-girlfriend, sent defendant a text asking, "What did you do?" Defendant responded, "I kild her." Law enforcement officers located defendant down the road from the residence in a field containing briars, weeds, and tall grasses. He was taken into custody at 5:18 p.m. with scratches on his arms and legs.

When law enforcement interviewed defendant later that day, defendant stated that both he and Amy were drug addicts and that on the night of 9 November 2011, they had been drinking and had also taken about thirty Klonopin pills each. Defendant stated that Amy tried to stab him with his pocketknife, at which point he took the knife from her, pushed her to the floor, sat on top of her, and stabbed her in the neck because she bit him. He stabbed her in the eye when she tried to scream for Robinson to help her. The knife blade broke off in her eye. Defendant stated that he "blacked out," "freaked out," and "killed her." Later, at trial, defendant would testify that he "had to end that fight. She was trying to get the knife back."

On 11 November 2011, Dr. Sam Davis, a pathologist at Harris Regional Hospital, performed an autopsy on Amy's body. Dr. Davis opined that the cause of death was "exsanguination, or bleeding to death" "due to stab wounds on her neck and eye." Amy had one stab wound in the upper right eyelid, perforating the eyeball, one stab wound in the left anterior neck, and two stab wounds to the anterior right neck, with one wound perforating the external jugular vein. Dr. Davis testified at trial about defensive wounds on the backs of her hands as "a textbook appearance of being stuck in a defensive posture. . . . [S]he was not striking, but rather [was] being struck."

On 22 November 2011, defendant was indicted for first-degree murder. Defendant filed a "Notice of Defenses" for accident, diminished capacity, and voluntary intoxication, and later amended his notice to include only diminished capacity and voluntary intoxication. Thereafter, defendant filed a "3rd Amended Notice of Defenses" for self-defense and voluntary intoxication.

The case came on for trial during the 23 May 2015 session of Swain County Superior Court, the Honorable Marvin P. Pope, Jr., Judge presiding. The jury returned a verdict of guilty of second-degree murder, and the trial court entered judgment and imposed a sentence of 180 to 225 months imprisonment. Defendant appeals.

On appeal, defendant contends the trial court (I) violated a statutory mandate or committed plain error by giving erroneous jury instructions on self-defense; (II) erred by sending inflammatory photographs of the decedent's body to the jury deliberation room; and (III) erred by failing to intervene and stop the prosecutor from making improper closing arguments.

I

[1] Defendant first argues that the trial court erroneously instructed the jury on self-defense when all the evidence showed that Amy was the aggressor. Defendant also contends that this issue is "preserved for review as a matter of law," despite his failure to object to the jury charge at trial. We disagree and review for plain error. *See State v. Juarez*, 369 N.C. 351, 357–58, 794 S.E.2d 293, 299–300 (2016) (reviewing for plain error the defendant's challenge to the trial court's jury instruction on the aggressor doctrine of self-defense where the defendant did not object to the instruction as given at trial).

Rule 10 the North Carolina Rules of Appellate Procedure provide that "[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, stating distinctly that to which objection is made and the grounds of the objection . . . ." N.C. R. App. P. 10(a)(2) (2017). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (citation omitted) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

"An individual is the aggressor if he 'aggressively and willingly enters into a fight without legal excuse or provocation.' " *State v. Effler*, 207 N.C. App. 91, 97, 698 S.E.2d 547, 551 (2010) (quoting *State v. Potter*, 295 N.C. 126, 144, 244 S.E.2d 397, 409 (1978)). "It is undisputed that '[a] person is entitled under the law of self-defense to harm another only if he is "without fault in provoking, engaging in, or continuing a difficulty with another." ' " *Id.* at 98, 698 S.E.2d at 552 (quoting State v. Stone, 104 N.C. App. 448, 451–52, 409 S.E.2d 719, 721 (1991)). "This Court has repeatedly held that 'where the evidence does not indicate that the defendant was the aggressor, the trial court should not instruct on that element of self-defense." *State v. Vaughn*, 227 N.C. App. 198, 202, 742 S.E.2d 276, 278 (2013) (quoting *State v. Jenkins*, 202 N.C. App. 291, 297, 688 S.E.2d 101, 105 (2010)).

"[T]he judge has the duty to instruct the jury on the law arising from all the evidence presented." *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006) (quoting *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253 (1985)). "In instructing the jury with respect to a defense to a criminal charge, 'the facts must be interpreted in the light most favorable to the defendant." *State v. Holloman*, 369 N.C. 615, 625, 799 S.E.2d 824, 831 (2017) (quoting *State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979)). It is considered error to charge the jury on the aggressor doctrine where "the record . . . discloses *no* evidence tending to show that the defendant brought on the difficulty or was the aggressor[.]" *Vaughn*, 227 N.C. App. at 203, 742 S.E.2d at 279 (emphasis added) (quoting *State v. Washington*, 234 N.C. 531, 535, 67 S.E.2d 498, 501 (1951)).

In the instant case, defendant challenges the following portion of the jury instructions:

> If the defendant voluntarily and without provocation entered the fight, the defendant could be considered the aggressor, unless the defendant thereafter attempted to abandon the fight. . . .
>
> . . . .
>
> The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor with the intent to kill or inflict serious bodily harm upon the deceased.

Contrary to defendant's assertion otherwise and far from "no evidence," *see id.* (citation omitted), there was sufficient evidence presented at trial that defendant was the aggressor. For example, a DVD

recording of defendant's 10 November 2011 interview with law enforcement officers was played for the jury in which he described how Amy came at him with the knife, he took the knife away from her, and proceeded to get on top of her and stab her in the neck and then in the eye to keep her from screaming for help. Based on this account to law enforcement, defendant became the aggressor after he gained control of the knife and then proceeded to get on top of Amy and stab her. Even though the jury also heard evidence—defendant's testimony—that Amy kept trying to regain control of the knife, defendant not only maintained control of the knife throughout the remainder of the fight, but he also continued the fight until Amy was killed.

This Court has previously noted that "the lack of injuries to [the] defendant, compared to the nature and severity of the wounds on [the victim] at his death, [was] sufficient evidence from which a jury could find that [the] defendant was the aggressor or that [the] defendant used excessive force." *State v. Presson*, 229 N.C. App. 325, 330, 747 S.E.2d 651, 656 (2013). Here, too, defendant had no visible injuries aside from a few scratches which defendant admitted he sustained after running through the woods the next morning. In contrast, Amy sustained stab wounds to the eye and the neck, as well as lacerations on her back, shoulder, lip, cheek, temple, hands, and fingers. Furthermore, the pathologist who performed the autopsy on Amy testified that "[t]his [was] a textbook appearance of being stuck in a defense position. . . . This is simply a classic example of defensive wounds . . . . [S]he was not striking, but rather being struck."

Defendant's text messages to Bradley prior to Amy's killing also provide sufficient evidence from which a jury could find that defendant was the aggressor. From 8:11 p.m. until 8:21 p.m., defendant sent multiple text messages stating he was going to kill Amy, even asking for lime (or "line," as defendant's referred to it) to help dispose of the body. As such, the jury could reasonably infer and find that defendant's testimony was not credible and that instead of fending off an attack from Amy, he instead instigated the fight with her in order to kill her, as he stated earlier via text message he wanted to do. Accordingly, the trial court did not err in instructing the jury on the aggressor doctrine where sufficient evidence supported the instruction. Defendant's argument is overruled.

II

[2] Defendant next argues the trial court erred by sending inflammatory photographs of the decedent's body to the jury deliberation room, over defendant's objection, in violation of N.C. Gen. Stat. § 15A-1233.

Defendant contends that sending the exhibits to the deliberation room without his consent constitutes error and that considering the number and content of the photographs, as well as the amount of time the jury viewed them, he was prejudiced by this error. We disagree.

Whether the trial court has violated a statutory mandate is reviewed *de novo*. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

"Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." N.C. Gen. Stat. § 15A-1233(b) (2015). "Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Chapman*, 359 N.C. 328, 350, 611 S.E.2d 794, 812–13 (2005) (quoting *State v. Blakeney*, 352 N.C. 287, 309–10, 531 S.E.2d 799, 816 (2000)).

In *State v. Cunningham*, the North Carolina Supreme Court noted that "[a]lthough the defendant did not object to the sending of the exhibits to the jury room, he did not consent to it as required by the statute." 344 N.C. 341, 364, 474 S.E.2d 772, 783 (1996). However, the Supreme Court concluded that "[i]n light of the strong evidence against the defendant, letting the jury have these items of evidence in the jury room could not have affected the outcome of the trial[,]" and "[a]ssuming this was error, it was harmless." *Id.* (citation omitted).

In the instant case, defendant filed a pretrial "Motion to Exclude Photographs" and also objected to the jury's request to see all photographic evidence during deliberations, although he did acknowledge that the decision was "in the Court's discretion":

> [Defendant's attorney]: Your Honor, I know it's in the Court's discretion, but I would object. I'd prefer for them to rely on the testimony and recollection.
>
> THE COURT: Well --
>
> [Defendant's attorney]: I mean, I know it's in your discretion, Your Honor.
>
> THE COURT: In my discretion, I'm going to allow them to have all the photographs that have been introduced into evidence.
>
> [Defendant's attorney]: Yes, Your Honor.

However, even if defendant "did not consent to [the jury's request] as required by the statute[,]" assuming it was error, it was harmless where defendant has failed to establish that he was prejudiced in light of the overwhelming evidence of defendant's guilt. *See id.* (citation omitted).

At trial, there were at least 170 or more photographic exhibits admitted into evidence, many of which were indeed images of the deceased's body or portions thereof. However, those photographs showed the circumstances and position of the deceased's body as it was found at the scene and the photographs of the injuries, including close-up views, were also relevant to show the type, severity, and number of injuries sustained by the deceased. They were necessary to depict the extent and nature of her injuries, as well as the location and position—inside a closet—in which she was found by law enforcement. This photographic evidence was the best evidence to help illustrate the responding officers' testimony. Indeed, defendant did not object to the admission of these photographs into evidence; he only objected to the trial court's decision to allow the photographs into the jury deliberation room. Defendant has not established how he was prejudiced by the trial court's decision to allow the jurors to review photographic exhibits which they had already seen.

In any event, there was more than sufficient evidence for a jury to find beyond a reasonable doubt that defendant committed second-degree murder and did not act in self-defense. Dr. Davis testified that Amy was struck in a defensive posture and that she "was not striking, but rather being struck." According to defendant's own testimony, he obtained control and possession of the knife and proceeded to stab Amy in the eye and the neck. Lastly, defendant's several text messages sent to Bradley prior to the murder also indicated that defendant intended to kill Amy. Defendant stated repeatedly that he was going to kill Amy and asked for lime to help dispose of the body.

Based on all of the forgoing, even if it was error for the trial court to allow the jury to review photographs of the deceased victim during jury deliberations without defendant's consent, this error was harmless where defendant has not established that he was prejudiced thereby. Defendant's argument is overruled.

III

[3] Lastly, defendant contends the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. Specifically, defendant contends the prosecutor's closing arguments were grossly improper as they injected the prosecutor's personal beliefs, appealed to the jury's passion, and led the jury away from the evidence. We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citing *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998)).

> In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Id.

"The scope of jury arguments is left largely to the control and discretion of the trial court, and trial counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Call*, 349 N.C. 382, 419, 508 S.E.2d 496, 519 (1998) (citation omitted). Closing arguments must "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Jones*, 355 N.C. at 135, 558 S.E.2d at 108.

In the instant case, defendant challenges the following portions of the prosecutor's argument as "grossly improper":

> But in this case, in this case, from the get-go, from the time you were seated . . . the State unequivocally, without any doubt, does not feel this defendant deserves the legal right to kill Amy Chapman in self-defense. That means he walks.
>
> . . . .
>
> So from the get-go I will say it and will say it until this process is done and will continue to believe that. This defendant does not have the legal right to kill Amy Chapman in self-defense. He doesn't get the opportunity to get any lesser included offense based on self-defense.
>
> . . . .

> [D]oes he have that right? Does he? You're going to make that decision. I've made mine up.
>
> . . . .
>
> [Does] [defendant] have the right to kill Amy Chapman in self-defense? If you want to go back and deliberate and say yes, he did, then you've got to do what you've got to do. You got to do it. I respectfully disagree.
>
> . . . .
>
> It's convenient now, after he's been interviewed and then transcribed that he now changes his story from up on top of her, stabbing her, straddling her. Now they're on the ground and she's grabbing for his groin area and trying to get to the knife.

At this point, defendant objected and the trial court sustained the objection but gave no curative instruction or otherwise instructed the prosecutor not to give his personal opinion.

> . . . [W]hat was his interest in changing his statement to that, to that? One is possibly getting a self-defense instruction. So that's what the law allows him to, based on the evidence that's been presented through his testimony.
>
> . . . .
>
> So we know he intended to kill her, because he's offering self-defense. He's offering self-defense. He got up here and says it was me or her. So what's he saying? I intended to kill her. I intended to do it. I'm proud of it.

The prosecutor then referenced letters defendant wrote to his family:

> Oh, I couldn't say much in my letters. I mean, come on. You're talking to family here. It was an accident. I would hate to see what wasn't an accident, you know.
>
> . . . .
>
> I went at 1:00 a.m. and went and saw [Robinson]. I was checking on him, he's got diabetes. Are you kidding me? Hate to keep using that. . . .
>
> No, it's because you hope he didn't hear anything, and you're making sure he didn't. That's what he was doing.

> That's what he was checking on. Checking on his diabetes, give me a break.

Error will not be found "in a trial court's failure to intervene in closing arguments *ex mero motu* unless the remarks were so grossly improper they rendered the trial and conviction *fundamentally unfair*." *State v. Allen*, 360 N.C. 297, 306–07, 626 S.E.2d 271, 280 (2006) (emphasis added) (citing *Call*, 349 N.C. at 419–20, 508 S.E.2d at 519). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Smith*, 359 N.C. 199, 218, 607 S.E.2d 607, 621 (2005) (alteration in original) (quoting *State v. Kemmerlin*, 356 N.C. 446, 470, 573 S.E.2d 870, 887 (2002)).

In the instant case, the challenged portions of the prosecutor's closing argument—and to which defendant did not object at trial—when taken in context of his entire argument, draw reasonable inferences based on defendant's inconsistent statements and point out those inconsistencies in defendant's testimony. The prosecutor's asides such as "Are you kidding me?" and "give me a break" and "come on," do not reflect the prosecutor's personal opinion, but rather point out inconsistencies in defendant's testimony. Further, with regard to the prosecutor's statement that he would "respectfully disagree" with the jury if they decided to deliberate and find that defendant killed Chapman in self-defense, even if this argument was improper, it was not so grossly improper as to render the trial and conviction "fundamentally unfair" and warrant the trial court's intervention *ex mero motu*. *See State v. Gladden*, 315 N.C. 398, 426, 340 S.E.2d 673, 690 (1986) (finding that it was not so grossly improper for the trial court to decline to intervene *ex mero motu* where the prosecutor argued that he "probably wouldn't [tell the truth] either" if he "was in [the defendant's] shoes"); *cf. State v. Walters*, 357 N.C. 68, 102–05, 588 S.E.2d 344, 363–66 (2003) (finding the prosecutor's argument improper where he compared the defendant to Adolf Hitler, over the defendant's objection, by imploring the jury to "stand up to evil" like Winston Churchill did "when he stood up to Hitler," but also finding that the "necessary showing of prejudice was not met").

Accordingly, where the prosecutor's argument was not so grossly improper as to render defendant's trial and conviction fundamentally unfair, the trial court did not err when it declined to intervene *ex mero motu* during the prosecutor's closing argument. Defendant's argument is overruled.

NO PREJUDICIAL ERROR.

Judge DILLON concurs.

Judge ARROWOOD dissents in a separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent from the Majority Opinion's holding that the trial court did not commit prejudicial error in sending photographs of the decedent's body to the jury room over defendant's objection.

N.C. Gen. Stat. § 15A-1233(b) (2017), in pertinent part, provides: "Upon request by the jury *and with consent of all parties*, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." (Emphasis added.)

In the present case, on 19 June 2016, the jury retired to deliberate at 10:05 a.m. At 10:56 a.m., the jury asked a question regarding punishment. The court properly instructed them that punishment was not a matter for them to consider, whereupon the jury took their morning break. Immediately upon the jury's return from the morning break at 11:21 a.m., the jury asked for all the photographs to be sent to the jury room. Defendant objected. In spite of this objection, the court stated that, in its discretion, it was going to permit the photographs to be sent to the jury room.

At approximately 11:31 a.m., the court had the approximately 179 photographs that were admitted into evidence sent to the jury room. Many of these photographs were from the autopsy to which defendant had previously objected. The jury took a lunch recess from approximately 12:26 p.m. until 1:58 p.m. Approximately two hours later, the jury indicated it was deadlocked 11-1. The court then gave an *Allen* charge and permitted the jury to take a 15 minute break. After deliberating an additional 45 minutes, the jury returned a verdict of guilty of second-degree murder. The objected to photographs were the only exhibits in the jury room during the deliberations.

Allowing the jury to receive the photographs in the jury room over defendant's objection was error. *See State v. Huffstetler*, 312 N.C. 92, 114, 322 S.E.2d 110, 124 (1984). The issue thus becomes whether the error was prejudicial.

N.C. Gen. Stat. § 15A-1443(a) (2017), in pertinent part, provides: "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." The burden is on the defendant to establish this prejudice. *See State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981).

When considering the circumstances of this case in their entirety, including: the large number of photographs (179), the fact that many of the photographs were graphic, the fact that only the photographic evidence was taken to the jury room, the fact that the improper photographs were in the jury room for almost the entire deliberation, and, particularly noteworthy, the facts that the jury was deadlocked to the extent that an *Allen* charge was necessary and that the court provided instructions and verdict sheets to the jury with various options to find defendant guilty, I believe defendant has met his burden of establishing there is a reasonable possibility that, had this error not been committed, a different result would have been reached.

Therefore, I vote to reverse this case and remand this matter to Swain County Superior Court for a New Trial.

STATE OF NORTH CAROLINA
v.
TYLER BRYANT PEED, DEFENDANT

No. COA17-743

Filed 6 February 2018

1. Appeal and Error—mootness—willful violation of probation—future adverse consequences

Where the trial court entered an order finding defendant in willful violation of his probation, defendant's appeal challenging the trial court's jurisdiction to consider whether he violated his probation was not moot even though he already had served the entire sentence assigned for revocation. Defendant would be subject to adverse consequences in the future based on the trial court's order, such as an aggravating factor in a future criminal proceeding.

2. Probation and Parole—improper probation extension—substance abuse program

The trial court erred by revoking defendant's probation where the violation occurred during an improper 12-month extension to give defendant time to complete a substance abuse program. N.C.G.S. § 15A-1342(a) and N.C.G.S. § 15A-1343.2(d), which allow extensions for completion of medical or psychiatric treatment, do not authorize extensions for completion of substance abuse programs

Appeal by Defendant from judgment entered 12 December 2016 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 12 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary Padget, for the State.

Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for the Defendant.

DILLON, Judge.

Tyler Bryant Peed ("Defendant") appeals from the trial court's judgment revoking his probation. Defendant's probation had been extended to allow Defendant time to complete one of the conditions of his probation. His probation was revoked for a violation which occurred during the extension. On appeal, Defendant contends that the trial court did not have jurisdiction to revoke his probation because the extension was not statutorily authorized. After careful review, we reverse.

I. Background

In 2013, Defendant received thirty (30) months of supervised probation in lieu of an active sentence in connection with a felony conviction. In February 2016, approximately four days before his probation was to expire, the trial court entered an order extending Defendant's probation for 12 months, with Defendant's consent. The purpose of the extension was to allow Defendant "to complete Substance Abuse Treatment[.]"

During the 12-month period of extension, Defendant violated probation. A hearing was held to determine whether Defendant's probation should be revoked based on the violation. During the hearing, Defendant moved to dismiss, arguing that the extension of his probation period was not authorized by statute. The trial court denied the motion. Defendant

then admitted to willfully violating probation. The trial court revoked Defendant's probation. Defendant timely appealed.

II. Justiciability

[1] The State contends that Defendant's appeal is moot because he has already served the entire sentence assigned for revocation, leaving no controversy left to be redressed.

Defendant, however, argues that his appeal is not moot, as there are potentially adverse consequences that he may endure as a result of the order revoking his probation. Indeed, our Supreme Court has stated that a criminal appeal is not moot, though the sentence has been served, where the "mere fact of conviction may result in various adverse consequences to the individual[.]" *In re A.K.*, 360 N.C. 449, 453, 628 S.E.2d 753, 756 (2006). Defendant cites a potential adverse consequence of the trial court's order that the "willful violation of the conditions of probation imposed pursuant to a suspended sentence" may be considered in a future criminal proceeding as an aggravating factor during sentencing. N.C. Gen. Stat. § 15A-1340.16(d)(12)(a) (2015). And, here, the trial court did find that Defendant willfully violated his probation.

The State, though, contends that the appeal is still moot because Defendant is *not* contesting the trial court's finding that he willfully violated his probation, only that the trial court lacked jurisdiction to revoke his probation. And, so the State's argument goes, it is only the fact that a defendant has willfully violated a condition of probation, and *not* the fact that a defendant's probation has been revoked, which may be used as an aggravating factor in a future criminal matter. The State cites as authority our holding in *State v. Posey*, ___ N.C. App. ___, 804 S.E.2d 580 (2017). We, however, hold that our *Posey* decision is distinguishable.

In *Posey*, the defendant's probation was revoked for a willful violation of a condition. We considered the defendant's appeal after he had served his time. As Defendant has done here, the defendant in *Posey* argued that his appeal was not moot because the order revoking his probation could be used against him as an aggravating factor in a future criminal proceeding. We held, though, that the appeal was still moot because the defendant was *not* challenging the trial court's finding that he had willfully violated his violation, but only the trial court's jurisdiction to revoke his probation:

> [T]he fact that [the defendant's] probation was revoked, in and of itself, does not trigger the application of N.C. Gen. Stat. § 15A-1340.16(d)(12a) [which allows a prior willful

> violation of a probation condition to be considered as an aggravating factor]. The only part of the trial court's judgment that could have any future detrimental effect is the finding that [the defendant] was in willful violation of his probation, a finding that [the 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 [revoked the defendant's probation].

Id. at ___, 804 S.E.2d at 581-82 (emphasis added).

This present matter is distinguishable from *Posey* because Defendant challenges the trial court's jurisdiction, not only to revoke his probation, but to even consider whether he willfully violated a condition of his probation. That is, unlike the defendant in *Posey*, Defendant here essentially argues that he was not even on probation when he committed his alleged violation.

Accordingly, with the revocation order in place, Defendant will be subject to potential adverse consequences in the future since that order contains a determination that Defendant willfully violated his probation. However, if we agree with Defendant's argument that his probation period had, in fact, already ended before he allegedly committed the act found by the trial court to constitute a willful violation, then the trial court's finding of a willful violation would be vacated. Therefore, Defendant's appeal is not moot. We now turn to the *merits* of Defendant's argument on appeal.

III. Analysis

[2] Defendant essentially argues that the trial court lacked jurisdiction to find that he had violated his probation because his probationary period was unlawfully extended. Specifically, Defendant contends that the reasoning the trial court used to extend his probation was not authorized by the governing statutes. We agree.

"[A]n appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review." *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citing *State v. Bryant*, 361 N.C. 100, 102, 637 S.E.2d 532, 534 (2006)).

In order to extend an individual's probationary period, the trial court must have statutory authority; absent such authority, any orders extending probation are void. *See State v. Gorman*, 221 N.C. App. 330, 335,

727 S.E.2d 731, 734 (2012). Here, the trial court extended Defendant's probation based on Defendant's consent. There are two statutes which authorize the trial court to extend the period of probation based on a defendant's consent, both of which authorize an extension to allow the defendant to complete/continue "medical or psychiatric treatment ordered as a condition of" the probation, namely N.C. Gen. Stat. §§ 15A-1342(a) and 15A-1343.2(d).[1]

Neither N.C. Gen. Stat. § 15A-1342(a) (2015) nor N.C. Gen. Stat. § 15A-1343.2(d) (2015) expressly authorize a trial court to extend a defendant's period of probation to allow him time to complete a "substance abuse program," as was done in this case. The State argues, though, that the completion of Defendant's "substance abuse program" is a permissible reason for the trial court to extend Defendant's probation as a continuation of "medical or psychiatric treatment." For the following reasons, we must disagree.

This is a question of statutory interpretation: Both N.C. Gen. Stat. § 15A-1342(a) and N.C. Gen. Stat. § 1343.2(d) authorize a trial court to extend a defendant's period of probation (with the defendant's consent) to allow a defendant time to complete "medical or psychiatric treatment." Did the General Assembly intend to authorize the trial court to extend the period of probation under these sections for the purpose of allowing the defendant additional time to complete "substance abuse treatment"? In other words, did the General Assembly intend for "substance abuse treatment" to be a type of "medical or psychiatric treatment"? In deciding this question, we are guided by our Supreme Court's directive that "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts . . . are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Redmond*, ___ N.C. ___, ___, 797 S.E.2d 275, 279 (2017).

We conclude that the General Assembly did not intend for a probation condition to complete "substance abuse treatment" to be synonymous with (or a subset of) a probation condition to complete "medical or psychiatric treatment." Specifically, N.C. Gen. Stat. § 15A-1343, which

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1. These statutes also allow the trial court to extend the probation period *with a defendant's consent* to allow the defendant more time to complete making restitution. However, restitution is not an issue in the present case. Also, another statute, N.C. Gen. Stat. § 15A-1344 (2015) authorizes a trial court to extend the probation period without a defendant's consent if good cause is shown. However, here, neither party argues that N.C. Gen. Stat. § 15A-1344 applies and, further, the trial court did not make any finding of good cause shown, but rather rested its authority on the basis of Defendant's consent.

enumerates the conditions of probation which may be imposed, lists "substance abuse . . . treatment" *separately from* "medical or psychiatric treatment." N.C. Gen. Stat. § 15A-1343(a1) (2015) (listing "[s]ubstance abuse assessment, monitoring, or treatment" as a permissible "intermediate probation" condition); N.C. Gen. Stat. § 15A-1343(b1)(2015) (listing "[m]edical or psychiatric treatment" as a permissible "special condition" of probation).

In sum, the General Assembly enumerates in N.C. Gen. Stat. § 15A-1343 the various conditions of probation available to a trial court to impose, which include separately "substance abuse . . . treatment" and "medical or psychiatric treatment." Based on N.C. Gen. Stat. § 15A-1343, there are situations where a trial court could order a defendant to participate in substance abuse treatment, *or* in medical treatment, *or* in psychiatric treatment, *or* in two of these three types of treatment, *or* in all three types.

The General Assembly further authorizes the trial court to extend the period of probation with the defendant's consent in limited situations. These limited situations enumerated by the General Assembly include 'allowing the defendant more time to complete his medical treatment or to complete his psychiatric treatment. The General Assembly could have also expressly authorized a trial court to extend the probation period to allow a defendant time to complete substance abuse treatment. However, the General Assembly has not done so. We, therefore, must hold that the General Assembly did not authorize the trial court to extend Defendant's period of probation in this case. We reverse the trial court's order revoking Defendant's probation in its entirety, including the trial court's finding that Defendant willfully violated his probation.

REVERSED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
NOUI PHACHOUMPHONE

No. COA17-247

Filed 6 February 2018

1. Sexual Offenses—first-degree sex offense with child—indecent liberties—procedural requirements for child testimony

Although the trial court erred in a first-degree sex offense with a child case by failing to follow N.C.G.S. § 15A-1225.1's procedural requirements when authorizing the child victim's testimony to be taken remotely, defendant failed to demonstrate how the procedural errors prejudiced him.

2. Sexual Offenses—first-degree sex offense with a child—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of first-degree sex offense with a child based on insufficient evidence of penetration where the child testified to the penetration and the State presented overwhelming corroborative evidence that defendant digitally penetrated her. The Court of Appeals dismissed defendant's additional challenge based on the State's alleged failure to present evidence that he digitally penetrated the victim within the time frame specified in the indictment, because defendant failed to argue this ground at trial.

3. Indecent Liberties—with child—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of indecent liberties with a child where the State presented substantial evidence that defendant digitally penetrated the child. The same act may support convictions and sentences for both first-degree sex offense and indecent liberties.

4. Criminal Law—prosecutor's argument—prior inconsistent statements

The trial court did not abuse its discretion in a first-degree sex offense with a child case by not intervening ex mero motu during the State's closing argument where defendant failed to demonstrate how the prosecutor's recitation of prior out-of-court statements by the victim and a witness that were inconsistent with their trial testimony rendered the proceedings fundamentally unfair, given the

trial court's later instruction limiting the jury from considering prior inconsistent statements as substantive evidence and the other overwhelming evidence of defendant's guilt.

Appeal by defendant from judgment entered 22 September 2016 by Judge Eric L. Levinson in Cleveland County Superior Court. Heard in the Court of Appeals 4 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth Guzman, for the State.

William D. Spence, for defendant-appellant.

ELMORE, Judge.

Noui Phachoumphone (defendant) appeals from a judgment entered after a jury convicted him of first-degree sex offense with a child and of taking indecent liberties with a child. The State's evidence tended to show that, during the evening of 19 August 2014, defendant's sister, Sara, entered defendant's girlfriend's apartment and saw defendant engaging in sexual activities with his girlfriend's six-year-old daughter, Tara.[1]

On appeal, defendant contends the trial court violated N.C. Gen. Stat. § 15A-1225.1's procedural requirements by authorizing Tara's testimony to be taken remotely without holding a recorded evidentiary hearing on the matter or entering an order supporting its decision to allow the State's motion. Defendant also contends the trial court erred by denying his motions to dismiss both charges for insufficient evidence, and by failing to intervene *ex mero motu* when the prosecutor argued to the jury that certain out-of-court statements established substantive evidence of defendant's guilt. We hold that defendant received a fair trial, free of prejudicial error.

I. Background

Prior to August 2014, six-year-old Tara lived in apartment 36 at Chesterfield Apartments in Kings Mountain with her mother and her mother's boyfriend, defendant, who was forty years old. Defendant's sister, Sara, also lived in a nearby apartment at Chesterfield Apartments.

During the evening of 19 August 2014, Sara was outside smoking a cigarette when she noticed defendant, also outside, drinking and "pretty

1. Pseudonyms are used to protect identities and for ease of reading.

intoxicated." A few minutes after Sara saw defendant go into apartment 36, she saw Tara walking outside by herself and then enter the apartment. Sara believed Tara was supposed to be staying with her babysitter at a nearby apartment in Chesterfield Apartments, so she went to investigate. After Sara's knocks on the door to apartment 36 went unanswered, she entered the apartment and saw defendant and Tara lying together in a bed on the living room floor. Exactly what Sara observed is disputed. According to Sara's statements to police immediately after the incident, she saw defendant lying on top of Tara while both were naked, and saw defendant masturbating while rubbing Tara's vagina; however, according to her trial testimony, she merely observed defendant with his pants on but no shirt, Tara's dress halfway off and somewhat up, and defendant with his hands around her. Whatever Sara saw when she entered the apartment, it caused her to became extremely upset, she tried to remove Tara from the apartment, and she got into a heated argument with defendant when he refused to let her take Tara. Sara then called 911.

Sergeant Doug Shockley of the Kings Mountain Police Department responded to the call at Chesterfield Apartments, where a 6-year-old girl was reportedly being held against her will. When he arrived, he met Sara, who was "crying hysterically" and appeared "very nervous and upset." Sgt. Shockley met defendant at the door. Defendant reported that he and Sara did not get along, and she was just trying to cause him trouble. Defendant stated that Tara became frightened that night and came downstairs to sleep beside him on the couch. Sgt. Shockley instructed defendant to wait outside as he spoke with Tara.

When Sgt. Shockley entered the apartment to speak with Tara, he saw her sitting on the couch, clutching a pillow, and "crying hysterically, shaking." According to Sgt. Shockley, Tara immediately stated: " 'I don't know why he did this to me.' " Tara clarified: " '[Defendant], I don't know why he was laying on top of me. He was rubbing me down there' " and then Tara "pointed toward . . . her genital area." Sgt. Shockley then contacted Detective Sergeant Lisa Proctor, who instructed that Sara, Tara, and defendant be taken into the police station for questioning.

During Sara's police interview, she reported that when she entered the apartment, defendant was "totally naked" and masturbating while playing with Tara. During Tara's interview, she reported that defendant "was naked," "had gotten on top of her," "taken her clothes off," and "touched her in her cootie with his hands."

The next day, Tara was examined by Dr. Christopher Cerjan, a pediatrician at Shelby Children's Clinic. During the exam, Tara reported to

Dr. Cerjan that defendant "took [her clothes] off," "touched her with . . . his hands," and "pointed to her groin." Dr. Cerjan discovered that Tara had very little hymen tissue, which he opined was abnormal for a six-year-old and that a penetrating injury was the only possible cause. He also found redness inside Tara's vaginal area, indicating that the penetration likely occurred within the preceding forty-eight hours.

Near the end of the first day of trial, the State called Tara to testify. Because she was unresponsive, the court decided to excuse the jury for the evening and start fresh the next day. On day two, the State directly examined Tara for nearly two-and-a-half hours but was unable to elicit any helpful testimony about the incident. Tara demonstrated that she understood the difference between a truth or a lie, but either did not respond at all or merely shook her head "yes" or "no" to several questions. Tara was unwilling to say defendant's name but did indicate that something happened between her and defendant, that it happened to her body, and appeared to indicate by confirming when the State pointed to this location on a bear used for demonstrative purposes, that it happened between her legs. Tara confirmed that "this [was] the right spot on [her] body where [she was] hurt." However, Tara was largely unresponsive when asked to provide any further details. The State then called Sara to testify.

Sara's trial testimony differed from her prior statements to police. Sara testified that when she entered the apartment, she saw defendant "laying on . . . the bed on the floor in the living room, and [Tara] next to him." "What [she] . . . clearly it didn't look appropriate. So immediately [she] told [Tara] to get up and come with [her]." She testified that defendant "had his pants on but he was shirtless," and Sara only "saw [Tara]'s dress halfway off and somewhat up. And [defendant] . . . had his hands around her but that, that was it." She explained: "I mean . . . from that moment, I just reacted and I called out [Tara's] name to come with me. And when [defendant] heard, they just stood up and that's when the . . . argument started." When pressed by the State during direct, Sara stated that at the time she gave her recorded police interview, she was "drunk," "upset," "mad," and "wasn't thinking clearly. . . ." Sara further stated that "it was dark," she "didn't see anything" but "jumped to conclusion [sic]," and "might have exaggerated" during the police interview. Sara admitted that in her prior recorded statement, she told police that she saw defendant "totally naked with his private part out and [masturbating] while he was playing with [Tara]," but stated at trial that she "said it out of anger," "exaggerated it a little bit," and "that's not what happened."

At the start of the third day of trial, the State filed a motion under N.C. Gen. Stat. § 15A-1225.1 to allow Tara's testimony to be taken remotely, arguing that Tara "would suffer and has suffered serious emotional distress by testifying in front of the defendant" and that "this emotional distress has made it difficult for [Tara] to speak, and [Tara]'s ability to communicate with the trier of fact is impaired and thus interferes with the ability of jurors to ascertain the truth." Defense counsel objected on the ground that the motion was untimely filed, and the State never presented an expert to support the motion. After considering the parties' arguments, and its own observation of Tara's prior in-court testimony, the trial court allowed the motion, authorizing Tara's testimony to be taken remotely.

During Tara's remote testimony, she demonstrated what defendant had done to her by inserting her finger through a hole an interpreter had created with her hands. She explained that "it hurt," that no one else had ever touched her that way, and that defendant had undressed her before committing the act.

After the State's presentation of evidence, defense counsel called defendant's brother and defendant to testify. Defendant's brother stated that defendant and Tara had a great relationship, that defendant was "like a father figure to [Tara]," and that defendant was largely responsible for Tara's care when her mother was at work. Defendant's testimony corroborated these remarks from his brother. According to defendant, during the night of the incident, he was watching television and relaxing, drinking a beer, while wearing shorts and a t-shirt. Tara was on the bed, had fallen asleep in shorts and a t-shirt, and he had just covered her with a blanket when Sara came into the apartment. Sara immediately stated " 'I know you been [sic] drinking. I'm taking [Tara].' " According to defendant, when he refused to give up Tara, Sara warned " 'I'm going to call the cops and tell them you messing [sic] with her.' " Defendant testified that he never did anything inappropriate with Tara.

At the conclusion of the evidence, defendant unsuccessfully moved to dismiss both charges for insufficiency of the evidence. The jury found defendant guilty as charged. The trial court imposed a prison sentence of 300 to 428 months for the first-degree sex offense with a child count, and a concurrent sentence of 21 to 35 months for the indecent liberties count. The trial court also ordered defendant to register as a sex offender for a period of thirty years, to enroll in lifetime satellite-based monitoring, and to have no contact with Tara for the remainder of his natural life. Defendant appeals.

II. Alleged Errors

On appeal, defendant contends the trial court erred by (1) failing to follow N.C. Gen. Stat. § 15A-1225.1's procedural requirements in authorizing Tara's testimony to be taken remotely, denying his motions to dismiss (2) the first-degree sex offense with a child charge and (3) the indecent liberties charge, and (4) failing to intervene *ex mero motu* when the State argued to the jury that Sara's and Tara's out-of-court statements were substantive evidence of his guilt.

III. Motion for Remote Testimony

[1] Defendant first contends the trial court violated N.C. Gen. Stat. § 15A-1225.1's procedural requirements by failing to (1) "hold a recorded evidentiary hearing," (2) "issue an order," and (3) "include in said order the five requirements set forth in section (d) of the statute." Defendant does not challenge the trial court's ultimate ruling permitting Tara to testify remotely under N.C. Gen. Stat. § 15A-1225.1; rather, he challenges the procedure employed in authorizing her remote testimony. We agree that the trial court erred by failing to follow statutory procedure, but overrule defendant's challenges on the ground that he has failed to demonstrate how any of these alleged procedural errors prejudiced him.

A. Review Standard

We review alleged statutory errors *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011). Yet "a new trial does not necessarily follow a violation of statutory mandate." *State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240–41 (2006) (citation omitted). A defendant "must show not only that a statutory violation occurred, but also that [he or she was] prejudiced by this violation." *Id.* (citation omitted); *see also State v. Braxton*, 352 N.C. 158, 178, 531 S.E.2d 428, 439 (2000) ("[E]ven if it be assumed *arguendo* that the jury selection procedure violated the randomness requirement of N.C.G.S. § 15A-1214(a), defendant has not demonstrated on appeal how he was prejudiced *by the procedure*." (emphasis added)); *State v. Nobles*, 350 N.C. 483, 506, 515 S.E.2d 885, 899 (1999) (holding the trial court erred by failing to follow a statutory mandate but refusing to award a new trial where the "defendant has not met his burden of showing prejudice as a result of the trial court's failure to follow the requirements of N.C.G.S. § 15A-1233(a)").

B. Discussion

Under N.C. Gen. Stat. § 15A-1225.1 (2015), a trial court may authorize a child victim to testify remotely "when [it] determines: (1) That the child witness would suffer serious emotional distress, not by the open

forum in general, but by testifying in the defendant's presence, and (2) That the child's ability to communicate with the trier of fact would be impaired." *Id.* § 15A-1225.1(b). Subsection (c) of the statute provides: "Upon motion of a party . . . and for good cause shown, the [superior] court shall hold a[recorded] evidentiary hearing to determine whether to allow remote testimony." *Id.* § 15A-1225.1(c); *see also State v. Jackson*, 216 N.C. App. 238, 240, 717 S.E.2d 35, 37 (2011) ("Upon a motion for remote testimony, the trial court must 'hold an evidentiary hearing[.]' . . ." (quoting N.C. Gen. Stat. § 15A-1225.1(c) (2009))). Subsection (d) contemplates that a trial court enter an order "allowing or disallowing the use of remote testimony" that "shall state the findings of fact and conclusions of law that support the court's determination." N.C. Gen. Stat. § 15A-1225.1(d). Subsection (d) provides further that "[a]n order allowing the use of remote testimony shall do the following:

> (1) State the method by which the child is to testify.
>
> (2) List any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony.
>
> (3) State any special conditions necessary to facilitate the cross-examination of the child.
>
> (4) State any condition or limitation upon the participation of individuals in the child's presence during his or her testimony.
>
> (5) State any other condition necessary for taking or presenting the testimony.

Id.

Both parties cite to two cases in which this Court addressed challenges to a trial court's N.C. Gen. Stat. § 15A-1225.1 authorization to take a child victim's testimony remotely. *See State v. Lanford*, 225 N.C. App. 189, 204–08, 736 S.E.2d 619, 629–31 (2013); *Jackson*, 216 N.C. App. at 240–41, 244–47, 717 S.E.2d 37–38, 40–42. But neither case provides guidance in assessing the procedure employed here. In both *Lanford* and *Jackson*, the State filed a pretrial motion for remote testimony, and the trial court held an evidentiary hearing before trial where it considered testimony from the State's witness(es) concerning whether the child would suffer serious emotional distress and be unable to communicate effectively to the jury. *Lanford*, 225 N.C. App. at 206–07, 736 S.E.2d at 630–31; *Jackson*, 216 N.C. App. at 239, 717 S.E.2d at 37. Here, contrarily, the State filed its motion during trial, after unsuccessfully attempting

to elicit Tara's testimony, and the State never presented any witnesses specifically to testify on whether Tara would suffer serious emotional distress or be unable to communicate effectively to the jury if she testified in defendant's presence. Additionally, the trial court here never entered an order on the motion.

Based on our interpretation of the statutory language, we agree that the procedures employed violated N.C. Gen. Stat. § 15A-1225.1's express requirements. However, "a new trial does not automatically follow a finding of statutory error." *State v. Garcia*, 358 N.C. 382, 406, 597 S.E.2d 724, 742–43 (2004). Defendant has failed to demonstrate how he was prejudiced by the particular procedure employed. *See id.* at 407–08, 597 S.E.2d at 743 (requiring a defendant "to show how the identified statutory violation [concerning the jury selection process] prejudiced his case"—that is, how "the aberrant procedure resulted in a biased jury, an inability to question the prospective jurors, an interference with his right to challenge, or any other defect without which a different result might have been reached.")

Here, the State had previously called Tara to testify during its case-in-chief for nearly two-and-a-half hours, affording the trial court an opportunity to closely observe her behavior, demeanor, and the effectiveness of her communication while testifying in front of defendant, and providing competent evidence to support its motion. That presentation developed a "record very clear to the Court" that Tara had suffered serious distress by testifying in front of defendant and that her ability to communicate effectively with the jury was "very evident[ly]" impaired. According to the "[c]ourt's observations . . . when [Tara] was in the courtroom for numerous hours, it was apparent," and the trial judge found, that Tara "was consistently frightened in her eyes"; that when the trial judge "looked into [Tara's] eyes, into her face[,]" she "just appeared to be scared"; that Tara "would very, very occasionally smile"; that Tara "articulated that she was, quote, scared herself" and "[h]er affect was consistent with that"; and that Tara "was hugging a bear . . . and was leaning into the person that was holding her on her lap."

Furthermore, the trial court held a lengthy conference on the State's motion, considered both parties' arguments, and explicitly allowed defendant to present evidence on the matter before rendering the required determinations that (1) Tara "would suffer serious emotional distress by continuing to be in the courtroom and in the defendant's presence[ ]" and that (2) "[c]learly [Tara]'s ability to communicate would continue to be impaired." During the conference on the motion, the prosecutor explained that she had met with Tara multiple times before

trial, brought her into the courtroom so Tara could practice answering questions in court, and brought Tara to another court session so she would be familiar with a full courtroom setting. Therefore, the prosecutor explained, she "did not anticipate the level of terror and shutdown that we had when [Tara] testified," which the prosecutor emphasized "was readily apparent to the court." The prosecutor elaborated:

> [Tara], you know, on day one was sobbing and keening and would not state her name the minute she walked in this courtroom.
>
> Yesterday when [Tara] testified, she progressively turned her back away from the defendant. She would not say his name. [Tara] has expressed to her father, to my assistant, to her father's girl friend, to everybody, that she does not want to see [defendant]. And I think that reluctance was very obvious and really impacted [Tara's] ability to testify in front of the jury, which I think has impacted the jury's ability to know and understand the events of this day.
>
> [Tara] refuses to speak in English and said she wanted to speak in Spanish to the extent that she spoke at all, even though she understands and speaks English.

Defendant does not dispute these statements on appeal, argue that good cause did not exist to authorize Tara's remote testimony, or challenge the trial court's substantive ruling in any respect.

The trial court's repeated and indubitable findings and conclusions were supported by competent evidence in light of its own close observation of Tara's behavior and demeanor while testifying in front of defendant for multiple hours, the prosecutor's statements implying that Tara did not fear testifying in the open forum generally but in front of defendant particularly, and the bench conference on the matter. Defendant was afforded an opportunity to present evidence on the State's motion, and to the extent the procedure employed may have prohibited defendant from examining a State witness on the matter, defendant has failed to show how this alleged procedural error prejudiced him. The transcript indicates that Tara demonstrated a fear of defendant and was unable to communicate effectively while testifying in front of him, and the trial court determined that her prior in-court testimony established a "record . . . very clear" that this was the case. Under these particular circumstances, defendant has failed to demonstrate prejudicial error in the hearing procedure employed by the trial court in authorizing the use

of Tara's remote testimony. *See Maryland v. Craig*, 497 U.S. 836, 860 (1990) ("[W]e decline to establish, as a matter of federal constitutional law, any . . . categorical evidentiary prerequisites for the use of the one-way television procedure.").

As to defendant's challenge concerning the trial court's failure to issue an order in allowing the State's motion, defendant similarly has failed to establish prejudice.

In the context of authorizing a courtroom closure, this Court has stated that "[i]n making its [required] findings, the trial court's own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court's observations of its own courtroom." *State v. Godley*, 234 N.C. App. 562, 565, 760 S.E.2d 285, 288 (citation, internal quotation marks, and brackets omitted), *disc. rev. denied*, 367 N.C. 792, 766 S.E.2d 626 (2014); *see id.* at 566–68, 760 S.E.2d at 289–90 (upholding findings based on the trial court's "opportunity to observe the alleged victim" and the "attitude and demeanor of the victim and the defendant and the general nature and character of the audience" as supported by competent evidence based in part on the "trial court's own observations of the . . . personnel inside the courtroom . . . ."). In this same context, this Court has found competent evidence existed to support a finding that "[t]here existed a particular fragile mental and emotional state of the victim due to the circumstances of the crime" based in large part on the trial court's observation of the victim. *See State v. Rollins*, 231 N.C. App. 451, 456–57, 752 S.E.2d 230, 234–35 (2013). We explained:

> [T]his type of finding of fact is one that the trial court is particularly well-qualified to make, and one that we are not well-qualified to question. The trial judge had the opportunity to observe [the victim], defendant, and the other witnesses during the trial, including [the victim's] demeanor during the State's evidence up to the point of the State's motion. Observations of this sort are something that cannot be captured in a written transcript but are crucial in this particular determination.

Id. We find this reasoning particularly instructive here.

Based on the trial court's two-and-a-half hour observation of Tara's behavior and demeanor while testifying in front of defendant, it had sufficient competent evidence from which to issue its findings on the matter, and defendant does not specifically challenge the propriety of any of those findings; rather, he challenges the method by which the trial

court rendered its findings and conclusions. The requirement that the trial court make written findings and conclusions serves to aid appellate review. While it would have been better practice for the trial court to reduce its oral findings to writing, we hold that those findings are adequate for appellate review, were supported by competent evidence, supported the conclusions, and justified the trial court's ultimate ruling. Accordingly, we overrule this challenge.

As to defendant's challenge that the trial court failed to issue an order reflecting that it considered N.C. Gen. Stat. § 15A-1225.1(d)'s five enumerations, defendant similarly has failed to demonstrate prejudice.

Defendant does not argue that the taking of Tara's remote testimony, from a logistical standpoint, prejudiced him in any respect. *See Garcia*, 358 N.C. at 407–08, 597 S.E.2d at 743 ("[D]efendant . . . has made no attempt . . . to show how the identified statutory violation prejudiced his case. Defendant has not complained that the aberrant [jury selection] procedure resulted in a biased jury, an inability to question the prospective jurors, an interference with his right to challenge, or any other defect without which a different result might have been reached."). Moreover, the transcript reflects that the trial court thoughtfully considered N.C. Gen. Stat. § 15A-1225.1(d)'s enumerations.

During the conference on the matter, the following relevant exchange occurred concerning the logistics of taking Tara's testimony remotely:

> [PROSECUTOR]: Mr. Sheppard is here from the [Administrative Office of the Courts] with the equipment, and he has set it up. It had to be somewhere close to the courtroom. So [Tara] will be in a closed room with, I would propose, my assistant and just sitting yesterday as she was in the courtroom, and we will be able to see them and the interpreter. And [Tara] cannot see us but she can hear us. And we can see her and everyone around her and every motion she makes. . . . by remote testimony.
>
> [Tara] will be visible to the court on its monitor and to the courtroom on this monitor just by television. You will be able to see her sitting in that room. Mr. Sheppard's set up the camera in here and in there and the audio equipment. There's a microphone that whoever is questioning her will probably need to use to facilitate the best ability for her to hear us, and she will have a microphone available to her as well. So it will be just like [Tara]'s sitting here except she's in another room visible to us on the screen. You can see and hear everything she does and says.

THE COURT: So you're talking about staying in the courtroom and questioning her from here?

[PROSECUTOR]: Yes, the defendant and counsel staying . . . .

. . . .

THE COURT: Well, I mean, you certainly would have the option of not being present, but [defense counsel], if he wished to be present . . . , by statute it says that he has to be given the opportunity to be physically present with the witness.

. . . .

THE COURT: So with respect to [defense counsel], if it's allowed, then he would have that option of being in [the courtroom] or being in the room with [Tara]. And then the statute talks about making sure there's contact or ability to communicate with [defendant] . . . during that time period. . . .

[DEFENSE COUNSEL]: I don't know how I would communicate with [defendant] unless he's in there with me. It's a little much to walk back and forth . . . .

THE COURT: . . . [T]he statute contemplates that [defendant] would not be physically present with you [in the room with Tara], but we could try to make arrangements, if it's allowed, to be closer. In other words, . . . so the walk maybe isn't quite as far[.] . . . [T]he statute . . . contemplates that . . . you would need to have access to [defendant], to consult with him throughout . . . .

It says, "and has the ability to communicate privately with the defendant during the testimony." So we need to make sure [defendant] is at least close to you.

. . . .

THE COURT: . . . [I]f it's your thinking[, defense counsel,] that . . . you don't wish to be present [in the room with Tara], that's fine. That's your choice. And if you want to question [Tara] from [the courtroom], that's fine. If [defendant] wants to do it from [the courtroom], then he has that option. If he wants [defense counsel] to go into the room

with [Tara] during the entire direct and cross . . . obviously you have got that option. That's your choice.

In terms of where the room is[ ] . . . .

Is there an[adjacent] room . . . where [defendant,] or out in the hallway[,] where [defendant] could sit in a chair, . . . close by?

. . . .

THE COURT: . . . [T]he Deputy is indicating somewhere in the hallway would work, somewhere close by.

. . . .

THE COURT: Just make sure [Tara]'s in the room first, and then [defendant] . . . can head over just a few steps away outside into the hallway.

. . . .

THE COURT: . . . So [the prosecutor] want[s] to have the assistant holding [Tara]? Then are you also intending to have the interpreter there?

[PROSECUTOR]: Yes, sir. I think just from the chairs and the setup, it would be easiest if [the support person] sat in the blue chair and put [Tara] on her lap. So [Tara] would be far enough up that we could see her the best way possible, and then the interpreter could sit or stand next to her[.] . . .

THE INTERPRETER: I probably would sit right behind her.

. . . .

THE COURT: . . . I will allow [Tara] to sit on the [support] person's lap and have the interpreter there.

. . . .

[PROSECUTOR]: Okay. The first thing[ ] . . . logistically we need to know is whether [defense counsel] prefers to stay in [the courtroom], like I am going to do, or prefers to go in the room with [Tara].

[DEFENSE COUNSEL]: I prefer to be in the room with [Tara].

After this conference, the trial court brought out the jury and explained:

> THE COURT: [The prosecutor] wants to recall [Tara], and [she] will be testifying by different means. And I have . . . made arrangements for . . . [defense counsel,] and for [defendant] to be close by . . . , in a remote room where there will be questions and responses. And [defense counsel] will be in the room with [Tara], though [defendant] will not be in the room but very close by. . . .
>
> So we will . . . excuse [defense counsel] and [defendant]. And . . . the [prosecutor is] going to be questioning . . . [Tara] from the courtroom. So [defense counsel] will be present [with Tara] but [the prosecutor is] going to be in the courtroom with us.

As reflected, although the trial court failed to issue a written order, it thoughtfully considered N.C. Gen. Stat. § 15A-1225.1(d)'s enumerations, and defendant does not allege any prejudice resulting from the trial court's consideration or application of those enumerations in its ruling. Accordingly, we overrule this challenge.

IV. Motions to Dismiss

Defendant next contends the trial court erred by denying his motions to dismiss both charges for insufficient evidence. We disagree.

A. Standard of Review

We review *de novo* the denial of a motion to dismiss for insufficient evidence. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016) (citation omitted). Such a motion "is properly denied if substantial evidence exists to show: (1) each essential element of the offense charged" and "(2) that defendant is the perpetrator of such offense." *Godley*, 234 N.C. App. at 568, 760 S.E.2d at 290 (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted).

"It is well settled that upon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom." *Id.* Further, "[i]f a motion to dismiss calls into question the sufficiency of circumstantial evidence, the issue for the court is

whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citation omitted).

B. First-degree Sex Offense Charge

[2] Defendant first contends the trial court erred by denying his motion to dismiss the first-degree sex offense with a child charge on the ground that the State presented insufficient substantial evidence that he digitally penetrated Tara.

"A person is guilty of statutory 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) (2015). " 'Sexual act' means" in relevant part "the penetration, however slight, by any object into the genital . . . opening of another person's body[.] . . ." *Id.* § 14-27.20 (2015). A finger is an "object." *State v. Smith*, 180 N.C. App. 86, 95, 636 S.E.2d 267, 273 (2006) (" 'Any object' in this context includes . . . a finger." (citation omitted)).

During Tara's remote testimony, she demonstrated by inserting her finger into a hole which the interpreter created with her hand, that defendant digitally penetrated her vagina and confirmed that her demonstration showed "what [defendant] did with his finger in [her] body." When asked "[h]ow did that feel physically on your body," Tara replied: "Bad" and then clarified that "[i]t hurt." Tara confirmed that no one "else ever touched [her] the way [defendant] touched [her] in [her] private part." When asked where "[defendant] touched [her] private part and put his finger in it," Tara replied: "In the living room." When asked whether she was clothed, Tara replied that her clothes were off and that defendant had undressed her. Dr. Cerjan performed a genital examination of Tara one day after the incident. He testified that during his examination, he discovered that Tara's hymen was substantially missing, which he opined was irregular for a six-year-old, and that "the only thing that would cause it would be a penetrating injury." He also observed "redness actually in [Tara's] vaginal area . . . behind where the hymen was," which indicated the penetrating injury would have occurred "within the last 48 hours."

Moreover, the State presented overwhelming corroborative evidence from which to reasonably infer that defendant digitally penetrated Tara. Responding officer Sgt. Shockley testified that Tara reported to him that defendant " 'was rubbing [her] down there' " and then "pointed toward . . . her genital area." Det. Proctor testified that Tara reported to him that defendant "had gotten on top of her," "had taken her clothes off

and that [defendant] . . . was naked," and that defendant "had touched her in her cootie with his hands." Dr. Cerjan testified that Tara reported that defendant "took [her clothes] off," "touched her with . . . his hands," and then "pointed to her groin." Accordingly, the trial court did not err in denying defendant's motion to dismiss the first-degree sexual offense with a child charge for insufficient evidence.

Defendant also contends the trial court erred by denying his motion to dismiss this charge because the State failed to present evidence that he digitally penetrated Tara within the time frame specified in the indictment, August 2014. However, at trial, defendant only moved to dismiss this charge on the basis that the State failed to present substantial evidence of penetration, not that the State failed to present evidence that he penetrated Tara during August 2014. Because defendant never moved to dismiss this charge on the ground that there existed a fatal variance between the trial evidence and the indictment, he waived his right to appellate review of this issue. *See State v. Jones*, 223 N.C. App. 487, 495–497, 734 S.E.2d 617, 623–24 (2012) (dismissing alleged indictment variance error as unpreserved where the defendant moved to dismiss for insufficient evidence but not on the grounds of a fatal variance between the trial evidence and indictment), *aff'd*, 367 N.C. 299, 758 S.E.2d 345 (2014). Accordingly, we dismiss this challenge.

C. Indecent Liberties Charge

[3] Defendant next contends the trial court erred by denying his motion to dismiss the indecent liberties charge because the State failed to present sufficient evidence he committed an act of indecent liberties. We disagree.

The essential elements of indecent liberties with a child under N.C. Gen. Stat. § 14-202.1(a) (2015) follow:

> (1) the defendant was at least 16 years of age, (2) he [or she] was five years older than his [or her] victim, (3) he [or she] willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Rhodes, 321 N.C. 102, 104–05, 361 S.E.2d 578, 580 (1987) (citation omitted).

Defendant only challenges element three: that he took or attempted to take an indecent liberty with Tara. Having concluded above that the

State presented substantial evidence that defendant digitally penetrated Tara, this same act supports the challenged element of this offense. *See State v. Swann*, 322 N.C. 666, 667–78, 370 S.E.2d 533, 539–40 (1988) (holding that the same act may support convictions and sentences for both first-degree sex offense and indecent liberties). Accordingly, the trial court did not err in denying the motion to dismiss the indecent liberties charge for insufficient evidence.

V. Improper Closing Remarks

[4] Defendant next contends the trial court erred by failing to intervene *ex mero motu* when the State argued during its closing argument to the jury impeachment/corroborative evidence as substantive evidence. We disagree.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010) (citation and quotation marks omitted). "Under this standard, only an extreme impropriety on the part of the prosecutor will compel [an appellate court] to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001) (citation, quotation marks, and brackets omitted). "To establish such an abuse, [the] defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Waring*, 364 N.C. at 499–500, 701 S.E.2d at 650 (citation and quotation marks omitted).

"Generally, prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citations and internal quotation marks omitted). During closing argument, a prosecutor "may, . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue"; however, a prosecutor "may not . . . express his [or her] personal belief as to the truth . . . of the evidence or as to the guilt . . . of the defendant[.] . . ." N.C. Gen. Stat. § 15A-1230(a) (2015). Additionally, arguing corroborative or prior-inconsistent-statements to the jury is error. *See, e.g.*, *State v. Easterling*, 300 N.C. 594, 604, 268 S.E.2d 800, 806 (1980) ("The statement having been offered

only corroboratively, it was improper for the State to allude to it as substantive evidence during closing argument." (citation omitted)); *State v. Tucker*, 317 N.C. 532, 544, 346 S.E.2d 417, 424 (1986) ("Although it was proper to cross-examine defendant concerning his prior convictions on the question of his credibility, these convictions were not admissible as substantive evidence tending to prove his guilt. It was error for the trial court to permit the prosecutor to argue as if they were.").

Here, defendant challenges the following argument the State made to the jury:

> [Defendant] was naked. [Tara] was naked. He was hovering over her playing with himself which his sister demonstrated and the child demonstrated and the sister said with his finger in her vagina. That ladies and gentlemen, is proof beyond a reasonable doubt. It's frankly proof beyond every doubt.

To the extent these statements came solely from Sara's and Tara's out-of-court statements that were inconsistent with their trial testimony, the prosecutor inappropriately recited those statements as substantive evidence. However, "[t]o merit a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *State v. Phillips*, 365 N.C. 103, 136, 711 S.E.2d 122, 146 (2011) (citation and internal quotation marks omitted). To this end, defendant, without citing to any legal authority, advances the following argument: "The [prosecutor] argued to the jury, with the tacit approval of the trial judge, that [Sara's] and [Tara's] out of court statements were sufficient for them to find defendant guilty beyond a reasonable doubt, even 'beyond any doubt.' But for the [prosecutor]'s improper prejudicial closing argument, the jury would have reached a different verdict."

In light of the substantive evidence elicited from Tara's remote testimony, the trial court's later instruction limiting the jury from considering prior-inconsistent-statements as substantive evidence, and the other overwhelming evidence of his guilt, we conclude that defendant has failed to "carr[y] the heavy burden of showing that the trial court erred in not intervening on his behalf." *State v. Thompson*, 188 N.C. App. 102, 110, 654 S.E.2d 814, 819 (2008). Accordingly, we overrule this challenge.

VI. Conclusion

Although the trial court failed to follow N.C. Gen. Stat. § 15A-1225.1's procedural requirements, defendant has failed to demonstrate how he

was prejudiced by any of these alleged procedural errors. Because the State presented substantial evidence of the challenged elements of both crimes, the trial court properly denied defendant's motions to dismiss those charges for insufficient evidence. Finally, although the prosecutor erred to the extent it may have argued prior-inconsistent statements to the jury, defendant failed to satisfy his burden of demonstrating how this argument rendered the proceedings fundamentally unfair. Accordingly, the trial court did not abuse its discretion by failing to intervene *ex mero motu* during the State's closing argument.

NO PREJUDICIAL ERROR.

Judges DIETZ and INMAN concur.

STATE OF NORTH CAROLINA
v.
FREDERICK JOHN SCHUMANN, DEFENDANT

No. COA17-707

Filed 6 February 2018

Constitutional Law—right to counsel—forfeiture by conduct—failure to hire counsel—repeated delays—pro se representation

The trial court did not err in a drug trafficking case by requiring defendant to proceed pro se where defendant forfeited his right to counsel by failing to hire counsel for years, resulting in repeated delays in the case proceeding to trial. The trial court followed the parameters set forth under N.C.G.S. § 15A-1242 in determining that defendant unequivocally elected to proceed pro se.

Appeal by Defendant from judgment entered 1 September 2016 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 14 December 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryn J. Thomas, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Fredrick John Schumann ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of four counts of trafficking "14 grams or more, but less than 28 grams of opium or heroin" and four counts of trafficking "28 grams or more of opium or heroin." On appeal, Defendant argues the trial court erred by requiring Defendant to represent himself at trial, on the grounds Defendant neither asked to proceed *pro se* nor engaged in the type of misconduct which would result in a forfeiture of Defendant's right to counsel. We disagree.

I. Factual and Procedural Background

On 7 August 2013, a grand jury indicted Defendant for the following offenses: (1) four counts of trafficking more than 28 grams of opium, namely Hydrocodone on 25 February 2013; (2) four counts of trafficking more than 28 grams of opium, namely Hydrocodone, on 22 March 2013; and (3) one count of selling marijuana on 6 March 2013. On 6 April 2016, Defendant was re-indicted on the eight trafficking hydrocodone cases as follows: (1) four counts of trafficking "14 grams or more, but less than 28 grams of an opium derivative, namely Hydrocodone" on 25 February 2013, and (2) four counts of trafficking "28 grams or more of an opium derivative, namely Hydrocodone."

On 12 September 2013, Defendant appeared before Judge Douglas B. Sasser ("Judge Sasser") in Columbus County Superior Court, and signed a waiver of counsel form declaring:

> I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

Defendant "freely, voluntarily and knowingly" waived this right.

On 12 December 2013, Defendant appeared before Judge D. Jack Hooks, Jr., ("Judge Hooks") and signed a second Waiver of Counsel Form. Here, Defendant repeated the declarations he made in his initial September waiver. On that same day, attorney Walter D. Palmer

("Palmer") filed a Notice of Limited Appearance of Counsel limiting Palmer's representation of Defendant to pre-trial case management.

On 16 September 2015, Defendant again appeared before Judge Sasser. Palmer told the trial court, "I previously filed a limited appearance basically through this point. I believe the State's got their labs back and would be ready to set a trial date." Judge Sasser and Defendant then conducted the following exchange:

> THE COURT: You understand that if you want a court-appointed attorney, now is the time to ask for it, otherwise you'll be responsible if this matter does not resolve itself for case management. It's your responsibility to hire an attorney or represent yourself at trial. Now, that should have been the conversation that took place with you back several months ago, if not more than a year ago. Mr. Palmer indicates that matters have not been resolved and it's now ready to go on to trial.
>
> Mr. Schumann, I would certainly recommend you get yourself ready for trial. You have to understand that the Court can't help you. You have to know about how to pick a jury, and how many peremptory challenges, what's required to exercise one, what motions you can make and when to make those motions, who gets opening statement, what is an opening statement, what can I say during a closing argument. A lot of things go into a trial. It's not simple and there's rules that have to be followed, and the rules apply to you the same as they apply to an attorney. Are you going to hire an attorney for trial?
>
> THE DEFENDANT: Yes, sir.

The Assistant District Attorney ("ADA") then advised the trial court the case could come up for trial in the middle of the following year. Judge Sasser then advised Defendant:

> I'll give you two months to get your attorney hired . . . . Mr. Schumann, at 9:00 a.m., November 5 be back in this courtroom . . . and hopefully you got your lawyer with you and then we'll talk to your lawyer about a trial date for your case, give him enough time to get prepared. You need to go ahead and get a lawyer. Don't come back in November saying, I don't have a lawyer yet. You need a lawyer in place. All right? . . . It's to confirm who trial counsel will be for Mr. Schumann.

On 5 November 2015, Defendant again appeared before Judge Sasser. The following exchange occurred:

> THE COURT: [A]ll the way back in September 2013, you indicated you were going to hire an attorney. So we're now over two years later. The State now has lab results and is ready to set this matter for trial, and the attorneys indicated you first made a limited appearance back in December 2013.
>
> You're still not fully retained in this matter, and I want to make sure you understand we're getting ready to set a trial date, and it's your responsibility to either have an attorney -- you said you could afford to hire one - - you've had two years, and in that two years, you've never come back in and said, You know, I lost my job, I just can't do it, I can't afford one, I need court-appointed counsel. Waited two years, and now it's ready for trial.
>
> It's your responsibility to have an attorney, or you understand that you'll be trying the matter yourself? And I would strongly recommend that you not represent yourself in a superior court trial with all that's involved, in jury selection, motions, presenting the evidence, knowing what evidence may be admissible and not admissible. There's a reason we have folks go to law school for years and take exams to be licensed to do this.
>
> So I strongly encourage you now is the time to get a lawyer retained, because if not, then I'll see you back in court - - and you understand for trafficking, I would anticipate with all these charges if convicted by a jury, probably most likely spend the rest of your life in prison.
>
> Do you understand that?
>
> THE DEFENDANT: Yes, sir.

On 10 December 2015, Defendant again appeared before Judge Sasser. Defendant stated, "I had hired Mr. Cartrette and now I'm back to the same boat again. Mr. Palmer didn't want to take the case." Therefore, Defendant told the court, "I need a little bit of time." The trial court responded, "Come back on January 7th. Report back to me and tell me who your lawyer is then, but you need to go ahead - - because that trial's coming up soon[.]" Defendant assured the trial court he understood, and then thanked Judge Sasser.

On 7 January 2016, Defendant was before Judge Sasser again. An attorney named Mr. Byrd was in court that day, and he explained:

> I'm not in a position to make an appearance for Mr. Schumann at this time. He indicated to me that he had spoken with Mr. Cartrette and thought Mr. Cartrette was going to be able to represent him; now understand he can't. I would be asking to come back in February to address that. I haven't had time to look over the case . . .

The trial court then stated, "I will leave it on the unrepresented calendar, set it for February, and hopefully you will be in a position to make an appearance at that time."

Defendant returned to court on 15 February 2016. The trial court told Defendant, "I talked with Mr. Byrd - - in case he is talking with you - - but he has not given - - he is not ready to make an appearance in your case yet." The trial court then stated, "You've got to go ahead and make arrangements to get Mr. Byrd or someone to come back here on March 10th, and we'll be ready to set the trial date on March 10th." Defendant replied, "All right."

The next time Defendant returned to court was 28 March 2016. The presiding judge was Ronald L. Stephens. The State informed the trial court:

> Mr. Schumann did have counsel. Mr. Palmer represented him through our case management calendar. Once that did not come to a non-trial resolution, because Mr. Palmer was on a limited basis, he withdrew leaving Mr. Schumann to find another attorney.
>
> From September up until today's date, I think he has done that, and he can address that more with you. But I've had two attorneys come to me within the last month to two - - the last one coming just last week - - trying to resolve the matter.
>
> . . . .
>
> [T]he State is ready to proceed to trial. I do worry about proceeding with him unrepresented with no counsel just because of the ramifications of his - - of his age and how much time he is looking at, it could amount to a life sentence for him.

The State then told the trial court, "I have communicated with three attorneys." The trial court addressed Defendant:

> [H]ow do you intend to proceed as far as - - as far as your case now? It's on the trial calendar, and that's unfortunate for you on this - - we - - we surely have a process in which it moves along. And I used to say the train is on the track, and frankly - - frankly, it's roaring right along. And I'm not sure who is driving it, because you don't have a lawyer evidently. And the constitution surely allows you to drive your own train; represent yourself. But these are serious charges. And if you are convicted of them, they carry mandatory sentences in which - - anyway, you can get a bunch of time.

Defendant responded by explaining his dealings with various attorneys over the past few months. The trial court then told Defendant, "You can choose your own lawyer, if you would like, if you can afford one. If you can't afford one, the Court will consider appointing you a lawyer; or you can represent yourself. But that's what the constitution gives you the right to do." The trial court went on to explain, "I just need to know today when you have your jury trial whether or not you're going to have a lawyer, you're going to be your own lawyer, or whether or not - - or how you are going to proceed."

The following colloquy occurred:

> THE DEFENDANT: My feelings that I run - - that I need - - I don't know if it's possible, but I need a - - a - - person in the back to - - point me in the directions through this - - this - - this proceedings at this point. Not speaking for me, but just describe - - cross the t's and dotting all the i's. And I - - I - - that kind of a counsel, I - -I was looking to see if I could find - - come up with that kind of counsel.
>
> THE COURT: Well, I mean - -
>
> THE DEFENDANT: But it looks like it's going to a jury trial.
>
> THE COURT: - - the constitution provides you the right to either represent yourself or select somebody to represent you; and that person, with your assistance, will speak for you. So you don't really get standby counsel. You don't get to represent yourself and then get somebody to sit behind you and then - -

> THE DEFENDANT: I'll represent myself, Your Honor.
>
> The attorneys that I've talked to didn't - - they just don't have the time to prepare for this. They've got too many things on their desk that are - -
>
> THE COURT: Well, is it - - is it that, or they just haven't been paid?
>
> THE DEFENDANT: No. It isn't the paying situation.

The trial court then continued the matter off the trial calendar and reset it for the next administrative session of court so the senior resident judge could address Defendant's counsel situation.

On 7 April 2016, Defendant was again before Judge Sasser. The State requested setting the matter on the July trial calendar and asked the court to address Defendant's counsel issue. The trial court stated:

> I'm going to do a standby counsel at this point. I've talked to Mr. Schumann before, and he's indicated he could hire counsel and waived his right to Court-appointed counsel; he wanted to hire an attorney. I clearly told him, and he understood, that if he did not hire counsel, then he would be on his own at trial.
>
> I'm going to give standby counsel. There's a totally different obligation of standby counsel as to retained or Court-appointed counsel. But for the purposes of protecting his rights, his constitutional rights to an attorney, I'll do standby counsel.

The trial court appointed attorney Jim Caviness ("Caviness") to serve as Defendant's standby attorney. The trial court advised Defendant he needed to have an attorney to represent him rather than representing himself, and reminded him he had been advised months ago of the serious nature of the charges. Caviness asked to discuss the situation with Defendant to determine if Defendant could afford an attorney. The trial court stated Defendant should have asked for a court-appointed attorney months earlier, and the case had already been continued numerous times. Additionally, the case had already once been on the trial calendar and subsequently removed due to Defendant's issue with finding counsel. The trial court stated it was not going to start the "process" again because Defendant told the court months earlier he could hire an attorney. The trial court concluded by determining, "He's going to get standby counsel or he's going to hire an attorney, as he told me he could do months ago."

Defendant again explained his dealings with various attorneys to the court. At one point, the trial court interrupted Defendant and stated, "Listen very carefully. You waived originally. You said you were going to hire an attorney back in 2013. It's now 2016." The trial court also reminded Defendant, "I specifically told you that if you wanted Court-appointed counsel - - if you could not afford an attorney, you could apply for Court-appointed counsel. And you told me no, you didn't want it." Defendant responded, "This is not a dollar issue, Your Honor. It's a situation where he had asked for more time to prepare[.]" The trial court then stated, "good news is I'm giving you until July. Be back on June 13th. Get him paid, and get him prepared."

On 5 May 2016, Defendant appeared before Judge Sasser requesting discovery. Standby counsel was also present. The State told the court it provided discovery to two attorneys, including one who returned the discovery to the District Attorney's office. The State continued:

> Mr. Schumann himself came to our office, maybe a couple months ago; we provided discovery for him again, to him personally. He has come back to the office as recently as two weeks ago asking for another copy of discovery.
>
> At some point, the State has complied by giving discovery. I know he has to have discovery to prepare for trial, but I just wanted to put this on the record that the State continues to comply by giving him multiple copies of discovery, and he continues to request more copies of discovery of the same thing.

The trial court ordered Defendant was entitled to a copy of his discovery, but if he needed an extra copy, he would have to pay for it.

On 13 June 2016, Defendant again appeared before Judge Sasser. The trial court asked Defendant if he hired an attorney, and Defendant responded he had not. The trial court then asked Defendant if he was still trying to hire counsel or was he representing himself with standby counsel. Defendant responded he was representing himself. Defendant then complained he was unable to read several of the CDs that came with discovery. The trial court ordered standby counsel to assist Defendant and "make sure that he has the ability to open his discovery on those discs."

On 14 July 2016, Defendant again appeared before Judge Sasser. Standby counsel informed the court Defendant missed his appointment with counsel which had been set for the purpose of assisting Defendant in opening the discovery discs. Standby counsel also reported while he

informed Defendant he could not negotiate a plea, Defendant asked standby counsel to tell the State he was willing to plead if he did not receive time or probation. The State declined Defendant's plea offer. The trial court then stated:

> Mr. Schumann, your trial date is approaching. I have actually got a murder trial that I anticipate going first, but sometimes things fall off, so your case could potentially be reached as soon as basically about a week and a half from now.
>
> I've had you in court numerous times. We've tried to give you a chance to hire an attorney. And I've appointed standby counsel for you. I tried to work out that if you have any kind of discovery issues, you can even work with standby counsel to make sure that they have the ability to open any documents, software, so you can view those. And time continues to pass, months go by, and it seems really that no progress is being made in regards to the case.
>
> . . . .
>
> And I've done everything I possibly can to try to accommodate you, to give you the opportunity to get an attorney, to get assistance. And what I'm seeing is you're not taking advantage of the opportunities the Court is trying to afford you. And later on down the road, the Court will have no problem saying put 12 people in the box, make a decision, and you understand, you might be spending the rest of your life in prison.
>
> . . . .
>
> And I feel confident you understand what's happening, you understand the process, and I'm afraid you're playing a game that is going to hurt you down the road.

Defendant responded by again complaining about discovery. The trial court informed Defendant his discovery issue "would be a potential trial issue" and reminded Defendant his court date was set for 25 July 2016.

Defendant's case came on for trial on 30 August 2016. Defendant appeared *pro se*. Caviness appeared as Defendant's standby counsel. Prior to bringing the jury in, the trial court advised Defendant his mandatory sentence on just one count would be 225 to 279 months' imprisonment. The trial court then stated:

> The State had discussed with you a possible plea which would get it outside the mandatory active range. And basically, if you want to try to talk with the State again and see if there's anything that you can try to work out, that they'll agree to at this point modifying and, you know, reducing and take a lesser-included offense and try to work something out, you can try to work a plea out. But we need to do something quick, because I've got the jurors waiting.

Defendant replied "I understand why lawyers are to be hired. Okay? I really do. . . . As far as having a lawyer goes - - which you told me to go and do - - I have tried my best." Defendant then complained his plea with the State involved spending three years in prison, and he insisted he would only accept a plea with no prison because "I can't do active time." The trial court reminded Defendant going to trial meant "all or nothing," and a conviction would probably mean a life sentence. Defendant replied, "I understand that, Your Honor."

At trial, the State's evidence tended to show Kevin Norris ("Norris"), a deputy with the Columbus County Sheriff's Department, worked with an undercover confidential informant named Jerry Adams ("Adams"). Adams agreed to be an informant in exchange for dismissal of the charges against him. Adams arranged to purchase hydrocodone from Defendant. Norris placed a recording device on Adams. From a position of about 200 to 300 yards away, Norris observed the meeting between Adams and Defendant. After the transaction, Adams turned the drugs over to Norris. Over the next few months, Adams had several more transactions of this nature with Defendant and Norris.

The jury found Defendant guilty of the four counts of trafficking 14 grams or more but less than 28 grams of opium or heroin, and four counts of trafficking 28 grams or more of opium or heroin. The jury failed to reach a verdict on the selling marijuana charge, and so the trial court declared a mistrial. The State subsequently dismissed the charge. The trial court sentenced Defendant to 90 to 120 months' imprisonment for the 25 February 2013 offenses, and a concurrent sentence of 225 to 282 months' imprisonment for the 22 March 2013 offenses. Defendant timely appealed.

II. Standard of Review

Constitutional issues are subject to *de novo* review. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower

tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

III. Analysis

"The right to counsel is one of the most closely guarded of all trial rights." *State v. Graham*, 76 N.C. App. 470, 473, 333 S.E.2d 547, 549 (1985). "A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution." *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999). Defendants are constitutionally "entitled to the assistance of counsel at every critical stage of the criminal process." *State v. Taylor*, 354 N.C. 28, 35, 550 S.E.2d 141, 147 (2001).

A defendant may voluntarily waive the right to counsel and instead proceed *pro se*. "[W]aiver of the right to counsel and election to proceed *pro se* must be expressed 'clearly and unequivocally.' " *State v. Thomas*, 331 N.C. 671, 673-74, 417 S.E.2d 473, 475 (1992) (quoting *State v. McGuire*, 297 N.C. 69, 81, 254 S.E.2d 165, 173 (1979)). "Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Thomas* at 674, 417 S.E.2d at 476 (citations omitted). A trial court's inquiry will satisfy this requirement if conducted pursuant to N.C. Gen. Stat. § 15A-1242. *Id.* at 674, 417 S.E.2d at 476 (citations omitted). Under N.C. Gen. Stat. § 15A-1242 (2017):

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Defendant first contends he did not unequivocally elect to proceed *pro se*. Defendant argues the trial court did not adhere to the requirements of N.C. Gen. Stat. § 15A-1242 and therefore his constitutional rights to counsel were violated. We disagree.

In 2013, Defendant signed two waivers of assigned counsel which explicitly acknowledged he had been informed of the nature of the charges and the statutory punishment for them.

In his brief, Defendant asserts it was "after he had difficulties finding an attorney who could represent him at trial did [he] give any indication he would represent himself" in March 2016. However, in both September and November 2015, Defendant stated he would be representing himself if he did not have an attorney at the time of trial. On 28 March 2016, Defendant stated "I'll represent myself" after he explained the attorneys he talked to did not have time to prepare. At that point, Judge Stephens asked Defendant if the attorneys declined to represent him because they had not been paid. Defendant denied money was an issue. Due to this exchange, Judge Stephens continued Defendant's case so the senior resident judge could address the issue of counsel.

In November 2015, Judge Sasser reminded Defendant that over the course of two years Defendant had never stated he could not afford an attorney or needed a court-appointed attorney. At the same time, Judge Sasser advised Defendant if he did not have an attorney by the trial date, he would have to represent himself. Judge Sasser also advised Defendant representing himself would involve jury selection, motions, presenting the evidence, knowing what evidence is admissible and "there's a reason we have folks go to law school for years and take exams to be licensed to do this." Finally, Judge Sasser told Defendant he needed to get an attorney because if he were convicted of the trafficking charges, he would most likely spend the rest of his life in prison.

The trial court inquired into Defendant's understanding of the seriousness of the charges on at least two occasions. In both instances, Defendant acknowledged his understanding. The trial court asked Defendant if he was unable to afford an attorney or would like to request a court appointed attorney on at least two occasions. In response, Defendant explicitly stated he could afford to hire an attorney and intended to do so.

During his many appearances before the court, Defendant made numerous excuses for not hiring an attorney, including claiming the attorneys he talked to were unavailable due to insufficient time to prepare or had been arrested. The trial court gave Defendant additional time to work out attorney representation ten times over the course of ten months. The trial court also twice gave Defendant at least three months' notice of a trial date.

Defendant also stated he would represent himself because the attorneys he had contacted needed more time to prepare and the court date set by the judge did not give him enough time. In response, the trial court gave Defendant four additional months to engage an attorney. Even after the trial court gave Defendant four additional months, Defendant came before the court and made the same excuses for why he had not hired an attorney.

The trial court repeatedly counseled Defendant on the seriousness of the charges. Both Judge Sasser and Judge Stephens had lengthy exchanges with Defendant on the need for counsel. Judge Sasser ultimately appointed standby counsel for Defendant in light of the seriousness of the charges.

On 14 July 2016, Judge Sasser told Defendant if he was convicted, he would likely spend the rest of his life in prison. Judge Sasser also told Defendant he still had time to make a plea with the State. Judge Sasser said, "I feel confident you understand what's happening, you understand the process, and I'm afraid you're playing a game that is going to hurt you down the road."

On 30 August 2016, before bringing the jury into the courtroom, Judge Sasser advised Defendant he was looking at a mandatory minimum sentence of 225 to 279 months' imprisonment. Defendant replied, "I understand why lawyers are to be hired. Okay? I really do. . . . As far as having a lawyer goes - - which you told me to go and do - - I have tried my best." Judge Sasser gave Defendant another chance to work out a plea deal and then stated, "I have told you repeatedly this was serious business." Defendant complained the plea deal involved spending three years in prison and insisted he would only accept a plea deal with no prison because "I can't do active time." Judge Sasser reminded Defendant going to trial meant all or nothing, and a conviction probably meant a life sentence. Defendant stated, "I understand that, Your Honor."

The trial court gave Defendant years to find an attorney. At each stage the trial court advised and counseled Defendant about his right to an attorney including his right to appointed counsel. The trial court also repeatedly counseled Defendant on the complexity of handling his own jury trial and the fact the judge would not be able to help him. Finally, the trial court repeatedly addressed the seriousness of the charges and advised Defendant a conviction likely meant a life sentence. Despite this, Defendant proceeded to represent himself at trial.

Defendant's assertion the trial court failed to take any measures to ascertain whether Defendant understood the various difficulties

associated with representing himself is without merit. Our review of the record indicates the trial court advised Defendant he would have to adhere to rules of court and evidence. The trial court also informed Defendant the court would not assist Defendant, and Defendant was facing serious charges which could result in a life sentence upon conviction. The record also indicates Defendant repeatedly expressed his understanding of the trial court's instruction on this issue. We conclude Defendant waived his right to court-appointed counsel.

The State also contends even if Defendant could fairly argue the trial court failed to advise Defendant of his rights in waiving counsel and the hazards of proceeding *pro se*, he forfeited his right to counsel by his conduct. We agree.

Forfeiture of counsel is separate from waiver because waiver requires a "knowing and intentional relinquishment of a known right" whereas forfeiture "results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000). "Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel." *State v. Leyshon*, 211 N.C. App. 511, 518, 710 S.E.2d 282, 288 (2011) (quoting *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006)). Forfeiture typically occurs when a defendant obstructs or delays the proceedings by refusing to cooperate with counsel or refusing to participate in the proceedings. *See State v. Blakeney*, ___ N.C. App. ___, ___, 782 S.E.2d 88, 94-95 (2016) (citations omitted).

In *Blakeney*, this Court outlined three types of behavior which may result in forfeiture:

> (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal rights.

Id. at ___, 782 S.E.2d at 94.

Here, Defendant's conduct falls within the first category of forfeiture described in *Blakeney* since Defendant employed "extended delaying tactics." *Id.* at ___, 782 S.E.2d at 94. First, Defendant waived his right to

assigned counsel in 2013. The trial court repeatedly advised Defendant on the seriousness of the charges and informed Defendant a conviction could lead to a life sentence due to Defendant's age. Time after time, Defendant stated he intended to hire his own attorney. Defendant made close to monthly appearances in court over a 10-month period, and consistently told the court he wished to hire his own attorney. During these appearances, the trial court asked Defendant at least twice if he needed appointed counsel. Defendant answered by claiming to have sufficient funds to hire an attorney. Additionally, the trial court continued Defendant's case several times to give Defendant's attorney time to prepare since Defendant claimed the attorneys he met with did not have adequate time to prepare for trial.

Based on the foregoing, we determine Defendant's conduct "result[ed] in the absence of defense counsel [which] constitutes a forfeiture of the right to counsel." *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006). Under our *de novo* review, we conclude Defendant's failure to hire his own counsel resulted in repeated delays in the case proceeding to trial, and therefore Defendant forfeited his right to court-appointed counsel. We further conclude the trial court followed the parameters set forth in N.C. Gen. Stat. § 15A-1242 in determining Defendant unequivocally elected to proceed *pro se*.

NO ERROR.

Judges INMAN and BERGER concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER LEE SINGLETARY

No. COA17-668

Filed 6 February 2018

Sentencing—resentencing—sex offenses—jurisdiction—date mandate transmitted from appellate division

The trial court had jurisdiction to resentence defendant for multiple convictions for sex offenses on the same day that the mandate from the appellate division was transmitted, as provided under Rule 32 of the N.C. Rules of Appellate Procedure. The Court of Appeals rejected defendant's argument that the mandate issues only when the lower court actually receives it.

Appeal by defendant from judgments entered 23 May 2016 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 12 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General John F. Oates, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant.

DIETZ, Judge.

Defendant Christopher Lee Singletary appeals his sentences following multiple convictions for sex offense charges. He contends that, after this Court filed an opinion vacating his original sentence and remanding for resentencing, the trial court improperly resentenced him before this Court issued the mandate.

As explained below, we reject Singletary's argument that the mandate had not issued at the time of resentencing. We hold that the mandate from the appellate division issues on the day that the appellate court *transmits* the mandate to the lower court, not the day when lower court actually *receives* it.

Applying that holding here, the trial court had jurisdiction to resentence Singletary on 23 May 2016. This Court filed its opinion vacating Singletary's sentence and remanding for resentencing on 3 May 2016.

Twenty days later, on 23 May 2016, this Court issued the mandate by transmitting it to the clerk of superior court. Because the mandate issued on 23 May 2016, the trial court had jurisdiction to resentence Singletary that same day. Accordingly, we reject Singletary's jurisdictional argument and affirm the trial court's judgments.

Facts and Procedural History

In 2015, Defendant Christopher Lee Singletary was convicted of multiple sex offenses involving a minor. On appeal, this Court vacated Singletary's sentence and remanded the case for a new sentencing hearing. *State v. Singletary*, __ N.C. App. __, 786 S.E.2d 712 (2016).

This Court filed its opinion on 3 May 2016 and the mandate issued on 23 May 2016, twenty days later. The Guilford County Clerk of Superior Court received this Court's judgment and mandate, and filed it, on 25 May 2016.

On 23 May 2016—the same day this Court issued the mandate and two days before the clerk of superior court received the written copy of the Court's judgment and mandate—the trial court resentenced Singletary. Singletary timely appealed.

Analysis

Singletary contends that the trial court lacked jurisdiction to resentence him because the court had not yet received the certified copies of the judgment and mandate transmitted by this Court. As explained below, we reject this argument.

In general, an appeal from a trial court judgment "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. N.C. Local Governmental Emp. Ret. Sys.*, 110 N.C. App. 83, 85, 428 S.E.2d 849, 850 (1993) (emphasis added). As a result, when this Court issues an opinion instructing a lower court to take further action, the lower court should not take that action until this Court issues its mandate. By issuing the mandate and accompanying judgment, this Court returns jurisdiction to the trial court, which may then proceed with the case in a manner consistent with this Court's ruling. *See* N.C. Gen. Stat. § 15A-1452.

Rule 32 of the Rules of Appellate Procedure describes when and how this Court issues its mandate. The rule provides that a mandate "is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to

the issuing court." N.C. R. App. P. 32(a). The rule further states that this Court "shall enter judgment and issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk." N.C. R. App. P. 32(b).

Singletary argues that, under Rule 32(a), the trial court could not resentence him until 25 May 2016, the date on which the clerk of superior court *received* the mandate, not 23 May 2016, the day this Court *transmitted* the mandate. We disagree. Rule 32(a) states that the mandate "is issued by its transmittal" from this Court to the lower court. Rule 32(b) then states that this Court "shall enter judgment and issue the mandate . . . twenty days after the written opinion of the court has been filed." Read together, these rules indicate the mandate "issues" on the day this Court transmits it to the lower court, not on the day the lower court receives it.

Here, the Court issued its mandate on 23 May 2016. The trial court resentenced Singletary that same day. Accordingly, we reject Singletary's argument that the trial court lacked jurisdiction to resentence him because the mandate had not yet issued.[1]

Conclusion

For the reasons discussed above, we affirm the trial court's judgments.

AFFIRMED.

Judges BRYANT and DILLON concur.

1. Singletary also argues that, as the result of a clerical error, the judgments for some of his offenses do not reflect the appropriate jail credit. In response, the State filed a supplement to the record indicating that Singletary already has served his sentence for those offenses and that he did, in fact, receive the appropriate jail credit, despite the clerical error in the judgment. Accordingly, this issue is moot. *State v. Black*, 197 N.C. App. 373, 375, 677 S.E.2d 199, 201 (2009).

STATE v. TERRELL

[257 N.C. App. 884 (2018)]

STATE OF NORTH CAROLINA
v.
JAMES H. TERRELL, JR.

No. COA17-268

Filed 6 February 2018

1. Search and Seizure—photographs—private search—warrantless search—thumb drive not a single container

The trial court erred by concluding a private citizen's prior viewing of defendant's thumb drive frustrated defendant's expectation of privacy in its entire contents and authorized a police detective to conduct a warrantless search through all of its digital data. The Court of Appeals declined to extend the container analogy applied to a videotape search in *State v. Robinson*, 187 N.C. App. 795 (2007), and held a thumb drive should not be viewed as a single container for Fourth Amendment purposes.

2. Search and Seizure—private-search doctrine—warrantless search—thumb drive—sufficiency of findings of fact—virtual certainty only contraband

The trial court erred by concluding that a detective's warrantless search of defendant's thumb drive did not violate his Fourth Amendment rights. Although the trial court did not make adequate findings of fact concerning the exact scope of a private citizen's and a detective's searches through the thumb drive, its findings established that the detective did not conduct the search with the requisite level of "virtual certainty" that the thumb drive contained only contraband or that his inspection would not reveal anything more than he already learned from the private citizen.

3. Search and Seizure—motion to suppress—probable cause—search warrant—tainted evidence from unlawful search

The trial court's ruling on defendant's suppression motion was reversed and remanded to the trial court to determine whether probable cause existed to issue a search warrant after excising from a detective's warrant application the tainted evidence arising from his unlawful search as required by *State v. McKinney*, 361 N.C. 53 (2006).

Judge STROUD concurring in part and dissenting in part.

STATE v. TERRELL

[257 N.C. App. 884 (2018)]

Appeal by defendant from judgment entered 17 November 2016 by Judge Beecher R. Gray in Onslow County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth J. Weese, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

ELMORE, Judge.

James H. Terrell, Jr. (defendant) appeals from a judgment entered after a jury convicted him of possessing a photographic image from secretly peeping, second-degree sexual exploitation of a minor, and twelve counts of third-degree sexual exploitation of a minor. This case presents the issue of how to apply the private-search doctrine to a follow-up police search for one potential contraband image among several other non-incriminating images stored on an electronic storage device. Or, put another way, to what extent the private-search doctrine authorizes police to conduct, without a warrant, a follow-up search for digital data on a privately searched electronic storage device.

Defendant's long-term girlfriend, Jessica Jones, opened defendant's briefcase when he was at work in order to search for information about his housekeeper in the Philippines while he was working overseas on a prior military contract job. Among employment papers and other personal effects, she found three USB flash drives (hereinafter "thumb drives"). Jones plugged each thumb drive into a computer. One of those thumb drives contained data. Jones clicked through its multiple digital file folders and subfolders until she found one subfolder containing images. After scrolling through several non-incriminating images, she saw one image of her nine-year-old granddaughter sleeping without a shirt. Jones believed the image was inappropriate, summoned authorities, and surrendered the thumb drive, which was secured in an evidence locker.

Later, an officer conducted a warrantless search through the images on the thumb drive to locate the granddaughter image. But during his follow-up search, the officer allegedly discovered images of other partially or fully nude minors that Jones never viewed. Using this information to support his warrant application, the officer obtained a search warrant to forensically examine the thumb drive's contents. The

executed search warrant yielded twelve incriminating images located in a different subfolder than the granddaughter image.

Defendant moved to suppress the contents of the thumb drive. He alleged that the officer had conducted an illegal warrantless search. He further sought to suppress the images recovered during the forensic examination under the search warrant as being fruit of the previous unlawful search. Defendant's motion was denied. The trial court determined that Jones's private viewing of the thumb drive effectively frustrated defendant's expectation of privacy in its contents and, thus, the officer's warrantless search was lawful under the private-search exception to the warrant requirement and did not violate defendant's Fourth Amendment rights.

On appeal, defendant contends the trial court erred by denying his motion to suppress the thumb drive's contents because the search warrant executed was based on illegally obtained evidence from the officer's warrantless search. He contends the trial court erred by concluding that Jones's prior search through the thumb drive effectively frustrated his expectation of privacy in its entire contents, thereby authorizing the officer to search, without a warrant, through all of the images on that device. He further contends the trial court's finding that the officer viewed incriminating images that Jones never viewed necessarily establishes that his subsequent search unconstitutionally exceeded the scope of Jones's earlier one.

We ultimately hold that the trial court reversibly erred by concluding that the officer's warrantless search was lawful under the private-search doctrine and, therefore, did not violate defendant's Fourth Amendment rights. However, because the record is insufficient for us to determine whether the trial court would have determined that the search warrant executed was supported by probable cause without the tainted evidence obtained during the officer's unlawful search, we remand this matter to the trial court to determine the validity of the search warrant.

I. Background

During their long-term relationship, James H. Terrell, Jr. (defendant) and Jessica Jones had lived together for over ten years and had two children together. Jones also had a daughter from another relationship, Cindy, who has a daughter, Sandy.[1]

1. Pseudonyms are used to protect identities.

Defendant served in the United States Marine Corps and after he left service, he began working various overseas military contractor jobs. When he returned from one such job in the Philippines in February 2013, he resumed living with Jones until January 2014.

On 13 January 2014, while defendant was at work, Jones searched his belongings for information about his housekeeper in the Philippines. She opened his briefcase and discovered, among employment paperwork and other personal effects, that it contained three USB thumb drives.

Jones plugged each thumb drive into a home computer. Two of the thumb drives were blank, but the third thumb drive, which was purple in color, contained data. On the purple thumb drive, Jones found a subfolder containing images and scrolled through various non-incriminating images until she discovered an image of her nine-year-old granddaughter, Sandy, that was taken the day after Thanksgiving. In the image, Sandy was sleeping, partially nude from the waist up with her breasts exposed (hereinafter "the granddaughter image"). Once Jones saw the granddaughter image, she stopped scrolling through the images and unplugged the thumb drive. Jones sought counsel from her preacher, who recommended contacting authorities. Jones also informed her daughter, Cindy, who is Sandy's mother, and Cindy expressed her desire to press charges.

That evening, Jones and Cindy brought the purple thumb drive to the Onslow County Sheriff's Department and reported to Detective Lucinda Hernandez that it contained the granddaughter image. Detective Hernandez did not ask to see the granddaughter image or open the thumb drive to view it but secured the thumb drive in an evidence locker.

The next day, Detective Eric Bailey was assigned to the case. He reviewed Detective Hernandez's report, and then interviewed Jones and Cindy, who also reported to him that the thumb drive contained the granddaughter image. After the interview, Detective Bailey decided to examine the thumb drive to verify their report. At Detective Bailey's request, the thumb drive was removed from the evidence locker, and a crime scene investigation (CSI) technician with the sheriff's department plugged it into a computer. During Detective Bailey's search for the granddaughter image, he scrolled through several non-incriminating images and allegedly saw images of other fully or partially nude minor females posing in sexual positions, images that Jones neither observed nor reported.

On 5 February 2014, Detective Bailey applied for a warrant to search, *inter alia*, the purple thumb drive for "contraband images of

child pornography and evidence of additional victims and crimes." In his application, Detective Bailey alleged that Jones reported that she saw the granddaughter image on defendant's purple thumb drive, that Jones reported her other daughter "several years ago" alleged that defendant "touched [her] down there," and that Jones also reported she found a floppy disk in the bed of defendant's truck about fifteen years ago that contained images of child pornography. According to Detective Bailey, an agent with the State Bureau of Investigation (SBI) refused to conduct a "forensic evaluation [of the thumb drive] based on [that] search warrant" and "asked [him] to put additional information in the search warrant."

On 5 May 2014, Detective Bailey applied for another search warrant, this time adding allegations that he personally reviewed the thumb drive and saw "several partially nude photographs of [the granddaughter]" as described by Jones, and that he also observed "several fully nude photographs of an unknown child standing beside and [sic] adult female in various sexual positions."

The SBI agent executing the search warrant forensically examined several electronic devices using complex forensic software that creates a mirror image of their contents. The forensic examination of the thumb drive yielded twelve other incriminating images located in a different subfolder than the granddaughter image. Ten of those images had been previously deleted, and therefore would not have been observable during Jones's or Detective Bailey's searches, but were extractable using a computer forensic tool.

Defendant was indicted for possession of a photographic image from secretly peeping for the granddaughter image, four counts of second-degree sexual exploitation of a minor, and twelve counts of third-degree sexual exploitation of a minor based on the twelve images recovered from the forensic examination. Three of the second-degree sexual exploitation charges were dropped but the remaining charges proceeded to trial.

Before trial, defendant moved to suppress the contents of the thumb drive, arguing that the executed search warrant was based on evidence illegally acquired during Detective Bailey's unlawful warrantless search. At the suppression hearing, defendant argued that Detective Bailey's thumb drive search violated his federal and state constitutional rights to be free from unreasonable searches. He further argued that Detective Bailey's warrantless search was not exempted by the private-search exception to the warrant requirement because it unconstitutionally exceeded the scope of Jones's prior search. Defendant emphasized that

Jones's search revealed only the granddaughter image, while Detective Bailey's search revealed images of other fully or partially nude minors that Jones never viewed. To satisfy its burden to establish that the evidence obtained during Detective Bailey's warrantless search was lawful, the State called Jones and Detective Bailey to testify.

According to Jones, when she plugged in the thumb drive, she opened various "folders and sub-folders" that she "did not think . . . had a title." She explained that "the pictures were all in one folder and . . . the other folders [contained] movies." After opening the "one" image folder, she scrolled those images. Jones saw "images of adult women and . . . children, but they were not inappropriate, meaning they were clothed"; "pictures of a person that [defendant] alleged was his housekeeper over in the Philippines"; images of an adult she recognized as defendant's childhood friend, some clothed and some partially clothed; and then she saw the granddaughter image. Once she saw that image, Jones stopped scrolling through the images and unplugged the thumb drive. According to Jones, she never saw any images of defendant; images of her and defendant; nor images of nude minors, particularly no "images of a fully naked young . . . female standing around adult women." Jones testified she told Detective Bailey that she "had discovered the image of [her] granddaughter lying in bed and she's partially unclothed" on the thumb drive.

According to Detective Bailey, after the thumb drive was plugged into the CSI computer, he was "going through checking it to try to find the [granddaughter image]." He explained that, while he was "scrolling through . . . there was a lot of photos in there[,]" and he was "clicking trying to find exactly where [the] image [was] located . . . ." Detective Bailey viewed "multiple images of adult females and also [defendant] together clothed, nude, partially nude." He then "continued [his] way down" and "finally happened upon the photograph of the granddaughter." He then stated that during his search, he "observed other young females, prepubescent females, unclothed, also some that were clothed."

The State presented no evidence describing the precise scope of either search Jones or Detective Bailey conducted on the thumb drive. Neither testified to the exact folder pathway they followed to arrive at the granddaughter image, identified which folders or subfolders they opened or reviewed, nor identified which subfolder of images they scrolled through to arrive at the granddaughter image.

At the conclusion of the suppression hearing, the trial court rendered an oral ruling denying defendant's motion. It concluded that "there was a private party who went into this [thumb drive] and, by doing so,

. . . it frustrated the defendant's reasonable expectation of privacy as to the contents of that [thumb drive]." The trial court continued: "[W]hen [Detective Bailey] went into that same [thumb drive] . . . to confirm what had been stated to him, he found additional matters and he did so in a manner that was, perhaps, more thoroughly [sic] than the initial examination by Ms. [Jones]. He ran into more images than what Ms. [Jones] ran into." Thus, the trial court determined, Detective Bailey's warrantless search did not violate defendant's Fourth Amendment rights.

At trial, the twelve images were admitted into evidence and a computer forensic analyst published a mirror image copy of the thumb drive to the jury. The initial Windows Explorer display screen of the thumb drive revealed multiple closed digital file folders. According to the transcript, that initial screen revealed at least the following parent folders (but likely more, since the witness displaying its content to the jury was asked multiple times to "scroll down" to find certain folders): "bad stuff," "Terrell resume," and "DI info." Opening the "bad stuff" folder revealed at least the following subfolders: "me," "Swanee," "red bone," and "Cabaniia." The evidence showed that the granddaughter image was located in the "red bone" subfolder, while the twelve other images were located in the "Cabaniia" subfolder.

After the presentation of evidence, the jury convicted defendant of all charges based on the granddaughter image and the twelve images recovered from the search warrant executed on the thumb drive. The trial court sentenced defendant to twelve consecutive terms of five to fifteen months in prison, and a term of twenty to eighty-four months of imprisonment, to run concurrent with the last five-to-fifteen-month term. On 28 November 2016, the trial court entered its written order denying defendant's suppression motion. Defendant appeals.

II. Standard of Review

"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. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (citation and quotation marks omitted). The trial court's legal conclusions "are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Arguments

Defendant contends the trial court erred by denying his motion to suppress the contents of the thumb drive seized from the executed

search warrant because it was based on illegal evidence obtained during Detective Bailey's unlawful search. He contends the trial court erred by concluding Jones's prior viewing of some images on the thumb drive effectively frustrated his expectation of privacy in the entire device, such that the private-search doctrine authorized Detective Bailey to search, without a warrant, through all of its digital data. Defendant cites to *United States v. Jacobsen*, 466 U.S. 109, 113–19, 104 S. Ct. 1652, 1656–59, 80 L. Ed. 2d 85 (1984) (establishing the private-search exception to the warrant requirement and instructing that the legality of a follow-up police search is limited by the degree it remains within the scope of the prior private search), to support his argument that because the trial court's findings establish that Detective Bailey's warrantless search exceeded the scope of Jones's earlier one, it was unlawful.

The State argues that the trial court properly determined that Detective Bailey's search was lawful under the private-search doctrine. The State contends that Detective Bailey's search was not unconstitutionally excessive in scope, since he merely examined the thumb drive "more thoroughly" than did Jones, citing to our decision in *State v. Robinson*, 187 N.C. App. 795, 798, 653 S.E.2d 889, 892 (2007) (holding that an officer viewing all of the footage of a videotape did not exceed the scope of a private search through only portions of the footage because the officer merely examined the "same materials . . . more thoroughly than did the private part[y]" (citations and internal quotation mark omitted)). The State further contends that even if Detective Bailey's search was conducted more thoroughly, it was not unconstitutionally excessive in scope because he had "virtual certainty" what contraband the thumb drive contained, citing to *Jacobsen*, 466 U.S. at 118–22, 104 S. Ct. at 1659–61 (establishing the virtual-certainty requirement), and *Rann v. Atchison*, 689 F.3d 832, 836–37 (7th Cir. 2012) (holding that an officer did not exceed the scope of a private search by viewing more files on a memory card and zip drive when officers were "substantially certain" those devices stored only child pornography), *cert. denied*, 133 S. Ct. 672 (2012).

We conclude that our decision in *Robinson* concerning the extent to which a private actor viewing portions of a videotape frustrates an individual's expectation of privacy in the entire videotape footage is simply inapplicable to searches for digital data on electronic storage devices. We therefore decline to extend the container analogy we applied to the videotape search in *Robinson* and hold a thumb drive should not be viewed as a single container for Fourth Amendment purposes. In light of this determination, we hold that the trial court erred by concluding that

Jones's thumb drive search effectively frustrated defendant's expectation of privacy in its entire contents.

We further hold that Detective Bailey's warrantless search was not authorized under the private-search doctrine, since the court's findings establish that Detective Bailey did not conduct his warrantless search with the requisite "virtual certainty" required under *Jacobsen* that the thumb drive contained only contraband, or that his inspection of its data would not reveal anything more than Jones already told him. However, because the trial court's order is insufficient for us to determine whether it would conclude that excising from the warrant application the evidence illegally obtained during Detective Bailey's unlawful search would still supply probable cause to issue the search warrant, we remand the matter to the trial court to make a determination, in the first instance, as to whether the remaining allegations in Detective Bailey's warrant application would have been sufficient.

IV. Analysis

"Both the United States and North Carolina Constitutions protect against unreasonable searches . . . ." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). A warrantless police search is presumptively unreasonable unless the State proves that search was exempted from the warrant requirement. *See Jacobsen*, 466 U.S. at 114, 104 S. Ct. at 1657 ("[W]arrantless searches of [personal] effects are presumptively unreasonable." (footnote omitted)); *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982) ("[W]hen the State seeks to admit evidence discovered by way of a warrantless search in a criminal prosecution, it must first show how the former intrusion was exempted from the general constitutional demand for a warrant." (citations omitted)). The private-search doctrine provides one such exemption from the warrant requirement.

A. The Private-Search Doctrine

Under the private-search doctrine, an officer may duplicate a private search, without a warrant, in order to observe first-hand incriminating information a private searcher has revealed to him. The rationale behind the doctrine is that Fourth Amendment protection extends only to governmental action; "it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected [solely] by a private individual . . . .' " *Jacobsen*, 466 U.S. at 113, 104 S. Ct. at 1656 (quoting *Walter v. United States*, 447 U.S. 649, 662, 100 S. Ct. 2395, 2404, 65 L. Ed. 2d 410 (1980) (Blackmun, J., dissenting)). Once an individual's privacy interest in particular information has been frustrated by a private actor, who

then reveals that information to police, the police may use that information, even if obtained without a warrant. *See id.* at 117, 104 S. Ct. 1658 (explaining that the private-search doctrine "standard follows from the analysis applicable when private parties reveal other kinds of private information to authorities"); *see also id.* ("Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information."). Thus, a duplicative police search exposing information already revealed by a private searcher is not a "search" under the Fourth Amendment, since it would intrude no existing privacy interest in that information.

But where a warrantless police search uncovers previously unrevealed private information, any additional privacy intrusion effected by that police search constitutes a Fourth Amendment "search," and police are therefore prohibited from using that information under the private-search doctrine. *See id.* at 117–118, 104 S. Ct. at 1658–59 ("[I]f the authorities use information with respect to which the expectation of privacy has not already been frustrated[,]" "the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant." (footnote omitted)). Thus, in determining whether information acquired during a warrantless police search can be used under the private-search doctrine, "the legality of the governmental search must be tested by the scope of the antecedent private search." *Id.* at 116, 104 S. Ct. at 1658 (citation omitted).

Additionally, "the Fourth Amendment's ultimate touchstone is 'reasonableness[.] . . .' " *Brigham City, Utah v. Stuart*, 547 U.S. 398, 398, 126 S. Ct. 1943, 1944, 164 L. Ed. 2d 650 (2006). "The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." *Jacobsen*, 466 U.S. at 115, 104 S. Ct. at 1657. Where information revealed by the private searcher is hidden from plain view, the reasonableness of a follow-up police search turns on whether the officer had "virtual certainty" that the item to be searched contained "nothing else of significance" and that his or her inspection of that item would not "tell him anything more than he already had been told" by a private searcher. *Id.* at 119, 104 S. Ct. at 1659.

B. Frustration of Privacy in Electronic Storage Devices

[1] Defendant contends the trial court erred by concluding that Jones's prior viewing of the thumb drive effectively frustrated his expectation of privacy in its entire contents and, therefore, Detective Bailey was

authorized to search, without a warrant, through all of its digital data without violating his Fourth Amendment rights. The State retorts that this conclusion was proper, relying heavily on our decision in *State v. Robinson*, 187 N.C. App. 795, 653 S.E.2d 889 (2007). *See id.* at 798–99, 653 S.E.2d at 892 (analogizing a videotape search to a container search, and holding that a private partial viewing of video footage from a videotape "opened the container" to its entire contents, effectively frustrating the defendant's expectation of privacy in all of the videotape footage). We find the State's authority unpersuasive as applied to searches of digital data on electronic storage devices, and hold that defendant retained an expectation of privacy in the information not revealed by Jones's search.

An individual has "reasonable and substantial" privacy interests in the digital information stored on a thumb drive. *See State v. Ladd*, ___ N.C. App. ___, ___, 782 S.E.2d 397, 403 (2016) ("Defendant's privacy interests in the digital data stored on these [external data] storage devices are both reasonable and substantial."). While this Court has applied the private-search doctrine to a police search of a privately searched videotape, *see Robinson*, 187 N.C. App. at 798–99, 653 S.E.2d at 892 (holding that a private search through some footage of a videotape frustrated an individual's privacy interests in the entire videotape footage), North Carolina courts have neither applied the private-search doctrine to a police search for digital data on a privately searched electronic storage device, nor defined the precise scope of a search for digital data on an electronic storage device, which bears directly on the extent to which a private search through a thumb drive may frustrate an individual's privacy interests in all of its digital data.

At issue is whether we should extend our holding in *Robinson*, as the State argues, treat the thumb drive as a single container for purposes of applying the private-search doctrine, and hold that Jones's prior search "opened the container" to all of the thumb drive's digital data, thereby authorizing Detective Bailey to conduct a "more thorough" examination of the entire device. We decline to do so.

C. A Thumb Drive is not a Single Container

In *Robinson*, the police viewed, without a warrant, the entire footage of a single videotape after a private searcher viewed portions of the footage and revealed to police that it showed the defendant engaging in sexual activities with two minors. 187 N.C. App. at 796, 653 S.E.2d at 891. The officer's videotape search confirmed what the private actor revealed to him—that the videotape contained footage of the defendant engaging in sexual activities with the two minors. *Id.* On appeal, we applied

the private-search doctrine and addressed whether the officer's search through the entire videotape footage exceeded the permissible scope of the private search through only portions of the footage. *Id.* at 797–99, 653 S.E.2d at 891–92.

The *Robinson* panel recognized that North Carolina courts had not defined the precise scope of a videotape search and turned to federal circuits courts of appeal for guidance. We adopted the Fifth and Eleventh Circuits' position that " 'the police do not exceed the scope of a prior private search when they examine the same materials . . . . more thoroughly than did the private parties.' " *Id.* at 798, 653 S.E.2d at 892 (quoting *United States v. Runyan*, 275 F.3d 449, 464 (5th Cir. 2001); citing *United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990)). We treated the videotape as a container, analogized the videotape search to a container search, and concluded that the private partial "viewing of the videotape effectively frustrated the defendant's expectation of privacy as to the contents of the [entire] videotape[.] . . ." *Id.* at 798, 653 S.E.2d at 892. Thus, because the prior private "viewing 'opened the container' of the videotape," we held that "the subsequent [police] viewing of the entire videotape was not outside the scope of [the private actor's] initial 'search.' " *Id.* at 799, 653 S.E.2d at 892 (citing *Runyan*, 275 F.3d at 465).

However, electronic storage devices are unlike videotapes, and a search of digital data on a thumb drive is unlike viewing one continuous stream of video footage on a videotape. The container analogy may appropriately apply to a videotape, since its entire "contents" can be revealed by merely playing that videotape and inactively observing its footage run until completion; a searcher need not further manipulate the videotape to observe the entire video footage. Thus, the more-thoroughly-searched principle may reasonably apply to a police viewing all of the video footage of a partially viewed videotape. But there are analytically significant reasons to view thumb drive searches differently.

One thumb drive may store thousands of videos, and it may store vastly more and different types of private information than one videotape. Data stored on a thumb drive may be concealed among an unpredictable number of closed digital file folders, which may be further concealed within unpredictable layers of nested subfolders. A thumb drive search that may require navigating through numerous closed file folders and subfolders is significantly more invasive and complex than a search of viewing one continuous stream of footage on a videotape. Based on a thumb drive's ever-expanding storage capacity, its potential to hold vastly more and distinct types of private information, and the complexity involved in searches of its digital data, we find *Robinson* and

the reasoning underlying our decision in that case simply inapplicable here. Accordingly, we decline to extend its container analogy to an electronic storage device and decline to apply the "opened the container" approach to authorize police to search through all of the digital data it may store.

In reaching this decision, we are guided by the substantial privacy concerns implicated in searches of digital data that the United States Supreme Court expressed in *Riley v. California*, 134 S. Ct. 2473, 2485, 189 L. Ed. 2d 430 (2014) (declining to extend the search-incident-to-arrest exception to police searches of digital data on cell phones). In *Riley*, the Court expressly rejected the analogy that a cell phone should be treated like a single container for Fourth Amendment purposes. *Id.* at 2488–89. In addressing the United States' argument that "a search of all data stored on a cell phone is 'materially indistinguishable' from searches of . . . physical items," the Supreme Court stated:

> That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

Id.; *see also id.* at 2485 ("A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in [a prior case]."). Since *Riley* was decided, this Court has relied on its guidance in rejecting the State's argument that a "GPS [device] should be viewed as a type of 'digital container' and treated the same as an address book, a wallet, or a purse" in the search-incident-to-arrest context. *See State v. Clyburn*, 240 N.C. App. 428, 435, 770 S.E.2d 689, 695 (2015) (holding that a search of the digital contents of a GPS was not a valid search incident to arrest).

While this is a private-search exception case, not a search-incident-to-arrest exception case, *Riley*'s guidance that the nature of an electronic device greatly increases privacy implications holds just as true, and it guides our decision in how best to apply a doctrine originating from the search of a container limited by physical realities to a search for

digital data on an electronic storage device that is not. *Cf. United States v. Lichtenberger*, 786 F.3d 478, 487 (6th Cir. 2015) (relying on *Riley*'s guidance in applying the private-search doctrine to a laptop search), *aff'g*, 19 F. Supp. 3d. 753 (N.D. Ohio 2014); *see also United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015) (relying on *Riley*'s guidance in applying the private-search doctrine to a cell phone search), *cert. denied*, *Sparks v. United States*, 136 S. Ct. 2009, *and cert. denied*, *Johnson v. United States*, 137 S. Ct. 34 (2016).

Accordingly, we decline to extend the container analogy we applied in *Robinson* to searches of digital data on electronic storage devices. We hold that an electronic storage device should not be viewed as a single container for Fourth Amendment purposes. The trial court therefore erred by concluding that Jones's thumb drive search effectively frustrated defendant's expectation of privacy in the contents of the entire device. We turn now to whether the trial court's findings support its conclusion that Detective Bailey's search remained within the permissible scope of Jones's prior search and whether it was reasonable under the circumstances, and was, therefore, a valid warrantless search under the private-search doctrine.

D. Validity of the Thumb Drive Search Under the Private-Search Doctrine

[2] Defendant challenges the finding that "*[i]n addition* to the [granddaughter image] Detective Bailey saw photographs of other nude or partially nude prepubescent females posing in sexual positions." (Emphasis added.) He contends this finding necessarily establishes that Detective Bailey's search unconstitutionally exceeded the scope of Jones's prior search because Jones never viewed those images and the granddaughter image was located in a different subfolder. The State contends that even if Detective Bailey's thumb drive search was "more thorough," it was not unconstitutionally excessive in scope under the private-search doctrine, because Detective Bailey had "virtual certainty" what contraband it contained. Because the private-search doctrine originated from an officer's physical search of the contents of a parcel box, which significantly differs from a digital search of data on an electronic storage device, we turn to the material facts of *Jacobsen* and its application of the private-search doctrine for guidance.

In *Jacobsen*, a Federal Express (FedEx) employee opened a damaged parcel package, a paper-wrapped cardboard box, which revealed that it contained crumpled newspaper covering a closed tube made of duct tape. 466 U.S. at 111, 104 S. Ct. at 1655. FedEx employees removed

the tube, cut it open, and discovered it contained zip-lock bags of white powder. *Id.* They summoned authorities to review the contents of the box, and replaced the plastic bags into the tube, and the tube and newspapers back into the box. *Id.* The responding Drug Enforcement Administration (DEA) agent saw that the repackaged box had a hole punched in its side and its top was open. *Id.* He removed the tube from the box, saw that one end of it had been slit open, removed the plastic bags from the tube, and then saw the white powder. *Id.* He then removed a trace of the white powder and conducted a field test confirming it was cocaine. *Id.* at 111–12, 104 S. Ct. at 1655.

The Court in *Jacobsen* addressed whether the DEA agent's warrantless search was valid under the Fourth Amendment. After articulating the private-search-doctrine standard, the Court began applying that doctrine by defining the scope of the FedEx employees' initial private search and then testing it against the DEA agent's subsequent one, in order to determine the extent to which the DEA agent's search invaded additional privacy interests and thus exceeded the scope of the FedEx employees' search. *Id.* at 118–20, 122, 104 S. Ct. at 1659–60, 1661. The Court explained that the FedEx employees' initial search, and the resulting invasions of privacy, "revealed that the package contained only one significant item, a suspicious looking tape tube[,]" and that "[c]utting the end of the tube and extracting its contents revealed a suspicious looking plastic bag of white powder." *Id.* at 115, 104 S. Ct. at 1657. Thus, the Court determined that the DEA agent's actions of removing the tube from the box, removing the plastic bags from the tube, and observing the white powder did not exceed the scope of the prior search, since "the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search." *Id.* at 120, 104 S. Ct. at 1660 (footnote omitted). Thus, "[i]t infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment." *Id.*

In analyzing the reasonableness of the DEA's warrantless search in light of what he knew from the FedEx employees' prior search, the Court explained that "[w]hen the first [DEA] agent on the scene initially saw the package, he knew it contained nothing of significance except a tube containing plastic bags and, ultimately, white powder." *Id.* at 118, 104 S. Ct. at 1659. The Court further determined that "[e]ven if the powder was not itself in 'plain view' because it was still enclosed in so many containers and covered with papers," the DEA agent was authorized to search the contents of the box because "there was a *virtual certainty*

that nothing else of significance was in the package and that *a manual inspection* of the tube and its contents *would not tell [the DEA agent] anything more than he had already been told*." *Id.* at 119–20, 104 S. Ct. at 1659 (emphasis added).

Accordingly, under *Jacobsen*'s beyond-the-scope test, judicial review centers on defining the precise scopes of both searches in order to determine whether a follow-up police search further invaded privacy interests and thus exceeded the scope of the prior private search. Further, under *Jacobsen*'s virtual-certainty requirement, where a private search does not leave incriminating evidence in plain view, judicial review of the reasonableness of a follow-up police search must be tested by the degree to which that officer had "virtual certainty" the privately searched item contained "nothing else of significance" other than the now non-private information, and that his inspection of that item "would not tell him anything more than" what the private searcher already told him.

Here, the trial court's only factual findings concerning the scope of both searches established the following:

> 3. . . . *[Jones] inserted the purple flash drive into a shared Apple computer and discovered, among other visual representations, a picture of her granddaughter,*. . . who appeared to be asleep and who was nude from the waist up with breasts displayed. . . .
>
> . . . .
>
> 6. Following his discussion with . . . [Jones], Detective Bailey went to the CSI Unit to confirm on the purple flash drive what he had been told by [Jones]. . . . *The CSI technician placed the purple flash drive into CSI's computer and selected the folder that had been identified by [Jones] as containing the . . . granddaughter [image]*. This viewing in the CSI Unit confirmed what . . . [Jones] had told Detective Bailey that she had discovered on the flash drive. *In addition to the [granddaughter image] Detective Bailey saw photographs of other nude or partially nude prepubescent females posing in sexual positions.*

(Emphasis added.) Based on these findings, the trial court determined that "Detective Bailey's initial search and examination of the purple thumb drive in the CSI Unit did not exceed the scope of the private, prior search done by [Jones], but could have been more thorough."

Jacobsen instructs that "[t]he additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." 466 U.S. at 115, 104 S. Ct. 1657. Thus, the trial court should have made detailed findings on the exact scope of both Jones's and Detective Bailey's searches of the thumb drive's contents, in order to determine precisely the extent to which Detective Bailey's search may have exceeded Jones's earlier one. However, the State never presented any evidence, *see State v. Romano*, 369 N.C. 678, 800 S.E.2d 644, 654 (2017) (placing the burden on the State to prove there was no state action when a nurse drew the defendant's blood, or "that the seizure of the blood was not an act of the State and thus, was not subject to the Fourth Amendment's search and seizure analysis"), and the trial court never made any findings establishing exactly what folder(s) and/or subfolder(s) Jones or Detective Bailey searched. Nor did the trial court's findings describe what "other visual representations" Jones viewed, or whether Detective Bailey only viewed those particular images.

Although the trial court found that Detective Bailey viewed images in a folder Jones identified as containing the granddaughter image, it did not explore whether the images of partially or fully nude minors Detective Bailey allegedly viewed were located in another subfolder of images other than that which Jones searched. To the extent that they were, those images were not admissible under the private-search doctrine. *Cf. United States v. Kinney*, 953 F.2d 863, 866 (4th Cir. 1992) (holding drug evidence found during a follow-up police search of a closet inadmissible where the private search revealed only guns: "This phase of the search cannot be supported by Akers' prior private search because the fruits of [the officer's] search, the white powder and drug paraphernalia, were never discovered by Akers.").

Ordinarily, " 'when the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court.' " *State v. Ingram*, 242 N.C. App. 173, 180, 774 S.E.2d 433, 440 (2015), *disc. rev. denied*, *writ denied*, 369 N.C. 195, 791 S.E.2d 677 (2016) (quoting *State v. Salinas*, 366 N.C. 119, 124, 729 S.E.2d 63, 67 (2012)). "In such a situation, 'remand is necessary because it is the trial court that 'is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.' " *Ingram*, 242 N.C. App. at 180, 774 S.E.2d at 440 (quoting *Salinas*, 366 N.C. at 124, 729 S.E.2d at 67). However, remand is not

required where "there are no material conflicts in the evidence" and "the superior court's order . . . contain[s] sufficient findings of fact to which this Court can apply the [applicable legal] standard." *Salinas*, 366 N.C. at 124, 729 S.E.2d at 67; *see also Ladd*, ___ N.C. App. at ___, 782 S.E.2d at 403–04 (declining to remand for additional findings where there was no "conflicting evidence for the trial court to adjudicate" and the facts were "sufficient for our *de novo* review of the trial court's conclusions").

After carefully considering the suppression hearing evidence, we conclude that there were no material evidentiary conflicts and that the trial court's findings are sufficient for our *de novo* review of its ultimate conclusion that Detective Bailey's warrantless search did not violate defendant's Fourth Amendment rights. We conclude that findings on the precise scope of both searches are immaterial in this particular case, in light of the other findings establishing that *Jacobsen*'s virtual-certainty requirement was not satisfied and, therefore, Detective Bailey's search was unauthorized under the private-search doctrine. *Cf. Lichtenberger*, 786 F.3d at 490 (concluding that an officer's lack of "virtual certainty" he viewed the same child pornography images a private searcher viewed on the defendant's laptop dispositively established that his search was unconstitutional under the private-search doctrine).

Jacobsen further instructs that because Jones's prior search did not leave incriminating evidence in plain view, judicial review centers on whether Detective Bailey had "virtual certainty that nothing else of significance [except for the granddaughter image that Jones revealed to him] was in the [thumb drive] and that a[n] . . . inspection of the [thumb drive] and its [digital data] would not tell him anything more than he already had been told." 466 U.S. at 119, 104 S. Ct. 1659; *see also id.* at 120 n.17, 104 S. Ct. at 1660 n.17 (noting the "*significant . . . facts*" that "the container could no longer support any expectation of privacy" and "it was *virtually certain that it contained nothing but contraband*" (emphasis added)). This virtual-certainty requirement limits unfettered governmental searching through all of the digital data stored on an electronic storage device that is not known to contain only contraband.

Here, neither the State's evidence, nor the trial court's findings, established that Detective Bailey proceeded with any certainty, much less the virtual certainty required, that the thumb drive contained only the potential contraband that Jones had reported, nor that Detective Bailey's inspection of its contents would not reveal anything more than what Jones had told him. Rather, the findings establish that the only defining characteristic of the thumb drive was its purple color, which reveals nothing about the nature of its digital contents, and that

Detective Bailey knew the thumb drive contained "other visual representations" in addition to the one granddaughter image that was not obviously child pornography. According to Jones, those other representations were images of fully clothed adult women and children; defendant's housekeeper; and defendant's childhood friend as an adult, posing clothed and partially clothed. The trial court's findings establish that Detective Bailey did not search the thumb drive with the same level of "virtual certainty" contemplated by *Jacobsen* that the thumb drive only contained child pornography contraband, or that his inspection of its digital contents would not reveal private information that Jones had not already revealed to him.

In urging us to reach a different result, the State cites to our decision in *Robinson* and two other federal circuit courts of appeal cases to support its position that Detective Bailey's search did not materially exceed the scope of Jones's prior one because he merely examined the thumb drive more thoroughly. Those cases are distinguishable because the officers in those cases could be virtually certain the devices contained contraband.

In *Robinson*, based on the now non-private information revealed by the private searcher that portions of the videotape showed the defendant engaging in sexual activity with two minors, *see id.* at 796, 653 S.E.2d at 891, the officer could have virtual certainty the videotape contained only contraband and that his viewing of the entire footage would not reveal anything further. Here, contrarily, the only now non-private information Jones's search revealed was that the thumb drive contained, among several other images, only one potential contraband image, which was not obviously child pornography. The evidence showed that the thumb drive contained various folders and subfolders storing different types of private digital data and that the granddaughter image was stored in one subfolder among numerous other non-incriminating images. Unlike the officer in *Robinson*, Detective Bailey did not have the same sort of certainty that the thumb drive only contained contraband, or that his search would not reveal anything more than what Jones had reported. The State's other authority is similarly distinguishable. *See Runyan*, 275 F.3d at 464 (holding that police did not exceed the scope of a private search by examining more files on partially searched computer disks that a private searcher revealed contained child pornography); *Rann*, 689 F.3d at 836–37 (holding that police did not exceed the scope of a private search by examining more images on a memory card and zip drive that the police "could be substantially certain" contained child pornography based on the private searchers' reports).

Moreover, while the private-search doctrine "does not prohibit governmental use of . . . now nonprivate information[,]" it prohibits "use [of] information with respect to which the expectation of privacy has not already been frustrated." *Jacobsen*, 466 U.S. at 117, 104 S. Ct. at 1658–59. The trial court's findings establish that the only "now non-private information" Jones's search revealed was that the thumb drive contained only one potentially incriminating image of her granddaughter sleeping without a shirt. Because Jones's search never revealed that the thumb drive contained child pornography images, the private-search doctrine alone could not have authorized Detective Bailey to use that information for his warrant application.

Under the Fourth Amendment's reasonableness inquiry, " '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *State v. Grice*, 367 N.C. 753, 762, 767 S.E.2d 312, 319 (2015) (quoting *Jacobsen*, 466 U.S. at 125, 104 S. Ct. at 1662 (alteration in original) (citation omitted)). The suppression evidence showed that Detective Bailey's search involved opening multiple closed folders and subfolders and scrolling through various non-incriminating files in search of one potential contraband image that was not obviously child pornography or overtly sexual in nature. The governmental interest alleged to justify the private-search exception to the warrant requirement was that of "merely avoiding the risk of a flaw in the [private searcher's] recollection," *Jacobsen*, 466 U.S. at 119, 104 S. Ct. at 1659, which carries little weight when balanced against the immense privacy interests at stake in the thumb drive search here, *see Riley*, 134 S. Ct. at 2488–91. Further, no risks supported an immediate search based on evidence preservation; the thumb drive was stored in an evidence locker. And thumb drives present no cognizable harm to police. *Id.* at 2485 ("Digital data stored on a cell phone cannot itself be used as a weapon. . . .").

"[T]he 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct.' " *United States v. Janis*, 428 U.S. 433, 446, 96 S. Ct. 3021, 3028, 49 L. Ed. 2d 1046 (1976) (citation omitted). "A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry v. Ohio*, 392 U.S. 1, 13, 88 S. Ct. 1868, 1875, 20 L. Ed. 2d 889 (1968). To hold that the evidence discovered during Detective Bailey's warrantless thumb drive search was admissible under the private-search doctrine may authorize unfettered police searching through all

of the digital data on an even more sophisticated electronic device that may contain greater quantities of distinct items of private information based merely on a private searcher viewing and revealing to police only one potentially incriminating file on that device. We therefore hold this evidence was inadmissible under the private-search doctrine and that Detective Bailey was prohibited from using it to support his warrant application.

In summary, although the trial court failed to make adequate factual findings concerning the exact scope of Jones's and Detective Bailey's searches through the thumb drive, its findings establish that Detective Bailey did not conduct his search with the requisite level of "virtual certainty" that the thumb drive contained only contraband or that his inspection of its contents would not reveal anything more than he already learned from Jones. Therefore, neither was Detective Bailey's warrantless thumb drive search authorized under the private-search doctrine, nor was he able to use the evidence he obtained during that search to support his warrant application. We thus hold that the trial court erred by concluding that Detective Bailey's warrantless search did not violate defendant's Fourth Amendment rights.

E. Probable Cause to Issue the Search Warrant

[3] Defendant next argues that without the illegally acquired information from Detective Bailey's search—that the thumb drive contained other images of minors posing in sexual positions—his warrant application failed to establish probable cause to issue the search warrant executed on the thumb drive that yielded the twelve incriminating images underlying his second- and third-degree sexual exploitation of a minor convictions. The State does not address the merits of this argument but contends that, because the evidence obtained during Detective Bailey's warrantless search was lawfully acquired pursuant to the private-search doctrine, the search warrant issued was valid.

> "The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause."

State v. McKinney, 361 N.C. 53, 59, 637 S.E.2d 868, 872 (2006) (emphasis omitted) (quoting *United States v. Giordano*, 416 U.S. 505, 554–55, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974) (Powell, J., concurring in part, dissenting in part) (citation omitted)). If excising illegally obtained information

from a warrant application would fail to supply probable cause to issue the search warrant, all evidence obtained from its execution must be suppressed as tainted fruit. *See, e.g.*, *McKinney*, 361 N.C. at 58, 637 S.E.2d at 872 (citations omitted).

"The 'common-sense, practical question' of whether probable cause exists must be determined by applying a 'totality of the circumstances' test." *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 597–98 (2014) (quoting *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527, 543 (1983), and citing *State v. Arrington*, 311 N.C. 633, 637, 641, 319 S.E.2d 254, 257 (1984)). Thus,

> "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, *there is a fair probability that contraband or evidence of a crime will be found in a particular place*. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed."

Id. at 664, 766 S.E.2d at 597–98 (emphasis added) (quoting *Gates*, 462 U.S. at 238–39, 103 S. Ct. at 2332, 76 L. Ed. 2d at 548 (third and fourth alterations in original), as quoted in *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257–58 (1984)).

Striking the information Detective Bailey acquired during his warrantless search—that the thumb drive contained "several fully nude photographs of an unknown child standing beside and [sic] adult female in various sexual positions"—all that remained to provide a "fair probability that contraband" would be found in the thumb drive, other than Jones's allegations concerning two incidents involving defendant in 2001, is Detective Bailey's allegation that Jones reported the thumb drive "contained pictures of [defendant] and other women engaged in sexual activities"; "pictures of them in her home[ ]"; and "pictures of her 9 year old granddaughter . . . in bed[,]" where she "appeared to be sleeping and she was exposed (Nude) from the waist up."

However, as defendant concedes, because the trial court determined that the evidence acquired by Detective Bailey's warrantless search was lawful under the private-search doctrine, the trial court never determined whether striking that information from his application would still supply probable cause to issue the search warrant. Further, the trial court's order contains no findings on the issue of whether it would have

found the evidence seized pursuant to the warrant admissible absent the tainted allegations acquired by Detective Bailey's unlawful thumb drive search. In such a situation, our Supreme Court has instructed that "remand to the trial court [is] more appropriate than unilateral appellate court determination of the warrant's validity[.]" *McKinney*, 361 N.C. at 64, 637 S.E.2d at 875 (citation omitted).

In *McKinney*, our Supreme Court was presented with an issue of whether omitting unlawfully obtained information from a search warrant application would have still supplied probable cause to issue the warrant. However, because the trial court's order "contained limited findings of fact," none of which "indicate[d] whether the trial court would have found the evidence seized pursuant to the warrant admissible even if the tainted evidence had been excised from the warrant application," *id.* at 63, 637 S.E.2d at 875, the Court determined that "the record . . . [did] not reveal the extent to which consideration of the illegally obtained information affected the trial court's determination that the evidence seized pursuant to the warrant should not be suppressed," *id.* Accordingly, the Court "decline[d] to speculate as to the probable outcome . . . had the trial court analyzed the validity of the search warrant based only on the legally obtained information on the warrant" and instead "afford[ed] the trial court an opportunity to evaluate the validity of the warrant" in the first instance. *Id.* at 65, 637 S.E.2d at 876.

Accordingly, under *McKinney*, we reverse the trial court's ruling on defendant's suppression motion and remand this matter to the trial court to determine, in the first instance, whether probable cause existed to issue the search warrant after excising from Detective Bailey's warrant application the tainted evidence arising from his unlawful search.

V. Conclusion

This case presents a novel issue for this Court of how to apply the private-search doctrine to an after-occurring police search for potential digital contraband on a privately searched electronic storage device. Guided by the *Riley* Court's emphasis on the tremendous privacy interests implicated in searches of digital data on a cell phone, and its express rejection of the analogy that a cell phone should be viewed as a single container in search-incident-to-arrest cases, as well as this Court's prior ruling in *Ladd*, we conclude that the "closed-container" approach we applied to the videotape search in *Robinson* should not be extended to searches for digital data on an electronic storage device. Accordingly, we hold that the trial court erred by concluding Jones's prior viewing of the thumb drive effectively frustrated defendant's expectation of privacy in its entire contents.

Additionally, while the trial court's findings did not adequately address the scope of both searches in order precisely to determine the extent to which Detective Bailey's search may have exceeded the scope of Jones's earlier one, we decline to remand the matter for more detailed findings. We conclude that such findings would be immaterial in light of the other findings establishing that Detective Bailey's search was not authorized under the private-search doctrine because he did not conduct his search with the requisite level of "virtual certainty" contemplated by *Jacobsen*. Since the additional information Detective Bailey acquired during his warrantless search was never revealed to him by Jones, the private-search doctrine did not permit him to use that information to support the warrant application. Accordingly, we hold the trial court erred by concluding the private-search doctrine authorized Detective Bailey's warrantless thumb drive search and, therefore, did not violate defendant's Fourth Amendment rights.

However, because the record "did not reveal the extent to which consideration of the illegally obtained information affected the trial court's determination that the evidence seized pursuant to the warrant should not be suppressed," *McKinney*, 361 N.C. at 63, 637 S.E.2d at 875, we reverse the ruling on defendant's suppression motion and remand this matter to the trial court with instructions to determine whether excising the evidence acquired during Detective Bailey's unlawful warrantless search would have supplied probable cause to issue the search warrant to forensically examine the thumb drive.

REVERSED IN PART AND REMANDED.

Judge TYSON concurs.

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

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

The majority opinion considers thirteen images: (1) the "granddaughter image"[1] which was Ms. Jones's primary concern when she

1. I believe the majority's use of the term "granddaughter image" is misleading because the child in the image is not defendant's granddaughter; this is important in the consideration of probable cause because any implication of familial relationship or affection between the child in the image and defendant is false. Defendant was the boyfriend of the child's grandmother. Nonetheless, I will refer to the image as the "granddaughter image" to avoid confusion.

came to the Sheriff's Department because it was her granddaughter; (2) two images of nude prepubescent girls in sexual positions[2] ("two seen images") discovered in the process of confirming the information law enforcement officers were given about the granddaughter image; (3) and the remaining ten ("ten deleted images") discovered through a data recovery method because they had been deleted from the thumb drive. It is important to distinguish the three categories of photographs from the outset because Detective Bailey's knowledge at certain points in time is relevant to the legal analysis and to the question remanded to the trial court regarding probable cause.

It is also essential to understand the convictions regarding the different categories of images. As I will further discuss later in this dissent a major flaw in this appeal is that we have none of the images in the record before us, making it difficult to pair a particular image with a specific conviction. We can determine from the indictment and jury instructions that defendant was convicted of secretly peeping based upon the granddaughter image. It also appears that a second-degree exploitation conviction was likely based upon the granddaughter image. As noted by the majority there were thirteen photographs. Defendant was convicted of twelve counts of third-degree sexual exploitation, one count of second-degree sexual exploitation, and one count of secretly peeping, for fourteen total convictions. Logically this could mean the second-degree exploitation conviction was based upon the granddaughter image and the twelve third-degree exploitation convictions were based upon the twelve images other than the granddaughter image. So I will assume that as to the granddaughter image defendant was convicted of secretly peeping and second-degree sexual exploitation, and as to the two seen images and the ten deleted images, defendant was convicted of twelve counts of third-degree sexual exploitation.[3]

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2. The majority opinion never states that Detective Bailey saw *two* other concerning images, but it does state there were twelve images at issue in addition to the granddaughter image, and ten of the twelve Detective Bailey could not have seen while looking for the granddaughter image because they had been deleted and were only discovered after the search warrant was issued and further analysis was performed on the thumb drive. This means there were two images at issue Detective Bailey would have seen while looking for the granddaughter image and because the trial court found as an unchallenged fact that while looking for the granddaughter image "Detective Bailey saw *photographs* of other nude or partially nude prepubescent females posing in sexual positions[,]" (emphasis added), those photographs must be the two not mentioned by the majority.

3. I also make this assumption because it is the defendant's duty to make sure the record is complete and includes all of the information necessary to understand the issues presented. *See N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 337, 688 S.E.2d 534, 536 (2010).

Now that I have clarified the images and convictions associated with the images, I will address the reasons for my dissent. I would affirm the trial court's denial of defendant's motion to suppress the granddaughter image based upon the private search doctrine, and I would find no error as to defendant's convictions for secretly peeping and second-degree exploitation of a minor. I dissent in part because there is no need to remand for any issue for the convictions based upon the granddaughter image. Because Detective Bailey found the two seen images while verifying Ms. Jones's report of the granddaughter image, I again would affirm the trial court in denying defendant's motion to suppress based upon the private search doctrine. I also would find no error on the third-degree sexual exploitation of a minor convictions entered based on the two seen images, and again remand is unnecessary on those images. As to the remaining ten deleted images and the ten related convictions for third-degree sexual exploitation of a minor, I agree with the majority these images do not fall under the private search doctrine and remand is necessary for the trial court to consider whether Detective Bailey had probable cause to obtain the search warrant. As to the ten deleted images and their related convictions, I concur in result only.

I. Evidence Not in the Record on Appeal

As I have mentioned, this appeal was filed on issues arising from thirteen photographic images and none were provided to this Court. If a party is seeking relief based upon a piece of evidence, that evidence must be in the record before this Court:

> Pursuant to the North Carolina Rules of Appellate Procedure, our review is limited to the record on appeal and any other items filed with the record in accordance with Rule 9(c) and 9(d).
>
> > The Court of Appeals can judicially know only what appears of record. Matters discussed in a brief but not found in the record will not be considered by this Court. It is incumbent upon the appellant to see that the record is properly made up and transmitted to the appellate court.

N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co., 202 N.C. App. 334, 337, 688 S.E.2d 534, 536 (2010) (citations, quotation marks, and ellipses omitted). The burden is on the appellant to ensure that all the evidence necessary to understand his argument is in our record. *See generally id.* Defendant would prefer that we lump all of the images together in the legal analysis – as the majority has – since that

would increase his chances of having more of his convictions reversed. But defendant should not benefit from any deficiency in the record.

II. Granddaughter Image

As this Court has noted before, "It is said that a picture is worth a thousand words. In this case, a picture would be worth several thousand words[.]" *State v. Sutton*, 232 N.C. App. 667, 673, 754 S.E.2d 464, 468 (2014). None of the thirteen images were provided to this Court, and on the granddaughter image specifically, this Court should make no assumptions of potential innocence about that image since we have not seen it. Perhaps someone could imagine an innocent reason for an unrelated adult male to have a photograph of his girlfriend's nine-year-old granddaughter's breasts stored in his photographs; someone could also easily imagine other reasons for the photograph and those reasons would provide not only probable cause for a future search warrant based upon the image but also grounds for a criminal conviction. The jury saw the image and they determined it violated North Carolina General Statute § 14-202(g) and convicted defendant of possessing a photographic image from peeping; this conviction means the jury found that defendant had taken the photograph "for the purpose of arousing or gratifying the sexual desire[.]" The "purpose of arousing or gratifying the sexual desire" is an element of the crime which the trial court instructed the jury on, and the jury unanimously found the granddaughter image to have been taken for such a purpose.

The majority's characterization of the granddaughter image as "not obviously child pornography" is perhaps correct but misleading as it ignores the fact that a partially nude photograph of a child may violate the law, as this one did for secret peeping and apparently second degree sexual exploitation, even if it is not "obviously pornographic." My primary concern is that the majority's focus on the term "pornography" could lead the trial court astray on remand. The trial court need not consider the granddaughter image to be child pornography to find probable cause for issuance of the warrant. It is true that the warrant affidavit alleged probable cause to search for "images of child pornography[,] but it also alleged probable cause to believe the search may reveal "evidence of additional victims and crimes committed in this case."

As the majority notes, the magistrate must be able

> to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place and the trial court

> must review to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

State v. Benters, 367 N.C. 660, 664, 766 S.E.2d 593, 597–98 (2014) (citation, quotation marks, ellipses and brackets omitted).

Even if all of the other images are excluded from consideration, the granddaughter image along with the other information in the warrant application and affidavit could support a finding of probable cause to issue the search warrant. Detective Bailey averred that in 2001 "there was an incident regarding child pornographic pictures[;]" in 2001 Ms. Jones's daughter, whom she had with defendant, had claimed defendant had "touched me down there[;]" and Ms. Jones also turned over a floppy disk drive from the 2001 "incidents" which she reported contained "children engaged in multiple sex acts." The passage of time since 2001 does not eliminate the potential import or relevance of the "incidents" of potential sexual molestation of a child and possession of child pornography in considering probable cause for a search warrant. And because the granddaughter image *is* evidence of criminal activity, it should also be an important part of the trial court's analysis on remand of whether there was probable cause for issuance of a search warrant to determine if the thumb drive may contain more similarly incriminating images.

III. The Two Seen Images

Turning now to the two images Detective Bailey saw prior to the granddaughter image, while I generally agree with the majority's analysis of the private search doctrine and determination that a thumb drive is not a single container, the majority's analysis overlooks the fact that Detective Bailey attempted to limit his initial search to find the image reported by Ms. Jones. Detective Bailey acted within the proper scope of the private search doctrine in his discovery of the granddaughter image and the two seen images as he was trying to confirm the existence of the granddaughter image. Ms. Jones brought the thumb drive to the Sheriff's Department. Ms. Jones did not specify which folder or sub-folder her granddaughter's photo was in, nor did she seem aware there were separate folders on the drive. Ms. Jones testified at the suppression hearing:

> Q. Okay. So, as you clicked on each folder or subfolder, you would open them up and see what the pictures were?
>
> A. Yeah, the *pictures were all in one folder* and then the other folders were like movies because he likes military movies and, you know, action movies and that -- that was it.

> Q. Do you remember the name of the folder or any of the sub-folders?
>
> A. *I don't think the folders had a title.* It was just a thumb – it's the title of the thumbdrive, purple rain.

(Emphasis added.)

Since Ms. Jones could not direct Detective Bailey to a particular folder, he could not go directly to the image but conducted his search reasonably considering the information Ms. Jones had given him. It is true, as the majority points out, that the thumb drive had many folders and sub-folders, but Ms. Jones did not understand how the data was organized on the drive.[4] We should not require individuals who take digital media to law enforcement and report potential sexual exploitation or abuse of children to be IT experts. Ms. Jones's understanding was that the thumb drive overall was entitled "purple rain" and she did not realize that "purple rain" was the entire drive which contained folders and sub-folders. The trial court also found in its order that Detective Bailey attempted to confirm the existence of the "granddaughter image" and discovered "photographs of other nude or partially nude prepubescent females posing in sexual positions." Detective Bailey specifically testified:

> Q. All right. So, at that point were you verifying what Ms. Jones had told you she had observed on the flashdrive?
>
> A. Yes.
>
> Q. And when you were able to verify what she told you she had seen on the flashdrive, what did you do?
>
> A. Then I completed my search.

Thus, the only evidence before the trial court was that Detective Bailey discovered the two seen images of prepubescent girls in sexual positions *before* he found the granddaughter image because upon discovering that image he *stopped* his search.

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4. The trial court found that "[t]he CSI technician placed the purple flash drive into CSI's computer and selected the folder that had been identified by Ms. Jones as contained the picture of her granddaughter[.]" "Folder" was the word Ms. Jones used in her testimony, but in actuality she only identified the "drive" – the purple rain thumb drive – and not the folder. There were many folders and sub-folders to choose from within the purple rain thumb drive, and Ms. Jones had not clarified to Detective Bailey which one contained the granddaughter image.

"[T]here is a remarkable dearth of federal jurisprudence elaborating on what types of investigative actions constitute exceeding the scope" of a private search. *U.S. v. Runyan*, 275 F.3d 449, 461 (5th Cir. 2001) (quotation marks and footnote omitted). The same is true of state court jurisprudence. The unique factual situations of each private search and the particular "container" involved make cases difficult to compare. I have sought without success to find another case with a factual situation as presented here, where a law enforcement officer engages in a reasonably limited search of a drive only to confirm what the private searcher has reported but sees other evidence during that search because the private searcher's report on the organization of the drive was inaccurate or incomplete. But in *Runyan* the Fifth Circuit set out what I deem to be a reasonable "guideline" in considering the issue before us:

> The guideline that emerges from the above analysis is that the police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that *container based on the statements of the private searchers, their replication of the private search, and their expertise.* This guideline is sensible because it preserves the competing objectives underlying the Fourth Amendment's protections against warrantless police searches. A defendant's expectation of privacy with respect to a container unopened by the private searchers is preserved unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search. Moreover, this rule discourages police from going on fishing expeditions by opening closed containers. Any evidence that police obtain from a closed container that was unopened by prior private searchers will be suppressed unless they can demonstrate to a reviewing court that an exception to the exclusionary rule is warranted because they were substantially certain of the contents of the container before they opened it.

Id. at 463–64. (emphasis added).

Applying this "guideline" here, the purple thumb drive was "a closed container" which was opened by Ms. Jones, a private searcher. *Id.* at 463. Ms. Jones's statement to Detective Bailey was that the images were all in one folder, and she did not believe the drive had multiple folders

or sub-folders. Detective Bailey was "substantially certain" the drive would contain the "granddaughter image" as described by Ms. Jones. *Id.* Detective Bailey sought to replicate Ms. Jones's private search but since she did not understand the organization of the drive, he could not go directly to the particular image he was seeking. Detective Bailey saw other images before he found the one he was seeking, but upon finding the granddaughter image he stopped and sought a search warrant. Detective Bailey did not go on a "fishing expedition" *after* finding the granddaughter image. *Id.* at 464. This case differs from any other I have been able to find because Detective Bailey limited his search to a reasonable effort to find exactly what Ms. Bailey reported and then stopped and got a search warrant.

Due to Detective Bailey's attempts to limit his search only to seeking the evidence Ms. Jones had brought to his attention, the majority's analysis wrongly requires perfection from a private searcher who reports finding contraband and a law enforcement officer who seeks to confirm existence of contraband as reported by a private searcher. Ms. Jones did not understand the internal organization of the thumb drive but described it to Detective Bailey as best she could. And by the majority's analysis, unless Detective Bailey had gone directly to the specific granddaughter image identified by Ms. Jones upon opening the drive, he would unconstitutionally exceed the scope of her private search. But had Detective Bailey attempted to get a search warrant without looking at the thumb drive to confirm Ms. Jones's report, he would not have had enough information to find probable cause to support a search warrant. If we require perfection of private searchers and law enforcement officers, law enforcement officers would have to get a search warrant before trying to confirm the private searcher's report of information on any type of digital media or device. Otherwise, they risk inadvertently finding an incriminating image before finding the one reported and then all of the evidence may be suppressed. The majority places law enforcement officers in a Catch 22 of being unable to confirm the private searcher's report without a search warrant because of the risk of accidental discovery of an image other than the one reported but being unable to get a search warrant without confirming the report.

The granddaughter image and two seen photos Detective Bailey found while searching for the granddaughter image fall within the scope of the private search doctrine, and they too were properly not suppressed by the trial court. Furthermore, the granddaughter image and the two seen images would support probable cause for the other ten

deleted images, although I agree with the majority that is a determination the trial court must ultimately make for itself.

IV. The Ten Deleted Images

Last, as to the ten deleted images discovered after the search warrant was issued and upon forensic analysis of the drive, I agree that the private search doctrine did not extend to these images. The trial court should use the information in the search warrant affidavit and application, the granddaughter image, and the two seen images to determine whether there was probable cause to issue the search warrant which ultimately led to the discovery of the ten deleted images. I therefore concur with the majority to remand to the trial court to determine probable cause for issuance of the search warrant for the ten deleted images.

In summary, I dissent on remand regarding the images and related convictions for secretly peeping and second-degree exploitation as to the granddaughter image and the convictions of third-degree exploitation as to the two seen images. I concur in remanding for a determination of probable cause as to the ten deleted images.

STATE OF NORTH CAROLINA
v.
DAVID ALLEN VETTER

No. COA17-524

Filed 6 February 2018

1. Burglary and Unlawful Breaking or Entering—misdemeanor breaking or entering—motion to dismiss—lack of consent—access to garage but not interior residence

The trial court did not err by denying defendant's motion to dismiss a charge of misdemeanor breaking or entering where the State presented substantial evidence that defendant lacked consent to enter the residence. Defendant's ex-girlfriend testified that defendant had permission to access only the garage in order to collect his belongings; defendant never possessed a key to the home; defendant was not given the new code to the security system after their break-up; the ex-girlfriend activated the alarm system when she saw him in her driveway; and defendant had to kick in a door to gain entry into the residence.

2. Trespass—domestic criminal trespass—motion to dismiss—sufficiency of evidence

The Court of Appeals rejected defendant's arguments that the trial court erred by denying his motion to dismiss a charge of domestic criminal trespass. First, his ex-girlfriend's conduct was sufficient to allow the jury to conclude that defendant was forbidden from entering the interior of the residence; second, defendant's limited permission to enter the garage did not render him incapable of trespassing on a separate area of the premises; third, the ex-girlfriend did not have to be present in her home at the time of the trespass for the premises to be "occupied" pursuant to the statute.

3. Criminal Law—clerical error—judgment—incorrect crime

Where the trial court's judgment erroneously stated that defendant was convicted of misdemeanor larceny rather than misdemeanor breaking or entering, the Court of Appeals remanded the case for correction of the clerical error.

Appeal by defendant from judgments entered 30 November 2016 by Judge Nathaniel J. Poovey in Lincoln County Superior Court. Heard in the Court of Appeals 5 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody R. Hairston, for the State.

Edward Eldred for defendant-appellant.

DAVIS, Judge.

In this appeal, we consider whether a defendant can lawfully be convicted of the offenses of domestic criminal trespass and breaking or entering where he possessed the prior consent of the victim to enter some — but not all — of the premises at issue. David Allen Vetter ("Defendant") appeals from his convictions for domestic criminal trespass, misdemeanor breaking or entering, and injury to real property. Because we find that Defendant exceeded the scope of the permission that had been granted to him, we affirm his convictions.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: Defendant dated Brittany Poole for approximately two years and lived with Poole in her Lincolnton, North Carolina home from 2013 until April 2015. Despite the fact that Defendant never possessed a key

to the house, Poole provided him with a garage door opener and generally left the door leading from the garage to the interior of the residence unlocked during the time period when Defendant was living with her. The home also had a security system that could be activated and deactivated by entering a code on a keypad. Defendant possessed the code to the security system while he lived at the residence.

In April 2015, Poole ended the relationship and ordered Defendant to leave her home. Although he moved out of the residence, Defendant did not take all of his belongings with him. Poole placed the majority of Defendant's possessions in the garage. In addition, his boat remained in the driveway. On a number of occasions thereafter, she would "tell [ ] him to come get his things." Poole testified that although Defendant had permission to enter the garage to retrieve his belongings he was not permitted to go inside the interior of the home.

On 11 June 2015, Defendant arrived unannounced at the residence. He spoke to Poole in the driveway as he was securing his boat to his truck. She asked if he was there to take his boat, and Defendant responded that he had also come "to get some other stuff." Following this interaction, Poole activated her home security system and left to visit a friend in the nearby town of Maiden. Using an application on her cell phone, she was able to observe Defendant's actions by watching a video stream from cameras that had been installed at her residence as part of her home security system. She stopped watching once Defendant drove away with the boat.

Unbeknownst to Poole, shortly after leaving the residence Defendant returned to her home. Poole subsequently received a call from the security company informing her that her security alarm had been triggered. A company representative asked her if she wanted the police to be notified, and she responded in the affirmative. Poole returned to the residence and discovered that the door leading from the garage to the interior of the house was "completely kicked in," although nothing was missing.

Shortly thereafter, Deputy William Payne of the Lincoln County Sheriff's Office arrived at the residence. Using her cell phone, Poole accessed a video recording from the security cameras and viewed the video with Deputy Payne. The video showed a person entering the home through the broken interior garage door and attempting to turn off the alarm system before leaving the residence. Poole identified Defendant as the person shown on the video.

Defendant was indicted by a Lincoln County grand jury on 14 March 2016 for felony breaking or entering, domestic criminal trespass, and

injury to real property. A jury trial was held beginning on 29 November 2016 before the Honorable Nathaniel J. Poovey in Lincoln County Superior Court.

At trial, Poole testified on direct examination, in pertinent part, as follows:

> [PROSECUTOR]: Okay. Who made the decision for David Vetter to leave your home in April?
>
> [POOLE]: I mean, I told him to leave and he left, except his things were still at the home.
>
> . . . .
>
> [PROSECUTOR]: Okay. And as of June of 2015, what property, if any, did David Vetter still have at your home?
>
> [POOLE]: A lot of stuff. The garage was half filled with his stuff. There was stuff underneath my house and his daughter's bed suit was in the home.
>
> [PROSECUTOR]: Okay. And did he have permission to go in your garage to get any of that --
>
> [POOLE]: Yes.
>
> [PROSECUTOR]: -- stuff? Did he have permission to go into your home --
>
> [POOLE]: No.
>
> [PROSECUTOR]: -- inside your house to get any of that stuff --
>
> [POOLE]: No.
>
> . . . .
>
> [PROSECUTOR]: Okay. And did David Vetter have any -- have permission to take any of your items from within your home?
>
> [POOLE]: No.
>
> [PROSECUTOR]: Okay. And just tell the jury, if you would, in a little more detail about what happened while David Vetter -- while you were there at your home on June 11 and David Vetter was there.

[POOLE]: I walked out to get into my vehicle. I noticed he was there hooking his boat up. I walked back inside, locked my door, set the alarm, and left.

[PROSECUTOR]: And when you say "lock your door," which door?

[POOLE]: The garage door which I normally leave unlocked, I locked it.

[PROSECUTOR]: Why did you do that that day?

[POOLE]: Because I knew he was there and he had no reason to be inside the house.

. . . .

[PROSECUTOR: . . . Was there any conversation about him going in the house?

[POOLE]: No.

[PROSECUTOR]: Okay. And again, did he have permission to go into your house?

[POOLE]: No.

. . . .

[PROSECUTOR]: Okay. Now, you said, I believe, that you set your alarm with an app on your phone.

[POOLE]: Uh-huh.

[PROSECUTOR]: Did you have an occasion while you were there to do anything else in regard to your alarm?

[POOLE]: I watched him. I watched him on the outside cameras get the boat and leave, but I pretty much quit watching after that. And it was probably not even 20 minutes later that the alarm company called me to say, "Your alarm is going off. Do you want us to send the police?" And I said, "Yes. My ex-boyfriend has been there."

[PROSECUTOR]: Okay. And if you would, describe for the jury your alarm system, where you got it and how it was set up.

[POOLE]: It's CPI. They came in and set it all up.

[PROSECUTOR]: And do you know how to work that alarm system?

[POOLE]: Uh-huh.

[PROSECUTOR]: And how do you work that alarm system?

[POOLE]: Well, there's a keypad at the garage door that you can set it with, or I generally use the app. It's the easiest thing. I can watch the cameras from the app. I can set it. I can turn it on, off, delay it, whatever.

. . . .

[PROSECUTOR]: Okay. And did you -- while you were at the other address in Maiden, again, tell the jury what use, if any, you made of that app and how you did that.

[POOLE]: All I did was set the alarm and I left. And I watched the outside cameras to see that the boat and the truck left. But pretty much after that I quit watching it. I assumed he got the boat and he was not coming back.

[PROSECUTOR]: Okay. So did you actually see [him] leave on the app?

[POOLE]: Uh-huh.

. . . .

[PROSECUTOR]: Now let me be clear: So there were items in the garage that he could get?

[POOLE]: Uh-huh.

[PROSECUTOR]: But did he have permission to come into your house to get any items?

[POOLE]: He didn't need to be in the home. He didn't live there. He had plenty of stuff to get outside in my garage and underneath my home that were his that he could have taken.

. . . .

[PROSECUTOR]: But were those things limited -- Were you fine with him getting anything other than the things that he was getting out of the garage?

[POOLE]: No.

. . . .

[PROSECUTOR]: And did you ever on June 11 of 2015 give David Vetter permission to come within the main part of your home past the garage?

[POOLE]: He was allowed to get his belongings from the garage.

[PROSECUTOR]: Okay. But to come -- to come into --

[POOLE]: To come in the house?

[PROSECUTOR]: -- past the garage?

[POOLE]: No. No.

[PROSECUTOR]: And was he given permission without your presence to take any items at all from your house?

[POOLE]: Not from in the home.

On cross-examination, the following exchange occurred between Poole and Defendant's counsel:

[DEFENDANT'S COUNSEL]: Okay. You said this morning I think that at some point you gave Mr. Vetter notice to leave.

[POOLE]: Uh-huh.

[DEFENDANT'S COUNSEL]: Am I remembering that right?

[POOLE]: Uh-huh.

. . . .

[DEFENDANT'S COUNSEL]: Okay. When did you give him that notice to leave?

[POOLE]: April, May, something like that. End of April, beginning of May.

At the close of the State's evidence, Defendant moved to dismiss all three charges based on insufficiency of the evidence. The trial court denied Defendant's motion except as to the felonious breaking or entering charge and instead submitted the lesser included offense

of misdemeanor breaking or entering — along with the remaining two charges — to the jury.

On 30 November 2016, the jury convicted Defendant of misdemeanor breaking or entering, domestic criminal trespass, and injury to real property. The trial court consolidated the breaking or entering and domestic criminal trespass convictions and sentenced Defendant to 45 days imprisonment, suspended the sentence, and placed him on supervised probation for 24 months. The court also sentenced Defendant to 45 days imprisonment for the injury to real property conviction, suspended the sentence, and placed him on supervised probation for 24 months. Defendant filed a timely notice of appeal.

Analysis

Defendant argues that the trial court erred in denying his motion to dismiss the misdemeanor breaking or entering and domestic criminal trespass charges based on insufficiency of the evidence. "A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, __ N.C. App. __, __, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, __ N.C. __, 792 S.E.2d 508 (2016). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's 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). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

I. Breaking or Entering

[1] Defendant contends that the trial court erred in denying his motion to dismiss the misdemeanor breaking or entering charge because the State failed to present substantial evidence that he lacked consent to enter the residence. Specifically, he argues that his entry into the building was complete once he entered the garage and that his presence there was lawful based on Poole's prior consent.

Misdemeanor breaking or entering "is a lesser included offense of felonious breaking or entering and requires only proof of wrongful breaking or entry into any building." *State v. O' Neal*, 77 N.C. App. 600, 606, 335 S.E.2d 920, 924 (1985) (citation omitted). N.C. Gen. Stat. § 14-54(c) provides that for purposes of the crime of breaking or entering the term " 'building' shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." N.C. Gen. Stat. § 14-54(c) (2017). "Entry under this statutory crime has consistently been held to mean entry without the owner's consent." *State v. Boone*, 297 N.C. 652, 658, 256 S.E.2d 683, 687 (1979).

It is well established that for purposes of the crime of breaking or entering a person can possess consent to enter a portion — but not the entirety — of a building. *See*, *e.g.*, *State v. Rawlinson*, 198 N.C. App. 600, 679 S.E.2d 878 (2009); In re S.D.R., 191 N.C. App. 552, 664 S.E.2d 414 (2008). The defendant in *Rawlinson* was convicted of breaking or entering a business office attached to the retail area of a video store open to the public. *Rawlinson*, 198 N.C. App. at 604, 679 S.E.2d at 881. The State presented evidence that "members of the general public were only permitted entrance into the office when invited and accompanied by an employee of the video store." *Id.* at 610, 679 S.E.2d at 884. Because the defendant in *Rawlinson* was neither invited nor accompanied by an employee at the time he entered the office, we held that he lacked consent to enter for purposes of N.C. Gen. Stat. § 14-54. *Id.*

Likewise, in *S.D.R.* the defendant — who was convicted of felonious breaking or entering — was a participant in an after-school program at the Anson County Cooperative Extension Service. *S.D.R.*, 191 N.C. App. at 554, 664 S.E.2d at 417. Although asked to wait in the building's library by a staff member on the day in question, the defendant instead crossed the hall and entered the director's office where he proceeded to steal money from the director's purse. We noted that "[a]lthough the Extension is a public building that houses a public agency . . . the evidence does not show that [the director's] job functions necessarily require the general public to have access to her office or that members of the general public generally use [her] office." *Id.* at 558, 664 S.E.2d at 419. As a result, we concluded that the defendant lacked consent to enter the office. *Id.* at 559, 664 S.E.2d at 420.

Here, Poole testified that while Defendant was permitted to have access to the garage in order to collect his belongings he lacked

permission to enter the interior of the residence. Although Defendant retained a garage door opener after moving out of the home, he never possessed a key to the home and was not given the new code to the alarm system after Poole changed it following their break-up. Furthermore, Poole activated the alarm system upon seeing Defendant in her driveway on 11 June 2015 before she left. Finally, the fact that Defendant had to kick in the door in order to gain entry into the residence supports the proposition that he lacked permission to enter the home.

Therefore, we hold that the State presented sufficient evidence that Defendant lacked consent to enter the interior of the residence. *See State v. Thompson*, 59 N.C. App. 425, 427, 297 S.E.2d 177, 179 (1982) ("[T]estimony that the outside key had been removed to prevent the daughter from breaking in again, and that the daughter was not welcome when the key was removed . . . clearly indicated the victims' lack of consent to their daughter's entry in their absence without an express grant of permission."), *appeal dismissed and disc. review denied*, 307 N.C. 582, 299 S.E.2d 650 (1983). Accordingly, the trial court properly denied Defendant's motion to dismiss the misdemeanor breaking or entering charge.

II. Domestic Criminal Trespass

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the domestic criminal trespass charge. N.C. Gen. Stat. § 14-134.3 provides, in pertinent part, as follows:

> (a) Any person who enters after being forbidden to do so or remains after being ordered to leave by the lawful occupant, upon the premises occupied by a present or former spouse or by a person with whom the person charged has lived as if married, shall be guilty of a misdemeanor . . . .

N.C. Gen. Stat. § 14-134.3(a) (2017).

Defendant initially contends that the statute does not proscribe mere entry "without permission." Rather, he argues, "it criminalizes entry only after an express prohibition." According to Defendant, he was never "forbidden" from entering the interior of the residence because Poole never expressly prohibited him from doing so.

The term "forbid" is not defined in N.C. Gen. Stat. § 14-134.3. However, our Supreme Court has held that "[n]othing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary

meaning of words within a statute." *State v. Abshire*, 363 N.C. 322, 329, 677 S.E.2d 444, 449 (2009) (citation and quotation marks omitted).

Webster's Ninth New Collegiate Dictionary defines "forbid," in part, as "to hinder or prevent as if by an effectual command." *Webster's Ninth New Collegiate Dictionary* 482 (9th ed. 1991). Here, Poole ended her relationship with Defendant in April 2015 and ordered him to leave her residence. She then reaffirmed through her actions on 11 June 2015 the fact that Defendant was not allowed to go inside the house by locking the door and activating her alarm system upon discovering Defendant in her driveway. Her conduct served to prevent him from entering the interior of the residence and functioned as a prohibition against him doing so. Thus, we are satisfied that the State introduced sufficient evidence from which a rational juror could have found that Defendant was forbidden from entering Poole's home for purposes of N.C. Gen. Stat. § 14-134.3.

Defendant further asserts that he did not commit domestic criminal trespass because (1) his entry upon the *premises* occurred at the time he initially drove onto Poole's driveway; and (2) that entry took place in accordance with prior permission from Poole for him to return to the home to retrieve his belongings. Thus, he contends, because he had Poole's consent to enter the premises in the first place it necessarily follows that he could not have been guilty of domestic criminal trespass.

This argument fails for essentially the same reasons as his argument regarding his breaking or entering conviction. Although the "premises" occupied by Poole included both her home and the surrounding curtilage, the specific portion of the premises that Defendant was forbidden from entering was the interior of Poole's home. She had granted him limited permission to enter the garage in order to collect his belongings, but this consent never extended to the inside of the residence. Therefore, the fact that Defendant initially entered a *portion* of the premises with Poole's consent did not render him incapable of later trespassing upon a separate part of the premises where his presence was forbidden.

Finally, Defendant argues that because Poole was not physically present at the time he entered the interior of her home the statute's requirement that the premises be "occupied" at the time of the trespass was not satisfied. In support of this contention, Defendant cites N.C. Gen. Stat. § 14-34.1 (criminalizing the act of discharging a firearm "into an *occupied* dwelling") (emphasis added) and N.C. Gen. Stat. § 14-202 (proscribing peeping "secretly into any room *occupied* by another person") (emphasis added) as examples of statutory crimes that use the word "occupied" to require the victim's actual physical presence.

Defendant's reliance on these two statutes is misplaced, however, because the harms they seek to prevent could not logically occur absent the victim's physical presence at the time of the offense. With regard to the crime of domestic criminal trespass, conversely, the infliction of mental distress upon a victim resulting from a defendant's unauthorized entry into her home is a harm that can occur regardless of whether the victim is physically present at the time of the trespass. Accordingly, Defendant's argument lacks merit.

We recognize that the circumstances of this case differ from the typical fact pattern of a domestic criminal trespass prosecution in that the victim actually requested Defendant's presence upon a portion of her property. Nevertheless, viewing the evidence in the light most favorable to the State — as we must — a reasonable juror could have concluded that the State's evidence satisfied all of the elements of this offense. Therefore, we conclude that the trial court properly denied Defendant's motion to dismiss the domestic criminal trespass charge.

III. Clerical Error

[3] In his final argument, Defendant contends, and the State concedes, that a clerical error exists in the trial court's judgment. The judgment erroneously states that Defendant was convicted of misdemeanor larceny rather than misdemeanor breaking or entering. Accordingly, we remand for correction of this clerical error. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." (citation and quotation marks omitted)).

Conclusion

For the reasons stated above, we conclude that the trial court did not err in denying Defendant's motion to dismiss. However, we remand for the correction of a clerical error in the judgment.

NO ERROR AT TRIAL; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges ZACHARY and BERGER concur.

STATE v. WILKERSON

[257 N.C. App. 927 (2018)]

STATE OF NORTH CAROLINA
v.
ROBERT E. WILKERSON

No. COA17-800

Filed 6 February 2018

Constitutional Law—right to speedy trial—Barker factors—full evidentiary hearing required

The trial court's prior speedy trial ruling in a robbery and murder case based on a previous remand was vacated, and defendant's motion for a speedy trial in a case that was delayed for nearly four years was again remanded for a full evidentiary hearing on the factors in *Barker v. Wingo*, 407 U.S. 514 (1972).

Appeal by defendant from order entered 1 February 2017 by Judge W. Osmond Smith, III in Durham County Superior Court. Heard in the Court of Appeals 8 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Marc X. Sneed, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

TYSON, Judge.

Robert Earl Wilkerson ("Defendant") appeals from the denial of his motion to dismiss for violation of his right to a speedy trial. The superior court failed to adequately weigh and apply the factors in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed.2d 103 (1972), after our previous remand, and failed to fully consider the *prima facie* evidence of prosecutorial neglect. We vacate the superior court's order and again remand this matter to the superior court for a full evidentiary hearing and to make proper findings and analysis of the relevant factors.

I. Background

On 2 July 2010, Defendant was arrested for offenses allegedly occurring on 7 April 2010. Defendant was subsequently indicted for robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and first-degree murder.

On 7 May 2012, Defendant filed a *pro se* motion for a speedy trial, which was adopted by his attorney and argued at a hearing on 23 August 2012. This motion was denied. Defendant filed a *pro se* motion to dismiss for violation of his right to speedy trial on 21 April 2014. This motion was also adopted and argued by his counsel, and also denied.

Defendant was tried 21 April 2014 through 2 May 2014. The jury returned a verdict of guilty for robbery and conspiracy to commit robbery, but found Defendant not guilty of murder. Defendant was sentenced to 97-126 months for robbery and a consecutive 38-55 months for conspiracy. Defendant appealed.

Defendant's first appeal was heard on 7 July 2015. *State v. Wilkerson*, 242 N.C. App. 253, 775 S.E.2d 925, 2015 N.C. App. LEXIS 560 (unpublished). This Court concluded Defendant had failed "to show that the trial court committed prejudicial error at his trial" and affirmed the Defendant's convictions. *Wilkerson*, 2015 N.C. App. LEXIS 560 at *40. However, this Court also concluded "[t]he trial court erred by summarily denying Defendant's motion without considering all of the *Barker* factors and making appropriate findings." *Id.* at *39. This Court concluded that the trial court had "simply stat[ed] that Defendant had 'made an insufficient showing to justify a dismissal under speedy trial grounds[,]' " instead of weighing the factors identified by the Supreme Court of the United States and the Supreme Court of North Carolina *Id.* This Court remanded the proceedings to the trial court to make appropriate findings. *Id.* at *40.

Upon remand, the superior court denied Defendant's motion to dismiss. During what was calendared as a status hearing on the issues remanded, the superior court proceeded to "take action in response to the Court of Appeals remand." Finding "[b]oth parties at the hearing had the full opportunity to present any evidence [they] desired[,]" the superior court did not allow for any further argument or any additional evidence to be presented. Defendant objected to the lack of a full evidentiary hearing. The superior court stated it had considered the *Barker* factors when it made its first ruling, and recorded these past considerations in a written order denying Defendant's motion to dismiss on 1 February 2017. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). We review the superior court's order to determine "whether the trial judge's underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citation omitted).

IV. Right to a Speedy Trial

Defendant argues the superior court relied upon unsupported factual findings and improperly analyzed the *Barker* factors to conclude his right to a speedy trial was not violated. Defendant asserts a proper application of the *Barker* factors could support the conclusion that his right to a speedy trial was violated. After review of the arguments and evidence in the record, following the new evidentiary hearing on remand, the superior court should consider all the evidence, and decide how each factor, separately and together, weighs for and against the State and Defendant to reach a final ruling.

The Supreme Court of the United States laid out a four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated. *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 116-17. "These factors are: (1) the '[l]ength of delay;' (2) 'the reason for the delay[;]' (3) 'the defendant's assertion of his right[;]' and, (4) 'prejudice to the defendant.' " *State v. Carvalho*, 243 N.C. App. 394, 400, 777 S.E.2d 78, 83 (2015) (quoting *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 117), *aff'd per curiam* 369 N.C. 309, 794 S.E.2d 497, 497 (2016), *cert. denied* __ U.S. __, 199 L. Ed. 2d 19 (2017). None of these factors are determinative; they must all be weighed and considered together:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the constitution.

Barker, 407 U.S. at 533, 33 L. Ed. 2d at 118-19.

A. Length of Delay

"[T]he length of the delay is not *per se* determinative of whether defendant has been deprived of his right to a speedy trial." *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003); *see Carvalho*, 243 N.C. App. at 401, 777 S.E.2d at 84. No bright line exists to signify how much of a delay or wait is prejudicial, but as wait times approach a year, a presumption of prejudice arises. *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992). This " 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry." *Id.*

Here, over three years and nine months elapsed from Defendant's arrest until his trial began. This Court had previously remanded this matter to the trial court for a full review and application of the *Barker* factors, indicating the length of delay was sufficient to trigger such a review. *Wilkerson*, 2015 N.C. App. LEXIS 560 at *38-*39.

Upon remand, the trial court acknowledged this "amount of time [was] noteworthy" but was "not *per se* prejudicial" because of "all the matters necessarily involved in the preparation by the prosecution and the defense of this case involving a first degree murder charge with co-defendants, including pretrial discovery, investigation and analysis of crime scene and crime laboratory analysis[.]" No specified length of time is "*per se* prejudicial," but as one of four factors to be reviewed, this factor weighs in favor of Defendant and triggers the need for analysis of the remaining three *Barker* factors. *See Carvalho*, 243 N.C. App. at 401, 777 S.E.2d at 84.

B. Reason for Delay

Defendant bears the burden of showing the delay was the result of "*neglect* or *willfulness* of the prosecution." *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255 (emphasis original). "If a defendant proves that a delay was particularly lengthy, the defendant creates a prima facie showing that the delay was caused by the negligence of the prosecutor." *State v. Strickland*, 153 N.C. App. 581, 586, 570 S.E.2d 898, 902 (2002) (citing *State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 655-56 (1996)), *cert. denied*, 357 N.C. 65, 578 S.E.2d 594 (2013).

Once the defendant has made a *prima facie* showing of neglect or willfulness, the burden shifts to the State to rebut and offer explanations for the delay. *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255. The State is allowed "good-faith delays which are reasonably necessary for the State

to prepare and present its case[,]" but is proscribed from "purposeful or oppressive delays and **those which the prosecution could have avoided by reasonable effort**." *State v. Washington*, 192 N.C. App. 277, 283, 665 S.E.2d 799, 804 (2008) (citation omitted) (emphasis original). Different reasons for delay are assigned different weights, but only "valid reason[s]" are weighed in favor of the State. *Barker*, 407 U.S. at 531, 33 L. Ed. 2d at 117.

This Court in *Chaplin* found a pre-trial delay of 1,055 days, with the case being calendared thirty-one times before being called, constituted a *prima facie* showing of prosecutorial negligence or willfulness. *Chaplin*, 122 N.C. App. at 664, 471 S.E.2d at 656. The State was unable to offer any reasonable explanation for the excessive delay and continuances, and that factor weighed in favor of the defendant. *Id.*

This Court in *Strickland* concluded a delay of 940 days was enough to constitute a *prima facie* showing of prosecutorial negligence. *Strickland*, 153 N.C. App. at 586, 570 S.E.2d at 903. However, the State rebutted this showing by providing evidence of prosecutorial backlog. *Id.* at 587, 570 S.E.2d at 903. Because the defendant was unable to produce any evidence of neglect or willfulness by the prosecutor, this factor weighed in favor of the State. *Id.*

Here, Defendant's trial was delayed 1,390 days, nearly four years and at least a year longer than either *Chaplin* or *Strickland*. In addition, in the previous appeal this Court recognized:

> Defendant's trial counsel argued that (1) the State had made a material misrepresentation in responding to Defendant's earlier motion that it was still waiting on the SBI laboratory's analysis of evidence; (2) the State had improperly used the delay for the strategic purpose of working out a plea agreement with [co-defendant] between the 23 August 2012 hearing and the date of trial[.]

Wilkerson, 2015 N.C. App. LEXIS 560 at *39.

At the speedy trial motion hearing on 23 August 2012, the prosecutor represented to the superior court that the State was still waiting on the State Bureau of Investigation ("SBI") to provide some DNA analysis on hair samples. This SBI report had been completed on 24 February 2012, almost six full months before the date of the hearing. At the hearing, the prosecutor repeatedly stated the hair evidence was collected in April 2012, when in fact it had been collected in October 2011. The prosecutor explained he had been assigned to Defendant's trial in April 2011,

and began requesting additional analysis from the SBI and FBI at that time. No explanation was provided of why, if the prosecutor's hair collection date was accurate, the prosecutor had waited a year to request the hair samples from Defendant. Further, at the April to May 2014 trial, an FBI agent testified that an analysis of records dated 7 April 2010 was requested of him "a year or so" before trial.

While agreeing "in spirit" with Defendant's motion for a speedy trial, the prosecutor argued he could not move forward without the completion of the hair analysis. Despite the State's assertion at the speedy trial hearing that it was otherwise prepared to go to trial, the State moved for at least two continuances after the trial was initially set for September 2013. The first continuance was granted after the State alleged that necessary witnesses were unavailable. The second was granted after the State alleged additional discovery had been provided and witnesses listed in this additional discovery had not been subpoenaed.

The misrepresentation concerning the hair samples was brought up at Defendant's pretrial motion to dismiss for violation of his right to speedy trial. His *pro se* motion, which was adopted and argued by his counsel, included an affidavit on this matter, as well as supporting documentation of the addition of the co-defendant's plea deal. The trial court heard these arguments, and summarily denied Defendant's motion. On remand from Defendant's previous appeal, the superior court found:

> 6. The defendant, in his motion to dismiss, contended that the State delayed his trial by intentionally misrepresenting to the Court that SBI Crime Lab analysis results had not been received, that the intentional delay by the State was for an improper purpose in allowing the State to obtain a statement from a co-defendant implicating the defendant in the alleged crimes[.]
>
> . . .
>
> 8. Reason for delay. Not withstanding [sic] the defendant's assertion that the former prosecutor handling this case willfully and intentionally misrepresented to the Court that laboratory results had not been received, the defendant has failed to show that the trial delay was due to willfulness or neglect on the part of the prosecution.

These findings are not supported by the evidence. The prosecutor purports to place the entire blame for the delays upon the SBI, indicating

there was "no part of our negligence in no part." The prosecutor may not have been willfully misrepresenting the status of the SBI report to the trial court at the hearing, but at a minimum he most certainly was negligent in not knowing the status of this completed report he expressly used as a reason to delay the trial, regardless of what he asserted at the hearing.

The State argues crowded dockets and anticipated laboratory results are "neutral factors" and are "valid justifications for the delay." Nowhere in the record are crowded dockets alleged by the State or found by the trial court to be a reason for the delays in Defendant's trial. The State's misrepresentation, whether negligent or willful, at the speedy trial motion could have been avoided by reasonable efforts. *See Washington*, 192 N.C. App. at 283, 665 S.E.2d at 804.

The State acknowledges it misrepresented the status of the SBI report, but now asserts it was a "mistake." The superior court's finding that Defendant did not provide evidence of negligence by the State regarding the delay is unsupported by the record evidence. Defendant's evidence, if true, would tend to show this second *Barker* factor weighs in his favor. Upon remand, the superior court must consider the evidence which would support a *prima facie* showing of neglect or willfulness of the prosecutor, and then, if a *prima facie* showing is established, allow the State the opportunity to rebut it.

C. Defendant Asserted Right to Speedy Trial

"A criminal defendant who vigorously asserts his right to a speedy trial will be considered in a more favorable light than a defendant who does not." *Strickland*, 153 N.C. App. at 587, 570 S.E.2d at 903.

Defendant filed a *pro se* motion for speedy trial on 7 May 2012, which was adopted and argued by his counsel. Prior to his motion for speedy trial, Defendant contacted prison officials as early as 30 January 2012 and sought action on the detainer on the pending charges filed from Durham County. On 21 February 2012, Defendant filed a motion for final disposition of the detainer, requesting resolution of the charges. Defendant objected to the case being continued at least one of the two times.

The superior court acknowledged Defendant's motion for speedy trial in its findings of fact, though it fails to credit or resolve the other instances of Defendant "vigorously assert[ing] his right to speedy trial." *See id.* Considering the record evidence, this *Barker* factor tends to weigh in favor of Defendant.

D. Prejudice

Following *Barker*, this Court has repeatedly held:

> [t]he right to a speedy trial is designed: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Of these, the most serious is the last*, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

State v. Webster, 337 N.C. 674, 680-81, 447 S.E.2d 349, 352 (1994) (quoting *Barker*, 407 U.S. at 532, 33 L.Ed.2d at 118) (quotation marks omitted) (emphasis in *Webster*).

In its findings of fact, the superior court noted Defendant was "currently serving an active sentence for the unrelated drug trafficking conviction that began on August 2, 2011." Defendant was arrested for this current charge on 2 July 2010. The superior court found that as a result of this incarceration "any anxiety or concern by the defendant . . . is thereby somewhat reduced or minimized."

The fact a defendant is already incarcerated while awaiting trial "does not mitigate against his right to a speedy and impartial trial." *State v. Frank*, 284 N.C. 137, 141, 200 S.E.2d 169, 172 (1973) (citations omitted).

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from undue and oppressive incarceration prior to trial. But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him.

Smith v. Hooey, 393 U.S. 374, 378, 21 L. Ed. 2d 607, 611 (1969) (citation and quotation marks omitted).

During his hearing on his motion for speedy trial, Defendant asserted the Durham County detainer for first-degree murder was impacting his current incarceration on the drug trafficking charge. Due to the nature of the first-degree murder charge, Defendant was held in higher security custody, which limited where he could be housed. While not determinative of prejudice, the superior court's conclusion that because Defendant was incarcerated on other charges it was not prejudicial to delay his pending trial, is unsupported by the evidence presented.

The fact that Defendant was incarcerated on other charges does not indicate he would have reduced anxiety or concern over the pending charge. Beyond the additional anxiety Defendant faced while being housed in allegedly "extremely violent" quarters, "there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large." *Id.* at 379, 21 L. Ed. 2d at 612.

Defendant argued the delay allowed for the State to secure a plea deal with Leryan Scarlett, a co-defendant. Scarlett initially denied any involvement in the robbery. After being charged with additional offenses while out on bond, Scarlett negotiated with the State to testify against Defendant in exchange for the additional charges being dropped.

Defendant presented evidence this agreement with Scarlett was reached after his motion for speedy trial had been denied. The superior court's conclusion that this argument was "unsubstantiated and not supported by any evidence" is not supported by the evidence presented. The superior court should allow and consider additional evidence in order to properly consider this issue.

During the delay, Defendant's brother, who was listed to be an alibi witness for Defendant, died. Defendant's brother proposed to testify that Defendant was at work during the time of the robbery. The superior court found there were copies of time cards from work and possibly other employees who could serve as alibi witnesses for Defendant, but excluded or ignored statements of defense counsel concerning the other alibi witnesses:

> There were other employees, Your Honor, yes. I can tell the Court, unfortunately, several of the family members are not available at this time. In particular, one individual who you've already heard referenced, that's Mr. Rico Wilkerson, I believe he is in federal custody at this time. I know there are other individuals who I have not been able

> to establish contact with since 2012, individuals who I had contact with prior to that date, however.

The superior court's findings are not supported by the record, and its conclusion "there [was] no actual, substantial prejudice to the defendant as a result of the delay" is not supported by the facts.

"*Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.' " *Doggett*, 505 U.S. at 655, 120 L. Ed. 2d at 530-31 (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118). "If witnesses die or disappear during a delay, the prejudice is obvious." *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118.

The State argues Defendant was unable to show he was substantially prejudiced, and cites *State v. Goldman*, 311 N.C. 338, 346, 317 S.E.2d 361, 366 (1984), for the proposition a defendant must prove actual and substantial prejudice. Our Supreme Court in *Goldman* rejected the defendant's claims of faded memories and lost witnesses as prejudice. *Id.* Unlike the defendant in *Goldman*, Defendant presents more than "general averments" regarding the prejudice he suffered. *See id.* at 345, 317 S.E.2d at 366. Defendant indicated two specific instances where evidence essential to his defense was prejudiced because of the delays in bringing his charges to trial. This factor, above all others, requires a careful and thoughtful analysis before deciding whether or not Defendant was prejudiced by delays to his right to a speedy trial.

V. Conclusion

Trial courts "must" engage in a "difficult and sensitive balancing process" to ascertain whether a violation of a defendant's right to a speedy trial has occurred. *See Barker*, 407 U.S. at 533, 33 L.Ed.2d at 118-19; *see also Spivey*, 357 N.C. at 118-19, 579 S.E.2d at 255. This balancing process is difficult because

> it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978) (citing *Barker*, 407 U.S. 514, 33 L. Ed. 2d 101).

Upon review of the four *Barker* factors, with the limited record before us, Defendant tends to show his Sixth Amendment right to a speedy trial may have been violated. The length of the delay and the lack of appropriate reason for the delay tends to weigh in his favor. Defendant's evidence regarding the prejudice he suffered in his pre-trial incarceration and the prejudice to his ability to defend against his charges, if true, would tend to weigh in his favor, but requires a more nuanced consideration.

The superior court concluded it had "weighed" and "balanced" the factors, but provided no findings to support this assertion. The written order produced upon this Court's earlier remand was changed little from the order on the previously summarily denied motion. The superior court's findings of fact were not supported by the evidence.

A full evidentiary hearing is required in order for the superior court to hear and make an appropriate assessment of Defendant's arguments. If the superior court ultimately concludes Defendant's right to a speedy trial was violated, the only remedy is dismissing the indictment and vacating those convictions. *See Barker*, 407 U.S. at 522, 33 L.Ed.2d at 112.

The trial court's prior speedy trial ruling upon the previous remand is vacated. Defendant's motion for a speedy trial is again remanded for a full evidentiary hearing on all *Barker* factors. *It is so ordered.*

VACATED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

RALPH WHITEHURST, PETITIONER-APPELLEE
v.
EAST CAROLINA UNIVERSITY, RESPONDENT-APPELLANT

No. COA17-629

Filed 6 February 2018

1. Public Officers and Employees—state employee—-university police officer—dismissal—just cause

A university police officer's failure to file a non-criminal information report constituted unacceptable personal conduct in that he acted in violation of a known or written work rule, but, considering the discipline imposed in other cases involving similar violations, this did not provide just cause for the officer's dismissal.

2. Public Officers and Employees—State employee—university police officer—improper conduct at scene

The conduct of a university police officer at the scene of an arrest did not provide just cause for his dismissal where he received a report of an assault, and when he arrived at a the scene several people were sitting on the person arrested, they reported to the officer that that the defendant had hit a girl in a bar, no one informed the officer that defendant himself had been assaulted, and the officer allowed witnesses to leave the scene without properly investigating. The severity of his conduct was substantially mitigated by his misunderstanding of the situation.

3. Public Officers and Employees—discipline—demotion instead of dismissal

An Administrative Law Judge had the authority to determine that demotion rather than dismissal was an appropriate action under 25 NCAC 1J.0604(a) where just cause for dismissal did not exist (the officer allowed potential witnesses to leave a crime scene).

Appeal by respondent from the Final Decision entered 22 February 2017 by Administrative Law Judge Donald J. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 15 November 2017.

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

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph A. Newsome and Special Deputy Attorney General Stephanie A. Brennan, for the State.

The McGuinness Law Firm, by J. Michael McGuinness, for amicus curiae North Carolina Police Benevolent Association and Southern States Police Benevolent Association.

ZACHARY, Judge.

Respondent East Carolina University appeals from a Final Decision of the North Carolina Office of Administrative Hearings, which concluded that respondent did not have just cause to dismiss petitioner Ralph Whitehurst from his position as a police sergeant at East Carolina University. After careful review, we affirm the decision of the administrative law judge.

Factual and Procedural Background

Petitioner-appellee Ralph Whitehurst was initially employed by the East Carolina University ("ECU") Police Department in April 2004 as a Master Police Officer. ECU promoted Whitehurst to Public Safety Supervisor in June 2006. Whitehurst was a permanent State employee subject to the North Carolina Human Resources Act, Chapter 126 of the North Carolina General Statutes.

On the evening of 17 March 2016, Whitehurst responded to a dispatch call reporting an assault on the ECU campus. Whitehurst's actions on the scene resulted in negative media coverage, and ECU administration began taking steps to dismiss Whitehurst from employment.

On 21 July 2016, ECU Chancellor Cecil Staton issued ECU's Final University Decision dismissing Whitehurst from employment. Whitehurst filed a petition for a contested case hearing with the Office of Administrative Hearings on 28 July 2016. On 22 February 2017, Administrative Law Judge Donald J. Overby ("ALJ") issued a Final Decision reversing Whitehurst's dismissal, ordering instead that he be demoted.

At issue on appeal is ECU's decision to dismiss Whitehurst based on his response to the 17 March 2016 assault. The unchallenged details of the incident are as follows.

On the night of 17 March 2016, non-ECU student Patrick Myrick "hit a girl in the face" at a bar in downtown Greenville. This prompted a group of individuals to pursue Myrick. The group of individuals chased Myrick onto ECU's campus and began attacking him. Meanwhile, an ECU telecommunicator saw the attack on Myrick on the University's surveillance cameras and alerted the ECU police. Whitehurst responded to the scene and was the first officer to arrive.

The surveillance footage shows that the attack on Myrick had ended by the time Whitehurst appeared. When Whitehurst arrived, the scene was relatively calm and the group of individuals was detaining Myrick by sitting on top of him. Whitehurst had not been informed of the details of the attack, but knew only that he was responding to "an assault" on campus.

When Whitehurst approached the group, most of the individuals began to leave, and it does not appear from the surveillance video that Whitehurst made an attempt to detain them. The individuals who remained on the scene told Whitehurst that Myrick "had assaulted a girl downtown, punched her in the face." Whitehurst asked Myrick what happened and Myrick told him that he "had been in a fight downtown." Whitehurst secured Myrick by placing handcuffs on him; however, he did not attempt to prevent the remaining individuals from leaving the scene, nor did he ask them to stay so that he could obtain a statement. Whitehurst noticed blood on Myrick's face and contacted emergency rescue.

Other officers began to arrive several minutes later. By that point, almost all of the perpetrators and witnesses of the assault on Myrick had left the scene. Whitehurst directed Officer Chuck Wills "to make sure to get the individuals on scene information." In the surveillance footage, Officer Tarkington is seen talking on her cell phone to a dispatcher, who informed her that Myrick had been the victim of an assault. However, Officer Tarkington did not convey this fact to Whitehurst. Whitehurst contends that he did not hear any of the radio calls about Myrick being assaulted. Myrick was brought to the hospital and no further action was taken.

That same morning, around 3:30 a.m., Whitehurst notified Chief Gerald Lewis and other command officers that he had responded to an assault on campus. Chief Lewis viewed the surveillance footage of the incident. Sgt. Jermaine Cherry informed Chief Lewis that Whitehurst had not filed a report with respect to the assault. Chief Lewis was concerned that no official reports were filed and that Whitehurst had not detained anyone at the scene in order to gather information from them. On 18 March 2016, Chief Lewis initiated an Internal Affairs investigation. Whitehurst viewed the surveillance footage for the first time when he met with Chief Lewis on 21 March 2016. Chief Lewis informed Whitehurst that he was being placed on an Investigatory Placement with Pay status effective that day.

The Internal Affairs Investigation Report concluded that Whitehurst's response to the assault violated three written work rules. The Report found that Whitehurst violated General Order 1400-01 when he failed to obtain information from the witnesses and suspects. The Report also

found that Whitehurst violated General Order 500-02 (Field Reporting and Management) because he failed to ensure that the appropriate report was filed in order to document the incident. Lastly, the Report concluded that by failing to document the incident, Whitehurst violated General Order 1100-01 (Criminal Arrest Policy and Procedure), which requires documentation by a responding officer when a private citizen detains someone. Whitehurst was notified that a pre-disciplinary conference would be held on 18 April 2016, and that his dismissal was being recommended.

Whitehurst's pre-disciplinary conference was conducted by Chief Lewis and Sara Lilley of the ECU Human Resources Department on 18 April 2016. Despite Whitehurst's responses to the allegations against him, Chief Lewis and Lilley concluded that Whitehurst engaged in unacceptable personal conduct for which no reasonable person should expect to receive a prior warning. This conclusion was based on Whitehurst's failure to properly investigate and document the incident, both of which constitute willful violations of the General Orders, the department's written work rules. Whitehurst was notified by letter of his dismissal for unacceptable personal conduct on 19 April 2016.

Whitehurst properly followed the ECU grievance procedure. On 29 June 2016, a grievance hearing was held before a three-member panel at ECU to consider Whitehurst's dismissal. The Grievance Hearing Panel recommended to the Chancellor that Whitehurst be demoted, rather than dismissed. On 21 July 2016, ECU Chancellor Staton issued a Final University Decision upholding Chief Lewis's dismissal of Whitehurst from employment for unacceptable personal conduct.

Whitehurst filed a petition for a contested case hearing with the Office of Administrative Hearings on 27 July 2016. On 22 February 2017, Administrative Law Judge Donald J. Overby issued a Final Decision. The ALJ determined that ECU "met its burden of proof, by the preponderance of the evidence, that [Whitehurst's] actions on the night of March 17, 2016, constitute unacceptable personal conduct, [and] that [just] cause exists for disciplining [Whitehurst.]" However, the ALJ reversed ECU's decision to dismiss Whitehurst, and concluded that:

> taking into account all of the facts and circumstances in this case, . . . dismissal was not the appropriate discipline[.] Having considered all the evidence presented, [Whitehurst's] work and discipline history, the fact that he has not previously been discipline[d] and all relevant factors, the appropriate punishment for [Whitehurst] is demotion.

The ALJ ordered that Whitehurst be reinstated to his employment by ECU, "but demoted to a position one pay grade below the rank he held at the time of his separation." ECU timely filed Notice of Appeal to this Court from the ALJ's Final Decision pursuant to N.C. Gen. Stat. §§ 7A-29(a) and 126-34.02(a).

Discussion

On appeal, ECU argues that the ALJ erred in concluding as a matter of law that ECU did not have just cause to dismiss Whitehurst from employment. ECU also argues that the ALJ did not have the authority to order the alternative relief that Whitehurst be demoted. We conclude that ECU's arguments lack merit, and affirm the decision of the ALJ.

I. Standard of Review

The standard of review to be applied on appeal of an administrative tribunal's final decision 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 [the] decision are reviewed under the whole-record test." *N.C. Dep't. of Env't. & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (citation, quotation marks, and alterations omitted). Section 150B-51 of our State's Administrative Procedure Act sets out in more detail the applicable scope and standards of review. That Section provides that

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2016).

Where the asserted error falls under subsections 150B-51(b)(5) and (6), we apply the "whole record standard of review." N.C. Gen. Stat. § 150B-51(c) (2016). Under the whole record standard of review, the reviewing "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." *Harris v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, ___, 798 S.E.2d 127, 133, *aff'd per curiam*, ___ N.C. ___, ___ S.E.2d ___ (2017 N.C. LEXIS *1020) (2017). "Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Id.* However,

> "[t]he whole record test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." Therefore, the whole record test "does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views."

Blackburn v. N.C. Dep't. of Pub. Safety, ___ N.C. App. ___, ___, 784 S.E.2d 509, 518 (2016) (quoting *Carroll*, 358 N.C. at 674, 599 S.E.2d at 903-04 (internal quotation marks omitted) and *Lackey v. Dep't of Human Res.*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982)) (alteration omitted).

We conduct a *de novo* review of an asserted error of law falling under subsections 150B-51(b)(1)-(4), *supra*. N.C. Gen. Stat. § 150B-51(c) (2016); *Blackburn*, ___ N.C. App. at ___, 784 S.E.2d at 518. "Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Souther v. New River Area Mental Health Dev. Disabilities & Substance Abuse Program*, 142 N.C. App. 1, 4, 541 S.E.2d 750, 752 (2001) (internal quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the ALJ." *Blackburn*, ___ N.C. App. at ___, 784 S.E.2d at 518.

The determination of "whether a public employer had just cause to discipline its employee requires two separate inquiries[.]" *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898. The initial inquiry is "whether the employee engaged in the conduct the employer alleges[.]" *Id.* (quotation marks omitted). This is a question of fact, "reviewed under the whole record test." *Id.* After determining that the employee did engage in the conduct alleged, the second inquiry is "whether that conduct constitutes

just cause for the disciplinary action taken." *Id.* (quotation marks omitted). "Whether conduct constitutes just cause for the disciplinary action taken is a question of law we review *de novo*." *Warren v. N.C. Dep't of Crime Control & Pub. Safety*, 221 N.C. App. 376, 378, 726 S.E.2d 920, 923 (2012) (citing *Carroll*, 358 N.C. at 666, 599 S.E.2d at 898).

II. ALJ'S Findings of Fact

The majority of the ALJ's findings of fact have not been challenged, and are thus binding on appeal. *Blackburn*, ___ N.C. App. at ___, 784 S.E.2d at 519 (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). ECU only argues that Findings of Fact Nos. 44, 55, and 57 are unsupported by substantial evidence. However, "after careful review of the record and the ALJ's order," we do not find it necessary to assess the evidentiary support for each of these findings in order to determine whether the ALJ correctly found that ECU did not have just cause to terminate Whitehurst's employment. *Id.* We will review the evidence supporting these findings to the extent that they become material to the ALJ's decision below.

III. Just Cause

[1] The State Human Resources Act, Chapter 126 of the North Carolina General Statutes, creates "a constitutionally protected 'property' interest in the continued employment of career State employees." *Peace v. Employment Sec. Comm'n.*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998). Pursuant to N.C. Gen. Stat. § 126-35(a) (2016), "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." If a career State employee believes that he was discharged, suspended, or demoted without just cause, he "may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 126-34.02(a) (2016). The Office of Administrative Hearings must then determine whether just cause existed for the employee's dismissal, demotion, or suspension. N.C. Gen. Stat. § 126-34.02(b)(3) (2016). "[T]he burden of showing that a career State employee was discharged . . . for just cause rests with the employer." N.C. Gen. Stat. § 126-34.02(d) (2016).

Only two grounds may constitute just cause for disciplinary action, including dismissal, pursuant to 25 N.C.A.C. 1I.2301(c): (1) unsatisfactory job performance, including grossly inefficient job performance, and (2) unacceptable personal conduct. 25 N.C.A.C. 1I.2301(c) (2016). "Unacceptable personal conduct" includes, among other things, "conduct for which no reasonable person should expect to receive prior

warning" and "the willful violation of known or written work rules[.]" 25 N.C.A.C. 1J.0614(8)(a) and (d) (2016). One instance of unacceptable personal conduct may constitute just cause for dismissal, and an employee may be dismissed without any prior warning or disciplinary action. 25 N.C.A.C. 1J.0608(a) (2016); *Hilliard v. North Carolina Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

However, while "just cause" is defined to include "unacceptable personal conduct," "the fundamental question in a case brought under N.C.G.S. § 126-35 is whether the disciplinary action taken was 'just.' " *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900.

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. . . . If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.

Warren, 221 N.C. App. at 383, 726 S.E.2d at 925. Accordingly, not every instance of unacceptable personal conduct will "give[] rise to 'just cause' for employee discipline." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 901. Rather, "just cause" "is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case." *Id.* at 669, 599 S.E.2d at 900 (internal quotation marks and citations omitted).

In determining whether unacceptable personal conduct constitutes just cause for dismissal under *Warren's* third inquiry, we look to several factors that were set forth in *Wetherington v. N.C. Dep't of Public Safety*, 368 N.C. 583, 780 S.E.2d 543 (2015). Those factors include "the severity of the violation, the subject matter involved, the resulting harm, the [employee's] work history, or discipline imposed in other cases involving similar violations." *Id.* at 592, 780 S.E.2d at 548.

In the instant case, the ALJ concluded that, under the first step of the *Warren* analysis, Whitehurst failed (1) to submit a non-criminal information report, and (2) to properly investigate the on-campus assault. Under the second prong—whether Whitehurst's actions constituted unacceptable personal conduct—the ALJ concluded that Whitehurst's conduct at the scene constituted unacceptable personal conduct, but that his failure to submit a non-criminal report did not.

We agree that Whitehurst's failure to file a non-criminal report, in violation of General Order 500-02, did not constitute just cause for his dismissal. As the ALJ explained in Conclusion of Law No. 24, which ECU has not challenged,

> [Whitehurst's] failure to submit a non-criminal information report is not unacceptable personal conduct. While indeed policy stated that such a report was to have been submitted, the undisputed evidence was that *the pattern and practice of the department was that this was left to the discretion of the supervisor*. There is no evidence that anyone had ever been disciplined for failure to submit this report, let alone dismissed. The evidence was that [Whitehurst] himself thought the matter was subject to his discretion, and there was no evidence that [Whitehurst's] thinking was either unreasonable or contrary to the pattern and practice of the department.

(emphasis added).

Whitehurst's failure to file a non-criminal report constitutes unacceptable personal conduct in that he acted in violation of a known or written work rule pursuant to 25 N.C.A.C. 1J.0614(8). However, upon consideration of the "discipline imposed in other cases involving similar violations," we agree that this violation did not provide just cause for Whitehurst's dismissal.

[2] Concerning Whitehurst's conduct at the scene, in Conclusion of Law No. 26 the ALJ reasoned that:

> [Whitehurst's] conduct at the scene constitutes unacceptable personal conduct. Not only did he fail to gain control prior to the arrival of the other officers, but it seems as though at some point he lost sight of the fact that there had been an assault on campus, despite the fact he was responding to an assault on campus and had someone with obvious signs of injury.

However, the ALJ concluded that Whitehurst's unacceptable personal conduct did not provide just cause for his dismissal. Taking into consideration all of the facts and circumstances of the case, including the factors that our Supreme Court set forth in *Wetherington*, we agree.

We do not discount the harm that resulted from Whitehurst's conduct on the evening of 17 March 2016. However, "just cause" is a concept

"embodying notions of equity and fairness" to the *employee*. *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 (internal quotation marks omitted). Whitehurst's conduct must be judged with reference to the facts of which he was aware at the time of his actions. After reviewing the whole record, including the ECU surveillance video footage, we conclude that the severity of Whitehurst's conduct was substantially mitigated by his misunderstanding of the situation with which he was presented.

At the time Whitehurst reached the scene, no one was being assaulted. As acknowledged by Chief Lewis and confirmed by ECU's surveillance video footage, upon arrival Whitehurst encountered a group of individuals restraining Myrick. When Whitehurst approached the group, "it was reported to him that [Myrick] . . . had assaulted a girl downtown [and] punched her in the face[.]" In that Whitehurst was responding to "an assault," this reasonably led him to believe that the assault had ended, and that the gathered individuals had detained the perpetrator. No one on the scene, including Myrick, informed Whitehurst that there had been a separate assault on Myrick. In fact, when Whitehurst asked Myrick what happened, Myrick "told . . . Whitehurst that he . . . had been in a fight downtown . . . [a]nd . . . said nothing about being the victim of an assault [on campus.]" Fairness and equity do not allow just cause for dismissal to be predicated upon Whitehurst's failure to respond appropriately to facts of which he had no knowledge.

In consideration of the "discipline imposed in other cases involving similar violations[,]" *Wetherington*, 368 N.C. at 592, 780 S.E.2d at 548, the minimal discipline received by Officer Tarkington is also relevant to our just cause analysis. The only ECU officer on the scene privy to information regarding the assault on Myrick was Officer Tarkington. Officer Tarkington, however, failed to convey that information to Whitehurst, for which she was issued a written warning. The relatively light discipline imposed on Officer Tarkington for a similar violation weighs heavily against a determination that just cause existed for Whitehurst to be cashiered.

Whitehurst's discipline-free work history is also relevant to this just cause analysis. We agree with ECU that Chief Lewis was aware of Whitehurst's work performance history when he made the decision to dismiss Whitehurst, despite the ALJ's finding to the contrary. However, Chief Lewis's discounting of that factor has no bearing on this Court's consideration of it in our *de novo* review.

Whitehurst was subject to regular performance reviews by ECU and generally received above average ratings. Jimmy Cannon, an ECU police

sergeant who worked with Whitehurst for roughly twelve years, testified that "He's been an outstanding peer to work with especially when it comes to his knowledge of police procedures and police work in general. He's one of the best . . . that I've worked with[.]" Whitehurst had worked for ECU for twelve years, with no disciplinary action. This factor also mitigates against a finding that just cause existed to dismiss Whitehurst from employment based on his conduct the night of 17 March 2016.

Lastly, we note that Whitehurst's position as a supervising law enforcement officer does not lower the standard that must be met in order to justify his dismissal. ECU is correct in citing *Blackburn v. N.C. Dep't of Public Safety* for the proposition that there is a "degree of responsibility associated with [Whitehurst's] position" as a supervising law enforcement officer. *Blackburn*, ___ N.C. App. at ___, 784 S.E.2d at 528. *Blackburn* does not, however, hold that anything less than just cause is required to dismiss a State employee where that employee is a law enforcement officer. In *Blackburn*, we simply held that, given Petitioner Blackburn's duty to ensure the health and safety of inmates, his "actions of (1) allowing [an inmate] to remain lying on his bed in handcuffs for five days, (2) without receiving anything to drink during this time, and (3) without any attention to [the inmate's] condition," directly contributed to that inmate's death, and constituted "just cause to terminate [Blackburn] for grossly inefficient job performance." *Id.* Whitehurst's violations in the present case clearly do not rise to the level of severity present in *Blackburn*.

We agree that Whitehurst's position as a law enforcement officer imposed duties upon him which are not commonly shared by other State employees. Nonetheless, Whitehurst is entitled to the exacting protections given to all career State employees pursuant to N.C. Gen. Stat. § 126-35. Considering all of the facts and circumstances of the present case, we conclude that ECU did not have just cause to dismiss Whitehurst from employment.

IV. ALJ's Authority to Demote Whitehurst

[3] ECU next argues that the ALJ did not have the authority to order that Whitehurst be demoted instead of dismissed after having found that just cause existed to impose "some" discipline on Whitehurst. This argument is unavailing.

" 'Unacceptable personal conduct does not necessarily establish just cause for all types of discipline.' " *Harris*, ___ N.C. App. at ___, 798

S.E.2d at 137, *aff'd per curiam*, ___ N.C. ___, ___ S.E.2d ___ (2017 N.C. LEXIS *1020) (quoting *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925). Rather, "[j]ust cause must be determined based upon an examination of the facts and circumstances of each individual case." *Id.* This inquiry extends not only to whether just cause existed to discipline generally, but also to whether just cause existed to impose the particular disciplinary action taken.

Upon its review of a contested case, the ALJ "may grant the following relief: (1) [r]einstate [the] employee to the position from which the employee has been removed[,] (2) [o]rder the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied[, or] (3) *[d]irect other suitable action to correct the abuse*[.]" N.C. Gen. Stat. § 126-34.02(a) (2016) (emphasis added). As our Supreme Court explicitly affirmed in *Harris*, the ALJ has the "authority to direct other suitable action upon a finding that just cause does not exist for the particular action taken by the agency[,]" which "includes the authority to impose a less severe sanction as 'relief.' " *Harris*, ___ N.C. App. at ___, 798 S.E.2d at 138, *aff'd per curiam*, ___ N.C. ___, ___ S.E.2d ___ (2017 N.C. LEXIS *1020) (quotation marks and alteration omitted). After reviewing the particular facts and circumstances of the case, "the ALJ may impose an alternative sanction within the range of allowed dispositions[]" set forth in 25 NCAC 1J.0604(a): "(1) written warning; (2) Disciplinary suspension without pay; (3) Demotion; and (4) Dismissal." *Id.*

In the present case, based on the information he had received, Whitehurst had no reason to believe that any of the individuals present at the scene were perpetrators of an assault on Myrick. Nevertheless, these individuals were potential witnesses, and Whitehurst made no attempt to prevent them from leaving the scene and did not request that they not leave the scene. The ECU surveillance video footage shows that after about 45 seconds, eight of the ten people present at Whitehurst's arrival had been allowed to walk away. As the Internal Affairs investigation found, this was in violation of General Orders 1400-01 and 1100-01. This also constituted unacceptable personal conduct for which no reasonable person should expect to receive a prior warning. Accordingly, while just cause did not exist to dismiss Whitehurst, "considering the totality of the unique facts and circumstances of the present case," *id.* at ___, 798 S.E.2d at 137-38, we affirm the ALJ's determination that demotion was an appropriate form of "other suitable action to correct the abuse[.]" N.C. Gen. Stat. § 126-34.02(a)(3) (2016).

Conclusion

For the reasons explained herein, the Final Decision of Administrative Law Judge Donald J. Overby is

AFFIRMED.

Judges STROUD and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 FEBRUARY 2018)

BRANCH BANKING & TR. CO. v. SURANE No. 17-842	Mecklenburg (16CVS3222)	Affirmed
COOK v. COOK No. 17-359	Wake (10CVD8072)	Vacated and Remanded
FAIRCLOTH v. FAIRCLOTH No. 17-332	Rockingham (12CVD1455)	Affirmed
HENDERSON v. HENDERSON No. 16-72-2	Mecklenburg (10CVD8288)	Affirmed
HOPKINS v. THOMAS No. 17-474	Pamlico (16CVS101)	Reversed
IN RE B.M. No. 17-663	Rutherford (09JA133)	Affirmed in part; Vacated in part.
IN RE C.C. No. 17-654	Wake (16SPC8132)	Affirmed
IN RE G.D.O. No. 17-902	Mecklenburg (14JT807) (14JT808) (16JT90)	Affirmed
IN RE K.W. No. 17-735	Guilford (16JA527)	Reversed and Remanded
IN RE S.K.D.M. No. 17-573	Caldwell (14JA112)	Affirmed
IN RE SMITH No. 17-483	Gaston (14SP50)	Affirmed
JACOBSON v. PADGETT No. 17-192	Wake (16CVD2437)	Dismissed
JENKINS v. EASTER SEALS UCP OF N.C. & VA., INC. No. 17-540	N.C. Industrial Commission (14-002099)	Affirmed
KEENA v. CEDAR ST. INVS., LLC No. 17-852	Mecklenburg (16CVS9789)	Affirmed

KELLY v. POLK CTY. N.C. No. 17-832	Polk (17CVS29)	Affirmed
LEE v. CTY. OF CUMBERLAND No. 17-446	Cumberland (14CVS9502)	Affirmed
LINKER v. LINKER No. 17-894	Guilford (14CVD359)	Affirmed
MESSER v. POLLACK No. 17-582	Haywood (09CVD589)	Vacated and Remanded
PARSONS v. PARSONS No. 17-278	Ashe (16CVS211)	Affirmed
SMS CONSTR., INC. v. WITTELS No. 16-1081	Dare (11CVS861)	Affirmed
STATE v. ANDREWS No. 16-925	Edgecombe (13CRS52078-79) (13CRS52080-81)	No Error
STATE v. ARTIS No. 17-478	Lenoir (15CRS51413) (16CRS411)	No Error
STATE v. BROWN No. 17-818	Mecklenburg (14CRS19602) (17CRS15)	No error in part, remanded in part.
STATE v. DAVIS No. 17-721	Guilford (13CRS98087) (13CRS98093-94) (14CRS24059)	No Error
STATE v. DORSEY No. 17-684	Guilford (14CRS83281-83)	No Error
STATE v. FERRELL No. 17-300	Durham (15CRS3817) (15CRS59165)	NO PREJUDICIAL ERROR
STATE v. FORNEY No. 17-631	Watauga (15CRS50683) (15CRS541)	No Error
STATE v. GATES No. 17-772	Swain (15CRS459) (15CRS50650-51)	No prejudicial error

STATE v. GOINS No. 17-458	Guilford (15CRS72384)	No Error
STATE v. HERRERA No. 17-695	Forsyth (12CRS40079)	Reversed and Vacated
STATE v. JACOBS No. 17-539	Brunswick (15CRS56227) (15CRS56234)	Vacated and Remanded; Remanded for correction of clerical error.
STATE v. JOHNSON No. 17-412	Cabarrus (14CRS51159) (14CRS51844) (15CRS1125) (15CRS1766)	Affirmed
STATE v. LILLY No. 17-835	Craven (15CRS50778)	Affirmed
STATE v. LLOYD No. 17-838	Forsyth (13CRS10665) (13CRS52707)	Affirmed
STATE v. MARTINEZ No. 17-505	Wake (02CRS53666) (08CRS81625-26)	No Prejudicial Error
STATE v. MAZARIEGOS No. 17-685	Wayne (15CRS50840)	Affirmed
STATE v. McALLISTER No. 17-614	Wilson (15CRS52815-16) (16CRS1081)	No error in part; no plain error in part; dismissed in part
STATE v. MITCHELL No. 17-706	McDowell (14CRS50464)	No Error
STATE v. RIGGINS No. 17-571	Alamance (05CRS59299-311) (05CRS59366-373)	Affirmed
STATE v. UPRIGHT No. 17-678	Rowan (15CRS2358) (15CRS50759-60)	No Error
STATE v. WHITE No. 17-214	Mecklenburg (15CRS207188) (15CRS24438)	Affirmed

STATE v. WHITE No. 17-142	Franklin (14CRS49)	NO PREJUDICIAL ERROR
STATE v. WHITEHEAD No. 16-294-2	Nash (13CRS54109)	No Error
STATE v. WILSON No. 17-750	Buncombe (15CRS83040)	No Error
STATE v. WOMACK No. 17-635	No Error (15CRS245429)	Mecklenburg
THOMSON v. HOLLING No. 17-734	Union (12CVD2587)	Vacated and remanded.
VINES v. McKOY No. 17-555	Durham (15CVD3128)	Dismissed

HEADNOTE INDEX

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APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

Interlocutory orders and appeals—dismissal orders—right to bring appeal after final judgment—Both 17 June and 31 August 2016 dismissal orders were properly before the Court of Appeals for review in an action related to timbering activities that had occurred on property belonging to a corporate entity in the process of being dissolved where plaintiff corporation was a limited partner, and not the acquiring corporation, at the time the suit was filed. Plaintiff's first appeal was from an interlocutory order and it was within plaintiff's right to bring this appeal following entry of a final judgment. **WLAE, LLC v. Edwards, 251.**

Interlocutory orders and appeals—issues in other claims—risk of inconsistent verdicts—The trial court's dismissal of a constitutional claim against defendant county was immediately appealable to the Court of Appeals due to the risk of inconsistent verdicts. The claim turned on issues that had to be determined as part of other claims pending before the trial court (the permit and building code approval for a fence). **Ballard v. Shelley, 561.**

Interlocutory orders and appeals—motion to compel arbitration—substantial right—An order denying a motion to compel arbitration affects a substantial right and is therefore immediately appealable. **iPayment, Inc. v. Grainger, 307.**

Interlocutory orders and appeals—redundant claim—substantial rights—The Court of Appeals dismissed plaintiffs' interlocutory appeal from the dismissal of their declaratory judgment claims against defendant county, based on lack of appellate jurisdiction. The dismissal of a redundant claim that mirrored two other remaining claims did not implicate substantial rights. **Ballard v. Shelley, 561.**

JNOV—directed verdict motion—not renewed at the close of all evidence—Defendant did not preserve for appellate review the denial of his motion for JNOV when he did not move for a directed verdict at the close of all the evidence. **Martin v. Pope, 641.**

Mootness—construction bond—architectural review application—contested fine—Plaintiff lot owners' appeal from defendant homeowner association's authority under its subdivision covenants to impose a $250 construction bond for plaintiffs' architectural review application for approval to remove trees and brush from their own yard was not moot where defendant's authority to require a bond directly related to defendant's power to impose a contested fine of $1,400 based on failure to post a bond. **McVicker v. Bogue Sound Yacht Club, Inc., 69.**

Mootness—willful violation of probation—future adverse consequences—Where the trial court entered an order finding defendant in willful violation of his probation, defendant's appeal challenging the trial court's jurisdiction to consider whether he violated his probation was not moot even though he already had served the entire sentence assigned for revocation. Defendant would be subject to adverse consequences in the future based on the trial court's order, such as an aggravating factor in a future criminal proceeding. **State v. Peed, 842.**

Notice of appeal after verdict but before entry of judgment—writ of certiorari—Where defendant gave oral notice of appeal in open court after the jury returned its verdict but before the entry of judgment by the trial court, his right to appeal was lost based on his failure to comply with Rule of Appellate Procedure 4(a). In its discretion, the Court of Appeals granted defendant's petition for writ of certiorari and considered the merits of his argument. **State v. Coley, 780.**

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

The trial court did not err in a foreclosure case by denying plaintiff's motion asking the trial court to alter or amend its judgment, or plaintiff's challenge to the trial court's authority to conduct a hearing in a different county, where plaintiff failed to articulate a legal argument or cite authority. **Wilson v. SunTrust Bank, 237.**

Preservation of issues—waiver—no ruling below—Defendant waived appellate review of whether the trial court erred by failing to allow defendant to join necessary parties where defendant did not obtain a trial court ruling on the issue. **Ford Motor Credit Co. LLC v. McBride, 590.**

Rule of Appellate Procedure 2—discretionary review—conviction unsupported by evidence—On remand from the Supreme Court, the Court of Appeals exercised its discretionary authority under Rule of Appellate Procedure 2 to consider defendant's argument concerning the sufficiency of the evidence to support his larceny conviction. The Court of Appeals explained a number of reasons for allowing discretionary review: The Supreme Court had previously suggested that fatal variances of the type in this case are sufficiently serious to justify review under Rule 2; allowing a conviction unsupported by evidence to stand would result in manifest injustice; and the exercise of discretionary authority under Rule 2 should be uniform and consistent from case to case. **State v. Campbell, 739.**

Standard of review—de novo for summary judgment—abuse of discretion for injunctive relief—Although de novo review is applied to orders granting summary judgment as to contracts claimed void for illegality, the abuse of discretion standard applies for the trial court's fashioning of injunctive relief. **Mid-Am. Apartments, L.P. v. Block at Church St. Owners Ass'n, Inc., 83.**

Waiver of appellate review—no motion to dismiss—Defendant waived appellate review of his argument that the evidence of aiding and abetting was insufficient to sustain his convictions stemming from the falsification of court records because he failed to make the appropriate motion to dismiss at trial. **State v. Golder, 803.**

Waiver—narrow objection at trial—broadened on appeal—Where defendant made a narrow objection at trial to the sufficiency of the evidence of obtaining property by false pretenses (that the dollar amount attributed to the thing of value obtained was less than alleged in the indictment), he could not broaden his argument on appeal to say that the evidence was insufficient because he did not obtain anything of value. He waived the new theory by not arguing it before the trial court. **State v. Golder, 803.**

Writ of certiorari—considerations of judicial economy—covenant not to compete—Assuming, without deciding, that plaintiff company failed to make the requisite showing of a substantial right with regard to the court's ruling under North Carolina Rule of Civil Procedure 12 in a case involving an alleged breach of a covenant not to compete, the Court of Appeals elected to treat plaintiff's appeal as a petition for certiorari and considered the appeal on its merits based on considerations of judicial economy and pursuant to its discretion under Rule 21 of the North Carolina Rules of Appellate Procedure. **Mkt. Am., Inc. v. Lee, 98.**

Writ of certiorari—untimely appeal from criminal judgment—civil judgment on attorney fees meritorious—The Court of Appeals exercised its discretion to issue a writ of certiorari to review a criminal judgment for assault and burglary where defendant failed to timely appeal, and also for a civil judgment for attorney fees where the issue was meritorious. **State v. Friend, 516.**

CIVIL PROCEDURE—Continued

CONSTITUTIONAL LAW

Double jeopardy—lesser-included offenses from same facts—Entry of judgment on defendant's convictions for common law robbery and the lesser-included offenses of non-felonious larceny and simple assault, which arose out of the same facts as the robbery, violated defendant's right to be free from double jeopardy. Defendant received the lowest possible sentence in the mitigated range, so the Court of Appeals did not remand for resentencing but did arrest judgment on his convictions for non-felonious larceny and simple assault so as to avoid any collateral consequences. **State v. Cromartie, 790.**

Due process—equal protection—attorney misconduct in evidentiary hearing—amount of time of hearing—prosecutorial misconduct—findings of fact—The Disciplinary Hearing Commission did not violate defendant attorney's due process and equal protection rights in an evidentiary hearing for attorney misconduct where there was no required amount of time to consider the evidence, no prosecutorial misconduct, and the findings of fact were not vague. **N.C. State Bar v. Livingston, 121.**

Due process—quasi-judicial hearing—agreed-upon procedures—Petitioner company was not denied due process in quasi-judicial hearings before a county Board of Adjustment in a zoning case, considering a special use permit to operate a rock quarry, where every party was represented by counsel who all agreed upon the procedures to be followed. **Little River, LLC v. Lee Cty., 55.**

Effective assistance of counsel—premature claim—dismissed without prejudice—Defendant's ineffective assistance of counsel claim in an assault and burglary case was premature and dismissed without prejudice to pursue it through a motion for appropriate relief in the trial court. **State v. Friend, 516.**

Procedural due process—reconsideration of fence permit—sufficiently pled claim—In a case arising from a neighborhood dispute about a fence, plaintiff property owners sufficiently stated a valid procedural due process claim where their complaint alleged that defendant county reconsidered previously approved permit and code determinations without notifying plaintiffs or allowing them an opportunity to contest the decision. **Ballard v. Shelley, 561.**

Right to counsel—forfeiture by conduct—failure to hire counsel—repeated delays—pro se representation—The trial court did not err in a drug trafficking case by requiring defendant to proceed pro se where defendant forfeited his right to counsel by failing to hire counsel for years, resulting in repeated delays in the case proceeding to trial. The trial court followed the parameters set forth under N.C.G.S. § 15A-1242 in determining that defendant unequivocally elected to proceed pro se. **State v. Schumann, 866.**

Right to counsel—no forfeiture of right—no serious misconduct or flagrant tactics—A defendant in a rape and kidnapping case did not engage in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. There was no indication of flagrant tactics or that defendant engaged in any inappropriate behavior either in court or with his assigned counsel. **State v. Pena, 195.**

Right to counsel—pro se—clear and unequivocal waiver required—The trial court erred in a rape and kidnapping case by denying defendant his constitutional right to counsel by requiring him to proceed to trial pro se when he did not clearly and unequivocally elect to do so. While defendant did state that he would represent

CRIMINAL LAW—Continued

prosecutor injected his personal beliefs, appealed to the jury's passion, and led the jury away from the evidence. The challenged portions of the prosecutor's argument, when taken in context of his entire argument, drew reasonable inferences based on defendant's inconsistent statements. Further, the prosecutor's statement that he would "respectfully disagree" if the jury found that defendant acted in self-defense was not so grossly improper as to render the trial and conviction fundamentally unfair. **State v. Mumma, 829.**

Prosecutor's argument—prior inconsistent statements—The trial court did not abuse its discretion in a first-degree sex offense with a child case by not intervening ex mero motu during the State's closing argument where defendant failed to demonstrate how the prosecutor's recitation of prior out-of-court statements by the victim and a witness that were inconsistent with their trial testimony rendered the proceedings fundamentally unfair, given the trial court's later instruction limiting the jury from considering prior inconsistent statements as substantive evidence and the other overwhelming evidence of defendant's guilt. **State v. Phachoumphone, 848.**

DECLARATORY JUDGMENTS

Identification of boundary line—adverse possession—premature dismissal of negligence and nuisance claims—The trial court erred in an action involving a dispute over a property line by dismissing plaintiff's amended claims for negligence and nuisance with prejudice based on defendants' purported violation of a county's 15-foot setback requirement where the true boundary line between the parties' properties had not yet been determined. **Parker v. DeSherbinin, 319.**

Identification of boundary line—location of fence—adverse possession—The trial court erred in an action involving a dispute over a property line by making a finding of fact that plaintiff constructed a fence along what he believed to be the northern-boundary line of his property where the overwhelming non-contradicted evidence indicated he constructed a fence within the boundary of his property. **Parker v. DeSherbinin, 319.**

Rezoning—lack of standing—failure to allege actual or imminent injury—The trial court did not err by dismissing plaintiff adjacent landowners' declaratory judgment action against defendants challenging the rezoning of a tract of land to allow for the development of a new elementary school and single-family development on the property, where defendants lacked standing. A county ordinance rezoning a tract of land is not subject to challenge in court by owners of an adjacent tract who fail to allege actual or imminent injury resulting from the rezoning. **Ring v. Moore Cty., 168.**

Standing—rezoning—failure to show special damages—The Court of Appeals dismissed plaintiff nonprofit's appeal in a rezoning case where it did not show it had standing to maintain a declaratory judgment action by failing to forecast evidence that it sustained special damages that were distinct from the rest of the community. **Cherry Cmty. Org. v. City of Charlotte, 579.**

DISCOVERY

Motion for relief—ex parte proceedings—police officer's personnel files and educational records—failure to produce affidavits or other evidence showing need—no special proceeding or action initiated—The trial court erred in an

STATUTES OF LIMITATION AND REPOSE—Continued

statute of limitations, and his action for conversion of chattels and goods was not brought within the applicable three-year statute of limitations. **Honeycutt v. Weaver, 599.**

Distribution of deceased's assets—statute of limitations—Plaintiff did not bring claims for breach of fiduciary duty, constructive fraud, and declaratory judgment within the applicable 10-year statute of limitations in an action between a brother and a sister arising from the sister's transfer of real estate to herself under her mother's power of attorney. The doctrine of adverse possession was not relevant, and any such claim would be subject to the 7-year statute of limitations under N.C.G.S. § 1-38. The statute of limitations was not stayed by plaintiff's petition claiming that the sister had renounced her right to be executor because the claims were not related to the mother's will but to the conveyance of real property while the sister was acting as attorney-in-fact. **Honeycutt v. Weaver, 599.**

TAXATION

Ad valorem assessment—erroneous—The decision of the N.C. Tax Commission concerning Forsyth County's ad valorem tax assessment of Lowe's Home Centers' real property was reversed and remanded where the County relied only on the cost approach to valuation and should have considered the income and comparable sales approaches to establish a true value; there was a substantial difference in value whichever assessment the County used; and the County abandoned the presumption of correctness afforded its initial assessment by abandoning that assessment in favor of the higher value given by its expert. The burden on the taxpayer was one of production of evidence that the County's valuation was arbitrary, not of persuasion. **In re Appeal of Lowe's Home Ctrs., LLC, 610.**

TERMINATION OF PARENTAL RIGHTS

Neglect—probable repetition—There was sufficient support for terminating a mother's parental rights where a social worker's testimony, along with the trial court's findings about the mother's lack of significant progress on her case plan, provided sufficient support for the finding that there would be a probable repetition of neglect if the child was returned to her care. While the mother was correct that she did not completely fail to work on her case plan, that work was only sporadic and inadequate. **In re M.J.S.M., 633.**

No-merit brief—termination affirmed—The termination of a father's parental rights was affirmed where his counsel filed a no-merit brief and the termination order included sufficient findings of fact, supported by clear, cogent, and convincing evidence to conclude that at least one statutory ground for termination existed. The trial court made appropriate findings on each of the relevant dispositional factors and did not abuse its discretion in assessing the child's best interests. **In re M.J.S.M., 633.**

Willful abandonment—findings not sufficient—An order terminating respondent's parental rights was vacated and remanded where the father's parental rights were terminated for willfully abandoning his child but the findings did not specifically address the six-month period immediately before the filing of the petition, were not adequate to support the ultimate finding that the father's conduct was willful, did not address the efforts the father could have been expected to make while incarcerated, and improperly mixed factual findings with conclusions of law. **In re D.E.M., 618.**

ZONING—Continued

Special use permit—rock quarry—arbitrary and capricious denial—no rebuttal of prima facie case—A county Board of Adjustment's decision in a zoning case to deny petitioner company's application for a special use permit to operate a rock quarry was arbitrary and capricious where there was no competent, material, and substantial evidence to counter or rebut petitioner's prima facie case or to support the Board's denial. **Little River, LLC v. Lee Cty., 55.**

Special use permit—rock quarry—prima facie showing—public health or safety—specification and conditions—impact on adjoining property values—harmony with adjoining properties—The trial court erred in a zoning case by concluding that petitioner company failed to make a prima facie showing of entitlement to a special use permit (SUP) for operation of a rock quarry where the proposed quarry would be established on a parcel already zoned and permitted for this use and would not have a material adverse impact on public health or safety, met all required specifications and conditions, expert testimony showed no impact on the adjoining or abutting property values, and the adjoining or abutting property owners were in favor of issuing the SUP for the quarry and testified to it being in harmony with their adjoining properties and surrounding areas. **Little River, LLC v. Lee Cty., 55.**

Use permit—solar energy farm—prima facie showing of entitlement—Where petitioners presented a prima facie showing of entitlement to their use permit to construct a solar energy farm and the county board of commissioners' denial of the application was based on lay opinion and speculation, the denial was unsupported by competent substantial evidence and was reversed. **Ecoplexus Inc. v. Cty. of Currituck, 9.**