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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ANGELA MESHELL BLUITT, PLAINTIFF
v.
WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER, WAKE FOREST UNIVERSITY, NORTH CAROLINA BAPTIST HOSPITAL AND EVAN RUBERY, MD, DEFENDANTS

No. COA17-1170

Filed 17 April 2018

1. Medical Malpractice—Rule 9(j)—documents outside the pleadings—motion to dismiss

A trial court's consideration of affidavits related to its N.C.G.S. § 1A-1, Rule 9(j) ruling did not convert a motion to dismiss into a motion for summary judgment. When a court rules on a Rule 9(j) motion, it must consider the facts relevant to Rule 9(j) and apply the law to them.

2. Medical Malpractice—res ipsa loquitur—Rule 9(j) certification—cardiac ablation

The trial court correctly dismissed a medical malpractice claim for failure to meet the requirements of N.C.G.S. § 1A-1, Rule 9(j) where plaintiff claimed that the trial court improperly applied the pretrial certification requirement because the claim was based in res ipsa loquitur. The medical procedure in this case involved a cardiac ablation, a complex procedure requiring expert testimony for a lay person to have a basis for determining negligence.

Appeal by plaintiff from order entered 1 June 2017 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 21 March 2017.

The Law Office of Java O. Warren, by Java O. Warren, and Christopher Allen White Law, by Christopher Allen White, for plaintiff-appellant.

Smith Moore Leatherwood LLP, by Kip D. Nelson, D. Clark Smith, Jr. and Joshua O. Harper, for defendants-appellees.

ARROWOOD, Judge.

Angela Meshell Bluitt ("plaintiff") appeals from an order granting Wake Forest University Baptist Medical Center, Wake Forest University, North Carolina Baptist Hospital, and Evan Rubery, MD's ("defendants") motion to dismiss for failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. For the reasons stated herein, we affirm the order of the trial court.

I. Background

On 31 January 2017, plaintiff filed a complaint for medical negligence against defendants, relying on the theory of *res ipsa loquitur*. The complaint alleged as follows. On or about 31 January 2014, plaintiff underwent a cardiac ablation, a surgery to remedy an irregular heartbeat, at Wake Forest University Baptist Medical Center. Plaintiff received general anesthesia, rendering her unconscious during the procedure. When plaintiff awoke after the surgery, she immediately "experienced horrific and excruciating pain in her lower back." Prior to being admitted for the cardiac ablation, plaintiff had no back pain or injury, and she claims no personal knowledge as to how, why, or when she sustained the injury to her back. On or about 24 February 2014, the injury on plaintiff's lower back was diagnosed as a third-degree burn. Due to the injury, plaintiff underwent a skin graft on 28 February 2014. Based on these facts, plaintiff alleges that the negligence of defendants was the proximate cause of the injury and damage to her person. The complaint did not allege that plaintiff's medical care had been reviewed by an expert prior to filing.

On 7 April 2017, defendants filed a motion to dismiss for failure to comply with Rule 9(j). Defendants filed a brief in support of their motion, and submitted four affidavits from cardiac electrophysiologists to support their arguments that the motion to dismiss should be granted because: (1) plaintiff's complaint failed to allege facts that establish negligence pursuant to *res ipsa loquitur*; (2) North Carolina rarely applies *res ipsa loquitur* to medical malpractice claims; (3) plaintiff's alleged injury was an inherent risk of the procedure she underwent; and

(4) even if the burns were not an inherent risk of the procedure, the average juror would require expert testimony to determine whether defendants' conduct fell below the applicable standard of care. In response, plaintiff submitted a brief opposing defendants' motion, photographs of plaintiff's back following the 31 January 2014 surgery, and affidavits from plaintiff and two of her family members.

On 30 May 2017, defendants' motion came on for hearing in Forsyth County Superior Court, the Honorable Richard S. Gottlieb presiding. On 1 June 2017, Judge Gottlieb granted defendants' motion, ruling that plaintiff's complaint failed to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.

Plaintiff appeals.

II. Discussion

On appeal, plaintiff argues that the trial court erred by granting defendants' motion to dismiss pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. Specifically, plaintiff argues the trial court converted the motion to dismiss into a motion for summary judgment by considering defendants' expert affidavits, and erred by impermissibly applying Rule 9(j)(1) and (2)'s certification requirements to her Rule 9(j)(3) claim, and, in so doing, failed to treat the complaint's allegations as true. We disagree and affirm the trial court's dismissal of plaintiff's complaint.

We review the trial court's dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure *de novo*. *Alston v. Hueske*, 244 N.C. App. 546, 548, 781 S.E.2d 305, 308 (2016) (citation omitted). "In medical malpractice actions, complaints must meet a higher standard than generally required to survive a motion to dismiss[,]" in that they must also meet the requirements of Rule 9(j). *Id.* at 551-52, 781 S.E.2d at 309 (citation omitted). "[W]hen ruling on [a motion to dismiss pursuant to Rule 9(j)], a court must consider the facts relevant to Rule 9(j) and apply the law to them." *McGuire v. Riedle*, 190 N.C. App. 785, 787, 661 S.E.2d 754, 757 (2008) (quoting *Phillips v. A Triangle Women's Health Clinic*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002)). "[A] trial court's order dismissing a complaint pursuant to Rule 9(j) is reviewed *de novo* on appeal because it is a question of law." *Alston*, 244 N.C. App. at 549, 781 S.E.2d at 308 (internal quotation marks and citation omitted).

Rule 9(j) states:

> Medical malpractice. - Any complaint alleging medical malpractice by a health care provider pursuant to G.S.

> 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2017).

Res ipsa loquitur applies when (1) direct proof of the cause of an injury is unavailable, (2) defendant controlled the instrumentality involved in the accident, and (3) "the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission." *Grigg v. Lester*, 102 N.C. App. 332, 333, 401 S.E.2d 657, 657-58 (1991) (citations omitted). "The certification requirements of Rule 9(j) apply only to medical malpractice cases where the plaintiff seeks to prove that the defendant's conduct breached the requisite standard of care—not to *res ipsa loquitur* claims." *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 103 (2002) (citation omitted). A plaintiff alleging *res ipsa loquitur* must show that the injury resulted from defendant's negligent act, and also "must be able to show—without the assistance of expert testimony—that the injury was of a type not typically occurring in [the] absence of some negligence by defendant." *McGuire*, 190 N.C. App. at 789, 661 S.E.2d at 758 (internal quotation marks, brackets, and citation omitted).

[1] We first address plaintiff's argument that the trial court applied the incorrect standard of review because its consideration of defendants' experts' affidavits converted the motion to dismiss into a motion for summary judgment. Our Court has previously addressed this argument, explaining that although "a motion to dismiss under Rule 12(b)(6) may be converted to a motion for summary judgment in" a situation where matters outside the pleadings are received and considered in ruling on a Rule 12(b)(6) motion to dismiss, when a court rules on "a motion to dismiss pursuant to Rule 9(j), a court must consider the facts relevant to Rule 9(j) and apply the law to them." *McGuire*, 190 N.C. App. at 787, 661 S.E.2d at 757 (internal quotation marks, brackets, and citations omitted). Accordingly, a trial court's consideration of affidavits related to its Rule 9(j) ruling does not convert a motion to dismiss into a motion for summary judgment. *See id.* at 787, 661 S.E.2d at 757. Thus, the trial court did not err by failing to convert the motion into a summary judgment motion.

[2] Next, plaintiff contends that the trial court allowed defendants to use the Rule 9(j)(1) and (2) certification requirements to obtain a dismissal of her complaint, even though she pleaded a claim pursuant to Rule 9(j)(3), which she claims stripped her of the right to have her complaint's allegations treated as true pursuant to Rule 12(b)(6). We disagree. Plaintiff's complaint failed to allege facts establishing negligence under the doctrine of *res ipsa loquitur* pursuant to Rule 9(j)(3); thus, the trial court correctly dismissed the complaint pursuant to Rule 9(j).

Our Court has "consistently found that '*res ipsa loquitur* is inappropriate in the usual medical malpractice case, where the question of injury and the facts in evidence are peculiarly in the province of expert opinion.' " *Robinson v. Duke Univ. Health Sys., Inc.*, 229 N.C. App. 215, 225, 747 S.E.2d 321, 329 (2013) (quoting *Bowlin v. Duke Univ.*, 108 N.C. App. 145, 149-50, 423 S.E.2d 320, 323 (1992)) (citation omitted). Nonetheless, *res ipsa loquitur* claims are appropriate in medical malpractice cases where:

> [t]he common knowledge, experience and sense of laymen qualifies them to conclude that some medical injuries are not likely to occur if proper care and skill is used; included, *inter alia*, are injuries resulting from surgical instruments or other foreign objects left in the body following surgery and injuries to a part of the patient's anatomy outside of the surgical field.

Id. at 225, 747 S.E.2d at 331 (quoting *Grigg*, 102 N.C. App. at 335, 401 S.E.2d at 659). We have applied this doctrine in a somewhat restrictive manner, as our Supreme Court has recognized that:

> the majority of medical treatment involves inherent risks which even adherence to the appropriate standard of care cannot eliminate. This, coupled with the scientific and technical nature of medical treatment, renders the average juror unfit to determine whether [a] plaintiff's injury would rarely occur in the absence of negligence. Unless the jury is able to make such a determination[, a] plaintiff clearly is not entitled to the inference of negligence *res ipsa [loquitur]* affords.

Id. at 225-26, 747 S.E.2d at 329-30 (quoting *Schaffner v. Cumberland County Hosp. System*, 77 N.C. App. 689, 692, 336 S.E.2d 116, 118 (1985)).

In accordance with this principle, our Court will affirm the dismissal of medical negligence complaints based on the *res ipsa loquitur* doctrine where both the standard of care and its breach must be established by expert testimony. *See*, *e.g.*, *Hayes v. Peters*, 184 N.C. App. 285, 288, 645 S.E.2d 846, 848 (2007) (holding that expert testimony was necessary for the average juror to determine whether a stroke from air emboli during an esophagastroduodenoscopy surgical procedure was an injury that would not normally occur in the absence of negligence); *Howie v. Walsh*, 168 N.C. App. 694, 698-99, 609 S.E.2d 249, 252 (2005) (holding that expert testimony was necessary for the average juror to determine whether the defendant dentist used excessive or improper force when plaintiff's jaw broke during a wisdom tooth extraction); *Grigg*, 102 N.C. App. at 335, 401 S.E.2d at 659 (holding that expert testimony was necessary for the average juror to determine whether the force exerted by the defendant obstetrician during a cesarean section was improper or excessive).

Here, plaintiff's cause of action for medical malpractice is premised on the assertion that defendants negligently burned her back while performing a cardiac ablation. She contends that her complaint meets the pleading requirements for a *res ipsa loquitur* claim, while defendants contend that *res ipsa loquitur* cannot apply as a matter of law to the facts alleged because expert testimony is required for a layperson to evaluate the facts at issue. Defendants support their position with four affidavits from specialists in the field who explain the procedures involved in a cardiac ablation, and that burns to the back, such as the one plaintiff suffered, are an unforeseeable, inherent risk of a cardiac

ablation, and can occur without negligence on the part of the physician performing the procedure.

We agree with defendants that the facts alleged in the complaint necessarily defeat a *res ipsa loquitur* claim. The procedures involved in a cardiac ablation, which is a complex medical procedure, are outside of common knowledge, experience, and sense of a layperson; thus, without expert testimony, a layperson would lack a basis upon which to make a determination as to whether plaintiff's back injury was an injury that would not normally occur in the absence of negligence, or was an inherent risk of a cardiac ablation. When a plaintiff claiming medical negligence would not be able to show that the injury was of a type not typically occurring in the absence of some negligence by a defendant without the use of expert testimony, as here, *res ipsa loquitur* claims are inappropriate. *McGuire*, 190 N.C. App. at 789, 661 S.E.2d at 758 (internal quotation marks and citation omitted).

Based on the facts in the record related to Rule 9(j), it is clear that plaintiff would not be able to prove her claim without the use of expert testimony. Therefore, plaintiff's complaint did not meet the requirements of Rule 9(j). Accordingly, dismissal pursuant to Rule 9(j) was proper.

AFFIRMED.

Judges STROUD and DAVIS concur.

CHRISTOPHER CHAMBERS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

THE MOSES H. CONE MEMORIAL HOSPITAL; THE MOSES H. CONE MEMORIAL HOSPITAL OPERATING CORPORATION D/B/A MOSES CONE HEALTH SYSTEM AND D/B/A CONE HEALTH; AND DOES 1 THROUGH 25, INCLUSIVE, DEFENDANTS

No. COA17-686

Filed 17 April 2018

Class Actions—mootness—sole representative—hospital costs—underlying claim dismissed

The trial court did not err by dismissing plaintiff's amended class action based on mootness where the claim arose from non-negotiated costs for emergency care. The hospital dismissed its claims against plaintiff, the sole member of the class. None of the exceptions to the mootness doctrine applied.

Appeal by plaintiff from order entered 16 March 2017 by Chief Business Court Judge James L. Gale in Guilford County Superior Court. Heard in the Court of Appeals 30 January 2018.

Higgins Benjamin, PLLC, by John F. Bloss, and Barry L. Kramer Law Offices, by Barry L. Kramer, Esq., admitted pro hac vice, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, LLP, by Philip J. Mohr and Brent F. Powell, for defendant-appellees The Moses Cone Memorial Hospital and The Moses Cone Memorial Hospital Corporation.

BRYANT, Judge.

Where the sole representative in a class action lacked a genuine personal interest in the outcome of the case and the unifying interests of the class was not temporary or unlikely to be resolved before the claim was heard, we affirm the trial court's dismissal of the class action complaint.

On 23 August 2011, before receiving treatment for an emergency procedure at Moses H. Cone Memorial Hospital (hereinafter "Moses Cone"), Christopher Chambers (hereinafter "Chambers") signed Moses Cone's Patient Consent form. The form stated "I understand that I am financially responsible for, guarantee and agree to pay in full, in accordance with *the regular rates and terms* of [Moses Cone] at the time of patient's

treatment, for charges for all services provided to me by [Moses Cone] . . . ." (Emphasis added). Moses Cone billed Chambers $14,578.14 for services rendered and materials provided during his stay at the hospital. When the bill went uncollected, Moses Cone sued Chambers and his wife in Guilford County District Court.

Chambers filed a class action complaint against Moses Cone in Guilford County Superior Court. Chambers alleged that Moses Cone charged inflated prices for emergency care services provided to uninsured patients. Within the hospital industry, a hospital's list of gross billing rates for products and services is referred to as a "chargemaster" list. However, these rates can be negotiated by insurance companies, managed care organizations, and uninsured patients seeking elective treatments. Chambers alleged that uninsured patients seeking emergency care procedures were charged the chargemaster price for products and services. Chambers argued that the Moses Cone emergency room Patient Consent Form's reference to "regular rates and terms" could not be made certain and were, therefore, governed by contract principles allowing Moses Cone to recover no more than "reasonable value" for its services and materials. Chambers contended that the reasonable value of the services he received was less than one-half of the amount Moses Cone charged. Chambers sought relief from Moses Cone under several theories, including: breach of contract, breach of covenant of good faith and fair dealing, constructive trust, declaratory judgment, restitution, and injunction.

Moses Cone answered Chambers's class action complaint and counter claimed against Chambers and his wife,[1] as well as the putative class, seeking relief for unrecovered balances for the cost of services rendered.

On 1 April 2016, Chambers filed an amended class action complaint seeking only a declaratory judgment that Moses Cone's Patient Consent form, obligating a patient to pay Moses Cone "in accordance with *the regular rates and terms*" applicable at the time of the patient's treatment, entitled Moses Cone to no more than the reasonable value of the treatment or services provided. Moses Cone subsequently dismissed with prejudice its counterclaims against Chambers and his wife and also dismissed its district court action against Chambers and his wife. Moses Cone then moved to dismiss Chambers's amended class action complaint with prejudice on the basis of Rule 12(b)(1).

1. *N.C. Baptist Hosps. v. Harris*, 319 N.C. 347, 349, 354 S.E.2d 471, 472 (1987) ("It is well settled that 'doctrine of necessaries' applies to necessary medical expenses." (citation omitted)); *id.* at 353, 354 S.E.2d at 474 ("hold[ing] that a wife is liable for the necessary medical expenses provided for her husband").

In an order entered 16 March 2017, the trial court dismissed Chambers's amended complaint on the basis of mootness: There was no longer a controversy between the parties, and the case did not fit within an exception that allowed a moot claim to proceed. Chambers appeals.

On appeal, Chambers argues that the trial court erred by concluding that Moses Cone's dismissal of its counterclaims defeated Chambers's right to continue prosecuting the putative class action. We disagree.

Rule 23 of our Rules of Civil Procedure provides that "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C. Gen. Stat. § 1A-1, Rule 23(a) (2017).

> [P]rerequisites for bringing a class action . . . [include] that . . . the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; [and] . . . the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case . . . .

Faulkenbury v. Teachers' & State Emps' Ret. Sys. of N.C., 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997); *see also Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282–83, 354 S.E.2d 459, 465 (1987); *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 548, 613 S.E.2d 322, 325–26 (2005).

> The party seeking to bring a class action under Rule 23(a) has the burden of showing that the prerequisites to utilizing the class action procedure are present. . . .
>
> The named representatives also must establish that they will fairly and adequately represent the interests of all members of the class. This prerequisite is a requirement of due process. *See Hansberry v. Lee*, 311 U.S. 32, 45, 85 L. Ed. 22, 29 (1940) (discussing F. R. Civ. P. 23).

Crow, 319 N.C. at 282, 354 S.E.2d at 465.

"Although North Carolina courts are not bound by the 'case or controversy' requirement of the United States Constitution with respect to the jurisdiction of federal courts, similar 'standing' requirements apply 'to refer generally to a party's right to have a court decide the merits of a dispute.' " *Meadows v. Iredell Cty.*, 187 N.C. App. 785, 787, 653 S.E.2d

925, 927–28 (2007) (citation omitted). "As is obvious from the wording of [Rule 23], one who is not a member of the represented class may not bring a class action representing that class." *Id.* at 788, 653 S.E.2d at 928 (citation omitted); *see also id.* at 789, 653 S.E.2d at 929 (affirming a trial court's dismissal of a class action in part because "[the] plaintiffs were not suitable to represent the proposed class"); *Laborers' Int'l Union of N. Am., AFL-CIO v. Case Farms, Inc.*, 127 N.C. App. 312, 315, 488 S.E.2d 633, 635 (1997) ("[Rule 23] does not grant or deny standing to parties. Rather than providing a basis for standing, this statute allows a party who is entitled to sue to bring suit on behalf of itself and other parties in the form of a class action." (citation omitted)).

Here, per the Amended Class Action Complaint,

> [Chambers] [brought] this action on behalf of himself and a class of all persons similarly situated, as defined as follows:
>
> > All individuals (or their guardians or representatives) who within four years of the date of the filing of the Complaint in this action and through the date that the [c]ourt certifies the action as a class action (a) received emergency care medical treatment at [Moses Cone] . . . ; (b) whose bills were not paid in whole or in part by commercial insurance or a governmental healthcare program; and (c) who were not granted a full discount or waiver under [Moses Cone's] charity policies or otherwise had their bills permanently waived or written off in full by [Moses Cone].

Chambers alleged that on 23 August 2011 he went to the emergency room at Moses Cone for an emergency medical procedure; at the time, he was uninsured. Chambers was subject to Moses Cone's standard contract terms and provisions, which stated that he was obligated to pay the hospital's bill "in accordance with the regular rates and terms of [Moses Cone]." The total payment billed to Chambers after his discharge was $14,458.14 and "upon information and belief such amount was based on 100% of the hospital's Chargemaster rates. [Moses Cone] [has] not written off, discounted or adjusted said billing." Chambers alleged that his claims "are typical of the claims of the [proposed] Class" and that "[he] is a member of the [proposed] Class as defined." Furthermore, Chambers alleged that he "will fairly and adequately represent and protect the interest of the Class. He shares the same interests as all Class members in having the Contract interpreted and in preventing

[Moses Cone] from pursuing collection of accounts based on billing at its Chargemaster rates."

However, after Chambers amended the proposed class complaint on 1 April 2016 to assert only one cause of action—declaratory judgment as to the interpretation of an open price term contained in Moses Cone's Patient Consent form signed by self-pay emergency care patients—and removed all other previous claims, such as breach of contract, breach of covenant of good faith and fair dealing, constructive trust, restitution, and injunction, Moses Cone ceased its efforts to collect Chambers's outstanding balance. On 18 May 2016, Moses Cone dismissed with prejudice all counterclaims against Chambers and his wife filed in response to the proposed class action complaint as well as the District Court action against Chambers and his wife for recovery of Chambers's $14,358.14 outstanding balance due Moses Cone. Thus, Chambers no longer has an individual claim against Moses Cone, and neither Chambers nor his wife is subject to suit by Moses Cone for recovery of the outstanding balance owed for emergency medical services provided 23 August 2011. Chambers's bill has effectively been permanently waived or written off, and thus, Chambers is no longer a member of the proposed class he seeks to represent. *See Faulkenbury*, 345 N.C. at 697, 483 S.E.2d at 431 ("[P]rerequisites for bringing a class action . . . [include] that . . . the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; [and] . . . the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case . . . ."); *Meadows*, 187 N.C. App. at 788, 653 S.E.2d at 928 ("As is obvious from the wording of [Rule 23], one who is not a member of the represented class may not bring a class action representing that class." (citation omitted)). "The general rule is that an appeal presenting a question which has become moot will be dismissed." *Thomas v. N.C. Dep't of Human Res.*, 124 N.C. App. 698, 705, 478 S.E.2d 816, 820 (1996), *aff'd*, 346 N.C. 268, 485 S.E.2d 295 (1997).

Chambers contends that there are at least three exceptions to the mootness doctrine which preclude dismissal of his action: "cases in which termination of a class representative's claim does not moot the claims of the unnamed members of the class," *id.* at 706, 478 S.E.2d at 821 (quoting *Simeon v. Hardin*, 339 N.C. 358, 371, 451 S.E.2d 858, 867 (1994)), "a defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice," *id.* at 705, 478 S.E.2d at 820 (alteration in original) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 71 L. Ed. 2d 152, 159 (1982)), and "the court has a 'duty' to address an otherwise moot

case when the 'question involved is a matter of public interest,' " *id.* at 705, 478 S.E.2d at 821 (citing *Matthews v. Dept. of Transp.*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978)). We hold these exceptions do not apply in the instant case.

Where our Supreme Court stated in *Simeon* that it believed the case before it belonged "to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class," *Simeon*, 339 N.C. at 371, 451 S.E.2d at 867 (citation omitted), the Court acknowledged there that the named plaintiff's challenged harm was "by nature temporary, and it [was] most unlikely that any given individual could have his . . . claim decided . . . before [his challenge was resolved]." *Id.* Here, Chambers does not raise a challenge that is by nature temporary or likely to be resolved before the claim could be heard. Therefore, this exception to the mootness doctrine is not applicable.

As to the remaining grounds raised as exceptions to the basis for holding Chambers's action moot, we note that each is an exception to holding the class action moot. *See Thomas*, 124 N.C. App. at 705, 478 S.E.2d at 820 ("[A] defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice." (citation omitted)); *id.* at 705, 478 S.E.2d at 821 ("[T]he court has a 'duty' to address an otherwise moot case when the 'question involved is a matter of public interest.' " (citation omitted)). We need not determine if the class action is now moot based on the conduct of Moses Cone or the public interest. The proposed class has but one representative—Chambers. And the sole class representative lacks a genuine personal interest in the outcome of the case. *See Faulkenbury*, 345 N.C. at 697, 483 S.E.2d at 431 (requiring that a class representative have "a genuine personal interest . . . in the outcome of the case"). Furthermore, Chambers has provided no authority which would allow the class action to proceed despite his lack of individual standing as class representative. *See* N.C. Gen. Stat. § 1A-1, Rule 23(a) ("[O]ne or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued."). Accordingly, we affirm the trial court's dismissal of Chambers's amended class action complaint.

AFFIRMED.

Judges DIETZ and BERGER concur.

ALINA COHEN, Employee, Plaintiff
v.
FRANKLIN COUNTY SCHOOLS/N.C. DEPARTMENT OF PUBLIC INSTRUCTION, Employer, SELF INSURED (SEDGWICK CMS, Servicing Agent) Defendant

No. COA17-1140

Filed 17 April 2018

Workers' Compensation—injury by accident—stroke following meeting

The Industrial Commission properly determined that plaintiff did not suffer an injury by accident and denied plaintiff's workers' compensation claim where plaintiff, a teacher, suffered a stroke after a meeting with her principal to discuss his observation of her teaching and a Professional Development Plan (PDP). Plaintiff had previously participated in post-observation evaluation meetings with the principal, she was familiar with the protocol for PDPs, the type of PDP involved here was not a meaningful departure from the typical procedures at the school, and the manner in which the meeting was conducted was not neither unexpected nor inappropriate.

Appeal by plaintiff from opinion and award entered 25 July 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 March 2018.

Hardison & Cochran, P.L.L.C., by Benjamin T. Cochran and J. Carter Whittington, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Patrick S. Wooten, for defendant-appellee.

DAVIS, Judge.

In this appeal, we revisit the issue of whether an employee who suffers an illness allegedly resulting from a meeting with her supervisor is able to establish an injury by "accident" under North Carolina's Workers' Compensation Act. Alina Cohen appeals from the opinion and award of the North Carolina Industrial Commission denying her claim for workers' compensation benefits. Because we conclude that she has failed to show an injury by accident within the terms of the statute, we affirm.

Factual and Procedural Background

On 19 January 2010, Cohen was hired by Franklin County Schools ("Defendant") to work as a full-time math teacher at Early College High School ("Early College"). Each teacher at Early College was "required to create an individual PDP [Professional Development Plan] at the beginning of the year that stated their goals and also a plan as to how to accomplish those goals with an associated timeline." As a part of her employment, Cohen "underwent periodic classroom observations and was evaluated by the school principal, James A. Harris, Jr." Harris was Cohen's principal throughout her employment with Early College.

Pursuant to his duties as the school principal, Harris would normally conduct "three observations with an evaluation" for each teacher throughout the course of the year. Prior to October 2013, Harris had conducted observations in Cohen's classroom and held evaluation conferences with her. Cohen was aware of the process for teacher observations and post-observation conferences with Harris. She also knew that post-observation conferences "should be during the ten working days after . . . observation."

In 2013, Harris received "various complaints in regard to [Cohen's] teaching." After having received these complaints, Harris "prepared an observation and a 'principal directed' PDP to go over with [Cohen] on October 11, 2013." He believed that the "PDP was designed for [Cohen] and him to work together to assist [her] and to get her to the level where we felt that she would become a better teacher."

On 11 October 2013, Harris went to Defendant's Central Office to meet with Charles Fuller, a director of secondary education. Harris told Fuller that he "had prepared a directed PDP for [Cohen] and that [he] did not believe that [Cohen] would receive it well." Because Harris did not have an assistant principal and "wanted someone to be a witness" during the meeting, Harris asked Fuller to sit in on the meeting.

That same morning, Harris saw Cohen at Early College and told her "that he had to go over the observation and PDP with her that day, and asked her to stay after school." In the past, Harris had not given Cohen advance notice of post-observation conferences and would typically "do most of these at the end of the school day . . . ."

At the conclusion of the school day on 11 October 2013, Cohen was leaving the school building for the weekend when she saw Fuller coming into the building. Cohen and Fuller greeted each other, and she walked outside. As she was leaving, Harris ran out of the building and stated,

"Mrs. Cohen, I need you to come back." Cohen followed Harris into his office and saw Fuller sitting in a chair inside the office.

Harris proceeded to explain that he was meeting with Cohen because of problems with her teaching. He explained that he had written out a PDP for her. She refused to sign the PDP and asked for a sheet of paper to instead write that she had been "pushed to sign [the PDP] without reading . . . ." The meeting lasted approximately fifteen to twenty minutes, and Cohen continued to argue with Harris until the end of the meeting at which point all three participants left the school.

Cohen testified that at some point during the 11 October 2013 meeting with Harris she began to experience "horrible head pain" and felt as though "her head was going to blow up." On 14 October 2013, she was seen by Dr. Richard Noble, an internist, and later that same day she was examined by Dr. Mitchell Freedman, a neurologist at Duke Health. Both Dr. Noble and Dr. Freeman determined that Cohen had suffered a stroke.

On 15 June 2015, Cohen initiated a workers' compensation claim by filing a Form 18 ("Notice of Accident to Employer"), and she submitted a Form 33 ("Request That Claim Be Assigned For Hearing") on 16 July 2015. Defendant filed a Form 61 ("Denial of Workers' Compensation Claim") on 20 July 2015.

On 12 April 2016, a hearing was held before Deputy Commissioner Philip A. Baddour, III. Cohen testified at the hearing in support of her claim for benefits. Harris and Fuller testified on behalf of Defendant. Depositions were later taken of Dr. Noble and Dr. Freedman.

On 23 December 2016, the deputy commissioner issued an opinion and award determining that Cohen's meeting with Harris and Fuller on 11 October 2013 was "an ordinary incident of employment constituting circumstances common to employees in any profession. There was nothing unexpected or unusual with regard to the way the meeting was arranged or conducted." The deputy commissioner concluded that Cohen "did not experience an unlooked for and untoward event . . . [and] did not suffer an injury by accident within the meaning of the North Carolina Workers' Compensation Act, and therefore her claim is not compensable." Cohen appealed to the Full Commission.

On 25 July 2017, the Full Commission issued an Opinion and Award affirming the deputy commissioner's decision and denying Cohen's claim for benefits. On 7 August 2017, Cohen filed a timely notice of appeal.

Analysis

Appellate review of an opinion and award of the Industrial Commission is typically "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed *de novo*." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680 (2013) (internal citations omitted), *aff'd per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015).

Under the Workers' Compensation Act, an injury is compensable if the claimant proves three elements: "(1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment." *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010) (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 77, 705 S.E.2d 746 (2011).

Here, Defendant concedes that Cohen's injury occurred during the course of her employment with Defendant. However, Defendant contends that Cohen has failed to satisfy the remaining two prongs of the inquiry.

We first determine whether the Commission erred by concluding that her injury was not the result of an accident within the meaning of the Workers' Compensation Act. It is well established that

> [f]or an injury to be compensable, the plaintiff must introduce competent evidence to support the inference that an accident caused the injury in question. . . . As used in our Workers' Compensation Act, the terms "accident" and "injury" are not synonymous. . . . An accident, as the term is used in the Act, is (1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause. . . . There must be some unforeseen or unusual event other than the bodily injury itself.

Cody v. Snider Lumber Co., 328 N.C. 67, 70, 399 S.E.2d 104, 106 (1991) (internal citations, quotation marks, and brackets omitted).

The Commission made the following findings of fact in its Opinion and Award relevant to this issue:

> 5. [Cohen] was hired to work at the Early College High School ("Early College") program with Defendant Franklin County Schools as a full-time math teacher beginning on January 19, 2010.
>
> 6. As part of her employment, [Cohen] underwent periodic classroom observations and was evaluated by the school principal, James A. Harris, Jr. Mr. Harris was [Cohen]'s principal through her entire time at the Early College. Mr. Harris testified that in the course of a year, there are normally three observations with an evaluation.
>
> . . . .
>
> 8. There was no requirement to announce when a principal was going to do an observation, but Mr. Harris testified that he usually announced the first observation, and thereafter he would tell the teacher that he was going to be in the room within a week's time, but not specify the exact day.
>
> 9. [Cohen] had undergone prior observations with Mr. Harris. [Cohen] testified that one year Mr. Harris refused to have an evaluation conference with her. However, according to the stipulated exhibits and Mr. Harris's testimony, the conference was not held because [Cohen] was on family medical leave due to her husband's illness and was not teaching at that time.
>
> 10. By 2013, Mr. Harris had received various complaints in regard to [Cohen]'s teaching. Mr. Harris testified that a complaint had been received that [Cohen] asked a student about what was on a North Carolina final exam, which is given for classes without an end-of-course exam. Mr. Harris further testified that there had been complaints from students that material was on tests that [Cohen] had not covered in class and that graded tests were not returned to students. Mr. Harris suspected, and later confirmed, that [Cohen] was recycling tests. This explained why there were items on the tests that had not been covered in class. Mr. Harris testified that in early 2013 he discussed these complaints with [Cohen] and there were

meetings between [Cohen] and disgruntled parents and students regarding the complaints.

11. [Cohen] testified that prior to October 11, 2013, she had no idea that there were any problems with her teaching. She also stated that there were never any issues about testing or protocols with testing.

12. Mr. Harris explained that as part of the evaluation process, teachers and administrators use different documents and forms for career development. Specifically, Mr. Harris explained that there is the observation and summary of the observation, but that there is also a Professional Development Plan (PDP). Mr. Harris testified that there were various types of PDPs. He explained that all of the teachers at his school were required to create an individual PDP at the beginning of the year that stated their goals and also a plan as to how to accomplish those goals with an associated timeline.

13. Mr. Harris prepared an observation and a "principal directed" PDP to go over with [Cohen] on October 11, 2013. Mr. Harris testified that based on the information that he had received from students and parents, and some of his observations, he prepared a "principal directed" PDP for [Cohen] to specifically address these issues and concerns and detail areas for improvement. The directed plan was for a 90-day timeframe. Mr. Harris testified that during the 90-day period, the PDP was designed for [Cohen] and him to work together to assist [Cohen] and "to get her to the level where we felt that she would become a better teacher."

14. On Friday, October 11, 2013, Mr. Harris went to the Franklin County Schools' Central Office to meet with Charles Fuller, director of secondary education overseeing curriculum instruction for grades 6 through 12. Mr. Fuller and Mr. Harris testified that Mr. Harris had prepared a directed PDP for [Cohen] and that Mr. Harris did not believe that [Cohen] would receive it well. Mr. Harris testified about his conversation with Mr. Fuller, "I told him that the documents that I was going to present may not be very flattering for Mrs. Cohen and that she may object and I wanted someone to be a witness because I

do not have an assistant principal that could come in with me. So I wanted a neutral party to be — to be present during that time."

15. Mr. Harris testified that he saw [Cohen] earlier in the day on October 11, 2013 and told her that he had to go over the observation and PDP with her that day, and asked her to stay after school.

16. Mr. Harris explained that the teachers know that he has ten days to get back with them after an observation is done, and sometimes the teacher comes to him to initiate a discussion. [Cohen] had full knowledge of this procedure, as she testified: "So after this evaluation, principal – okay – come in observe – observation, let's say. Okay. After observation, principal set up with teacher post-observation conference. Post-observation conference with the rules of the North Carolina State should be during the ten working days after it was actually observation [sic]."

17. Mr. Harris explained that he had not previously scheduled post-observation conferences with [Cohen] in advance. Mr. Harris testified, "I don't believe I did because, again, sometimes you just maybe grab a person and say, 'Hey, I need to get this done'. . . . So I try to do most of these at the end of the school day because our school is unique. There is always a time when they're supervising students, so to do that during a planning time is not a good time because they are with people. So the best time to do it is usually after – after school."

18. [Cohen] alleges that at the end of the school day, she cleaned up her classroom and then she saw Mr. Harris as she was leaving and said, "Mr. Harris, I am last one. I leaving [sic] right now. Have a nice weekend." She testified that Mr. Harris told her to have a nice weekend and a rest. She testified that as she left the building, she saw Mr. Fuller coming in and they greeted each other. She then proceeded to the location where her husband picks her up, and that Mr. Harris ran out of the building and said, "Mrs. Cohen, I need you to come back." [Cohen] testified that she thought there was some emergency, "fire or flood or something like this." [Cohen] then went to Mr. Harris'

office where she "heard that he played with the lock," and she noticed Mr. Fuller sitting in a chair to the left a bit behind her. She testified that they did not ask her to sit down.

19. [Cohen] testified that she "felt something not comfortable because school was absolutely empty, building was absolutely empty." She further testified, "I believe the door was locked, but again, I say I believe because after – Okay." These statements are in direct conflict with Mr. Harris' testimony. Mr. Harris testified that the door was never locked, and that the door was closed because the matter was private and he did not want the secretary to hear. Mr. Harris testified that the PDP process is confidential.

20. [Cohen] testified that Mr. Harris started the meeting by saying, " 'Mrs. Cohen, we have a lot of problems,' or trouble – I don't sure [sic] of what word he exactly use – 'with your teaching.' " [Cohen] then testified to a narrative that she did not understand the purpose of the meeting, that Mr. Fuller and Mr. Harris began talking about "papers," that they told her it was her PDP, but that she did not have her glasses. [Cohen] further testified, "I did not have glasses. I cannot see what it's in the writing, but by the form – format, I see it's not my PDP. I say, 'It's not my PDP.' They say, 'Whatever. We prepared this – to this, and you need to sign.' "

21. [Cohen] then testified, "I turned this paper, the PDP. Okay. I could not read but I – see, I know. I thirty-five years teaching. So I look. It was marked toward one – Just a second. Sorry. It was marked toward one position. It's lined up, first, individual plan; second, mentoring plan; and third one is directory – direct – directory and directive plan. This is final step before you fire somebody." [Cohen] contends that she informed Mr. Harris that she did not have her glasses and that she would not sign the PDP.

22. [Cohen] testified about her perception of the events, "I asked few [sic] times, 'What is going on?' but I did not have any answers on this. I was very confused and I become very nervous because, you know, you're in the

– I believe in the locked room with two men. What they said what it's – for me, doesn't make sense. You know, I – okay – I don't want to say it doesn't make sense. I could not understand what is going on. You understand? I don't know how to react. I don't understand things."

23. [Cohen] testified that during the meeting she started to feel bad and started to shake. [Cohen] testified that she started to feel like her head was going to "blow up." According to [Cohen], she informed Mr. Harris and Mr. Fuller multiple times during the meeting that she was feeling bad and needed to see a doctor because she had high blood pressure. [Cohen] testified that Mr. Harris and Mr. Fuller pressured her to sign the PDP and informed her that once she signed the PDP then she could leave.

24. By contrast, Mr. Harris testified that [Cohen] sat down, and he began to explain to her why they were there and about the PDP and the observation. Mr. Fuller testified that Mr. Harris asked "Could we review this?" and [Cohen] said, "Sure," and she took a seat. Mr. Harris explained that he wanted to go over the PDP first so that she would understand what he was expecting of her with the milestones he had set, and that he was then going to go over the observation. He asked her if she would acknowledge receiving the documents, and he explained to her that "signing those documents did not imply that she agreed or accepted, just that she had received and that she understood what I was explaining to her." Mr. Harris testified, "And when I started, it – she interrupted, and every time from that point on, I would start to explain to her, she would interrupt. It got to the point where at one point Mr. Fuller said, 'Mrs. Cohen, if you would just stop and allow him, he will explain to you everything that's involved,' and then when I proceeded again, she would interrupt again."

25. Mr. Harris testified that this process lasted about fifteen to twenty minutes. At that point, [Cohen] asked for a piece of paper and sat at the corner of Mr. Harris' desk and wrote out a statement. [Cohen] got up to make a copy of the document but came back stating that the copier would not work, and Mr. Harris went to help her make copies. By this time, the secretary was gone and

they left the door open. Mr. Harris testified that [Cohen] continued to "argue and whatnot" until close to 4:00 p.m. and then departed.

26. Mr. Harris testified that [Cohen] did not complain of dizziness during the October 11, 2013 meeting and she did not ask to see a doctor. According to Mr. Harris, [Cohen]'s behavior and demeanor as she was leaving the meeting was normal and there was no indication that she needed to seek medical assistance at that time.

. . . .

28. The Full Commission finds that [Cohen] perceived the PDP and observation documents to be, as she testified, the "final step before you fire somebody." However, as Mr. Fuller and Mr. Harris testified, a directed PDP is only one step in the evaluation process and does not result in termination of employment; rather, often times performance issues are satisfactorily addressed and the employee remains employed.

29. The Full Commission finds Mr. Harris' testimony as to [Cohen] being informed of the meeting on October 11, 2013, to be credible. [Cohen] demonstrated that she was familiar with the observation process and the purpose of a PDP. The Full Commission finds that [Cohen]'s testimony that she was unaware of a meeting after school to discuss the observation and that she was unaware of the purpose of the meeting is not credible.

30. To the extent the testimony of [Cohen], and Mr. Harris, and Mr. Fuller are inconsistent with regard to what occurred at the meeting in Mr. Harris' office, the Full Commission affords greater weight to the testimony of Mr. Harris and Mr. Fuller than to the testimony of [Cohen].

Based on these findings of fact, the Commission concluded that Cohen had not "suffer[ed] an injury by accident within the meaning of the North Carolina Workers' Compensation Act." Cohen has not specifically challenged any of the Commission's findings of fact. Thus, they are binding on appeal. *See Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) ("Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." (citation omitted)).

This Court has held that "[i]f an employee is injured while carrying on the employee's usual tasks in the usual way the injury does not arise by accident." *Gray v. RDU Airport Auth.*, 203 N.C. App. 521, 525, 692 S.E.2d 170, 174 (2010) (citation, quotation marks, and brackets omitted). "In contrast, when an interruption of the employee's normal work routine occurs, introducing unusual conditions likely to result in unexpected consequences, an accidental cause will be inferred." *Id.* (citation and quotation marks omitted). Thus, "[t]he essence of an accident is its unusualness and unexpectedness . . . ." *Id.* (citation and quotation marks omitted).

On several prior occasions, this Court has addressed the question of whether an injury sustained by an employee related to a meeting with her supervisor should be deemed to have resulted from an accident for purposes of the Workers' Compensation Act. In *Pitillo v. North Carolina Department of Environmental Health & Natural Resources*, 151 N.C. App. 641, 566 S.E.2d 807 (2002), the plaintiff was a waste management specialist responsible for inspecting commercial hazardous waste facilities. As a part of her employment, she was subjected to annual performance reviews from her supervisor. *Id.* at 643, 566 S.E.2d at 809. During one such review, she "received ratings of 'outstanding' or 'very good' in twelve areas, and a rating of 'good' in two areas, for an overall rating of 'very good plus.' " *Id.*

The plaintiff was upset that her co-workers had rated her as merely "good" in two areas. She sought to meet with the deputy director and personnel officer of the division. *Id.* at 643, 566 S.E.2d at 810. The meeting lasted two hours and was attended by the deputy director, the personnel officer, the plaintiff's supervisor, and the manager of employee relations. The following day, the plaintiff was referred to a psychiatrist and was treated for "stress induced anxiety" and a "diagnosed nervous breakdown." *Id.*

The plaintiff filed a claim for workers' compensation benefits, but the Commission denied her claim. *Id.* at 644, 566 S.E.2d at 810. We affirmed, holding that the plaintiff did not suffer an injury by accident. *Id.* at 646, 566 S.E.2d at 812. In so ruling, we rejected her argument that the presence of her supervisor and the manager of employee relations as well as the subject matter of the meeting and the behavior directed toward her were "unexpected and traumatic." *Id.* at 646, 566 S.E.2d at 811.

In *Knight v. Abbott Laboratories*, 160 N.C. App. 542, 586 S.E.2d 544 (2003), the plaintiff, a laboratory employee, had requested a vacation day but her request was denied by her supervisor, Mr. Fuller. She

subsequently learned that her co-worker had received the same vacation day that she had requested. Upon becoming aware of this information, she went to Mr. Fuller's office. *Id.* at 544, 586 S.E.2d at 545. Mr. Fuller became upset when the plaintiff asked him about the denial of her vacation request. He "rose from his desk, and began talking to plaintiff in a loud, angry voice waving his hands and fingers in plaintiff's face." *Id.* During the meeting, "both parties raised their voices," and the plaintiff "returned to her workstation in tears." *Id.*

After the meeting, the plaintiff broke out in hives and sought medical attention. *Id.* She was diagnosed with Post Traumatic Stress Disorder and recurrent major depression, which her psychologist believed was substantially aggravated by the confrontation. *Id.* at 544, 586 S.E.2d at 546. She filed for workers' compensation benefits, but the Commission found that her injury had not occurred by accident and was therefore non-compensable. *Id.* at 545, 586 S.E.2d at 546. Citing *Pitillo*, this Court affirmed the denial of her claim for benefits.

> In this case, although plaintiff initiated the meeting with Fuller, she contends his behavior toward her was unexpected and traumatic. The Commission found, however, and the evidence shows that both plaintiff and Fuller raised their voices and both were participants in the argument initiated by plaintiff's complaint that she had improperly been deprived of her desired vacation day. The Commission also recognized that while such confrontations may be infrequent, disagreements between an employee and a supervisor are not uncommon and found that the confrontation between plaintiff and Fuller did not constitute an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. We agree with the Commission's findings. The evidence shows that plaintiff deliberately initiated the meeting with Fuller to voice her disagreement with his decision to award the vacation day to another employee. It is not unexpected that this would lead to a heated discussion involving raised voices on both the part of the supervisor and employee. . . . Therefore, the heated confrontation with plaintiff's supervisor was not so unusual such as to constitute an interruption in the normal work routine.

Id. at 546-47, 586 S.E.2d at 547 (internal citations and quotation marks omitted).

In the present case, Cohen contends that the 11 October 2013 meeting itself was unusual and resulted in unexpected consequences because (1) Fuller was sitting in on the meeting; (2) a "principal directed" PDP was utilized; and (3) Cohen left the meeting without signing the PDP. However, Cohen's attempt to shoehorn the facts of this case into the definition of the term "accident" for purposes of a workers' compensation claim is unavailing. We see no material distinction between the meeting at issue here and the meetings at issue in *Pitillo* and *Knight*. Although the meeting in the present case was not initiated by Cohen, we do not read *Pitillo* or *Knight* as standing for the proposition that this factor alone is dispositive in determining whether a meeting is sufficiently unusual or likely to yield unexpected consequences so as to qualify as an accident under the Workers' Compensation Act.

We observe that Cohen had previously participated in post-observation evaluation meetings with Harris. She also knew that other teachers had similarly participated in such meetings — generally within ten days of an observation.[1]

Moreover, Cohen was familiar with the protocol for PDPs. She had created a PDP for herself on past occasions as all teachers at Early College were required to do. Although she had not previously been required to create a principal directed PDP, Harris had utilized directed PDPs for other teachers at Early College. Thus, this type of principal directed PDP was not a meaningful departure from the typical procedures at the school.

We further note that with respect to the manner in which the meeting was conducted, the Commission's findings establish that the conversation between Cohen and Harris was neither unexpected nor inappropriate. There was nothing remarkable about Harris providing negative feedback to Cohen after having observed her class or requiring her to take action to correct deficiencies in her job performance. Moreover, the Commission rejected the suggestion that either Harris or Fuller raised their voices at Cohen during the meeting or spoke to her in an inappropriate manner. At most, Cohen received critical feedback that was unwelcome to her — an occurrence that is not unusual for an employee at any job.

While we do not categorically foreclose the possibility that the existence of unusual circumstances could cause a meeting between an employee and her supervisor to constitute an accident under the

1. While the record is not entirely clear on this point, it appears that Harris had conducted an observation of Cohen within ten days prior to the 11 October 2013 post-observation meeting.

Workers' Compensation Act, we are satisfied that the meeting between Cohen and Harris does not present such a case. Thus, we hold the Commission properly determined that Cohen did not suffer an injury by accident.[2]

Conclusion

For the reasons stated above, we affirm the Full Commission's 25 July 2017 opinion and award.

AFFIRMED.

Judges STROUD and ARROWOOD concur.

ALLAN AND JENNIFER COLE, PLAINTIFFS
v.
BONAPARTE'S RETREAT PROPERTY OWNERS' ASSOCIATION, INC.;
BONAPARTE'S RETREAT I PROPERTY OWNER'S ASSOCIATION, INC.; AND
CHARLES G. HAMILTON, JR., DEFENDANTS

No. COA17-492

Filed 17 April 2018

1. Real Property—adverse possession—tacking on—deeded property and adjacent property

A purchaser who bought a parcel of land in a subdivision along the Calabash River and later discovered that part of the land was a "reserved" area not conveyed by the deed could not tack his adverse possession of the reserved area onto the adverse possession of that area by the prior owner of the deeded property. North Carolina does not follow the majority rule in such situations.

2. Corporations—nonprofit corporation—property owners association—pleading requirements—derivative claim—ultra vires claim

Plaintiffs failed to meet the necessary pleading requirements to bring derivative claims against a nonprofit corporation under N.C.G.S. § 55A-7-40 in a case involving a land dispute. Plaintiffs did

2. Having determined that Cohen has not established that she suffered an injury by accident, we need not address her remaining argument.

not have standing to bring an ultra vires claim individually, did not show that the nonprofit's board and officers were impermissibly designated, and did not show that the transfer of property was inherently unlawful.

3. Easements—by necessity—not raised by pleadings—insufficient evidence—substantial prejudice

The trial court erred by imposing an easement in favor of defendant property owners' association where the issue was not raised by the pleadings or by either party, was not supported by the evidence, and worked to the substantial prejudice of plaintiffs, who owned the servient parcel.

Appeal by Plaintiffs from summary judgment entered 19 December 2016 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 4 October 2017.

Hodges Coxe Potter & Phillips, LLP, by Bradley A. Coxe, for Plaintiffs-Appellants.

Marshall Williams & Gorham, LLP, by John L. Coble, for Defendants-Appellees.

INMAN, Judge.

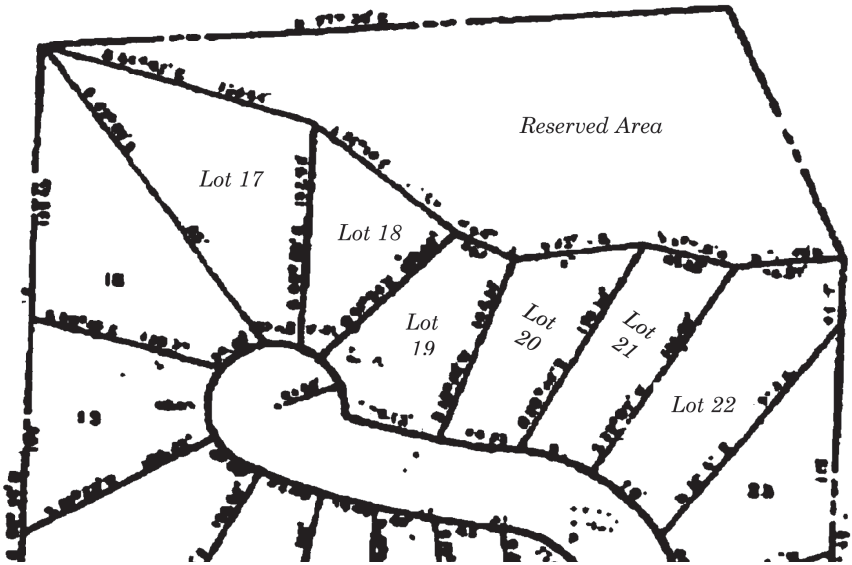
When a grantor who owns one parcel of land and adversely possesses an adjacent parcel without color of title conveys both parcels to grantees by deed that describes only the parcel in which the grantor holds title, the grantees may not tack their time of possession to the grantor's time to satisfy the statutorily prescribed period for adverse possession. Further, a trial court may not impose an easement when neither party has raised the issue, the easement is not suggested by the evidence, and the relief results in substantial prejudice to the owner of the servient parcel.

Plaintiffs Allan and Jennifer Cole ("Mr. Cole" and "Mrs. Cole," respectively; collectively "Plaintiffs") appeal from the entry of summary judgment in favor of defendants Bonaparte's Retreat Property Owners' Association, Inc. ("BRPOA"), Bonaparte's Retreat I Property Owner's Association, Inc. ("BRIPOA"), and Charles G. Hamilton, Jr. ("Mr. Hamilton," collectively "Defendants"). Plaintiffs contend that: (1) they were entitled to summary judgment granting them title to real property by adverse possession and rescinding its prior transfer from BRPOA to BRIPOA; (2) the

trial court erred in granting summary judgment on all claims in favor of Defendants; and (3) the trial court erred in ordering an easement over their property for Defendants' benefit. After careful review, we affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL HISTORY

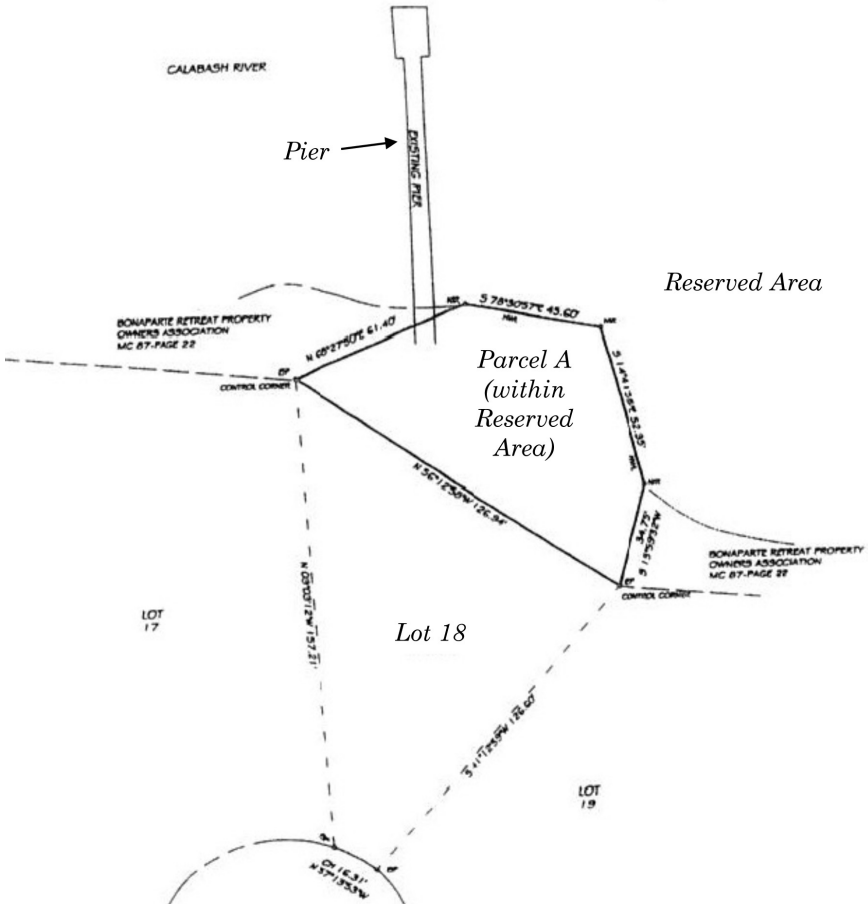
In 1972, real estate developer Ocean Side Corporation ("Ocean Side") began development of the Bonaparte's Retreat I subdivision along the Calabash River in Brunswick County, North Carolina. The developer filed a plat map of the subdivision with the Brunswick County Register of Deeds (the "Register of Deeds"), designating discrete lots for development as well as various "reserved areas." One such designated lot, Lot 18, was located on the north side of the development and, per the plat map, was bordered to the south by a cul-de-sac, to the west and east by Lots 17 and 19, respectively, and to the north by a reserved area (the "Reserved Area"). This particular Reserved Area was bordered to the south by Lots 17 through 22 and to the north by the Calabash River. An excerpt from a plat map showing the above areas is provided below, with italicized annotations by this Court for legibility:



On 22 July 1981, Ocean Side conveyed Lot 18 to Gerald Rodney Earney ("Mr. Earney") by warranty deed. The property description in the deed describes only Lot 18 and, by express reference to a plat map filed with the Register of Deeds, does not include the Reserved Area between Lot 18 and the Calabash River.

BRPOA incorporated in August of 1984 to serve as a homeowner's association for the Bonaparte's Retreat subdivision. The following year, Ocean Side conveyed several properties to BRPOA by non-warranty deed, including the Reserved Area north of Lot 18. After taking ownership of the Reserved Area, however, BRPOA failed to file the necessary reports with the North Carolina Secretary of State and was suspended by the State on 24 January 1986. In 1991, homeowners in Bonaparte's Retreat decided to "reincorporate" as a second homeowner's association, BRIPOA, rather than revive BRPOA.

Sometime after purchasing Lot 18, Mr. Earney built a pier into the Calabash River off of a portion of the Reserved Area located between Lot 18 and the river ("Parcel A"). According to an affidavit executed by his son, Mr. Earney mistakenly believed that Parcel A was part of Lot 18 and considered Lot 18 to be waterfront property. Mr. Earney cleared and landscaped Lot 18 and Parcel A, docked boats at the pier on Parcel A, used Parcel A to access the pier, and prohibited other people from using the pier without his permission. Mr. Earney had a septic tank installed but built no other structures on Lot 18 or Parcel A. An excerpt from a survey obtained by Plaintiffs showing the pier, lot, and parcel is provided below, with italicized annotations by this Court for legibility:



On 22 September 2000, Mr. Earney conveyed Lot 18 to Plaintiffs by general warranty deed. Per the deed, Mr. Earney conveyed only Lot 18 to Plaintiffs and, by reference to a plat map on file with the Register of Deeds, excluded from the property description Parcel A and the Reserved Area. Although the real estate listing that led Plaintiffs to purchase Lot 18 advertised the property as waterfront, Plaintiffs never met or spoke with Mr. Earney to inquire about the discrepancy between the listing and all of the conveyance documents, including the deed. Mr. Cole acknowledged that, "everything [Mr. Earney] signed said Lot 18."

Plaintiffs, like Mr. Earney, mistakenly believed Lot 18 was a waterfront lot. Beginning in 2001, Plaintiffs started clearing trees and mowed

Parcel A. In 2002, Plaintiffs began repairing and renovating the pier, adding a gate and handrails. Plaintiffs tied a rope or chain across the pier entrance, posted no trespassing signs on the pier, and hired a landscaper to mow and maintain Lot 18 and Parcel A during this time. Plans to build a home on Lot 18 coalesced and Plaintiffs hired a contractor to construct their house in 2008. When their contractor surveyed the property prior to the start of construction, Plaintiffs discovered for the first time that they did not, in fact, own Parcel A. Plaintiffs' contractor also told them that construction of their home would require a variance from the Town of Calabash's Board of Adjustment (the "Board of Adjustment"), because Plaintiffs planned to construct the house within 25 feet of Parcel A in violation of the town's setback requirements.

Upon learning they did not own Parcel A, Plaintiffs sought to purchase Parcel A from BRIPOA's board of directors. The sale was stymied, however, because the board of directors discovered it was without requisite authority under BRIPOA's declarations to approve such a transfer.[1] Plaintiffs then applied to the Board of Adjustment to obtain the necessary setback variance. In the variance hearing on 24 June 2008, the Calabash Building Inspector/Code Enforcement Officer "acknowledged that [Parcel A] is owned by the Bonaparte Retreat Property Owner's Association (POA) and is used for common open space. The POA property abuts the Calabash River." In ruling on the variance application, the Board of Adjustment made findings of fact, including findings that "the adjacent property to the rear is open space owned by the subdivision's Property Owner's Association[,]" and "the adjoining rear property is required open space for the subdivision[.]" The variance was approved contingent on BRIPOA's consent, and BRIPOA's board of directors provided written consent to the variance to the Board of Adjustment a few days later.

Construction began on Plaintiffs' home in 2013. Plaintiffs placed "no trespassing" signs on Lot 18 and Parcel A to keep people off the building site and used Parcel A to store materials during construction. In October of 2014, Plaintiffs again sought to purchase Parcel A from BRIPOA. When BRIPOA's board of directors once more ascertained that they could not sell Parcel A to Plaintiffs under their by-laws, Plaintiffs rescinded their offer.

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1. Nothing in the record indicates that Plaintiffs or BRIPOA's board of directors were aware in 2008 that Parcel A and the Reserved Area had not yet been conveyed from the then-defunct BRPOA to BRIPOA.

Plaintiffs filed their complaint for adverse possession against BRPOA on 2 September 2015. Two days later, BRPOA's corporate status was reinstated by the North Carolina Secretary of State. On 9 September 2015, BRIPOA's board of directors met and voted to appoint various officers of BRPOA, naming Mr. Hamilton president of the newly-revived entity. On 28 October 2015, BRPOA conveyed the Reserved Area including Parcel A to BRIPOA by special warranty deed, with Mr. Hamilton signing as president of BRPOA. Plaintiffs filed an amended complaint on 1 March 2016, adding Mr. Hamilton and BRIPOA as defendants and, in addition to seeking a declaratory judgment that they owned Parcel A by adverse possession, asked the court to order by specific performance the rescission or correction of the special warranty deed. Defendants filed their answer to the amended complaint and asserted no counterclaims.

All parties moved for summary judgment. Following a hearing, the trial court granted summary judgment in favor of Defendants and declared BRIPOA to be owner of Parcel A. The trial court also declared "an easement for ingress and egress across . . . Lot 18" in favor of BRIPOA. Plaintiffs timely appealed.

II. STANDARD OF REVIEW

We review entry of summary judgment *de novo*, *Matter of Will of Allen*, ___ N.C. App. ___, ___, 801 S.E.2d 380, 383 (2017), meaning this 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) (internal quotation marks and citation omitted). Rule 56 of the North Carolina Rules of Civil Procedure allows for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). In considering the record, we do so "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." *BellSouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 80, 606 S.E.2d 721, 724 (2005).

III. ANALYSIS

Section 1-40 of the North Carolina General Statutes permits a party to acquire title to real property through adverse possession without color of title if he "has possessed the property under known and visible lines and boundaries adversely to all other persons for 20 years[.]" N.C.

Gen. Stat. § 1-40 (2017). The term "adverse" has been defined by our Supreme Court as follows:

> It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner.

Locklear v. Savage, 159 N.C. 236, 237-38, 74 S.E. 347, 348 (1912). In short, "[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 . . . under known and visible lines and boundaries." *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176 (2001).

A. Plaintiffs Cannot Tack Their Adverse Possession of Parcel A to Their Predecessor's Adverse Possession

[1] In certain circumstances, a party who has adversely possessed real property for less than 20 years may satisfy the prescriptive period of N.C. Gen. Stat. § 1-40 by "tacking" his possession to that of a prior adverse possessor. "Tacking is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years." *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974) (citing J. Webster, *Real Estate Law in North Carolina* § 289 (1971)). To establish the necessary privity for tacking, the " 'initial adverse possessor [must] transfer[] his possession to a successor adverse possessor by some recognized connection. Thus the privity connection is made out if an adverse possessor transfers his possession to another by deed or will or even by parol transfer.' " *Lancaster v. Maple Street Homeowners Ass'n, Inc.*, 156 N.C. App. 429, 438, 577 S.E.2d 365, 372 (2003) (quoting James A. Webster, Jr., *Webster's Real Estate Law in North Carolina*, § 14-9, at 654 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999)).

Courts in most other states allow tacking when a grantor adversely possessing property beyond the bounds of a parcel he owns by deed

conveys the parcel described by deed to a grantee who continues adversely possessing the same extraneous property. *See*, *e.g.*, *Bryan v. Reifschneider*, 181 Neb. 787, 792, 150 N.W.2d 900, 904 (1967) ("It is the generally accepted rule . . . [that] the taking of possession of contiguous lands, some of which are not within the calls of the deed, which have been used by the grantor as a unit . . . , and the transfer of possession pursuant to a deed or contract has evidentiary value as to the existence of privity."); *see also* James A. Webster, Jr., *Webster's Real Estate Law in North Carolina*, § 14.09 at 14-18 (Patrick K. Hetrick et al. eds., 6th ed. 2017) ("The general rule is that tacking is allowed in such a fact situation.").

But the North Carolina Supreme Court has repeatedly departed from the majority rule. *See generally Ramsey v. Ramsey*, 229 NC 270, 49 S.E.2d 476 (1948); *Newkirk v. Porter*, 237 N.C. 115, 74 S.E.2d 235 (1953); *Burns v. Crump*, 245 N.C. 360, 95 S.E.2d 906 (1957); *see also* Webster, Jr., *Webster's Real Estate Law in North Carolina*, *supra*, § 14.09 at 14-18 (recognizing North Carolina's deviation from the general rule).

In *Ramsey*, the plaintiff brought an ejectment action against the defendant, an adjacent landowner, over the defendant's use of a spring located on the plaintiff's property. 229 N.C. at 271, 49 S.E.2d at 476. The defendant and his predecessors in title had used and maintained the spring for over 50 years, and the defendant raised adverse possession as a defense to the ejectment claim. *Id.* at 271, 49 S.E.2d at 476. The defendant had adversely possessed the spring for only seventeen years at the time of the action, but argued that his adverse possession should be tacked to his predecessor's in title in order to satisfy the requisite twenty-year statutory period. *Id.* at 272-73, 49 S.E.2d at 477-78. In determining whether the defendant and his predecessor had the necessary privity to allow tacking, the Supreme Court looked to the property actually conveyed to the defendant as set forth in his deed:

> It is true there is evidence tending to show that his predecessor in title used the spring as he used it. But his deed did not convey or purport to convey the spring or the triangular tract upon which it is located. The description contained in defendant's deed does not embrace it. *Hence there is no privity between him and his predecessors in title as to this land which lies outside the boundary of the land conveyed by them. Therefore, he is not permitted to tack their possession, even if adverse within the meaning of the law*, to his possession so as to show adverse possession for the requisite statutory period.

Id. at 273, 49 S.E.2d at 477 (emphasis added). As a result, the defendant was unable to satisfy the prescriptive period and his claim failed. *Id.* at 273, 49 S.E.2d at 478.

In *Newkirk*, our Supreme Court applied the same rule, citing *Ramsey* and its cognates:

> [A] deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, and this is so even though the grantee enters into possession of the land not described and uses it in connection with that conveyed.

Newkirk, 237 N.C. at 120, 74 S.E.2d at 238-39 (citing *Blackstock v. Cole*, 51 N.C. 560 (1859); *Boyce v. White*, 227 N.C. 640, 44 S.E.2d 49 (1947); *Ramsey*, 229 N.C. 270, 49 S.E.2d 476; *Simmons v. Lee*, 230 N.C. 216, 53 S.E.2d 79 (1949)).

In *Burns*, the defendants sought to defeat a civil action for trespass under a counterclaim of adverse possession. 245 N.C. at 360-61, 95 S.E.2d at 907. The defendants' deed did not include the land claimed by adverse possession, but they contended that the deed "was intended to cover the disputed area." *Id.* at 362, 95 S.E.2d at 908. The defendants presented evidence that they and their predecessor in title had held the disputed area in open, notorious, and adverse possession for more than 20 years. *Id.* at 362, 95 S.E.2d at 908. The Supreme Court held that the defendants could not tack their adverse possession, as "[a] deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, although the grantee enters into possession of the land not described and uses it in connection with that conveyed." *Id.* at 364, 95 S.E.2d at 910.

Ramsey, *Newkirk*, and *Burns* reflect that in North Carolina, privity through a deed does not extend beyond the property described therein. "[I]t is elementary that we are bound by the rulings of our Supreme Court," *Mahoney v. Ronnie's Road Service*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996) (citation omitted), and we are therefore compelled to apply the rule as set forth in those cases.[2] As a result, we hold

2. We acknowledge the paucity of more contemporary decisions from either this Court or the Supreme Court applying the tacking privity rule as described in *Ramsey*, *Newkirk*, and *Burns*. This Court applied the rule to affirm summary judgment dismissing an adverse possession claim in a more recent unpublished case, *C & S Realty Corp. v. Blow*, 175 N.C. App. 591, 624 S.E.2d 431, 2006 WL 91594 (2006). *C & S Realty* turned

that Plaintiffs lack the necessary privity to tack their adverse possession of Parcel A to that of Mr. Earney.

Neither party on appeal contends that the deed from Mr. Earney to Plaintiffs included Parcel A. The deed from Mr. Earney to Plaintiffs conveys only "Lot 18[,]" with reference in the property description to a plat map that clearly divides Lot 18 and the Reserved Area that includes Parcel A.

Further, Plaintiffs' amended complaint acknowledges that: (1) Parcel A was part of the Reserved Area outside of Lot 18; (2) the Reserved Area was deeded to BRPOA; (3) Lot 18 was deeded to Mr. Earney; and (4) Mr. Earney was Plaintiffs' "predecessor in title to Lot 18[.]" When asked in his deposition whether he owned any additional property in Brunswick County, Mr. Cole responded "[w]e only own Lot 18." Mrs. Cole also testified that the property deeded from Mr. Earney did not include Parcel A.

Finally, the Board of Adjustment, in granting Plaintiffs' requested variance in 2008, found as a fact that Parcel A was not Plaintiffs' property. Plaintiffs did not appeal this quasi-judicial decision, and they are collaterally estopped from asserting any ownership interest in Parcel A as of that date. *See* N.C. Gen. Stat. § 160A-388(a1) (2017) (permitting boards of adjustment to issue zoning variances by quasi-judicial proceeding) *and Hillsboro Partners, LLC, v. City of Fayetteville*, 226 N.C. App. 30, 35-39, 738 S.E.2d 819, 824-26 (2013) (holding that collateral estoppel applies to quasi-judicial decisions by a municipal body and "precludes a party from contesting a previously decided factual issue" resolved therein (citation omitted)). In short, the record shows that the deed from Mr. Earney to Plaintiffs did not convey any possessory interest in Parcel A, and Plaintiffs may not rely on it alone to establish privity for tacking their adverse possession of Parcel A to Mr. Earney's adverse possession. *Ramsey* at 273, 49 S.E.2d at 477; *Newkirk* at 120, 74 S.E.2d at 238-39; *Burns* at 363, 95 S.E.2d at 909.

Because Plaintiffs cannot tack their adverse possession of Parcel A to Mr. Earney's adverse possession, they must satisfy the twenty year period of adverse possession alone. N.C. Gen. Stat. § 1-40. At the earliest, Plaintiffs began adversely possessing Parcel A with the purchase

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entirely on the application of the tacking privity rule as set forth in *Burns*, and the Supreme Court denied discretionary review. 635 S.E.2d 287 (2006); *see also Lancaster*, 156 N.C. App. at 440, 577 S.E.2d at 373 (distinguishing *Ramsey* to allow tacking where "the disputed property is included in the description in the quitclaim deeds to defendant. Defendant has privity of title to the disputed land and may tack the adverse possession[.]"), *aff'd per curiam*, 357 N.C. 571, 597 S.E.2d 672 (2003).

of Lot 18 in 2000. Plaintiffs brought their action for adverse possession fifteen years later. Plaintiffs' premature action fails as a matter of law to satisfy the twenty year prescriptive period in N.C. Gen. Stat. § 1-40. The trial court therefore did not err in granting summary judgment to Defendants and denying Plaintiffs' motion for summary judgment.

B. The Trial Court Did Not Err in Granting Defendants Summary Judgment on Plaintiffs' Remaining Claims Against BRPOA

[2] Plaintiffs also contend that the trial court erred in denying their summary judgment motion because BRPOA's transfer of the Reserved Area, including Parcel A, to BRIPOA was unauthorized as a matter of law. Plaintiffs have failed to meet the necessary pleading requirements to bring their claims derivatively and do not have standing to bring these particular claims individually.

The North Carolina Nonprofit Corporation Act generally prohibits claims challenging the validity of an action taken by a nonprofit corporation as ultra vires, with limited exceptions. N.C. Gen. Stat. § 55A-3-04 (2017). Under those exceptions, an action may be maintained: (1) "by a member . . . against the corporation to enjoin the act;" (2) by the corporation directly or through a derivative action; and (3) by the Attorney General. N.C. Gen. Stat. § 55A-3-04(b). In bringing a derivative claim against a nonprofit, the complaining member must comply with N.C. Gen. Stat. § 55A-7-40, which requires the plaintiff to, *inter alia*, "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain or for not making the effort." N.C. Gen. Stat. § 55A-7-40(b) (2017).

Plaintiffs' amended complaint, even when construed liberally, fails to allege the necessary elements of a derivative claim required by N.C. Gen. Stat. § 55A-7-40(b). The amended complaint contains no allegation of any efforts by Plaintiffs to persuade Defendants to rescind the conveyance from BRPOA to BRIPOA, nor any allegation of why such efforts would be futile. Accordingly, Plaintiffs have failed to properly bring a derivative claim.

Plaintiffs have not asserted an ultra vires claim in their individual capacities. Even if we assume *arguendo* that Plaintiffs intended to bring an ultra vires action individually against BRPOA in addition to a derivative claim, the statute permits such actions by a member individually only "to enjoin the [ultra vires] act[.]" N.C. Gen. Stat. § 55A-3-04. Construing Plaintiffs' complaint liberally, the purported ultra vires acts

here were the improper appointment of BRPOA's board of directors and officers and the subsequent transfer of real property to BRIPOA. Plaintiffs' complaint does not seek injunctive relief as to these actions. Instead, Plaintiffs request specific performance—an order that BRPOA and/or BRIPOA rescind or correct the deed conveying Parcel A. This claim for relief does not fall within an exception to the general prohibition against ultra vires claims. N.C. Gen. Stat. §§ 55A-3-04(a) & (b); *see also Willow Bend Homeowners Ass'n, Inc. v. Robinson*, 192 N.C. App. 405, 411, 665 S.E.2d 570, 574 (2008) (noting that because member-defendants in an action by a homeowners' association to collect an assessment did not seek injunctive relief by counterclaim, "it is possible that N.C. Gen. Stat. § 55A-3-04 foreclosed [the d]efendants' former argument regarding the validity of Plaintiff's corporate actions [as ultra vires]"). Summary judgment was therefore properly denied to Plaintiffs and granted to Defendants.

Additionally, Plaintiffs have failed to show as a matter of law that BRPOA's board and officers were impermissibly designated. BRPOA's articles of incorporation state in pertinent part:

> 4. The corporation shall have members which may be divided into such classes as shall be provided in the by-laws. All members shall be accepted, appointed, elected, or designated *in the manner provided in the by-laws*.
>
> 5. The directors of the corporation shall be elected by the members *in the manner provided by the by-laws*.

(emphasis added). Section 55A-8-40 provides that a nonprofit "has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws." N.C. Gen. Stat. § 55A-8-40(a) (2017). The by-laws therefore determine the classes of members, how directors are elected by those members, and how officers are appointed. Plaintiffs, however, failed to introduce the by-laws at summary judgment by affidavit or exhibit, and they do not appear anywhere in the record. Because the by-laws setting forth the classes of membership, the voting rights of each class of member, and the procedures for the designation of BRPOA's board of directors and officers are not in the record, we cannot conclude that they were violated here.

Nor do we hold that the transfer from BRPOA to BRIPOA was inherently unlawful. Plaintiffs argue that BRPOA could transfer the property only with the unanimous consent of its members, yet fail to cite any statute, case, or governing corporate document imposing such a

requirement on BRPOA.[3] Instead, Plaintiffs cite decisions from other states and a North Carolina Supreme Court decision concerning the statutory rights of condominium owners in the common areas of condominium projects. *See Dunes South Homeowners Ass'n, Inc. v. First Flight Builders*, 341 N.C. 125, 459 S.E.2d 477 (1995) (interpreting provisions of the Unit Ownership Act, N.C. Gen. Stat. § 47A-1 *et seq.* (1976), to hold that a developer owning units in a condominium developer may not unilaterally exempt itself from payment of its pro rata share of maintenance expenses of common areas). Because Plaintiffs have failed to identify any statutory, corporate, or precedential legal authority prohibiting BRPOA's transfer in the manner performed here, and we have found none, we reject their argument that BRPOA's transfer was ultra vires as a matter of law. As a result of our holding, Plaintiffs are not entitled to recover attorneys' fees and costs under N.C. Gen. Stat. § 6-21.5 (2017) ("[T]he court . . . may award a reasonable attorney's fee to the *prevailing party* if the court find that there was complete absence of a justiciable issue[.]" (emphasis added)).

C. The Trial Court Erred In Declaring an Easement Across Lot 18 In Favor of Defendants

[3] Plaintiffs' final argument on appeal posits that the trial court erred in declaring an easement across Lot 18 in favor of Defendants so that they may access Parcel A. Notably, neither Plaintiffs nor Defendants requested the imposition of such an easement in their pleadings. Nor did the trial court provide the parties with any notice or an opportunity to be heard regarding such relief before it was ordered. After review of the hearing transcript, the record, and the relevant case law, we agree with Plaintiffs.

Rule 54 of the North Carolina Rules of Civil Procedure permits a trial court to "grant the relief to which the party in whose favor [the judgment] is rendered is entitled, even if the party has not demanded such relief in his pleadings." N.C. Gen. Stat. § 1A-1 Rule 54(c) (2017). Under the rule, the relief granted "is always proper when it does not operate to the substantial prejudice of the opposing party." *N.C. Nat. Bank v. Carter*, 71 N.C. App. 118, 122, 322 S.E.2d 180, 183 (1984) (citation omitted). Relief is improper, however, where: (1) a party fails to reference or

3. While N.C. Gen. Stat. § 47F-3-112 (2017) requires the consent of eighty percent of a planned community association to transfer common property, that statute applies only to communities created after 1999 and other pre-existing communities meeting certain exceptions. N.C. Gen. Stat. § 47F-1-102 (2017). Plaintiffs acknowledge in their brief that these statutory requirements for the transfer of common property do not apply to Defendants.

rely upon any common law or statutory theory giving rise to such relief, *Ridley v. Wendel*, ___ N.C. App. ___, ___, 795 S.E.2d 807, 814-15 (2016); (2) the relief is not "consistent with the claims pleaded and embraced within the issues presented to the court[,]" *Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 137, 693 S.E.2d 208, 213 (2010) (citation omitted); or (3) the relief is "not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial." *N.C. Nat. Bank* at 122, 322 S.E.2d at 183.

Here, the trial court awarded Defendants "the right of an easement for ingress and egress across . . . Lot 18[.]" No such relief was requested by either party, and the trial court failed to identify the nature of the easement imposed. *See, e.g.*, Webster, Jr., *supra*, § 15.08 at 15-14 ("Easements may be created in at least ten ways."). The hearing transcript, for its part, reveals that the trial court considered the easement as involving necessity:

> [PLAINTIFFS' COUNSEL]: I'm sorry. Your Honor, are you finding that there is an easement over the Lot 18?
>
> THE COURT: It is, yes, sir. And – and –
>
> [PLAINTIFFS' COUNSEL]: Your Honor, I think – I would just respectfully say that that was not noticed for here today. They have not made that claim in any type of pleading at all.
>
> THE COURT: Yeah. But – but with all due respect, there's – there's no access to it. And by law, it's got to be some access to it. And so I'm of the humble opinion that it – it happens by operation of law because of the motion for summary judgment has been granted, because an easement can be implied.
>
> And that's why when I asked the question with regard to the aerial photo, you know, there's no clear path. . . . And I questioned counsel about how people would access this lot before the no-trespass signs were put up.
>
> . . .
>
> I have found that an easement exists by the fact that the association owns what is back there, and they have to by law have access to it.

Defendants, though they refer to the easement as both implied and by necessity in their brief, also appear to consider the easement imposed

to be one of necessity, as their sole argument concerns the elements for easements by necessity. Our review is therefore focused on whether the imposition of an easement by necessity was within the scope of the pleadings and evidence presented at summary judgment. *N.C. Nat. Bank* at 122, 322 S.E.2d at 183.

Both Plaintiffs and Defendants cite *Jernigan v. McLamb*, 192 N.C. App. 523, 665 S.E.2d 589 (2008), in support of their respective positions, and we find it dispositive of the issue. As noted by the parties, the necessity leading to the easement "must arise at the time of conveyance from the common grantor." *Id.* at 527, 665 S.E.2d at 592. An easement by necessity in this case is therefore proper only if Ocean Side's conveyance of Lot 18 to Mr. Earney in 1981 resulted in inaccessibility to the Reserved Area containing Parcel A. Plaintiffs point out that the Reserved Area runs along the northern border of Lots 17-22 in the Bonaparte's Retreat development, and an affidavit submitted at summary judgment stated that Ocean Side still owned Lot 22 until its sale to the affiant in 1984. Thus, the evidence shows that Ocean Side still had access to the Reserved Area containing Parcel A at the time of Lot 18's conveyance from the common grantor, and there is nothing in the record disclosing an inability to access Parcel A through the Reserved Area at that time. The trial court's imposition of an easement by necessity was therefore "not . . . justified by the evidence adduced at [summary judgment]" and contrary to Rule 54(c). *N.C. Nat. Bank* at 122, 322 S.E.2d at 183.

Even if we assume *arguendo* that the trial court intended to create an implied easement from prior use, the evidence necessary to impose such an easement was not before the trial court. In order to demonstrate an implied easement by prior use, one must show:

> (1) there was a common ownership of the dominant and servient parcels of land and a subsequent transfer separated that ownership, (2) before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was 'apparent, continuous and permanent,' and (3) the claimed easement is 'necessary' to the use and enjoyment of the plaintiffs' land.

Metts v. Turner, 149 N.C. App. 844, 849, 561 S.E.2d 345, 348 (2002) (citation omitted). Here, the common owner of Parcel A, the dominant tract, and Lot 18, the servient tract, at the time of their separation was Ocean Side. However, no evidence showing Ocean Side's use of Lot 18 to access Parcel A at the time of separation was introduced at summary judgment, nor does it appear elsewhere in the record. Thus, to the extent the trial

court sought to create an easement implied by prior use, it erred in doing so. *N.C. Nat. Bank* at 122, 322 S.E.2d at 183.

Even if we were to assume that the evidence supported an easement by necessity or implied by prior use, the imposition of an easement in this action was without sufficient notice to Plaintiffs to avoid "substantial prejudice[.]" *N.C. Nat. Bank* at 122, 322 S.E.2d at 183. "An essential foundation of the Anglo-American system of jurisprudence is the protection of real and personal property interests[,]" Webster, Jr., *supra*, § 1.01 at 1-4, and the easement implied here permits the roughly 188 members of BRIPOA access across Plaintiffs' property. This severely hampers Plaintiffs' "right to exclude others, one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384, 129 L. Ed. 2d 304, 321 (1994) (citation and internal quotation marks omitted). Given the importance of property rights generally and the right to exclude specifically, the trial court's imposition of an easement across Plaintiffs' property in favor of an entire planned community of approximately 188 members, without notice to or at the request of either party, worked to Plaintiffs' "substantial prejudice" and was error. *N.C. Nat. Bank* at 122, 322 S.E.2d at 183.

In reaching this holding, we acknowledge that Defendants' answer alleged Plaintiffs were "seeking to deny the easement rights each owner of a lot in the Development has to use the common property of the Development[.]" This invocation of some unspecified easement rights, however, was wholly inadequate to avoid Plaintiffs' substantial prejudice and does not constitute a sufficient reference to any common law or statutory theory giving rise to the easement imposed by the trial court. *Ridley*, ___ N.C. App. at ___, 795 S.E.2d at 814-15. First, the reference to an easement was made as part of Defendants' first defense, which contended the members of BRIPOA were unnamed necessary parties to Plaintiffs' action, and not as part of any affirmative assertion of easement rights or a counterclaim therefor. Second, Defendants failed to identify the nature of the easement claimed, each of which requires different evidence proving different elements. *See, e.g.*, *Adelman v. Gantt*, ___ N.C. App. ___, ___, 795 S.E.2d 798, 803-05 (2016) (analyzing the different elements required for easements implied by prior use and easements by necessity). Defendants' oblique reference to "easement rights" in a defense of failure to join necessary parties was therefore insufficient to put Plaintiffs on notice as to which elements to disprove and what evidence to rebut. Third, the easement rights Defendants referenced as restricted by Plaintiffs' adverse possession of Parcel A were those of

each member of BRIPOA "to use common property[,]" suggesting that the easement in question lay over Parcel A, if adversely possessed by Plaintiffs, to the rest of the Reserved Area, not over Lot 18. In short, the relief ordered by the trial court "was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial[,]" and worked to Plaintiffs' substantial prejudice, constituting reversible error. *N.C. Nat. Bank* at 122, 322 S.E.2d at 183.

IV. CONCLUSION

Plaintiffs are not entitled to summary judgment on their adverse possession claim because North Carolina law prohibits them from tacking their adverse possession of Parcel A to that of their predecessor in title. Nor are they entitled to summary judgment on their claims seeking to invalidate the transfer of Parcel A from BRPOA to BRIPOA, as they failed to properly plead a derivative claim, lacked standing to seek the relief requested as individual members, and did not show that the transfer was ultra vires as a matter of law. The trial court properly granted summary judgment to Defendants on these claims. Nevertheless, we reverse in part, as we hold that the trial court erred in imposing an easement across Lot 18 in favor of Defendants that was not forecasted by the pleadings, supported by the evidence, and which worked to the substantial prejudice of Plaintiffs.

AFFIRMED IN PART; REVERSED IN PART.

Judges ELMORE and DIETZ concur.

JERRY DAVIS, EMPLOYEE, PLAINTIFF
v.
CRAVEN COUNTY ABC BOARD, EMPLOYER,
PENN NATIONAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA17-908

Filed 17 April 2018

1. Workers' Compensation—treatment for injury—drug not approved by FDA

In a workers' compensation case involving a longstanding ankle injury, the Court of Appeals rejected the argument that the workers' compensation providers should not be required to provide a non-FDA approved drug. The text of the Workers' Compensation Act does not limit the types of drugs that might be required solely to those approved by the FDA.

2. Workers' Compensation—treatment of injury—drug not approved by FDA—effectiveness

Whether a particular drug is reasonably required in treating a workers' compensation claimant is a question of fact. There was at least some competent evidence supporting the Industrial Commission's finding that a non-FDA approved compound cream recommended by two doctors was reasonably required in this case.

Appeal by defendants from opinion and award entered 16 May 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 February 2018.

The Law Offices of Nicole D. Hart, PLLC, by Nicole D. Hart, for plaintiff-appellee.

Midkiff, Muncie & Ross, P.C., by Brian C. Groesser, for defendants-appellants.

DIETZ, Judge.

Plaintiff Jerry Davis injured his ankle at work and struggled with pain for many years. In 2014, his doctors prescribed a compound cream that Davis found more effective than previous treatments. This compound cream was not approved by the U.S. Food and Drug Administration.

Defendants, who are Davis's workers' compensation providers, refused to compensate him for this non-FDA-approved treatment. The Industrial Commission concluded that the compound cream was reasonably required to provide relief and ordered Defendants to pay. Defendants appealed.

As explained below, we reject Defendants' argument that non-FDA-approved drugs should be categorically excluded from medical compensation under the workers' compensation system. The text of the Workers' Compensation Act does not limit drug treatment solely to FDA-approved drugs. Defendants assert a number of persuasive policy arguments concerning the risks of non-FDA-approved drugs, but this Court has no authority to rewrite the law on policy grounds. That is a task for the legislative branch.

We likewise reject Defendants' argument that the compound cream is not reasonably required to provide relief in this case because its risks outweigh the marginal pain relief Davis experienced. This is a fact question for the Commission. There is at least some competent evidence supporting the Commission's findings and they are therefore binding on this Court. Accordingly, we affirm the Commission's opinion and award.

Facts and Procedural History

Plaintiff Jerry Davis began working for the Craven County ABC Board in 2009. In May 2010, Davis injured his right ankle while at work and began receiving workers' compensation.

In 2011, Davis was treated by Dr. Marcono Hines at Nova Pain Management. Dr. Hines prescribed Davis Voltaren gel, an FDA-approved drug. In 2014, Defendants sent Davis to Dr. Garlon Campbell, a pain management physician at The Carolinas Center for Surgery. On 4 June 2014, Dr. Campbell conducted a physical examination of Davis and noted that Davis's symptoms were consistent with complex regional pain syndrome or reflex sympathetic dystrophy.

Dr. Campbell prescribed Davis a compound cream to treat his condition. That compound cream was not approved by the FDA, the federal agency that regulates prescription drugs. However, the drugs that are "compounded" together to create the cream each are FDA-approved on their own for the treatment of various medical conditions.

At a follow-up visit, Davis told Dr. Campbell that the compound cream relieved some of his symptoms. Dr. Campbell recommended continued use of the compound cream for three months. Defendants

refused to pay for this non-FDA-approved drug treatment and refused to authorize any further treatment by Dr. Campbell.

Davis continued to be treated by Dr. Hines and, after Davis reported his experience with the compound cream, Dr. Hines prescribed a similar, non-FDA-approved compound cream to treat Davis's pain. Defendants again refused to authorize or pay for this prescription.

On 7 July 2015, Davis moved to compel Defendants to pay for the compound cream. In his deposition, Dr. Hines testified that Davis experienced more pain relief when using the compound cream than when using Voltaren gel. Dr. Hines opined that the compound cream was reasonably necessary to provide Davis with pain relief.

On cross-examination, Dr. Hines acknowledged that the compound cream was not FDA-approved and that many health insurers refuse to approve the compound cream for treatment. When asked who would bear the risk if something happened to a patient while using a non-FDA-approved medicine, Dr. Hines stated he was no longer comfortable prescribing compound creams and would not do so for other patients. But because Davis had a successful experience with the compound cream, Dr. Hines testified he would still prescribe the compound cream for Davis with the understanding that if Davis experienced any problems, he would immediately cease its use.

Dr. Campbell also testified. He explained that he often prescribes compound cream and has experience with patients who have used the cream long-term. While Dr. Campbell has noticed skin irritation in connection with the cream, he has never seen a toxic reaction. Dr. Campbell stated the compound cream is "very safe," even though the combination of drugs is not FDA-approved. Dr. Campbell opined that the compound cream was reasonably necessary to relieve Davis's pain. Dr. Campbell also testified that he would prescribe the compound cream to others and was unaware of any toxicity or death with patients who used the compound cream.

On 26 October 2016, a deputy commissioner concluded that the compound cream was reasonably necessary to effect a cure, provide relief, or lessen Davis's period of disability. The deputy commissioner ordered Defendants to authorize and pay for the compound cream. Defendants appealed to the Full Commission. The Full Commission affirmed the deputy commissioner and again ordered Defendants to authorize and pay for the compound cream. Defendants timely appealed.

Analysis

[1] Defendants oppose the Commission's opinion and award on two grounds and we address them in turn below.

First, Defendants argue that they should not be required to authorize and pay for treatment using a non-FDA-approved drug. Defendants assert that "medical compensation" under the Workers' Compensation Act only applies to medical care that "may *reasonably* be required to effect a cure or give relief." N.C. Gen. Stat. § 97-2(19) (emphasis added). Defendants point to a number of persuasive policy reasons why non-FDA-approved drugs are dangerous. Given these health risks, Defendants argue, non-FDA-approved drugs cannot be reasonably required for medical care under any circumstances.

We reject this argument. The text of the Workers' Compensation Act does not limit the types of drugs that might reasonably be required solely to those that are FDA-approved. Instead, the statute indicates that whether a particular medical treatment "may reasonably be required to effect a cure or give relief" is a fact question that must be individually assessed in each case. Were this Court to create a categorical exclusion for non-FDA-approved medical treatments, we would, in effect, be adding an exception to the Act where one does not exist in the text. We cannot do so. This Court is "an error-correcting body, not a policy-making or law-making one." *Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ.*, 242 N.C. App. 375, 381, 774 S.E.2d 922, 927 (2015). We have no authority to create exceptions to the plain text of statutes on policy grounds. If requiring workers' compensation providers to compensate injured workers for non-FDA-approved drugs is bad policy, it is for our General Assembly to change that law. Accordingly, we reject Defendants' argument that non-FDA-approved drugs categorically fall outside the statutory definition of "medical compensation" because they are never reasonably required to effect a cure or provide relief. *See* N.C. Gen. Stat. §§ 97-2(19), 97-25.

[2] Next, Defendants argue that this Court should "weigh the minimal relief that Plaintiff subjectively reports as receiving from the cream versus the risks associated with injured workers using non-FDA-approved drugs" and conclude that the compound cream in this case is not "reasonably required" to give relief under N.C. Gen. Stat. § 97-2(19). We again reject this argument.

As explained above, whether a particular drug is reasonably required is a fact question. This Court does not engage in *de novo* review of facts in workers' compensation cases. Instead, we apply the competent

evidence standard. Under that standard of review, if the Commission's factual findings are supported by *any* competent evidence in the record, those findings are binding on appeal. *Adams v. Frit Car, Inc.*, 185 N.C. App. 714, 717, 649 S.E.2d 651, 653 (2007).

Here, there was at least some competent evidence supporting the Commission's finding that "the compound cream recommended and prescribed by both Dr. Campbell and Dr. Hines is reasonably required to effect a cure, provide relief, or lessen Plaintiff's period of disability." Davis testified that the compound cream provided several hours of pain relief, which was significantly better than other pain management treatments his doctors had prescribed. The cream also permitted him to stand and walk more freely than other treatments.

Dr. Campbell and Dr. Hines, two physicians who treated Davis, testified that the compound cream provided relief from Davis's pain that was more effective than other available treatments. Both physicians also testified that Davis reported no significant adverse effects from the compound cream and that they were not aware of any other patients who suffered adverse side effects when using the compound creams. Both physicians therefore concluded that the compound cream was reasonably required to afford relief, even if the cream was not FDA-approved.

To be sure, Defendants point to other evidence in the record indicating that the risks of these compound creams outweigh the marginal pain relief Davis experienced. But this Court, applying the competent evidence standard, cannot override the Commission's fact-finding simply because evidence supports the opposite finding. There is at least some competent evidence supporting the Commission's finding and it is therefore binding on this Court. Accordingly, we reject this argument and affirm the Commission's opinion and award.

Conclusion

We affirm the Industrial Commission's opinion and award.

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

DANIEL RYAN DeBRUHL, Petitioner
v.
MECKLENBURG COUNTY SHERIFF'S OFFICE, Respondent

No. COA17-880

Filed 17 April 2018

1. Constitutional Law—due process—concealed handgun permit—not renewed

Petitioner had a property interest in renewal of his concealed carry handgun permit for due process purposes. Because N.C.G.S. § 14-415.11(b) did not give the local sheriff unfettered discretion in the issuance of a renewal, an applicant had a legitimate claim of entitlement to renewal so long as the enumerated criteria had been satisfied.

2. Constitutional Law—due process—renewal of concealed handgun permit—procedural—appeal of denial

Defendant was deprived of procedural due process in the denial of his application to renew his concealed handgun permit by the absence of a hearing. In this case, there was a vague, bare-bones written notice that this application had been denied and that he would have the opportunity to appeal, but petitioner was not notified of the factual basis for the denial or the specific statutory subsection under which the permit had been denied. Moreover, petitioner was not given a hearing or an opportunity to submit even minimal contradictory information.

Appeal by petitioner from order entered 28 April 2017 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 24 January 2018.

Redding Jones, PLLC, by Ty Kimmell McTier and David G. Redding, for petitioner-appellant.

Ruff Bond Cobb Wade & Bethune, LLP, by Ronald L. Gibson, for respondent-appellee.

ZACHARY, Judge.

The issue presented is whether the due process clause of the Fourteenth Amendment requires that the applicant be afforded an

opportunity for an evidentiary hearing to contest the denial of his application for renewal of a Concealed Handgun Permit pursuant to N.C. Gen. Stat. § 14-415.12(a)(3). We conclude that it does.

I. Factual Background

On 9 September 2016, Petitioner Daniel Ryan DeBruhl submitted an application for the renewal of his Concealed Handgun Permit to the Mecklenburg County Sheriff's Office. A veteran of the United States military, Petitioner had maintained a Concealed Handgun Permit for ten years prior to submitting his renewal application. The Sheriff's Office issued a perfunctory denial of Petitioner's application for renewal on 14 December 2016, without notice of the nature of or basis for the denial or any opportunity for Petitioner to be heard on the allegations against him.

The communication that advised Petitioner of the denial contained the following information:

> It is found that your actions for the following constitute a violation of the provisions set forth in the North Carolina General Statute 14-415.12 for the possession of a concealed handgun permit.
>
> Your application for a concealed handgun permit has been denied for the following reasons:
>
> [N.C. Gen. Stat. §] 14-415.12(a) – Does not meet the requirements for application
>
> [N.C. Gen. Stat. §] 14-415.12(b)(1) – Ineligible to own, possess, or receive firearm under State or Federal Law
>
> YOU ARE DENIED DUE TO INFORMATION RECEIVED FROM VETERANS AFFAIRS.

Petitioner appealed the Sheriff's decision to the district court on 6 March 2017, but complained that "there is no way for Petitioner to know what facts to challenge on appeal" because of the lack of facts "provided in the Denial." After "having reviewed [Petitioner's] criminal background and other relevant information," the Honorable Regan A. Miller entered an order "Denying Appeal For A Concealed Handgun Permit" on 24 April 2017. In Finding of Fact No. 5, the trial court concluded that the Sheriff's Office "denied [Petitioner] a Concealed Handgun Permit because [Petitioner] sought or received mental health and/or substance abuse treatment in 2016," although Petitioner had not previously been

adjudicated to be mentally ill. In Finding of Fact No. 6, the district court found that Petitioner "suffers from a mental health disorder that affects his ability to safely handle a firearm."[1] Based on these findings, the district court concluded that "[t]he Sheriff's decision was a reasoned and reasonable decision[,]" and affirmed the denial of Petitioner's Concealed Handgun Permit renewal application. Petitioner was not afforded any opportunity to be heard on the matter before the court entered its order.

Petitioner filed notice of appeal to this Court on 30 May 2017. On appeal, Petitioner argues that "the district court's finding of fact that petitioner suffers from a mental health disorder was improper absent a formal adjudicatory hearing regarding petitioner's mental competency and violates petitioner's due process rights." In the alternative, Petitioner argues that the district court's "application of section N.C.G.S. § 14-415.12(a)(3) is overbroad, contrary to statutory construction and encompasses a myriad of protected activities under the Second Amendment of the United States Constitution."

We find Petitioner's due process claim dispositive.

II. North Carolina Statutory Framework

[1] In North Carolina, "[a]ny person who has a concealed handgun permit may carry a concealed handgun unless otherwise specifically prohibited by law." N.C. Gen. Stat. § 14-415.11(a) (2017). The criteria for obtaining a Concealed Handgun Permit are set forth in N.C. Gen. Stat. § 14-415.12. A permit is obtained from the local sheriff and once issued is valid for five years. N.C. Gen. Stat. § 14-415.11(b) (2017). If an individual applies to renew his Concealed Handgun Permit, the sheriff must determine whether that individual "remains qualified to hold a permit in accordance with the provisions of G.S. 14-415.12." N.C. Gen. Stat. § 14-415.16(c) (2017).

N.C. Gen. Stat. § 14-415.12 provides that a sheriff "shall issue" a Concealed Handgun Permit to an applicant so long as "the applicant qualifies under the following criteria:"

> (a) . . .
>
> > (1) The applicant is a citizen of the United States or has been lawfully admitted for permanent residence . . .

1. While neither the Sheriff's Office nor the district court cited a specific statutory provision, the district court's language tracks that of N.C. Gen. Stat. § 14-415.12(a)(3), which provides for the denial of a Concealed Handgun Permit if the applicant "suffer[s] from a physical or mental infirmity that prevents the safe handling of a handgun."

and has been a resident of the State 30 days or longer immediately preceding the filing of the application.

(2) The applicant is 21 years of age or older.

(3) The applicant does not suffer from a physical or mental infirmity that prevents the safe handling of a handgun.

(4) The applicant has successfully completed an approved firearms safety and training course which involves the actual firing of handguns and instruction in the laws of this State governing the carrying of a concealed handgun and the use of deadly force. The North Carolina Criminal Justice Education and Training Standards Commission shall prepare and publish general guidelines for courses and qualifications of instructors which would satisfy the requirements of this subdivision. An approved course shall be any course which satisfies the requirements of this subdivision and is certified or sponsored by:

a. The North Carolina Criminal Justice Education and Training Standards Commission,

b. The National Rifle Association, or

c. A law enforcement agency, college, private or public institution or organization, or firearms training school, taught by instructors certified by the North Carolina Criminal Justice Education and Training Standards Commission or the National Rifle Association.

Every instructor of an approved course shall file a copy of the firearms course description, outline, and proof of certification annually, or upon modification of the course if more frequently, with the North Carolina Criminal Justice Education and Training Standards Commission.

(5) The applicant is not disqualified under subsection (b) of this section.

N.C. Gen. Stat. § 14-415.12(a) (2017). Even where the applicant satisfies subsections (a)(1)-(4) above, however,

> (b) The sheriff shall deny a permit to an applicant who:
>
> (1) Is ineligible to own, possess, or receive a firearm under the provisions of State or Federal law.
>
> (2) Is under indictment or against whom a finding of probable cause exists for a felony.
>
> (3) Has been adjudicated guilty in any court of a felony . . . .
>
> . . .
>
> (6) Is currently, or has been previously adjudicated by a court or administratively determined by a governmental agency whose decisions are subject to judicial review to be, lacking mental capacity or mentally ill. Receipt of previous consultative services or outpatient treatment alone shall not disqualify an applicant under this subdivision.
>
> . . .
>
> (8) Except as provided in subdivision (8a), (8b), or (8c) of this section, is or has been adjudicated guilty of . . . one or more crimes of violence constituting a misdemeanor . . . within three years prior to the date on which the application is submitted.

N.C. Gen. Stat. § 14-415.12(b) (2017).

The statute thus includes two provisions related to mental health: N.C. Gen. Stat. § 14-415.12(a)(3) and N.C. Gen. Stat. § 14-415.12(b)(6). The critical distinction between the two subsections is the requirement of a prior adjudicatory hearing. Under N.C. Gen. Stat. § 14-415.12(b)(6), if an applicant has been adjudicated to be "lacking mental capacity or mentally ill[,]" the sheriff must deny the application. However, even without a prior adjudication of mental illness, if a sheriff determines that an applicant "suffer[s] from a physical or mental infirmity that prevents the safe handling of a handgun" under N.C. Gen. Stat. § 14-415.12(a)(3), the sheriff may deny the application.

III. The Due Process Clause

The Fourteenth Amendment to the United States Constitution provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. 14, § 1. An

important check on the power of the government, the principle of procedural due process requires that the states afford the individual a certain level of procedural protection before a governmental decision may be validly enforced against the individual. Procedural due process safeguards may be invoked when a state seeks to apply its laws in a manner in which individuals are "exceptionally affected, in each case upon individual grounds[.]" *Bi-Metallic Invest. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446, 60 L. Ed. 372, 375 (1915) (discussing *Londoner v. Denver*, 210 U.S. 373, 385, 52 L. Ed. 1103, 1112 (1908)).

"The touchstone of [procedural] due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 41 L. Ed. 2d 935, 952 (1974) (citation omitted). In order to guard against the threat of any such arbitrary government action, "the right to some kind of prior hearing is paramount." *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70, 33 L. Ed. 2d 548, 556 (1972). The United States Supreme Court has consistently held that "[t]he right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 32 (1976) (citation and quotation marks omitted). However, whether a state will owe procedural due process protections to an individual depends upon the nature of the individual right that is at stake. "The requirements of procedural due process apply only to the deprivation of . . . liberty and property" interests. *Roth*, 408 U.S. at 569, 33 L. Ed. 2d at 556.

Accordingly, in order for Petitioner to prevail in his argument that he was entitled to a hearing on appeal from the denial of his renewal application, it must first be determined that he had a property or liberty interest in retaining his Concealed Handgun Permit that was deserving of due process protection.

IV. Whether Process was Owed

Petitioner maintains in the instant case that he was entitled to due process protection in the form of a hearing because he "had both a liberty and property interest at issue at the time of the Denial." The Sheriff's Office maintains that "[t]he District Court's Order affirming the Sheriff's denial of the [Petitioner's] Application for a Concealed [Handgun] Permit does not violate any constitutional right to bear arms . . . ." We first address Petitioner's contention that he had a vested property interest in his Concealed Handgun Permit at the time of the denial of his application.

"[T]he property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 571-72, 33 L. Ed. 2d at 557. In this sense, a property interest "may take many forms." *Id.* at 576, 33 L. Ed. 2d at 560. Nevertheless, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Id.* "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577, 33 L. Ed. 2d at 561.

A legitimate claim of entitlement is often created by statute. *E.g.*, *id.* ("Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]"); *Wolff*, 418 U.S. at 557, 41 L. Ed. 2d at 951; *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) (citation omitted) ("State law determines whether an individual . . . does or does not possess a constitutionally protected 'property' interest in continued employment."). For example, in *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287 (1970), the United States Supreme Court "held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process." *Roth*, 408 U.S. at 576, 33 L. Ed. 2d at 560 (discussing *Goldberg*). A valid property interest existed in *Goldberg* because the welfare payments were "grounded in the statute defining eligibility[.]" *Id.* at 577, 33 L. Ed. 2d at 561. While "[t]he recipients had not yet shown that they were, in fact, within the statutory terms of eligibility[,]" the Supreme Court "held that they had a right to a hearing at which they might attempt to do so." *Id.*

In contrast, in *Bd. of Regents v. Roth*, the respondent had a " 'property' interest in employment at Wisconsin State University-Oshkosh [that] was created and defined by the terms of his appointment." *Id.* at 578, 33 L. Ed. 2d at 561. However, those terms "specifically provided that the respondent's employment was to terminate" after the one-year contract term, and "they made no provision for renewal whatsoever." *Id.* Under those circumstances, "the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." *Id.* The decision to rehire the respondent was left solely to the discretion of the University.

The statutory regime in the present case is analogous to that in *Goldberg*. Petitioner's initial permit was valid only for a period of five

years, and there is no question but that, pursuant to the provisions of the statute, he maintained a property interest in that permit during those years. Moreover, Petitioner maintained a property interest in the renewal of his Concealed Handgun Permit upon expiration of his prior permits. The relevant statute provides that "[t]he sheriff *shall* issue a permit to carry a concealed handgun to a person who qualifies for a permit under G.S. 14-415.12." N.C. Gen. Stat. § 14-415.11(b) (2017) (emphasis added). Because the statute does not give the local sheriff unfettered, unassailable discretion in the issuance of permit renewals, an applicant enjoys a legitimate claim of entitlement to renewal so long as the enumerated criteria have been satisfied. *E.g.*, *Mallette v. Arlington County Emples. Supplemental Retirement Sys. II*, 91 F.3d 630, 635 (4th Cir. 1996). Thus, Petitioner had a clear property interest in the renewal of his Concealed Handgun Permit, and was entitled to procedural due process protections.

In that Petitioner had a recognized property interest in the renewal of his Concealed Handgun Permit, we need not determine whether he also had a liberty interest in its renewal.

V. What Process was Due

[2] Having established that Petitioner had a property interest in the issuance of his Concealed Handgun Permit sufficient to trigger procedural due process protection, we must determine whether Petitioner was deprived of such protection by the manner in which his renewal application was denied.

The statute at issue provides that a sheriff may deny an application for a Concealed Handgun Permit pursuant N.C. Gen. Stat. § 14-415.12(a)(3) without first holding a hearing on the matter. *See Kelly v. Riley*, 223 N.C. App. 261, 265, 733 S.E.2d 194, 197 (2012) ("N.C. Gen. Stat. § 14-415.16 . . . specifically governs renewal of a concealed handgun permit[,] [and] does not require a hearing prior to the nonrenewal of an applicant's concealed handgun permit.") (quotation marks and alterations omitted). The statute instead affords the following scope of procedural protections:

> A person's application for a permit shall be denied only if the applicant fails to qualify under the criteria listed in this Article. If the sheriff denies the application for a permit, the sheriff shall, within 45 days, notify the applicant in writing, stating the grounds for the denial. An applicant may appeal the denial, revocation, or nonrenewal of a permit by petitioning a district court judge of the district

> in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal. The determination by the court shall be final.

N.C. Gen. Stat. § 14-415.15(c) (2017). Accordingly, following a sheriff's denial of a Concealed Handgun Permit application, the process afforded is the applicant's opportunity to appeal that decision.

The question remains, however, whether the opportunity to obtain appellate review is sufficient when that review is unaccompanied by an opportunity to be heard. We conclude that appellate review without an opportunity to be heard does not satisfy the demands of due process.

It is manifest that "some kind of hearing is required at some time before a person is finally deprived of his property interests." *Wolff*, 418 U.S. at 557-58, 41 L. Ed. 2d at 952 (citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 95 L. Ed. 817, 852 (1951)).

> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. . . . That a conclusion satisfies one's private conscience does not attest its reliability. The validity . . . of a conclusion largely depend[s] on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refugee Committee, 341 U.S. at 171-72, 95 L. Ed. at 854. Nevertheless, "[t]hat a hearing has been thought indispensable in so many other situations, leaving the cases of denial exceptional, does not itself prove that it must be found essential [everywhere]." *Joint Anti-Fascist Refugee Committee*, 341 U.S. at 172, 95 L. Ed. at 854. It does, however, create a "burden of showing weighty reason for departing in [an] instance from a rule so deeply imbedded in history and in the demands of justice." *Id.*

In the case at bar, nothing has been presented to this Court that would justify the departure from such a significant safeguard of the rights of the individual. There has been no indication "that it will be

impractical or prejudicial to a concrete public interest to disclose" to an applicant the nature and basis of the denial of the applicant's renewal application and, when on the grounds that the applicant "suffer[s] from a . . . mental infirmity," "to permit [the applicant] to meet [the allegations] if [the applicant] can." *Joint Anti-Fascist Refugee Committee*, 341 U.S. at 172-73, 95 L. Ed. at 854. Instead, our attention has been directed to *Kelly v. Riley*, 223 N.C. App. 261, 733 S.E.2d 194 (2012), in support of the argument of the Sheriff's Office that the "denial of [Petitioner's] Application for a Concealed [Handgun] Permit does not violate any constitutional right to bear arms[.]" However, *Kelly* is inapplicable to the case at bar.

In *Kelly*, the sheriff's office denied the petitioner's application for a Concealed Handgun Permit under the mandatory disqualification provision of N.C. Gen. Stat. § 14-415.12(b)(8) because the petitioner had a "previous conviction for assault on a female[.]" *Kelly*, 223 N.C. App. at 262, 733 S.E.2d at 195. It is important to note that *Kelly* involved issues of substantive due process rather than procedural due process. Moreover, in *Kelly* the *petitioner was afforded a hearing on appeal* from the denial of his Concealed Handgun Permit. The petitioner had also been protected by the various adjudication procedures that led to his initial conviction.

In the instant case, Petitioner was not afforded the benefit of an adjudicatory proceeding prior to the district court's affirmance of the Sheriff's Office's denial of his Concealed Handgun Permit renewal on the grounds that Petitioner "suffers from a mental health disorder that affects his ability to safely handle a firearm." Rather, the procedures employed consisted of (1) a vague, bare bones written notice advising Petitioner that his application had been denied, and (2) an opportunity to appeal that denial. The written notice stated that Petitioner had been denied pursuant to "NCGS 14-415.12(a)—Does not meet the requirements for application." The notice did not specify which subsection of N.C. Gen. Stat. § 14-415.12(a) Petitioner did not satisfy, nor did it provide him with an explanation of the factual basis for the denial. Finally, the notice informed Petitioner that "You may appeal the decision by submitting a written or typed petition (statement); or complete the appeal form and submit to the Senior Resident Superior Court Judge setting forth the reasons for appeal." In Petitioner's appeal to the district court, he noted that "[t]he information provided in the Denial is so minimal that there is no way for Petitioner to know what facts to challenge on appeal." Petitioner was not subsequently provided with any such information, and on appeal the district court merely "reviewed [Petitioner's] . . . relevant information" before finding that Petitioner "suffers from a

mental health disorder that affects his ability to safely handle a firearm." It is undisputed that Petitioner was first informed of the precise grounds for the denial of his renewal application in the district court's order. Petitioner was not afforded a hearing on appeal, nor was he given an opportunity to submit even minimal contradictory information, before the district court made its final determination.

These procedures were wholly inadequate. The State's prohibition against the grant of a Concealed Handgun Permit to a person who "suffer[s] from a . . . mental infirmity that prevents the safe handling of a handgun" necessarily requires an individualized inquiry as to whether the specific applicant does indeed suffer from a mental infirmity. N.C. Gen. Stat. § 14-415.12(a)(3) (2017). The absence of any prior process requires that, if sought, process is due at that moment. This is particularly so in the instant case, as a determination under N.C. Gen. Stat. § 14-415.12(a)(3) that an individual suffers "from a . . . mental infirmity that prevents the safe handling of a handgun" is especially susceptible to the type of arbitrary governmental action that the due process clause was designed to prevent.

We do not discount the safety concerns expressed by the Sheriff's Office. Nonetheless, "[t]he heart of the matter is that democracy implies respect for the elementary rights of men. . . ." *Joint Anti-Fascist Refugee Committee*, 341 U.S. at 170, 95 L. Ed. at 853. "[A] democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Id.* The State is not "immune from the historic requirements of fairness merely because [it] acts, however conscientiously, in the name of security" and safety. *Id.* at 173, 95 L. Ed. at 855.

At the very least, it is evident that "some kind of hearing is required at some time before a person is finally deprived of his property interests." *Wolff*, 418 U.S. at 557-58, 41 L. Ed. 2d at 952 (citation omitted). We need not determine the full panoply of rights that Petitioner *should* have been afforded had there been a hearing in the present case. By definition, "a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal." *Londoner*, 210 U.S. at 386, 52 L. Ed. at 1112. Here, Petitioner was deprived of his procedural due process safeguards by the absence of any hearing whatsoever.

VI. Conclusion

Where a local sheriff determines that an application for renewal of a Concealed Handgun Permit ought to be denied on the grounds that

the applicant "suffer[s] from a . . . mental infirmity that prevents the safe handling of a handgun[,]" that applicant must be afforded an opportunity to dispute the allegations underlying the denial before it becomes final. The opportunity to appeal the denial to the district court as set forth in N.C. Gen. Stat. § 14-415.15(c) is procedurally sufficient only to the extent that it provides an opportunity for the applicant to be heard at that stage. At a minimum, an applicant denied the renewal of a permit pursuant to the provisions of this subsection must be provided notice of the precise grounds for the sheriff's denial, together with the information alleged in support thereof. This process must be followed by an opportunity to contest the matter in a hearing in district court. Because neither was afforded in the instant case, the district court's Order Denying Appeal For A Concealed Handgun Permit is reversed. The matter is reversed and remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and ARROWOOD concur.

DTH MEDIA CORPORATION; CAPITOL BROADCASTING COMPANY, INC.; THE CHARLOTTE OBSERVER PUBLISHING COMPANY; THE DURHAM HERALD COMPANY; Plaintiffs

v.

CAROL L. FOLT, in her official capacity as Chancellor of the University of North Carolina at Chapel Hill, and GAVIN YOUNG, in his official capacity as Senior Director of Public Records for the University of North Carolina at Chapel Hill, Defendants

No. COA17-871

Filed 17 April 2018

1. Public Records—educational records—student discipline—Federal Education Rights and Privacy Act—no conflict with state law

Officials of the University of North Carolina at Chapel Hill were required to release certain student disciplinary records related to sexual assaults, requested by news organizations pursuant to the Public Records Act. The federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2017), did not prohibit the University's compliance with the records request, to the extent it requested the names of the offenders, the nature of each violation, and the sanctions imposed.

2. Public Records—educational records—student discipline—Family Educational Rights and Privacy Act—federal pre-emption

The Court of Appeals rejected the argument of university officials that Congress intended to occupy the field of educational records such that the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2017) (FERPA), pre-empted state public records laws with respect to public educational records that were expressly exempted from FERPA's protections.

3. Public Records—educational records—student discipline—public policy arguments

In a Public Records Act case, the Court of Appeals declined to address university officials' public policy arguments concerning the effects of the disclosure of certain student disciplinary records. Normally, questions of public policy are for the legislature.

Appeal by plaintiffs from order entered 9 May 2017 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 20 March 2018.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens and Michael J. Tadych, for plaintiff-appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stephanie A. Brennan, for defendant-appellees.

Engstrom Law, PLLC, by Elliot Engstrom, for Student Press Law Center, amicus curiae.

TYSON, Judge.

I. Background

This Court reviews the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2017) ("FERPA"), and the North Carolina Public Records Act, N.C. Gen. Stat. §§ 132-1 to -11 (2017) (the "Public Records Act"), to determine whether officials of The University of North Carolina at Chapel Hill ("UNC-CH") are required to release students' disciplinary records, who have been found to have violated UNC-CH's sexual assault policy. The following facts were stipulated to by the parties and adopted by the trial court.

DTH Media Corporation; Capitol Broadcasting Company, Inc.; The Charlotte Observer Publishing Company; and, The Durham Herald Company (collectively, "Plaintiffs"), are North Carolina-based news organizations, which regularly cover events at UNC-CH. The defendants are Carol L. Folt, the Chancellor of UNC-CH, and Gavin Young, the Senior Director of Public Records of UNC-CH (collectively, "Defendants"), who are being sued in their official capacities.

Plaintiffs sent a public records request to UNC-CH in a letter dated 30 September 2016, asking for "copies of all public records made or received by [UNC-CH] in connection with a person having been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by [UNC-CH's] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office."

UNC-CH denied Plaintiffs' request on 28 October 2016 in a letter signed by Joel G. Curran, UNC-CH's Vice-Chancellor for Communications and Public Affairs. Vice-Chancellor Curran concluded the records requested by Plaintiffs are "educational records" as defined by FERPA and are "protected from disclosure by FERPA."

After denial of their request, Plaintiffs filed a complaint and petitioned for an order to show cause against Defendants on 21 November 2016, under the Public Records Act, and the North Carolina Declaratory Judgments Act, N.C. Gen. Stat. §§ 1-253 to -267. Plaintiffs sought, in part: (1) a preliminary order compelling Defendants to appear and produce the records at issue; (2) an order declaring that the requested records are public records as defined by N.C. Gen. Stat. § 132-1; (3) an order compelling Defendants to permit the inspection and copying of public records pursuant to N.C. Gen. Stat. § 132-9(a).

On 21 December 2016, Defendants filed their answer to Plaintiffs' complaint and petition. Following subsequent communications between the parties, including a mediation conducted pursuant to N.C. Gen. Stat. § 78-38.3E, Plaintiffs narrowed the scope of their request to encompass records in the custody of UNC-CH and limited to: "(a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by the [UNC-CH] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) the date and nature of each violation for which each such person was found responsible; and (c) the sanctions imposed on each such person for each such violation." Defendants stipulated that UNC-CH retains the records sought by Plaintiffs in their narrowed request. The matter was heard in Wake

County Superior Court on 6 April 2017. On 9 May 2017, the trial court entered an order and final judgment denying Plaintiffs' request, as it related to students who had been found responsible for serious sexual misconduct. The court granted Plaintiffs' request for records related to UNC-CH employees, who had been disciplined for such offenses.

The trial court's order and final judgment concluded the Public Records Act does not compel release of student records where "otherwise specifically provided by law." The trial court concluded FERPA "otherwise specifically provides" and grants UNC-CH "discretion to determine whether to release (1) the name of any student found 'responsible' under [UNC-CH's] policy for a 'crime of violence' or 'non-forcible sex offense,' (2) the violation, and (3) the sanction imposed." Plaintiffs timely filed notice of appeal from the trial court's order and final judgment.

Defendants complied with that portion of the trial court's order and final judgment relating to records regarding UNC-CH's employees, and both parties agree UNC-CH employees' records addressed in the order and judgment are not at issue on appeal.

II. Jurisdiction

Jurisdiction lies in this court over appeal of a final judgment of the superior court in a civil case. N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issue

Plaintiffs argue their public record's request for the disciplinary information of UNC-CH students falls within an exemption to FERPA's non-disclosure provisions and Defendants are required to comply with their Public Records Act request.

IV. Standard of Review

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003) (citation omitted). This appeal involves questions regarding the interpretation of FERPA and the Public Records Act. We review *de novo*.

V. Analysis

A. North Carolina Public Records Act

[1] The Public Records Act is codified at N.C. Gen. Stat. §§ 132-1 to -11 (2017). The public policy underlying the Public Records Act is enunciated

by the General Assembly at N.C. Gen. Stat. § 132-1(b), which provides, "The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost[.]"

The Public Records Act "affords the public a broad right of access to records in the possession of public agencies and their officials." *Times-News Publ'g Co. v. State of N.C.*, 124 N.C. App. 175, 177, 476 S.E.2d 450, 451-52 (1996), *disc. review denied*, 345 N.C. 645, 483 S.E.2d 717 (1997). "[T]he purpose of the Public Records Act is to grant liberal access to documents that meet the general definition of 'public records[.]' " *Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 238 N.C. App. 351, 352, 768 S.E.2d 23, 24 (2014).

The Public Records Act defines "public records" to include "all . . . material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." N.C. Gen. Stat. § 132-1(a).

The Public Records Act permits public access to all public records in an agency's possession "*unless* either the agency or the record is specifically exempted from the statute's mandate." *Times-News*, 124 N.C. App. at 177, 476 S.E.2d at 452 (emphasis supplied). "Exceptions and exemptions to the Public Records Act must be construed narrowly." *Carter-Hubbard Publ'g Co., Inc. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 624, 633 S.E.2d 682, 684 (2006) (citation omitted), *aff'd*, 361 N.C. 233, 641 S.E.2d 301 (2007).

Here, the trial court correctly determined that the UNC-CH student disciplinary records requested by Plaintiffs are "public records" as defined by the Public Records Act at N.C. Gen. Stat. § 132-1(b). Neither party contests the trial court's determination and conclusion that the records at issue are "public records" under the Public Records Act. Also, neither party disputes that UNC-CH is a public agency of North Carolina and is subject to the Public Records Act. *See* N.C. Gen. Stat. § 132-1(b).

B. Family Educational Rights and Privacy Act

The Congress of the United States enacted FERPA in 1974 "under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278, 153 L.Ed.2d

309, 318 (2002). "The Act directs the Secretary of Education to withhold federal funds from any public or private 'educational agency or institution' that fails to comply with these conditions." *Id.* FERPA provides, in part, that:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization. . . .

20 U.S.C. § 1232g(b)(1).

FERPA defines "education records" as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A); *see also* 34 C.F.R. § 99.3 (specifying definition of "education records" under FERPA). Plaintiffs and Defendants concede that UNC-CH receives federal funding and is generally subject to FERPA.

The parties also do not dispute the records Plaintiffs requested are "educational records." Twenty years ago with similar parties, this Court recognized that student disciplinary records are "educational records" for purposes of FERPA. *DTH Publ'g Corp. v. UNC-Chapel Hill*, 128 N.C. App. 534, 541, 496 S.E.2d 8, 13, *disc. review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998); *see United States v. Miami Univ.*, 294 F.3d 797, 812 (6th Cir. 2002) ("[S]tudent disciplinary records are education records because they directly relate to a student and are kept by that student's university.").

FERPA permits the release of certain student disciplinary records in several situations. FERPA expressly exempts and does not prohibit disclosure "to an alleged victim of any crime of violence . . . or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by the institution against the alleged perpetrator . . . ." 20 U.S.C. § 1232g(b)(6)(A). Most relevant here is another exemption of FERPA, which allows an educational institution to release "the final results of any disciplinary proceeding . . . if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense." 20 U.S.C. § 1232g(b)(6)(B).

Plaintiffs assert: (1) this express exemption removes their request for disclosure from exclusion under FERPA's sanctions; (2) FERPA does not prohibit Defendants from complying with their request; and, (3) as a result, the express intent of the Public Records Act requires Defendants to comply with Plaintiffs' request.

Defendants contend § 1232g(b)(6)(B) of FERPA impliedly grants and requires educational institutions to exercise discretion when deciding whether to release the student disciplinary records admittedly exempted from FERPA's non-disclosure provisions. They argue the binding Public Records Act conflicts with § 1232g(b)(6)(B) by removing the institution's discretion to decide whether to release the exempted records. Defendants assert "the federal Family Educational Rights and Privacy Act . . . governs the records at issue and precludes their release." Defendants conclude that to the extent the Public Records Act conflicts with FERPA's implied grant of discretion to UNC-CH, FERPA is supreme and pre-empts our Public Records Act, as federal law. The trial court agreed with Defendants' arguments.

C. Reconciling the Public Records Act and FERPA

1. Canons of Statutory Interpretation

To assess the parties' arguments, we must first determine whether a conflict exists between FERPA and the Public Records Act. In reviewing the relationship and any overlapping coverages between FERPA and the Public Records Act, we are guided by several well-established principles of statutory construction.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the [plain] language of the statute . . ., the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

"When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (internal quotation marks and ellipses omitted) (citing *Meyer v. Walls*, 122 N.C. App. 507, 512, 471 S.E.2d 422, 426 (1996), *aff'd in part, rev'd in part*, 347 N.C. 97, 489 S.E.2d 880 (1997)).

" '[S]tatutes *in pari materia* must be read in context with each other.' " *News & Observer Publ'g Co. v. Wake Cty. Hosp. System, Inc.*, 55 N.C. App. 1, 7, 284 S.E.2d 542, 546 (1981) (quoting *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976)). " '*In pari materia*' is defined as '[u]pon the same matter or subject.' " *Id.* at 7-8, 284 S.E.2d at 546 (quoting Black's Law Dictionary 898 (4th ed. 1968)).

Here, the "plain language" of § 1232g(b)(6)(B) of FERPA states:

> Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding . . . if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

Defendants argue, and the trial court agreed, that this language requires UNC-CH to exercise discretion on whether to release the admittedly public records of the final results of disciplinary hearings. Defendants have not cited any case law interpreting FERPA to support their proposed interpretation of this provision. Plaintiffs argue the plain language of the statute does not support Defendants' and the trial court's interpretation.

Our comprehensive review of relevant case and statutory law from this and other jurisdictions, both state and federal, fails to disclose any authority interpreting FERPA's § 1232g(b)(6)(B) as providing to public postsecondary educational institutions an express absolute discretionary authority over whether to release FERPA-exempted student disciplinary records and subject to disclosure under its express terms.

The language "[n]othing . . . shall be construed to prohibit an institution . . . from disclosing the final results of any disciplinary proceeding" does not indicate any congressional intent to *require* educational institutions to exercise discretion over or before releasing FERPA-exempted student disciplinary records in contravention of unambiguous and broad state public records laws expressly requiring such disclosure. No language in § 1232g(b)(6)(B) or the corresponding Code of Federal Regulations provisions speak to whether an educational institution *must* exercise discretion over whether to disclose student disciplinary records. 20 U.S.C. § 1232g(b)(6)(B), 34 C.F.R. 99.31(a)(14). Defendants do not argue that the records Plaintiffs requested are prohibited or

exempted from disclosure, or cannot be disclosed or released under § 1232g(b)(6)(B) without potential sanctions under FERPA.

The only language in § 1232g(b)(6)(B) that concerns an educational institution's purported "discretion" is: "if the institution *determines* as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense." 20 U.S.C. § 1232g(b)(6)(B) (emphasis supplied). Plaintiffs' records request is limited to students, who UNC-CH has already expressly determined to have engaged in such misconduct, and the records of which are expressly subject to disclosure under FERPA. 20 U.S.C. § 1232g(b)(6)(B).

UNC-CH's process used to determine whether a student violated school policy or crimes involves a completely different and separate determination from whether the admittedly public records relating to the discipline previously imposed for the misconduct should be released. FERPA's plain language in § 1232g(b)(6)(B) does not condition an educational institution's compliance on requiring the exercise of discretion to determine whether to release disciplinary records that FERPA expressly exempts from non-disclosure, in the face of a public records request.

Defendants' assertion of an absolute authority to exercise discretion on whether to release non-exempt records is undercut by other provisions of FERPA. § 1232g(b)(2)(B) provides:

> (2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—
>
> . . . .
>
> (B) except as provided in paragraph (1)(J), such information is furnished in compliance with *judicial order*, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency . . . .

20 U.S.C. § 1232g(b)(2)(B) (emphasis supplied).

The regulations implementing this provision provide:

> (a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:
>
> . . . .
>
> (9)(i) The disclosure is to comply with a *judicial order* or lawfully issued subpoena.

34 C.F.R. 99.31(a)(9)(i) (emphasis supplied).

Defendants' position that FERPA grants them absolute discretion to decide whether to release exempt disciplinary records is contradicted by these provisions, which do not prohibit an educational institution from complying with a judicial order. § 1232g(b)(2)(B) makes no distinction between a judicial order that *requires* disclosure and an order that *authorizes* disclosure. If a court orders an educational institution to release an exempt record, § 1232g(b)(2)(B) does not indicate the institution would be in violation of FERPA by complying with a mandatory court order. 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. 99.31(a)(9)(i).

However, we note that we do not interpret § 1232g(b)(2)(B) as granting a court the authority to remove an education record's nondisclosable status by ordering its release. *See Press-Citizen Co. v. Univ. of Iowa*, 817 N.W.2d 480, 493 (Iowa 2012) (stating that "[it] would make no sense to interpret the 'judicial order' exception" in a way that would mean FERPA only has effect until a party requesting records obtains a court order compelling release).

Interpreting § 1232g(b)(2)(B) and § 1232g(b)(6)(B) together indicates an educational institution would not be subject to loss of funding or other sanction for complying with a judicial order mandating disclosure of records that are exempt from FERPA's protections. 20 U.S.C. § 1232g(b)(2)(B); § 1232g(b)(6)(B); *see In re Hayes*, 199 N.C. App. 69, 79, 681 S.E.2d 395, 401 (2009) ("Words and phrases of a statute are to be construed as a part of the composite whole[.]"), *disc. review denied*, 363 N.C. 803, 690 S.E.2d 695 (2010).

2. Public Records Held by Public Agency

We decline to interpret FERPA as advocated by Defendants. Such an interpretation conflicts with both the Public Records Act's mandatory disclosure requirements and the plain meaning of FERPA's

§ 1232g(b)(6)(B), which allows disclosure. *See Taylor*, 131 N.C. App. at 338, 508 S.E.2d at 291 ("Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible.").

The disciplinary records at issue are stipulated by the parties to be "public records," and held by a "public agency" subject to the Public Records Act and that § 1232g(b)(6)(B) exempts them from FERPA's general non-disclosure of educational records.

3. Limitations on Disclosure

Plaintiffs request:

> (a) the name of any person who, since January 1, 2007, has been found responsible for rape, sexual assault or any related or lesser included sexual misconduct by the [UNC-CH] Honor Court, the Committee on Student Conduct, or the Equal Opportunity and Compliance Office; (b) *the date* and nature of each violation for which each such person was found responsible; and (c) the sanctions imposed on each such person for each such violation. (Emphasis supplied).

FERPA only authorizes disclosure of "the *name* of the student, the *violation* committed, and any *sanction* imposed by the institution on that student" from the general rule of non-disclosure of disciplinary records. 20 U.S.C. § 1232g(b)(6)(B) (emphasis supplied). The dates of offenses requested by Plaintiffs are not disclosable under FERPA. *See id.*

N.C. Gen. Stat. § 132-1(b) provides that the public may obtain copies of public records "unless *otherwise specifically provided by law.*" N.C. Gen. Stat. § 132-1(b) (emphasis supplied). Because § 1232g(b)(6)(B) "otherwise specifically provide[s]" that only the information listed therein is subject to disclosure, the dates of student offenses are not subject to disclosure under the Public Records Act. *See id.*; 20 U.S.C. § 1232g(b)(6)(B).

No conflict exists between FERPA and the Public Records Act for UNC-CH to release the public records within Plaintiffs' limited and narrow requests. The express terms of FERPA permit the disclosure of the information requested by Plaintiffs, except for the dates of violations. *See* 20 U.S.C. § 1232g(b)(6)(B). Defendants concede that if FERPA does not provide them the discretion to withhold what are admitted to be public records, they are compelled to release the records.

As qualified above, we hold Defendants, as administrators of a public agency, are required to comply with Plaintiffs' request to release the public records at issue under the Public Records Act. FERPA's § 1232g(b)(6)(B) does not prohibit Defendants' compliance, to the extent Plaintiffs' request the names of the offenders, the nature of each violation, and the sanctions imposed. Defendants' arguments are overruled.

D. Federal Pre-emption

[2] Defendants also argue FERPA pre-empts the Public Records Act with respect to the Public Records Act's mandatory disclosure requirements. We disagree.

The Supremacy Clause of the Constitution of the United States provides that the laws of the United States, the Constitution and treaties "shall be the supreme Law of the Land." U.S. Const. Art. VI, cl 2. "Congress may pre-empt, i.e., invalidate, a state law through federal legislation" either expressly or implicitly. *Oneok, Inc. v. Learjet, Inc.*, __ U.S. __, __, 191 L. Ed. 2d 511, 517 (2015). "A reviewing court confronting this question begins its analysis with a presumption against federal preemption." *State ex rel. Utilities Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 525, 614 S.E.2d 281, 287 (2005) (citing *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715, 85 L.Ed.2d 714, 722-23 (1985)).

The Congress of the United States may expressly pre-empt a state law "if the federal law contains explicit pre-emptive language." *Salzer v. King Kong Zoo*, 242 N.C. App. 120, 123, 773 S.E.2d 548, 550 (2015) (internal quotation marks and citations omitted). With respect to Plaintiffs' public records request, FERPA does not expressly pre-empt the Public Records Act, as neither § 1232g(b)(6)(B) nor any other provision of FERPA contains explicit language stating it pre-empts state public records laws. *See id.*

Defendants also argue UNC-CH is not required to comply with Plaintiffs' public records request under the theory of federal "implicit pre-emption." Implicit pre-emption can occur through either "conflict" or "field" pre-emption. *Id.* at 123-24, 614 S.E.2d at 551. Field pre-emption occurs where Congress "intended to foreclose any state regulation in the area, irrespective of whether state law is consistent with federal standards." *Oneok*, __ U.S. at __, 191 L. Ed. 2d at 511 (citation and quotation marks omitted). "In such situations, Congress has forbidden the State to take action in the field that the federal statute pre-empts." *Id.* (emphasis omitted).

Field pre-emption occurs when the federal government either "completely occupies a given field or an identifiable portion of it." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13, 75 L. Ed. 2d 752, 770 (1983) (citation omitted).

> The intent to displace state law altogether can be inferred from a framework of regulation so pervasive . . . that Congress left no room for the States to supplement it or where there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

Arizona v. United States, 567 U.S. 387, 399, 183 L. Ed. 2d 351, 369 (2012) (internal quotations and citations omitted). "Field pre-emption is wrought by a manifestation of congressional intent to occupy an entire field such that even without a federal rule on some particular matter within the field, state regulation on that matter is pre-empted, leaving it untouched by either state or federal law." *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 44, 681 S.E.2d 465, 476 (2009) (citation omitted).

Here, FERPA contains no manifestation of congressional intent to occupy the field of public educational records and particularly those which are expressly exempted from FERPA's non-disclosure rules. The plain language of § 1232g(b)(6)(B) does not manifest such an intent. In looking to congressional intent, the statements from the Congressional Record of the U.S. Representative who introduced the amendment that would be codified as § 1232g(b)(6)(B) of FERPA is salient and compelling. The stated intent and purpose of § 1232g(b)(6)(B) is to:

> [D]eal with the Family Educational Rights and Privacy Act that was passed in 1974 that basically has allowed universities, Federal[ly funded] universities, to withhold the release of names of students found by disciplinary proceedings to have committed crimes[.] I believe there should be a balance between one student's right of privacy to another student's right to know about a serious crime in his or her college community. The Foley amendment to the Higher Education Amendments Act of 1998 [P.L. 105-244] provides a well-balanced solution to the problem. It would remove the Federal protection that disciplinary records enjoy and *make reporting subject to the State laws that apply*.

144 Cong. Rec. H2,984, (daily ed. May 7, 1998) (statement of sponsor Rep. Foley) (emphasis supplied); *see* Zach Greenberg & Adam Goldstein,

Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interest, 44 J. Legis. 22, 26 (2017).

No indication from the text of § 1232g(b)(6)(B) nor within its legislative history supports the contention that Congress intended to occupy the field of educational records to such an extent that FERPA would pre-empt state public records laws with respect to public educational records that are expressly exempted from FERPA's protections.

The legislative history shows Congress intended that records exempted from FERPA under § 1232g(b)(6)(B) would be "subject to the State laws that apply." 144 Cong. Rec. H2,984, (daily ed. May 7, 1998) (statement of sponsor Rep. Foley). This intent is plainly inconsistent with "[t]he intent to displace state law." *Arizona*, 567 U.S. at 399, 183 L. Ed. 2d at 369. FERPA does not pre-empt the Public Records Law under the "field pre-emption" theory. *See id.*

Defendants also assert implied pre-emption under the "conflict pre-emption" theory. Conflict pre-emption occurs in two circumstances: (1) "where compliance with both state and federal law is impossible" and (2) "where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok*, __ U.S. at __, 191 L. Ed. 2d at 517 (internal quotation marks and citation omitted).

With regard to the first type of conflict pre-emption, it is possible for UNC-CH to comply with both § 1232g(b)(6)(B) and the Public Records Act. Whereas § 1232g(b)(6)(B) allows UNC-CH to disclose the records at issue without federal sanction, the Public Records Act expressly requires the requested records to be released. As discussed above, and contrary to Defendants' assertion, FERPA does not expressly or impliedly grant educational institutions the absolute discretion to decide whether to release exempt educational records. *See* 20 U.S.C. § 1232g(b)(6)(B). Defendants would not violate § 1232g(b)(6)(B) by disclosing and releasing the records Plaintiffs requested in order to comply with the Public Records Act.

With regard to the second type of conflict pre-emption Defendants assert, the Public Records Act disclosure requirements do not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Oneok*, __ U.S. at __, 191 L. Ed. 2d at 517. The plain text of § 1232g(b)(6)(B) permits Defendants disclosure of the limited information specifically listed therein. *See* 20 U.S.C. § 1232g(b)(6)(B). No indication in § 1232g(b)(6)(B) nor elsewhere in

FERPA supports the contention that Congress established the objective of barring public records requests of information that it expressly exempted from FERPA's non-disclosure provisions.

The legislative history of § 1232g(b)(6)(B) indicates Congress' intent and objective in amending FERPA was to strike "a balance" between students' privacy rights and other students' and their parents' rights to know about dangerous individuals in campus communities. *See* 144 Cong. Rec. H2,984, (daily ed. May 7, 1998) (statement of Rep. Foley). Congress decided to strike this balance by "remov[ing] the Federal protection that disciplinary records enjoy and make reporting subject to the State laws that apply." *Id.* Compelling Defendants' compliance with the Public Records Act with regard to the limited and exempted information Plaintiffs have requested does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok*, __ U.S. at __, 191 L. Ed. 2d at 517.

Defendants cite *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 73 L. Ed. 2d 664 (1982), to support their pre-emption arguments. *Fidelity Federal* involved a regulation issued by the Federal Home Loan Bank Board ("FHLBB") that permitted federally-chartered savings and loan associations to exercise due-on-sale clauses. 458 U.S. at 141, 73 L. Ed. 2d at 664. The preamble to the regulation provided "that the due-on-sale practices of federal savings and loan associations shall be governed 'exclusively by Federal law' and that the association 'shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements.' " *Id.* at 147, 73 L. Ed. 2d at 671. California law limited mortgage lenders' exercise of due-on-sale clauses. *Id.* at 148-49, 73 L. E. 2d at 672. California homeowners sued Fidelity Federal Savings and Loan Association for exercising the due-on-sale clauses in violation of California law. *Id.*

The Supreme Court of the United States determined the FHLBB's regulation pre-empted California law. *Id.* at 159, 73 L. Ed. 2d at 679. Defendants cite this case for their proposition, "[w]here Congress legislates to define the discretion an organization may exercise, that legislation preempts state law curtailing that discretion." Contrary to Defendants' assertion, *Fidelity Federal* is not analogous to the situation before us. The Supreme Court determined the FHLBB's regulation preempted California's conflicting law because the preamble to the FHLBB regulation expressly stated that federal savings and loans would not be subject to any state laws that imposed different requirements from federal laws. *Id.* An additional FHLBB regulation stated, "the due-on-sale practices of federal savings and loans 'shall be governed exclusively by

the Board's regulations in preemption of and without regard to any limitations imposed by state law on either their inclusion or exercise.' " *Id.* (citation omitted).

Defendants also cite *Andrews v. Federal Home Loan Bank*, 998 F.2d 214 (4th Cir. 1993), for the proposition that where federal law allows for an organization to exercise discretion, any state law taking away that discretion is pre-empted. In *Andrews*, the United States Court of Appeals for the Fourth Circuit held that where federal law expressly provided, "The directors of each Federal Home Loan Bank . . . shall have power . . . to select, employ, and fix the compensation of such officers, employees, attorneys, and agents . . . and to *dismiss at pleasure* such officers, employees, attorneys, and agents[,]" a dismissed bank employee's wrongful termination claim under state law was pre-empted. 998 F.2d at 220 (emphasis in original) (citation omitted).

Unlike the express language of the federal statute in *Andrews*, nothing in § 1232g(b)(6)(B) of FERPA purports to grant an educational institution express discretion over the release of exempt student records. To read § 1232g(b)(6)(B) as granting such discretion would contravene the intent of Congress to preserve or give states authority over disclosure of exempt student disciplinary records. *See* 144 Cong. Rec. H2,984, (daily ed. May 7, 1998) (statement of sponsor Rep. Foley).

Fidelity Federal and *Andrews* are patently distinguishable from the case at hand, because neither § 1232g(b)(6)(B), any other provision of FERPA, nor any relevant federal regulations expressly or impliedly pre-empt state law to grant educational institutions discretion over disclosure of exempt student disciplinary records. *See*, *e.g.*, 20 U.S.C. § 1232g(b)(6)(B).

Federal law does not pre-empt the Public Records Act with regard to the specific limited information sought in Plaintiffs' public records request, which is not otherwise prohibited from disclosure under § 1232g(b)(6)(B) of FERPA. Defendants have failed to overcome the presumption against federal pre-emption and their arguments are overruled. *See Carolina Power & Light Co.*, 359 N.C. at 525, 614 S.E.2d at 287 (stating the rule of presumption against federal pre-emption).

E. Policy Arguments

[3] Defendants also assert numerous "policy arguments" concerning the effects of potential disclosure of the requested records at issue under Title IX. *See* 20 U.S.C. §§ 1681-1688. After concluding that FERPA pre-empted the Public Records Act, the trial court declined to address

Defendants' policy arguments, stating, "[T]he Court has not considered the policy reasons for UNC[-CH]'s exercise of discretion, UNC[-CH]'s desire to protect and nurture its students, or any other potentialities of disclosure."

Defendants argue the release of the specific records requested by Plaintiffs would interfere with UNC-CH's Title IX process for dealing with sexual assault by: (1) deterring victims and witnesses from coming forward and participating in UNC-CH's Title IX process; and, (2) by jeopardizing the safety of alleged sexual assault perpetrators.

" 'It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures.' Normally, questions regarding public policy are for legislative determination." *In re N.T.*, 214 N.C. App. 136, 144, 715 S.E.2d 183, 188 (2011) (quoting *Cochrane v. City of Charlotte*, 148 N.C. App. 621, 628, 559 S.E.2d 260, 265 (2002)). We do not address the asserted merits of Defendants' policy arguments.

We note in passing, FERPA specifically mandates that any disclosures "may include the name of any other student, *such as a victim or witness*, *only with the written consent* of that other student." 20 U.S.C. § 1232g(b)(6)(C) (emphasis supplied).

VI. Conclusion

The Public Records Act requires UNC-CH, a public agency, to comply with Plaintiffs' public records request. FERPA does not prohibit the disclosure of the limited information requested by Plaintiffs, except for the dates of offenses. No indication from the text of § 1232g(b)(6)(B) or within its legislative history supports Defendants' assertion that Congress intended to occupy the field of educational records to such an extent that FERPA pre-empts state public records laws with respect to public educational records that are expressly exempted from FERPA's protections. The legislative history of the 1998 amendments to FERPA shows Congress intended that records exempted from FERPA under § 1232g(b)(6)(B) would be "subject to the State laws that apply." 144 Cong. Rec. H2,984, (daily ed. May 7, 1998) (statement of sponsor Rep. Foley)

FERPA expressly limits the educational records release and disclosures to:

> the final results of any disciplinary proceeding— [and] (i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution

> on that student; and (ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

20 U.S.C. § 1232g(b)(6)(B)-(C).

Defendants must comply with Plaintiffs' public records request to release the student disciplinary records at issue, as provided above. That portion of the superior court's order and judgment appealed from, and as contrary to our holding, is reversed. This cause is remanded to the superior court for further proceedings as are necessary and consistent herewith. *It is so ordered.*

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges BRYANT and ELMORE concur.

CARLOS PACHAS, BY HIS ATTORNEY IN FACT, JULISSA PACHAS, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA17-710

Filed 17 April 2018

Public Assistance—Medicaid—judicial review—previous order—different issues of law and fact

Where a Medicaid recipient filed a motion in superior court to enforce the court's previous order regarding his Medicaid deductible, that court lacked jurisdiction to review the appeal—which concerned a different Medicaid program subject to different rules—until after exhaustion of the administrative review process.

Judge HUNTER, JR. dissenting in separate opinion.

Appeal by petitioner from order entered 21 April 2017 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2018.

Legal Services of Southern Piedmont, by Madison Hardee and Douglas Stuart Sea, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Lee J. Miller, for respondent-appellee.

DIETZ, Judge.

Carlos Pachas was a Medicaid recipient. In 2016, he challenged the deductible applied to his Medicaid coverage. After losing throughout the administrative process, Pachas ultimately prevailed on judicial review in the trial court. The court held that the applicable Medicaid statute required the State to use the federal poverty level for a family, not an individual, to calculate Pachas's income limit.

Later, Pachas qualified for an alternative Medicaid program subject to at least some different rules than traditional Medicaid. After the State again imposed a deductible based on the federal poverty level for individuals, Pachas skipped the administrative review process and returned directly to the trial court with a motion to enforce the court's previous order and petition for writ of mandamus. The trial court dismissed the motion for lack of jurisdiction.

As explained below, we affirm. Although a trial court, sitting as an appellate court to review an agency decision, has jurisdiction to enforce an existing order, it lacks jurisdiction to apply a previous order to new facts and legal arguments not at issue in the previous ruling. Here, the new Medicaid program in which Pachas enrolled permits the State to request, and the federal government to grant, waivers from various Medicaid provisions. The State contends that the federal government waived the income limit rules for this alternative Medicaid program. This argument involves questions of law and fact not addressed in the first judicial review proceeding, which concerned standard Medicaid coverage.

Our holding today does not mean we agree with the State on the underlying Medicaid issue. We hold only that Pachas cannot bypass the agency review process and take this new issue directly to the trial court. Accordingly, we affirm the trial court's dismissal of Pachas's motion and petition for lack of jurisdiction.

Facts and Procedural History

In 2014, Petitioner Carlos Pachas began receiving Medicaid coverage after a stroke and a brain tumor left him confined to a wheelchair and in need of nursing care. Pachas was the primary provider for his wife, his two minor children, and his wife's elderly parents.

In early 2015, Pachas began receiving Social Security disability benefits. The Mecklenburg County Department of Social Services determined that, based on his Social Security disability payment of $1,369 per month, Pachas's income was above the federal poverty level and thus required him to pay a deductible on his Medicaid benefits. DSS informed Pachas that it would not provide further Medicaid coverage until Pachas paid a 6-month deductible of $6,642.

DSS calculated this deductible based on the federal poverty level for an individual, rather than the poverty level for a family. Had DSS applied the federal poverty level for a family, Pachas would have been eligible for Medicaid benefits without having to pay a deductible.

Pachas appealed DSS's decision through the administrative process but did not prevail. He then petitioned for judicial review in superior court. Pachas argued that the applicable federal statute, 42 U.S.C. § 1396a(m), required the agency to determine his Medicaid eligibility based on the federal poverty level for a "family of the size involved." Because Pachas was the primary provider for his wife, children, and elderly in-laws, he contended that the agency should have used the federal poverty level for a family of either four or six people.

Pachas prevailed in superior court. The court reversed the agency decision and ordered the agency to reinstate Pachas's Medicaid benefits. The court held that the agency improperly applied the income limit because "[t]he plain language of the controlling federal statutory provision, 42 U.S.C. § 1396a(m), states that the applicable Medicaid income limit . . . must be based on a 'family of the size involved.' "

In February 2017, Pachas left the nursing facility that had been caring for him and returned home under a special Medicaid program known as the Community Alternative Program for Disabled Adults, or CAP/DA. The CAP/DA program offers the State the option of providing Medicaid coverage to adults who wish to receive support services at their own homes, rather than in a nursing home.

The State has discretion to define the scope of its CAP/DA program by requesting a waiver of various Medicaid provisions from the federal government. *See* 42 U.S.C. § 1396n(c). The State contends that it requested, and received, a waiver from the requirement that it calculate CAP/DA income limits using a "family of the size involved" under 42 U.S.C. § 1396a(m).

Based on this purported waiver, when Pachas enrolled in the CAP/DA program and began receiving in-home support services, the State

calculated his income limit for CAP/DA coverage using the individual federal poverty level, not the family poverty level. As a result, the State required him to pay a deductible before receiving CAP/DA coverage.

The trial court, in its initial order on judicial review, did not address the CAP/DA program or the factual and legal issues concerning the State's request for a waiver of various Medicaid provisions through CAP/DA. Indeed, the CAP/DA program was not even at issue in the initial administrative challenge because, at the time, Pachas was receiving only standard Medicaid coverage. As a result, the administrative record from the initial proceeding does not include any documents addressing either CAP/DA coverage generally or whether the federal government approved the State's purported request to waive the requirements of 42 U.S.C. § 1396a(m).

After learning that the State would require a deductible for CAP/DA coverage, Pachas bypassed the administrative review process and filed in superior court a motion to enforce the court's previous order and a petition for a writ of mandamus. Following a hearing, the trial court dismissed the motion and petition for lack of jurisdiction.

The trial court ruled that its initial order "does not apply to Petitioner's Medicaid eligibility under the CAP/DA waiver" because the CAP/DA program is "governed by [a] separate federal statute, 42 U.S.C. § 1396n(c)" which permits the federal government "to waive the State Plan requirements for income and resource rules . . . that the Court considered in the March 17, 2016 Order." The trial court therefore held that "Petitioner must resort to the administrative process governed by N.C.G.S. § 108A-79 to appeal" the State's decision to require a deductible for CAP/DA coverage. Pachas appealed the trial court's ruling to this Court.

Sadly, Pachas passed away during this litigation. His wife, Julissa Pachas, was substituted as petitioner in her capacity as administrator of Pachas's estate.

Analysis

Pachas challenges the trial court's dismissal of his motion to enforce the court's previous order, and the corresponding petition for a writ of mandamus. We begin our analysis by discussing the trial court's authority to consider these filings.

Ordinarily, trial courts lack jurisdiction to directly review a decision by a county department of social services with respect to Medicaid coverage. The General Assembly created an administrative review process

for these claims, and courts have jurisdiction to hear these disputes only when they arrive through a petition for judicial review after exhaustion of this administrative review. *See* N.C. Gen. Stat. §§ 108A-79, 150B-43.

But as in other legal proceedings, trial courts reviewing administrative decisions have jurisdiction to enforce their own orders. *See* N.C. R. Civ. P. 70; *Bryan v. BellSouth Commc'ns, Inc.*, 492 F.3d 231, 236 (4th Cir. 2007). Thus, when a trial court on judicial review orders an agency to take action, the court retains jurisdiction to ensure its order is carried out. Consequently, when a trial court interprets a statute and orders the agency to apply that interpretation—as happened here—the agency must do so. If the agency ignores the trial court's instructions, the court retains the power to take further action to ensure compliance.

There are limits to this supervisory authority, however. The trial court's authority to supervise the agency's actions extends only to issues "actually presented and necessarily involved in determining the case." *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974). In other words, the trial court's continuing jurisdiction applies to issues involving "the same facts and the same questions, which were determined in the previous appeal." *Id.*

Here, the trial court properly concluded that the agency's determination of Pachas's CAP/DA program eligibility involved *different* facts and legal issues than the traditional Medicaid benefits at issue in its first order. As the trial court observed, its first order instructed the State "to reinstate Petitioner's Medicaid eligibility through the North Carolina Medicaid State Plan pursuant to the controlling federal statutory provision, 42 U.S.C. § 1396a(m)."

The court then observed that Pachas later "voluntarily applied for Medicaid eligibility through the Community Alternative Program for Disabled Adults . . . which is governed by [a] separate federal statute, 42 U.S.C. § 1396n(c)." Unlike the traditional Medicaid program at issue in the court's first order, the CAP/DA program permits the State to seek waivers from various provisions of the Medicaid statutes. 42 U.S.C. § 1396n(c). The State contends that it requested, and received, a waiver from the requirement that it calculate CAP/DA income limits based on a "family of the size involved" under 42 U.S.C. § 1396a(m).

The scope of this waiver provision, and whether the State in fact applied for and received a waiver of the income limits provision, involve facts and legal questions that were *not* "actually presented and necessarily involved" in the trial court's order addressing traditional Medicaid coverage. *Tennessee-Carolina Transp., Inc.*, 286 N.C. at 239, 210 S.E.2d

at 183. Indeed, these issues *could not* have been addressed in the court's first order because, as the parties concede, with respect to traditional Medicaid coverage, the statutory income limit requirements cannot be waived.

As a result, the trial court correctly held that "the Order signed on March 17, 2016 does not apply to Petitioner's Medicaid eligibility under the CAP/DA waiver" and that "Petitioner must resort to the administrative process governed by N.C.G.S. § 108A-79 to appeal the February 14, 2017 decision issued by the Mecklenburg County DSS." The trial court lacks jurisdiction to review the legal and factual issues raised in this appeal until they reach the court through exhaustion of the administrative review process and a petition for judicial review.

We recognize that this is a frustrating result for the Pachas family, who already fought one lengthy administrative battle with the agency and must now do so again. And we agree with our dissenting colleague that requiring a "dying indigent" to slog through this pointless bureaucracy before presenting his legal arguments to a court of law feels "unjust and wrong." But it is what the law requires. Although the agency seems convinced of its legal position, that does not make the administrative review process "futile" or "inadequate" as those terms are defined by law. *See Huang v. North Carolina State Univ.*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815–16 (1992). Once Pachas has an opportunity to be heard on these issues in the administrative review process, the agency might well agree and rule in his favor.

Simply put, the law requires Pachas to exhaust administrative remedies before presenting these new legal and factual arguments to the trial court. If requiring claimants like Pachas to exhaust administrative remedies in these circumstances is unfair or unjust, it is up to those who enacted these administrative laws and regulations to fix it. We reject our dissenting colleague's view that judges can ignore the law if the outcome seems to them unjust or wrong. Even if all judges were angels, this would be dangerous. And we are not angels.

Although we reject Pachas's arguments on appeal, we make two observations about this case in the interest of justice. First, much of the parties' briefing concerned the portion of the trial court's order stating that "[a]ccording to 42 U.S.C. § 1396n(c)(3), DHHS is allowed to waive the State Plan requirements for income and resource rules under 42 U.S.C. § 1396a(m)." Because, as explained above, the trial court lacked jurisdiction to adjudicate the CAP/DA coverage issue, the court had no authority to decide this question. The State *asserts* that it has this

waiver authority, but that legal question—and the factual question of whether the State actually applied for and received such a waiver—are issues that must be decided through the agency review process.

Second, a Medicaid recipient ordinarily must appeal a decision of a county department of social services within 60 days from the date of the agency's action. N.C. Gen. Stat. § 108A-79(c). The statutes governing the administrative review process state that failure to timely appeal constitutes a waiver but "for good cause shown, the county department of social services may permit an appeal notwithstanding the waiver." *Id.* Pachas sought review directly in the trial court, rather than through the administrative process, in good faith. His arguments on appeal were not frivolous. If there was ever a case in which good cause exists to permit an untimely administrative appeal, this is it.

Conclusion

For the reasons discussed above, we affirm the trial court's order dismissing Pachas's motion and petition for lack of jurisdiction.

AFFIRMED.

Judge ELMORE concurs.

Judge HUNTER, JR. dissents with separate opinion.

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

I respectfully dissent from the majority's holding that the trial court lacked jurisdiction to review the legal and factual issues raised in this appeal until Carlos Pachas[1] reaches the court through exhaustion of the administrative review process and a petition for judicial review. As Pachas's exhaustion of the administrative review process is imperative to the issues raised in this appeal, a chronological timeline of events is necessary.

At the relevant time, Pachas, age 47, financially supported his immediate and extended family. His wife, Julissa, their two minor daughters, and his elderly in-laws, ages 76 and 73, all lived with Pachas in Mecklenburg County, North Carolina. Pachas's mother-in-law suffered from osteoporosis. Due to his in-laws' inability to pay rent, Pachas and

1. On appeal, Pachas's estate is represented by the administrator of the estate, Julissa Pachas.

his wife provided them with food and clothing. Both minor daughters received $336 per month in Social Security income.

In December 2013, Pachas's "problems really started . . . [as] . . . his vision . . . was starting to decline[.]" In 2014, Pachas suffered a stroke and brain tumor, which resulted in required 24-hour care. Consequently, Pachas's doctor[2] "disabled him because . . . according to the MRI result he couldn't work anymore."[3] Although disabled in 2014, Medicare eligibility began in 2016. In January 2015, Pachas started receiving $1,369 per month as Social Security Disability Benefits and sometime later applied for Medicaid/Special Assistance re-enrollment.[4] However, on 20 April 2015, Mecklenburg Department of Social Services ("DSS") requested Pachas provide proof of income for himself and Julissa, and all bank numbers and statements in his and Julissa's names. The request for information set a deadline of 2 May 2015.

During this time, Julissa, an employee of Bissell Companies, left her job to care for Pachas. She explained, "I ha[d] to stop working because he, started getting very sick. . . . He had numerous, several different problems, and I had to stop working. He need[ed] a lot of therapies." On 9 March 2015, Pachas executed a power of attorney, authorizing Julissa to act on his behalf. On 1 May 2015, Bissell Companies notified Julissa, as of 3 May 2015, her coverage under Bissell's group medical, dental, and vision insurance would cease due to separation from employment.

On 5 May 2015, DSS sent notice to Pachas, informing him his Medicaid benefits would terminate, unless he met a $6,642 six-month deductible. Pachas requested an administrative hearing to appeal the termination of his benefits and contended "[h]ad DSS applied the applicable income limit for a household of either four or six persons, [Pachas] would have remained eligible for MAD benefits without having to meet a deductible[.]" The applicable income limit for a household of four persons, in 2015, was $2,021. The applicable income limit for a household of six persons, in 2015, was $2,715. Pachas asserted the North Carolina Department of Health and Human Services ("DHHS") violated 42 U.S.C. 1396a(m) by concluding the Medicaid income limit applicable to him was the limit for a single individual. According to Pachas's petition, the

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2. The record does not disclose which doctor labeled Pachas as disabled.

3. The record does not disclose in what field Pachas worked prior to the decline of his health.

4. The record does not indicate on which date Pachas submitted an application for re-enrollment for the Medicaid/Special Assistance Program.

applicable individual income limit is 100% of the federal poverty line for a "family of the size involved." Pachas contended the family of the size involved in the present case is four to six individuals. The family of the size involved would be four, if only counting Pachas, Julissa, and their two daughters. However, the family of the size involved would be six, if counting his in-laws as members of Pachas's family.

As the first step in the administrative review process, in May 2015, DSS held a local hearing to discuss Pachas's contentions. At the local hearing, DSS specialist, Melinda Bass, heard statements regarding the disputed deductible. Pachas requested the applicable income limit be four to six individuals. On 13 May 2015, Pecolia Price, a Local Hearing Officer, affirmed the agency's decision. In support of her decision, she cited Medicaid Manual ("MA") section 2360, which states, "[m]edically needy recipients whose net income exceeds the Medically Needy Income Limit must meet a deductible before they may be authorized for Full Medicaid. The deductible is met by incurring medical expenses equal to the amount of the deductible." Price concluded "the county action on this case was correct and that all of the appropriate policies and procedures were followed."

Pachas next requested an appeal at the DSS state level. On 16 June 2015, DSS held a state hearing. Again, DSS cited MA 2360 to support its actions regarding Pachas's Medicaid coverage. During the hearing, Pachas's attorney asked Julissa to speak to Pachas's medical situation:

> [Q]: . . . And, does [Pachas] still have a need for medical treatment?
>
> . . .
>
> [A]: He needs a lot of therapies. He also needs that thing that is for cancer. Chemotherapy or something like that, but he doesn't have cancer. He has vasculitis, in the brain. He's taking steroids for a year and a half. The doctor needs to remove the, take away him from steroids. He cannot take it anymore, that's why he needs chemotherapy. The chemotherapies are extremely expensive.
>
> [Q]: Without Medicaid is he able to afford, afford the chemotherapy and physical therapy that the doctor has recommended?
>
> . . .
>
> [A]: No. . . . I cannot even cover his medicines, monthly medicines because they are extremely expensive.

> [Q]: And without the treatment and medicines that have been recommended will [Pachas] ever be able to recover?
>
> …
>
> [A]: Impossible.

In support of his contentions, Pachas cited *Martin v. North Carolina Department of Health and Human Services*.[5] Pachas insisted a "family size" included those who lived with and relied upon him, therefore making an individual income level inapplicable to his current situation.

On 10 August 2015, Gwendolyn Vinson, a State Hearing Officer, affirmed Pachas's six-month Medicaid deductible requirement. Pachas appealed the decision on 13 August 2015. On 27 August 2015, Pachas filed an argument, in support of their appeal with DHHS, appealing the DSS state hearing decision, and contending DHHS must compare Pachas's income against 100% of the official federal poverty level for his family size. Further, Pachas argued the hearing officer plainly erred in her interpretation of the applicable federal statute.

On 1 October 2015, DHHS Assistant Chief Hearing Officer, Nancy Pappenhagen, affirmed the 10 August 2015 decision. Within her decision, Pappenhagen concluded, as a final decision, Pachas's Medicaid services required a $6,642 deductible. On 16 October 2015 Pachas filed a petition for judicial review, pursuant to N.C. Gen. Stat. § 108A-79(k) and the Administrative Procedure Act, N.C. Gen. Stat. § 150B-43, *et seq.* Pachas sought reversal of the 1 October 2015 final agency decision, which terminated his Medicaid Benefits. Additionally, Pachas requested reinstatement of his Medicaid Benefits, effective 1 June 2015, and for continuation of his benefits without having to meet the deductible. Pachas again contended DHHS erred by concluding "the Medicaid income limit applicable to [him] was the limit for a single individual in violation of 42 U.S.C. 1396a(m), under which the applicable income limit is 100% of the federal poverty line for a 'family of the size involved.' "

On 17 November 2015, DHHS filed a response to Pachas's petition for judicial review. DHHS contended "the Final Agency Decision of [DHHS] contains adequate findings of fact and conclusions of law which are in conformity with the applicable federal and State statutes, rules, regulations, cases, and policies, and are supported by substantial competent evidence of record."

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5. *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 670 S.E.2d 629 (2009).

On 6 January 2016, the Mecklenburg County Superior Court heard arguments from Pachas and DHHS regarding Pachas's Medicaid benefits and large deductible requirement. In its 17 March 2016[6] order, the trial court reversed the final agency decision. The trial court ordered DHHS "promptly reinstate Medicaid benefits to [Pachas] effective June 1, 2015 and to continue providing Medicaid to [Pachas] until determined ineligible under the rules as modified according to this decision." The trial court found the final agency decision "erroneous as a matter of law[.]" Specifically, the trial court found:

> 2. The North Carolina General Assembly has elected the option under the federal Medicaid statute, 42 U.S.C. § 1396a(m), to provide Medicaid to aged, blind and disabled persons with incomes under 100% of the federal poverty level. . . . This category of Medicaid is known as categorically needy coverage for the aged, blind and disabled (MABD-CN).
>
> 3. The income limit for MABD-CN varies by the number of persons considered by the agency to be in the household unit because the federal poverty line varies by household size.
>
> . . .
>
> 8. The plain language of the controlling federal statutory provision, 42 U.S.C. §1396a(m), states that the applicable Medicaid income limit for the MADB-CN category must be based on a "family of the size involved." Because the official poverty line published annually by the federal government varies by family size, the determination of family size determines the applicable income limit under the language of this statute.
>
> 9. The Federal Medicare and Medicaid agency has interpreted the language "a family of the size involved" to include "the applicant, the spouse who is living in the same household, if any, and the number of individuals who are related to the applicant or applicants, who are living in the same household and who are dependent on the applicant or the applicant's spouse for at least one-half of their financial support." 42 C.F.R. § 423.772 (2005).

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6. Although entered on 18 March 2016, the parties refer to this order as the 17 March 2016 order. I follow suit.

DHHS did not appeal this order. Instead, pursuant to the 17 March 2016 order, DHHS reinstated Pachas's Medicaid benefits, retroactive to 1 June 2015.

During the above summarized proceedings, Pachas's medical condition worsened. A physician diagnosed Pachas with encephalitis and sepsis, rendering[7] Pachas "completely blind, wheelchair bound, and fully dependent on others for all his daily needs." Additionally, the physician noted Pachas was confused and restless.

On 6 May 2016, University Place admitted Pachas as a patient, where he received 24-hour care. Pachas remained in the facility until his discharge in February 2017. During this time, Pachas's Medicaid benefits covered his care, with no need to meet a deductible.

Following his time at University Place, Pachas received home care through the Community Alternative Program for Disabled Adults ("CAP/DA"). As described by Petitioner, CAP/DA is a program which "provides Medicaid services in the home for persons who would otherwise require care in a nursing home." Pachas's CAP/DA services cost $33,714.89 annually, while his Medicaid reimbursement rate of his nursing home facility cost $160.23 per day.

On 14 February 2017, DSS sent Pachas a notice, stating his monthly CAP/DA deductible would be $1,113, effective 28 February 2017. DSS, again, assessed his individual income when determining CAP/DA eligibility. On 15 February 2017, Pachas filed a motion in the cause to enforce the 17 March 2016 order and filed a petition for a writ of mandamus. In support of the motion and petition, Pachas contended he "[wa]s . . . imminently threatened with irreparable harm and ha[d] no adequate remedy at law." He further asserted:

> 12. Because they need to support a family of six, [Pachas] and his wife cannot afford to pay for medical care up to the amount of [his] monthly deductible . . . . If that occurs, [Pachas] will be unable to obtain his medications, his CAP-DA in-home care services, and other critically needed medical care.
>
> 13. If [Pachas] loses access to CAP-DA services, he will likely be forced to leave his family again and enter a nursing home, at great expense to the taxpayer, causing severe emotional harm to [Pachas] and his family.

7. The record does not indicate the physician's name and medical history with Pachas.

> 14. . . . [Pachas] has no available administrative remedy to enforce th[e] Court's order. Exhaustion of the administrative remedy that has been offered to him would be futile.

Pachas requested, *inter alia*, the court direct DHHS "to immediately reinstate [his] Medicaid benefits, including [his] CAP-DA services, effective February 14, 2017 and continuing without having to first meet a deductible."

On 6 March 2017, DHHS filed a motion to dismiss and response to Pachas's motion to cause to enforce the trial court's order and petition for writ of mandamus. DHHS contended:

> 4. The administrative procedures by which a public assistance applicant or recipient may appeal the actions and decisions of a county department of social services . . . are provided in N.C. Gen. Stat. § 108A-79 and Article 4 of the North Carolina Administrative Procedure Act.
>
> 5. Under N.C. Gen. Stat. § 108A-79, "A public assistance applicant or recipient shall have a right to appeal the decision of the county board of social services, county department of social services, or the board of county commissioners . . . . These statutory administrative appeal procedures include local appeal hearings with the county DSS, state level administrative appeal hearings with the DHHS Office of Hearings and Appeals, and appeal to the Superior Court for judicial review of DHHS final agency decisions.
>
> . . .
>
> 7. In this case, the legislature has provided adequate administrative remedies for the actions and decision that [Pachas] complains of in his Motion in the Cause to Enforce Court's Order and Petition for Writ of Mandamus, and [Pachas] has not exhausted the statutory administrative remedies that are available to him.

In support of its argument, DHHS stated:

> 9. In this case, there can be no question that the actions and decisions of the Mecklenburg County DSS in evaluating [Pachas]'s CAP/DA Waiver application for services involve discretionary rather than ministerial duties. The criteria used for evaluating an application for CAP/DA

> Waiver eligibility is not governed by the March 17, 2016 Order but instead by state and federal statutes, regulations, and policies, including 42 U.S.C. § 1396n, the North Carolina CAP/DA Waiver, and relevant sections of the North Carolina Adult Medicaid Manual.
>
> . . .
>
> 13. Such an overly expansive application of the March 17, 2016 Order, as requested by [Pachas], would have the effect of entitling [Pachas] to unlimited access to any and all Medicaid eligibility and services regardless of the relevant state and federal statutes, regulations, and policies . . . .

On 27 March 2017, the trial court heard arguments from Pachas and DHHS on Petitioner's motion to enforce the court's order and petition for writ of mandamus. On 17 April 2017, Pachas passed away.[8] Four days later, on 21 April 2017, the trial court dismissed the motion in the cause to enforce court's order and petition for writ of mandamus. The trial court concluded:

> 2. The [17 March 2016] Order found that the language "family of the size involved" contained in 42 U.S.C. § 1396a(m) must be considered when determining [Pachas]'s Medicaid eligibility under the State Plan.
>
> . . .
>
> 6. According to 42 U.S.C. §1396n(c)(3), DHHS is allowed to waive the State Plan requirements for income and resource rules under 42 U.S.C. § 1396a(m) that the Court considered in the March 17, 2016 Order.
>
> 7. DHHS does not consider the "size of the family involved" when determining an individual's deductible under the CAP/DA waiver.
>
> 8. Therefore, the Order signed on March 17, 2016 does not apply to [Pachas]'s Medicaid eligibility under the CAP/DA waiver.

On appeal, DHHS asserts the federal government authorized DHHS to waive the income requirements, which includes the "family of the size

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8. The court substituted Julissa as a party in the action.

involved" requirement, found in 42 U.S.C. 1396a(m) when determining financial eligibility for CAP/DA coverage. The majority holds the wavier provision relied upon by the State "involve[s] facts and legal questions that were *not* 'actually presented and necessarily involved' in the trial court's order." Therefore, the majority holds, these issues "*could not* have been addressed in the court's first order . . . ." Thus, as a result, the majority agrees with the trial court's order "Petitioner must resort to the administrative process . . . to appeal the February 14, 2017 decision issued by the Mecklenburg County DSS."

As stated in the majority, "the General Assembly created an administrative review process for these claims, and courts have jurisdiction to hear these disputes only when they arrive through a petition for judicial review after exhaustion of this administrative review." *See* N.C. Gen. Stat. §§ 108A-79, 150B-43 (2017). However, Pachas is correct that it is well settled the "exhaustion requirement may be excused if the administrative remedy would be futile or inadequate." *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 372, 595 S.E.2d 773, 777 (2004) (citing *Huang v. N.C. State Univ.*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815 (1992)). In holding Pachas must resort to the administrative process, the majority does not address the futility or inadequacy of the administrative remedies in the instant case.

Given the tragic history of Pachas, I cannot vote to place him, or others similarly situated, back in the hands of the Medicaid bureaucracy, which has already denied benefits on the identical question of family size and its relation to required deductibles for Medicaid coverage. In my view, it is particularly telling that in the first case, the law of his case was based upon the conclusion that the State had made an error of law in denying him benefits. To tell a dying indigent that he or his family must endure another round of "administrative remedies", when the Medicaid authorities moved him from one program to another for their own cost benefits, and when the issue is a matter of law, which had been previously adjudicated, is simply unjust and wrong. Under the specific facts of this case, I would hold requiring the dying indigent to exhaust his administrative remedies would be futile.

N.C. Gen. Stat. § 108A-79 (2017) provides the remedy for individuals who wish to challenge the termination of their Medicaid coverage. The statute, in pertinent part, reads:

> A public assistance applicant or recipient shall have a right to appeal the decision of the county board of social services, county department of social services, or the board

> of county commissioners granting, denying, terminating, or modifying assistance, or the failure of the county board of social services or county department of social services to act within a reasonable time under the rules and regulations of the Social Services Commission or the Department. Each applicant or recipient shall be notified in writing of his right to appeal upon denial of his application for assistance and at the time of any subsequent action on his case.

Id. However, in the present appeal, Pachas is not simply challenging the Medicaid coverage termination, but, rather, the violation of the trial court's 17 March 2016 order requiring DHHS to apply his family size to income considerations. Specifically, this is an appeal for enforcement.

A trial court's authority encompasses the power to enforce its own judgments. *See Sturgill v. Sturgill*, 49 N.C. App. 580, 587, 272 S.E.2d 423, 428-29 (1980); *Parker v. Parker*, 13 N.C. App. 616, 618, 186 S.E.2d 607, 608 (1972). Here, Petitioner has once, already, fully exhausted the administrative review process, thereby complying with the requirement to do so. The administrative review process produced an order which supported Pachas's challenge of initial Medicaid coverage. Now, he seeks judicial review for the enforcement of such order after it was violated by DHHS and DSS.

In concluding the trial court lacks jurisdiction to enforce its 17 March 2016 order, the majority seemingly strips Pachas, and those similarly situated, of an adequate remedy. Mindful of the necessity of the administrative review process, but aware of the administrative review process's inability to provide Pachas with an adequate remedy, I conclude the trial court does have jurisdiction to decide this issue. I would, therefore, reverse the trial court's 21 April 2017 decision and remand with instructions to re-determine Pachas's Medicaid eligibility, in compliance with the 17 March 2016 order.

SAVAGE TOWING INC., PLAINTIFF
v.
TOWN OF CARY, A MUNICIPAL CORPORATION, DEFENDANT

No. COA17-1228

Filed 17 April 2018

1. Appeal and Error—interlocutory orders and appeals—preliminary injunction—ordinance not yet in effect—substantial right not affected

There was no substantial right enabling an interlocutory appeal where plaintiff sought a preliminary injunction to enjoin enforcement of an ordinance prior to the ordinance becoming effective. Plaintiff could not argue that the denial of the preliminary injunction would cause irreparable harm.

2. Appeal and Error—interlocutory appeals—substantial right—due process

There was no substantial right that would allow an interlocutory appeal to proceed where plaintiff contended that a towing ordinance deprived it of due process rights through the provision of civil and criminal penalties. Plaintiff could contest a civil penalty by refusing to pay the penalty; if the town chose to pursue the penalty, plaintiff would receive the notice and hearing due any civil defendant. Moreover, nothing in the ordinance allowed the town to bypass settled criminal procedures for the enforcement of misdemeanors.

3. Appeal and Error—interlocutory orders and appeals—substantial right—towing ordinance—equal protection

There was no deprivation of a substantial right justifying an interlocutory appeal where plaintiff towing company contended that a towing ordinance violated its equal protection rights. The ordinance, on its face, did not appear to classify towing companies doing business within the town, but rather classified types of property and situations in which the ordinance's provisions may apply.

Appeal by plaintiff from order entered 5 July 2017 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 4 April 2018.

Cary Law, by R. Daniel Gibson, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, LLP, by Brian M. Love and Jacob H. Wellman, for defendant-appellee.

TYSON, Judge.

Savage Towing Inc. ("Plaintiff") appeals the trial court's order denying its motion for preliminary injunction. We dismiss this interlocutory appeal without prejudice.

I. Background

Plaintiff is a towing business operating within Cary, North Carolina. For more than a decade, Plaintiff has provided accident recovery, roadside assistance, long-distance towing, and vehicle tows from private property. Plaintiff maintains contracts with several businesses and various private property owners to monitor their parking areas and remove improperly parked, abandoned, and trespassing vehicles.

On 23 February 2017, the Cary Town Council unanimously approved the addition of Article IV (the "Ordinance") to Chapter 20 of the Town's Code of Ordinances, which places certain requirements and regulations on the non-consensual towing of vehicles from private parking lots located within the Town of Cary (the "Town"). The affidavit of Captain Steven Wilkins of the Cary Police Department indicates the purpose of the Ordinance was to address the volume and frequency of complaints received by the Cary Police Department arising from the non-consensual towing of vehicles. Between 2010 and 2016, the Cary Police Department received 148 complaints relating to non-consensual tows from private property. Nothing in the record indicates whether any of these complaints were related to incidents later proven to involve illegal towing. At oral argument before this Court, Plaintiff's counsel and the Town's counsel agreed that none of these complaints reflect or were found to constitute any improper conduct or actions by Plaintiff.

The Ordinance requires, in part, towing companies and private property owners who hire towing companies to post signs either "at each entrance," "every 50 feet of the frontage," or "at each parking space" within a privately-owned parking lot. Cary, N.C., Code of Ordinances, art. IV, § 20-153(a) (2017). Towing companies must report to the Cary Police Department the make, color, license tag number, location the vehicle was towed from, and the location where the vehicle will be held within 15 minutes of towing the vehicle. *Id.* at § 20-154.

Towing companies must respond immediately to calls from owners or operators of trespassing and removed vehicles or return calls within 30 minutes of receiving a message. *Id.* at § 20-155(a). A person with the authority to release a towed vehicle must report to the location of the vehicle within two hours of a phone call by a person requesting

release of the vehicle, subject to exceptions for requests made between midnight and 6:00 a.m. *Id.* In addition to cash, towing companies are required to accept payment by major credit and debit cards and provide detailed receipts. *Id.* at § 20-155(c).

Towing services must allow a vehicle owner access to the illegally parked and towed vehicle in order to remove the owner's personal property. *Id.* at § 20-156(b). Towing services must tow an illegally parked vehicle to a fenced, lighted, secured, and clearly signed lot within 15 miles from where the illegally parked vehicle was towed. *Id.* at § 20-157. The Ordinance provides civil and criminal penalties for any towing services and private property lot owners that violate its provisions. *Id.* at § 20-158.

Plaintiff challenged the Ordinance by filing a verified complaint and motion for preliminary injunction on 15 May 2017, seeking: (1) a declaration that the Town's Ordinance is *ultra vires*; (2) a declaration that N.C. Gen. Stat. § 20-219.2 violates the North Carolina Constitution; (3) a ruling that the Town's Ordinance violates Plaintiff's rights to due process and equal protection under the Constitution of the United States and the North Carolina Constitution; and (4) a preliminary injunction barring the Town from enforcing the Ordinance.

Plaintiff's motion for preliminary injunction was heard in Wake County Superior Court on 30 May 2017. At the hearing, Plaintiff argued the Ordinance violated its constitutional rights to due process and equal protection. The trial court denied the motion for preliminary injunction, concluding that Plaintiff "has failed to show there is a likelihood of success on the merits of its claims for relief . . . ." Shortly thereafter, Plaintiff timely filed notice of appeal. Plaintiff filed a petition for writ of *supersedeas* and motion for temporary stay on 31 May 2017, which petition and motion this Court denied by order dated 1 June 2017.

The Ordinance became effective 1 June 2017. On 31 July 2017, Plaintiff filed another petition for writ of *supersedeas* and motion for temporary stay, which this Court also denied by order dated 4 August 2017.

At the hearing on Plaintiff's motion for preliminary injunction, Plaintiff's counsel stated that all Plaintiff's arguments regarding the Ordinance are "unconstitutional as-applied arguments." However, Plaintiff's counsel conceded at oral argument before this Court that he had misspoken, and Plaintiff is making only a facial challenge to the Ordinance. Plaintiff's verified complaint, and its briefed and oral arguments, are consistent with a facial challenge. We analyze Plaintiff's arguments as such.

II. Jurisdiction

A. Interlocutory Appeal

All parties agree that the order Plaintiff appeals from is interlocutory. *QSP, Inc. v. Hair*, 152 N.C. App. 174, 175, 566 S.E.2d 851, 852 (2002) ("Appeal of a trial court's ruling on a motion for preliminary injunction is interlocutory."). "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995) (citation omitted).

To be reviewable on appeal, "the trial court's order must: (1) certify the case for appeal pursuant to N.C. R. Civ. P. 54(b); or (2) have deprived the appellant of a substantial right that will be lost absent review before final disposition of the case." *Bessemer City Express, Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 639, 573 S.E.2d 712, 714 (2002) (citations omitted). The trial court's order denying Plaintiff's motion for preliminary injunction was not certified as immediately appealable under N.C. Rule Civ. Pro. 54(b).

B. Substantial Rights

Plaintiff argues the trial court's order affects its substantial rights, which will be irreparably harmed unless a preliminary injunction is granted. Plaintiff asserts that the denial of its requested preliminary injunction subjects it to the enforcement of the allegedly illegal Ordinance, which will potentially work harm by depriving it of its substantial rights to due process and equal protection of the law.

A substantial right is "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citation omitted). "Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citation omitted). To prove that a substantial right is affected, an appellant must first prove that the right itself is substantial. *Id.* Second, an appellant "must demonstrate why the order affects a substantial right. . . ." *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) (emphasis and citation omitted).

C. Ordinance Not in Effect

[1] In assessing our jurisdiction to review the merits of Plaintiff's interlocutory appeal, we are guided by this Court's opinion in *Bessemer City*, *supra*. *Bessemer City* involved a zoning ordinance amendment that purported to "restrict[] the location, design and use of video gaming machines[]" and forbade arcades that did not comply with the ordinance from having video gaming machines unless they obtained a conditional use permit. 155 N.C. App. at 638, 573 S.E.2d at 713. The amendment had a six-month grace period for non-conforming uses. *Id.*

After the amendment was passed and before the end of the six-month grace period, arcade owners filed a declaratory judgment action to invalidate the zoning ordinance amendment and a motion for preliminary injunction to enjoin enforcement of the ordinance. *Id.* Approximately five months after the end of the grace period, the trial court entered an order denying the arcade owners' motion for preliminary injunction and the arcade owners appealed. *Id.* at 638-39, 573 S.E.2d at 713.

This Court declined to address the arcade owners' appeal on the merits, and dismissed the appeal as interlocutory, reasoning:

> Here, we need not determine whether the use or operation of video gaming machines by plaintiffs in their businesses constitutes a substantial right, because the trial court's denial of the preliminary injunction did not deprive them of that, or any other, right. *At the time plaintiffs moved for the injunction, the amendment was not in effect.* They were still operating as conforming uses. Plaintiffs can make no argument that the trial court's order deprived them of a vested right to continue as nonconforming uses, or some other substantial right, that will work injury to them if not corrected before appeal from final judgment.

Id. at 639-40, 573 S.E.2d at 714 (emphasis supplied).

In the instant case, Plaintiff filed its complaint and motion for preliminary injunction on 15 May 2017, prior to the Ordinance becoming effective on 1 June 2017. Plaintiff "can make no argument that the trial court's order deprived [it] of . . . substantial right[s]" that will cause irreparable harm, if the trial court's order is not reviewed before final judgment. *Id.*

D. Due Process

[2] Plaintiff asserts that its rights to due process under the United States and North Carolina Constitutions are substantial rights. Plaintiff asserts

the Ordinance will deprive it of its due process rights because of a provision allowing for civil and criminal penalties. The particular provision of the Ordinance at issue states, in relevant part:

> (a) Civil penalty. Violation of this Article IV shall subject the offender(s) to a civil penalty in the amount of $100.00. In the event there is more than one violation within any one-year period, then the civil penalty shall be increased for each additional violation over one during such period[.]
>
> . . . .
>
> (2) Violators shall pay any issued penalty within 72 hours of the issue date and time. The town attorney, or designee, is authorized to file suit on behalf of the town to collect any unpaid citations, and the police chief, or designee, is authorized to verify and sign complaints on behalf of the town in such suits. A police officer may issue a citation for violations of this article.
>
> (3) Appeal of a civil penalty amount may be made to the Town Manager or designee within 30 calendar days from the date of issuance by filing an appeal stating with specificity the grounds for the appeal and the reasons the penalty should be reduced or abated . . . .
>
> (c) Criminal penalty. In addition to, or in lieu of, such civil penalties or other remedies, violation of this article shall constitute a misdemeanor.

Cary, N.C., Code of Ordinances, art. IV, § 20-159(a)-(c). This Court has recognized that the constitutional right to due process is a substantial right. *See K2 Asia Ventures v. Trota*, 209 N.C. App. 716, 724, 708 S.E.2d 106, 112 (2011). Plaintiff argues the Ordinance violates its due process rights by subjecting it to civil and criminal liability without adequate notice and hearing.

Nothing in the text of the ordinance indicates Plaintiff will be deprived of its substantial right to due process, absent immediate appellate review. The Ordinance's requirement for civil penalties to be paid within 72 hours of the issuing date does not deprive Plaintiff the opportunity to contest the civil penalty without prior notice and hearing. If Plaintiff contests the imposition of a civil penalty for violation of the Ordinance, Plaintiff could refuse to pay the penalty. If the Town chooses to enforce a penalty by filing a civil action, then Plaintiff would receive

the notice and hearing afforded to any defendant in a civil action. Plaintiff could fully contest the merits of the imposition of the penalty in court.

Additionally, nothing in the text of the Ordinance allows the Town to bypass settled criminal procedures for the purported enforcement of misdemeanors, including the Rule of Lenity, if the Town attempts to assert criminal penalties against Plaintiff for violating the Ordinance. Although Plaintiff is not mounting an "as-applied" challenge to the Ordinance, Plaintiff has not alleged it has violated the Ordinance, nor has the Town attempted to enforce civil or criminal penalties against Plaintiff for a violation of the Ordinance.

Plaintiff has failed to show the trial court's denial of its motion for preliminary injunction will "potentially work injury" to its substantial rights to due process "if not corrected before appeal from final judgment." *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736.

E. Equal Protection

[3] Plaintiff also argues that the trial court's denial of its motion for preliminary injunction will irreparably harm its substantial rights to equal protection. Plaintiff asserts the Ordinance violates its federal and state constitutional rights to equal protection by exempting tows from public property within the town limits of Cary and tows initiated by police. The Ordinance states, in relevant part:

> (a) The provisions of this Article apply to any private property used for residential or non-residential purposes, upon which a private parking lot is located.
>
> (b) Notwithstanding the foregoing, this Article does not apply to the towing, removal or immobilization of a motor vehicle (i) if the motor vehicle obstructs adequate ingress and egress to, from, or within a private parking lot; (ii) if the motor vehicle has been abandoned on private property without the consent of the private property [*sic*]; or (iii) if the motor vehicle is being removed pursuant to the direction of a law enforcement officer or otherwise in accordance with the provisions of this Code or state law.

Cary, N.C., Code of Ordinances, art. IV, § 20-151.

"The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina [or its political subdivisions] from denying any person

the equal protection of the laws." *Department of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001) (citations omitted). "[T]o state an equal protection claim, a claimant must allege (1) the government (2) arbitrarily (3) treated them differently (4) than those similarly situated." *Lea v. Grier*, 156 N.C. App. 503, 509, 577 S.E.2d 411, 416 (2003).

On its face, § 20-151 of the Ordinance does not appear to discriminate among classes of towing companies, but among the types of property and situations in which the Ordinance's provisions may apply. Plaintiff alleges in its verified complaint that the Town unconstitutionally targeted the requirements of the Ordinance at particular towing companies, including Plaintiff.

Presuming, *arguendo*, Plaintiff has a substantial right to equal protection, Plaintiff has failed to show how the trial's court order harms this asserted substantial right. The Ordinance, on its face, does not appear to classify towing companies conducting business within the town limits of Cary, but classifies parking lots, based upon whether they are private or public, and situations in which the requirements of the Ordinance apply, based upon whether the actions are initiated by law enforcement officers or private individuals.

In addition the Ordinance specifically provides exclusions from any applications and enforcement actions:

> (b) Notwithstanding the foregoing, this Article does not apply to the towing, removal or immobilization of a motor vehicle (i) if the motor vehicle obstructs adequate ingress and egress to, from, or within a private parking lot; (ii) if the motor vehicle has been abandoned on private property without the consent of the private property [*sic*]; or (iii) if the motor vehicle is being removed . . . otherwise in accordance with the provisions of this Code or state law.

Cary, N.C., Code of Ordinances, art. IV, § 20-151(b). These broad and substantial exemptions may render the Ordinance's regulations ambiguous and effectively null; however, the question of the interpretation of the Ordinance is not before this Court and remains to be determined by the trial court.

III. Conclusion

At this point in the litigation under a review of a facial challenge, Plaintiff has failed to show that its substantial rights will be harmed by the trial court's denial of its motion for preliminary injunction. The

constitutional issues remain to be determined upon a more developed record.

Without the Rule 54(b) certification or the showing of potential harm to a substantial right, we lack jurisdiction over Plaintiff's interlocutory appeal. The appeal is dismissed without prejudice. *It is so ordered.*

DISMISSED.

Judges ELMORE and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
ZACHARY ALLEN BLANKENSHIP, DEFENDANT

No. COA17-713

Filed 17 April 2018

1. Evidence—hearsay—exceptions—excited utterance—absence of stress

The trial court erred by admitting statements made by a child sexual abuse victim to her grandparents as excited utterances under N.C. Rule of Evidence 803(2). The grandparents described the victim as "normal" and "happy" when she made the statements.

2. Evidence—hearsay—exceptions—present sense impression—no evidence of timing of event

The trial court erred by admitting statements made by a child sexual abuse victim to her grandparents as a present sense impression under N.C. Rule of Evidence 803(1). The record lacked evidence of exactly when the sexual misconduct occurred.

3. Evidence—hearsay—exceptions—residual—findings of trustworthiness—review by appellate court

The trial court failed to make the proper findings to establish the trustworthiness of statements made by a child sexual abuse victim to her grandparents when it admitted the statements under the residual exception in N.C. Rule of Evidence 804(b)(5). Upon its own review of the record, the Court of Appeals concluded there were sufficient guarantees of trustworthiness and that the evidence was properly before the jury.

4. Evidence—hearsay—exceptions—residual—guarantees of trustworthiness

The Court of Appeals concluded that a child sexual abuse victim's statement to a victim advocate had sufficient guarantees of trustworthiness and thus was properly before the jury under the residual hearsay exception, N.C. Rule of Evidence 804(b)(5).

5. Evidence—hearsay—exceptions—residual—guarantees of trustworthiness

The trial court did not err by admitting statements made by a child sexual abuse victim to a family member during diaper changes under the residual hearsay exception, N.C. Rule of Evidence 804(b)(5), because the trial court made adequate findings under *State v. Triplett*, 316 N.C. 1 (1986), and the statements had sufficient guarantees of trustworthiness.

6. Evidence—hearsay—exceptions—medical diagnosis or treatment—prejudice

Defendant failed to demonstrate prejudicial error in the trial court's admission of a child sexual abuse victim's statements to an emergency room nurse, because the trial court properly admitted substantially identical statements made by the victim to others.

7. Sexual Offenses—corpus delicti—corroboration of facts and circumstances

The trial court erred by denying defendant's motion to dismiss charges of statutory sexual offense and indecent liberties with a child where the State failed to prove the corpus delicti of the crimes. The State relied solely upon defendant's uncorroborated confession to law enforcement officers and failed to prove strong corroboration of essential facts and circumstances.

8. Constitutional Law—effective assistance of counsel—cold record

The Court of Appeals dismissed, without prejudice to his right to file a motion for appropriate relief, defendant's ineffective assistance of counsel claim where the cold record was insufficient for direct review of his claims.

Judge DIETZ concurring in separate opinion.

Appeal by Defendant from judgments entered 24 February 2017 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 7 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne M. Middleton, for the State.

Mark Montgomery, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Zachary Allen Blankenship ("Defendant") appeals following jury verdicts convicting him of rape of a child by an adult offender, four counts of taking indecent liberties with a child, and three counts of sexual offense with a child by an adult offender. Following the verdicts, the court sentenced Defendant to two consecutive terms of 300 to 420 months imprisonment and ordered Defendant to register as a sexual offender for the rest of his natural life. On appeal, Defendant contends the court erred in admitting hearsay statements and denying his motion to dismiss. In the alternative, Defendant argues his counsel rendered ineffective assistance of counsel. We hold the court did not err in admitting hearsay statements, but reverse the court's denial of Defendant's motion to dismiss the three counts of statutory sexual offense with a child by an adult offender and four counts of indecent liberties charges. We dismiss, without prejudice to his right to file a motion for appropriate relief, Defendant's ineffective assistance of counsel claim.

I. Factual and Procedural History

On 3 February 2014, a Catawba County Grand Jury indicted Defendant for one count of rape of a child, four counts of taking indecent liberties with a child, and three counts of sexual offense with a child. On 15 December 2016, the State filed a "Motion to Admit Hearsay Statements of the Victim into Evidence through Other Exceptions Clause 803 & 804[.]" (All capitalized in original). On 19 December 2016, Defendant filed his objection to the State's motion. Also on 19 December 2016, Defendant filed a motion to suppress his confession.

On 3 January 2017, the court held a hearing on Defendant's motion to suppress and the State's motion to admit hearsay statements. The State and Defendant stipulated to Rose's[1] unavailability for purposes of hearsay exceptions.

The State first called Defendant's mother, Gabrielle. On 30 November 2013, Gabrielle waited for Rose's mother, Tammy, to drop Rose off at

1. We use this pseudonym to protect the identity of the juvenile and for ease of reading. N.C. R. App. P. 3.1 (2017).

Gabrielle's home. Typically, Tammy dropped Rose off at 8:30 in the morning. However, that day, Tammy did not arrive at 8:30, so Gabrielle and her husband went to Tammy's workplace. Upon arriving, Tammy told them she ran late that morning, so Rose stayed home with Defendant. Tammy offered to call Defendant, but Gabrielle said not to, because she would run errands before picking up Rose.

Gabrielle and her husband, Keith, arrived at Defendant's home and knocked on the door. As Gabrielle slightly opened the door, Defendant "hollered no, wait a minute, wait a minute." Gabrielle shut the door, paused, grabbed the doorknob again, and Defendant again said, "wait a minute." Gabrielle told Defendant to hurry up. Defendant opened the door. Gabrielle saw Rose, who was wearing a t-shirt, but no bottoms. Gabrielle told Defendant he needed to stop "let[ting] her run around naked[,]" and Defendant explained he was potty training Rose. Gabrielle put a diaper on Rose, dressed Rose, and brought Rose to Keith's truck.

As Gabrielle placed Rose in the car seat, Rose said, "daddy put his weiner on my coochie." Gabrielle "was blown away" because she "never heard her say anything like that before." Gabrielle instructed Rose to "tell poppy what [she] just told nana." Rose "repeated the words exactly." Keith said, "I don't understand what a coochie is, and she pointed to her vagina." Keith wanted to confront Defendant, but Gabrielle told him they would "take care of this in another way." Gabrielle and Keith brought Rose to the emergency room.

On cross-examination, Gabrielle indicated she was not "concerned" about Rose's "physical or mental condition" when she saw Rose at Defendant's home. Additionally, Rose did not "indicate any pain or suffering[.]" Rose "was normal" and not crying when she talked with Gabrielle.

The State next called Keith Blankenship, Defendant's father. Keith's testimony regarding the morning of 30 November 2013 matched Gabrielle's testimony. Keith described Rose as "act[ing] like [Rose]" that morning and as "[n]ormal."

The State called Adrienne Opdike, a former victim advocate at the Children's Advocacy and Protection Center.[2] Odpike interviewed Rose on 12 December 2013. In the interview, when asked about "boo-boo's", Rose said, "daddy put his weiner in my coochie and I bleed. I have blood." While Odpike did not say "it in [Rose's] verbatim language, . . . [Rose] did say daddy, coochie, blood together. She repeated that several

2. At the time of the hearing, Opdike was the director of the Children's Advocacy and Protection Center.

times." Rose also mentioned something "coming out of the weiner" but could not elaborate.

The State next called Bobbi Christopher, Rose's second cousin's wife. Bobbi first met Rose in 2013, when Rose was two years old. While on vacation in November 2013, Bobbi received a text message from Tammy, asking if she and Rose could stay with Bobbi and her husband. Bobbi agreed to let them stay at her home.

In early December 2013, the first time Bobbi changed Rose's diaper, Rose "put her hand on her vagina and . . . [said] daddy put his weinie in me coochie." Rose said this statement and "I bleed in my coochie" "every time" Bobbi changed Rose's diaper. Bobbi described the remarks as "[s]pontaneous."

In an oral ruling, the court admitted Rose's statements to Gabrielle and Keith under Rule 803(1) (Present Sense Impression), Rule 803(2) (Excited Utterance), and the residual exception of Rule 804(b)(5) of the North Carolina Rules of Evidence. The court also admitted Rose's statements to Opdike under the residual exception of Rule 804(b)(5). Lastly, the court admitted Rose's statement to Bobbi under Rule 803(1) (Present Sense Impression), Rule 803(3) (Statement of the Then Existing Mental, Emotional, or Physical Condition), and the residual exception of Rule 804(b)(5). In an order entered 6 January 2017, the court denied Defendant's motion to suppress his confession.[3]

On 20 February 2017, the court called Defendant's case for trial. The State first called Gabrielle. Gabrielle's testimony regarding 30 November 2013 matched her testimony at the 3 January 2017 hearing. Defendant did not object to any parts of the testimony regarding Rose's statements to Gabrielle.

The State next called Keith, whose testimony largely matched the testimony from the January hearing. Keith added when Gabrielle told Tammy about the allegations, Tammy "got very angry . . . and started hollering that her husband is not a pervert[.]" Again, Defendant did not object to any of Keith's testimony about Rose's statements to him.

The State called Amy Walker Mahaffey, a registered nurse in the emergency room at Lake Norman Regional Medical Center. The State tendered Mahaffey as an expert in performing sexual assault exams. Before Mahaffety testified about what Gabrielle told her that Rose said,

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3. Defendant does not present any appellate arguments regarding whether his confession was voluntary.

Defendant objected. The court dismissed the jury, and the following discussion ensued:

> THE COURT: . . . And then the other argument that you had was what?
>
> [DEFENSE COUNSEL]: No exceptions to the hearsay, particularly on those. You know, there is a medical diagnosis exception in this particular case, but --
>
> THE COURT: So in regards to what the -- what [Rose] Blankenship said to the grandparents in the car -- and did I hear from Bobbi Christopher? I think I did.
>
> [STATE]: You did, Your Honor.
>
> THE COURT: And that is what she said to her in the house that day.
>
> [STATE]: Yes.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Which I'll renew my objection at this time knowing that it's been ruled on just for preservation.

The court admitted the statements, under Rule 803(4) of the North Carolina Rules of Evidence—statements made for the purpose of a medical diagnosis or treatment.

During the examination, Rose said, "daddy put his weiner in my coochie[.]" Mahaffey examined Rose's genitalia, and Rose told Mahaffey "nothing hurt." Upon review, "[t]here were no obvious signs of trauma, meaning that there had been no blunt force trauma to the area." However, lack of trauma did not mean Rose was not penetrated. Additionally, the exam and the lack of findings were consistent with what Rose reported to Mahaffey.

The State called Bobbi Christopher. Bobbi's testimony regarding how Rose came to live with her and Rose's comments during diaper changes matched her testimony at the January hearing. At the time of the trial, Rose lived with Bobbi's daughter and son-in-law.

The State next called Adrienne Opdike. The State tendered Opdike as an expert in forensic interviewing. Before testifying regarding what Rose told her in the interview, Defendant objected. Defense counsel "assert[ed] that objection as to everything Ms. Opdike says that [Rose]

says" but would also object to three specific lines. As at the January hearing, Opdike testified Rose told her "daddy put his wiener in her coochie and she bleed." Rose could not answer "specific questions" about the incident, but kept "repeating that statement." Rose also stated, "weiner come out, weiner come out."

The State called Marcella McCombs with the Catawba County Sheriff's Office. In 2013, McCombs worked as a child sexual assault investigator. On 13 December 2013, McCombs executed two search warrants—one for Defendant's home and one for electronics in the home—and arrested Defendant. Investigators searched Defendant's electronics for pornographic material, but did not find any on Defendant's computer.

McCombs returned to the Sheriff's Office to interview Defendant. McCombs read Defendant his *Miranda* rights, and Defendant signed a form, waiving the rights. McCombs recorded the interview with Defendant, which was published to the jury.

In the beginning of the interview, Defendant denied watching pornography in the past two years or touching Rose inappropriately. However, Defendant told officers he and Tammy often had sex together while Rose laid in the bed. In several instances, they would "continue", even after Rose awoke. Additionally, sometimes Rose would climb on his back while he was having sex with Tammy.

Defendant admitted to watching pornography in front of Rose. Additionally, Rose witnessed Defendant ejaculate. Two weeks before the interview, Defendant watched pornography on his computer. Rose sat on a nearby couch while Defendant watched and masturbated.

Defendant would also put lotion on his fingers and "rub" Rose's vagina. He rubbed her "about three" times, all within the month prior to the interview. However, Defendant denied Rose's allegations of him putting his penis "in her coochie."

Another time, Defendant watched videos "of a sexual nature" on the computer. Rose "grabbed" and "squeezed" his penis. He thought she learned how to grab his penis from watching him masturbate.

The State called Tammy. On 30 November 2013, Tammy, Gabrielle, and Keith arranged for Tammy to bring Rose to her grandparents' on Tammy's way to work. However, Tammy woke up late and left Rose at home with Defendant. Gabrielle and Keith arrived at Tammy's work and discussed picking up Rose from Tammy and Defendant's home. Tammy asked if they wanted her to call Defendant, so he would be ready for

their arrival. Gabrielle and Keith "said that . . . they weren't for sure if they were going to pick her up then[,]" so Tammy did not call Defendant.

Tammy got off work around 3:00 p.m. and called Gabrielle and Keith, who told her to come to their house to pick up Rose. When Tammy arrived at their home, Gabrielle told Tammy "something had happened and [she] wasn't going to like it[.]" Gabrielle and Keith told Tammy "[Defendant] had been reported as a risk to [Rose]." Tammy was in shock and "never thought [Defendant] to be a threat to [Rose]." Rose never made similar statements to Tammy about Defendant.

Tammy brought Rose back to her and Defendant's home. Tammy told Defendant of the allegation, "and he was a bit in shock[.]" Tammy and Rose left Defendant's home and stayed the night at their church. Tammy and Rose then moved in with Bobbi, but Tammy soon moved back in with Defendant.

The State next called Jennifer Owen, a supervisor with Catawba County Department of Social Services ("DSS"). In November 2013, Owen worked as a forensic investigator with DSS. On or about 2 December 2013, Owen met with Tammy and Rose, and Owen explained the allegations against Defendant to Tammy. Tammy "was upset about it. She was somewhat angry saying that she didn't believe it, that this was a waste of time, that [Defendant] loved [Rose] and that he was more protective of [Rose] than she was." Tammy told Owen how Rose walked in on Tammy and Defendant having sex. Upon seeing Rose, the two separated and covered themselves. Rose said "weiner in coochie" and repeated the statement several times

On 4 December 2013, a nurse at Children's Advocacy and Protection Center completed a forensic medical exam of Rose. During the exam, Rose "indicated there was blood in her coochie and it came from the bed" and said "mommy broke it[.]"

After the exam, Owen scheduled a forensic interview of Rose. When Owen told Tammy about Rose's statements in the interview,[4] Tammy "didn't agree. She didn't believe it. She continued to defend [Defendant] and state he would never do any of this and that [Rose] wasn't telling the truth and none of this had ever happened."

On 13 December 2013, McCombs called Owen and told her officers arrested Defendant and Defendant "confessed." Around 2 p.m., Owen

4. Owen did not testify, specifically, about the statements Rose made in the forensic interview.

arrived at the Catawba County Detention Center. After receiving investigators' permission, Owen spoke with Defendant. Defendant told Owen:

> he had not done anything and then he said that he had already told investigators everything that had happened . . . . He told me that he had touched [Rose]. He said that he sleeps naked with [Rose], that him and Tammy sleep together and [Rose] sleeps in the bed with them and that he sleeps naked. He told me that there were multiple times when he and Tammy had engaged in sexual intercourse and that [Rose] would usually wake up. Sometimes she would watch but there would be times that she would actually crawl on his back while they were having sex and that they would not always stop because he didn't want to stop.

Owen called Tammy and informed her of Defendant's statements. Tammy "argued [Defendant] did not confess" and asked to speak to Defendant, but Owen did not have such authority. Tammy told Owen that Rose made those statements because Rose saw them have sex in October. Tammy also stated Defendant's statements about Rose climbing on his back during sex were truthful. Additionally, Owen testified on 11 November 2013, Tammy told a social worker Rose had made a statement about her coochie, and Tammy scolded her and said "you're not supposed to say that until you're married." Throughout her conversations with Owen, Tammy changed her story.

Next, the State called Thad Scronce, a lieutenant with the Catawba County Sheriff's Office. In November and December 2013, Lt. Scronce worked as a supervisor in the Special Victim's Unit and supervised McCombs. On 13 December 2013, Lt. Scronce accompanied other investigators to Defendant's home, where they executed two warrants. Investigators searched Defendant's electronics for child pornography, but did not find any.

Lt. Scronce returned to the Sheriff's Office and joined McCombs to interview Defendant. The interview lasted approximately two hours and forty-five minutes. Defendant initially denied the allegations. However, McCombs and Lt. Scronce continued the interview because Defendant changed his story and contradicted himself.

The State rested. Defendant moved to dismiss all the charges. The court denied Defendant's motion. Defendant did not present any evidence.

The jury found Defendant guilty of rape of a child by an adult offender, four counts of taking indecent liberties with a child, and three counts of sexual offense with a child by an adult offender. The court sentenced Defendant to two consecutive terms of 300 to 420 months imprisonment and ordered Defendant to register as a sexual offender for the rest of his natural life. Defendant gave timely oral notice of appeal.

II. Standard of Review

A. Hearsay Statements

"The trial court's determination as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal." *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 (2011) (citation omitted).

"[A] trial court's evidentiary ruling on a pretrial motion to suppress is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Gullette*, ___ N.C. App. ___, ___, 796 S.E.2d 396, 399 (2017) (citation, brackets, and quotation marks omitted). *See State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007). Where Defendant renewed his objection at trial, we review the erroneous admission of hearsay for prejudicial error. *State v. Wilkerson*, 363 N.C. 382, 420, 683 S.E.2d 174, 197 (2009); N.C. Gen. Stat. § 15A-1443(a) (2017). "A defendant is prejudiced by evidentiary error '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.' " *Id.* at 415, 683 S.E.2d at 194 (quoting N.C. Gen. Stat. § 15A-1443(a)).

However, where Defendant failed to object to the admissibility of certain hearsay statements, we review for plain error. N.C. R. App. P. 10(a)(4) (2017). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation marks and citation omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

However, a court's determination to admit a hearsay statement under the residual exception of Rule 804(b)(5) of the North Carolina Rules of Evidence is reviewed for abuse of discretion. *State v. Brigman*, 178 N.C. App. 78, 87, 632 S.E.2d 498, 504 (2006) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported

by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Thus, regarding the hearsay statements, if the trial court admitted the statements under an exception *other than the residual exception*, we review for either plain error or prejudicial error, dependent upon whether Defendant objected at trial. We review admission under the residual exception for abuse of discretion.

B. Motion to Dismiss

Regarding Defendant's motion to dismiss for violation of the *corpus delicti* rule, "[t]his Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). *See also State v. Cox*, 367 N.C. 147, 154-55, 749 S.E.2d 271, 277 (2013) (applying the same standard when analyzing the *corpus delicti* rule). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations and quotations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

III. Analysis

On appeal, Defendant contends: (1) the court erred in admitting hearsay statements; (2) the State failed to sufficiently corroborate his confession, in violation of the *corpus delicti* rule; and (3) trial counsel rendered ineffective assistance of counsel. We address his arguments in turn.

A. Hearsay Statements

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. R. Evid. 801(c) (2017). Unless excepted by statute or the North Carolina Rules of Evidence, hearsay is generally inadmissible. N.C. R. Evid. 802 (2017).

i. Rose's Statements to Her Grandparents, Gabrielle and Keith

At the 3 January 2017 pre-trial hearing, the court admitted Rose's statements to Gabrielle and Keith for the following reasons:

> I think based upon the evidence, based upon the fact that the defendant said that the victim made that statement and there's other corroborating evidence that the victim made that statement and that based upon the time consideration of when the victim said the last time he -- when the defendant said the last time he committed any act of that nature with the alleged victim was two weeks ago and that this incident with Gabrielle and Keith Blankenship occurred almost exactly two weeks before that, that it does come in under a Present Sense Impression and an excited utterance.
>
> I also believe that it would be admissible as substantive evidence pursuant to 804(b)(5), other exceptions. Specifically I find that based upon all the evidence that I've heard in this motion and in the previous one, that this statement has, in comparison with all of the hearsay exceptions, equivalent circumstantial guarantees of trustworthiness.
>
> The statement is offered as evidence of a material fact. The statement is more probative and on point the witness offered than any other evidence which the proponent can procure through reasonable efforts, taking into consideration the fact that the defense has stipulated that the witness is unavailable, and I'll also find that the general purposes of the rules of evidence and the interest of justice will be served by the admission of the statement into evidence.
>
> It also appears that the State has given sufficient and appropriate notice to defense of its intention to offer the statement and the particulars of it.

Although Defendant filed a motion to suppress these statements, he did not object to the testimony at trial. *See State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010). Thus, we review for plain error. N.C. R. App. 10(c)(4).

(1) Excited Utterance Exception

[1] Rule 803(2) excepts excited utterances, which are "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C. R. Evid. 803(2). "To qualify as an excited utterance, the statement must relate to '(1) a sufficiently startling experience suspending reflective thought and (2) be a spontaneous reaction, not one resulting from reflection or fabrication.' " *State v. McLaughlin*, ___ N.C. App. ___, ___, 786

S.E.2d 269, 283, *disc. review denied*, ___ N.C. ___, 787 S.E.2d 29 (2016) (quoting *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988)). Traditionally, when determining spontaneity, courts looked at the time lapse between the event and statement; however, " 'the modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement.' " *Id.* at ___, 786 S.E.2d at 283 (quoting *State v. Smith*, 315 N.C. 76, 87, 337 S.E.2d 833, 841 (1985)).

Here, the State correctly asserts the delay between Defendant's acts and Rose's statements to Gabrielle and Keith does not bar admission of the statements as excited utterances. However, the State presented insufficient evidence to establish "the declarant was under the stress" of a startling event. N.C. R. Evid. 803(2). *See also McLaughlin*, ___ N.C. App. at ___, 786 S.E.2d at 284 (citation omitted). Stress is one of the crucial factors in this hearsay exception, and the State presented no evidence of Rose's stress. *See Smith*, 315 N.C. at 88, 337 S.E.2d at 842 (stating spontaneity and stress are the crucial factors). Thus, while spontaneity does not preclude the statements from being excited utterances, the absence of stress does.

The State cites to *McLaughlin* in support of its contention the statement is an excited utterance. However, in *McLaughlin*, our Court specifically discussed the declarant's stress while making statements to his mother. There, the declarant "came into the house 'frantically' and was 'shaking' while telling [his mother about the abuse.]" *McLaughlin*, ___ N.C. App. at ___, 786 S.E.2d at 283; *see also Smith*, 337 N.C. at 88, 315 S.E.2d at 842 (concluding a statement by a victim was an excited utterance when the child was afraid and scared when relating the incident). In contrast, both Gabrielle and Keith described Rose as "normal" and "happy" when making the statements. As such, the trial court erred in admitting the statements as excited utterances.

(2) Present Sense Impression Exception

[2] Rule 803(1) excepts from the rule against hearsay a present sense impression, which is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." N.C. R. Evid. 803(1) (2017). "The basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." *State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997) (citation omitted). "There is no rigid rule about how long is too long to be 'immediately thereafter.' " *State*

v. Clark, 128 N.C. App. 722, 725, 496 S.E.2d 604, 606 (1998) (citing *State v. Cummings*, 326 N.C. 298, 314, 389 S.E.2d 66, 75 (1990)).

In its brief, the State argues "[t]he circumstances indicated that defendant likely was in the process of sexually abusing the victim when the Blankenships arrived at this residence, and defendant confessed to repeatedly abusing her over the previous month." However, at trial, the State argued:

> The State did not allege the 30th as being the day when he actually had sex with the child. We allege the full month. The reason why we allege that full month for all these charges is because the defendant indicated that that was the time in which he was doing inappropriate things with his daughter.
>
> He did admit the last time he did something inappropriate, in the interview, was two weeks prior which would be that 30th. But the State's not saying that on that 30th that that was the exact day that he actually used his penis to penetrate her or his finger to penetrate her. The defendant didn't make clear what exactly he did to her on that particular day.

During his confession, Defendant admitted he watched pornography two weeks before. While admitting he touching Rose "about three times[,]" he said all three times occurred in the month prior.

The record lacks evidence of exactly when the sexual misconduct occurred, and, thus, we cannot conclude the trial court properly admitted the statements as present sense impressions. *See Smith*, 315 N.C. at 89, 337 S.E.2d at 842-43 (citation omitted) (noting leniency in the timing of the excited utterance hearsay exception is inapplicable when there is no evidence of exactly when the misconduct occurred). *See also State v. Hoxit*, No. COA14-439, 2014 WL 7472946, at *4-*5 (unpublished) (N.C. Ct. App. Dec. 31, 2014) (applying *Smith* to the present sense impression exception and holding a statement was not a present sense impression because there was no evidence the alleged misconduct occurred immediately before the declarant made the statements). Accordingly, here, the trial court erred in admitting the statement as a present sense impression.

(3) Residual Exception

[3] Finally, Rule 804(b)(5) excepts from the rule against hearsay certain statements "having equivalent circumstantial guarantees of

trustworthiness[.]"[5] N.C. R. Evid. 804(b)(5). In *State v. Triplett*, the Supreme Court adopted a six-part test for admitting statements under the residual exception in Rule 804(b)(5): (1) has proper notice been given; (2) is the hearsay covered by any of the exceptions listed in Rule 804(b)(1)-(4); (3) is the hearsay statement trustworthy; (4) is the statement material; (5) is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts; and (6) will the interests of justice be best served by admission. 316 N.C. 1, 9, 340 S.E.2d 736, 741 (1986).

When determining trustworthiness, the court should consider: "(1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability." *State v. Nichols*, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988) (citations omitted). If the court fails to make the proper findings to establish the trustworthiness of a statement, the appellate courts can "review the record and make our own determination." *State v. Valentine*, 357 N.C. 512, 518, 591 S.E.2d 846, 853 (2003). *See also State v. Daughtry*, 340 N.C. 488,514, 459 S.E.2d 747, 760 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 736 (1996); *State v. Swindler*, 339 N.C. 469, 474-75, 450 S.E.2d 907, 911 (1994), *disapproved of on other grounds*, *State v. Jackson*, 348 N.C. 644, 653, 503 S.E.2d 101, 106-07 (1998).

At the suppression hearing, the court concluded:

> I also believe that it would be admissible as substantive evidence pursuant to 804(b)(5), other exceptions. Specifically I find that based upon all the evidence that I've heard in this motion and in the previous one, that this statement has, in comparison with all of the hearsay exceptions, equivalent circumstantial guarantees of trustworthiness.
>
> The statement is offered as evidence of a material fact. The statement is more probative and on point the

5. As stated *supra*, we review the Court's determination under the residual exception for abuse of discretion. However, our Supreme Court held that discretionary decisions of the trial court are not subject to plain error review. *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000) (stating that the North Carolina Supreme Court "has not applied the plain error rule to issues which fall within the realm of the trial court's discretion"), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). *See also State v. Norton*, 213 N.C. App. 75, 81, 712 S.E.2d 387, 391 (2011). Nevertheless, as our Court did in *Norton*, "in the interest of ensuring that [Defendant] had a fair trial, we address the merits of [his] argument." *Id.* at 81, 712 S.E.2d at 391.

> witness offered than any other evidence which the proponent can procure through reasonable efforts, taking into consideration the fact that the defense has stipulated that the witness is unavailable, and I'll also find that the general purposes of the rules of evidence and the interest of justice will be served by the admission of the statement into evidence.
>
> It also appears that the State has given sufficient and appropriate notice to defense of its intention to offer the statement and the particulars of it.

The court engaged in steps one and four through six. However, the court did not determine whether the statement fits within any of the Rule 804(b)(1)-(4) exceptions. While we note the State did not argue for admission under another Rule 804(b) exception, we must conclude the court erred in failing to enter its conclusion in the record of whether the statement was admissible under another exception. *See State v. Moore*, 87 N.C. App. 156, 158, 360 S.E.2d 293, 295 (1987).

Additionally, the court failed, in compliance with the requirement for step three, to "include in the record his findings of fact and conclusions of law that the statement possesses equivalent circumstantial guarantee of trustworthiness." *Triplett*, 316 N.C. at 9, 340 S.E.2d at 741 (citation and quotation marks omitted). Although the court determined the statements possessed a guarantee of trustworthiness, it found no facts to support such a conclusion. Accordingly, we hold the court erred in admitting the statement under the residual exception in Rule 804(b)(5). *See Swindler*, 339 N.C. at 474, 450 S.E.2d at 911 ("This conclusion alone is an inadequate determination that a statement contains the 'equivalent circumstantial guarantees of trustworthiness' necessary to allow its admission under the residual hearsay rule.").

Nonetheless, upon our own review of the record, we conclude there are sufficient guarantees of trustworthiness. First, Rose possessed personal knowledge of the events. Second, Rose had no motivation to fabricate at the time of the statements. Third, Rose never recounted the statements. And, fourth, Rose was unavailable because of her lack of memory of the events. *See State v. Pretty*, 134 N.C. App. 379, 386, 517 S.E.2d 677, 683 (1999); *State v. Wagoner*, 131 N.C. App. 285, 290, 506 S.E.2d 738, 741 (1998).

Defendant alleges there is insufficient indicia of trustworthiness because the court stated:

> [t]his child, in the Court's opinion, is not old enough to know the difference between reality and fantasy, which in my mind bolsters the fact that, and bolsters the trustworthiness of the statement.

Defendant concedes, and we note, the court stated this in relation to Bobbi's testimony, not Gabrielle's or Keith's.

Defendant cites *State v. Stutts*, 105 N.C. App. 557, 414 S.E.2d 61 (1992). In *Stutts*, our Court concluded the trial court erred in finding guarantees of trustworthiness when also concluding the child victim was unavailable due to her inability to discern truth from falsehood or the difference between reality and imagination. Thus, we held "that finding a witness unavailable to testify because of an inability to tell truth from fantasy prevents that witness' out-of-court statements from possessing guarantees of trustworthiness to be admissible at trial under the residual exception set forth in Rule 804(b)(5)." *Id.* at 562-63, 414 S.E.2d at 64-65.

The State cites *State v. Holden*, 106 N.C. App. 244, 416 S.E.2d 415 (1992). In *Holden*, the child witness could not testify due to "fear and trepidation[.]" *Id.* at 252, 416 S.E.2d at 420. During *voir dire*, the court stated the child witness "did not understand the consequences of not telling the truth[.]" *Id.* at 252, 416 S.E.2d at 420. Similar to Defendant here, the defendant argued the court's statement showed untrustworthiness of the statements and *Stutts* require reversal. First, our Court noted *Stutts* applied Rule 803(24), not Rule 804(b)(5), and held *Stutts* did not control the case, because the child witness was not unavailable due to an inability to distinguish truth from fantasy. *Id.* at 252, 416 S.E.2d at 420.

We conclude the case *sub judice* is more analogous to *Holden* than to *Stutts*. The court determined, and the parties stipulated to the determination, Rose was unavailable due to lack of memory, not due to an inability to distinguish truth from fantasy. While the court made a statement regarding Rose's inability to know the difference between reality and fantasy during the suppression hearing, as in *Holden*, the statement "is not sufficient to overcome the circumstantial indicia of reliability[.]" *Id.* at 252, 416 S.E.2d at 420.

Additionally, Defendant suffered no prejudice from the court failing to explicitly state none of the other Rule 804(b) exceptions applied. *See Moore*, 87 N.C. App. at 158, 360 S.E.2d at 295. Accordingly, we conclude the statements have sufficient guarantees of trustworthiness and the court did not err in admitting the statements under Rule 804(b)(5).

In conclusion, we conclude the court erred in admitting the statements under Rules 803(1) and 803(2). However, Defendant failed to demonstrate reversible error because the trial court properly admitted the statements under Rule 804(b)(5).

ii. Rose's Statement to Opdike

[4] Defendant next contends Opdike's testimony about Rose telling her "Daddy put his weiner in my coochie and it bleed" was inadmissible hearsay. At the suppression hearing, the court admitted Rose's statements to Opdike under the residual exception of Rule 804(b)(5) and stated:

> The second statement that the State wishes to admit is the statement of the -- is the interview with Adrienne Opdike, and I'll also find that that statement is admissible in this case. It is -- it does fall within an exception to the hearsay rule, namely 804(b)(5), that for the same reasoning and under the same grounds as previously determined with regard to the statement made to Gabrielle and Keith Blankenship.

Defendant objected to the testimony at trial, and, thus, we review the admission under the residual exception for abuse of discretion. As above, we conclude the statement has sufficient guarantees of trustworthiness, and the court did not abuse its discretion by admitting the statement under Rule 804(b)(5).

iii. Rose's Statements to Bobbi Christopher

[5] Defendant argues Rose's statements to Bobbi were inadmissible hearsay. At the suppression hearing, the court concluded the statements were admissible under Rule 803(1) (Present Sense Impression), Rule 803(3) (Statement of the Then Existing Mental, Emotional, or Physical Condition), and the residual exception of Rule 804(b)(5). At trial, Defendant initially objected when the State asked Bobbi about what Rose said during a diaper change. However, Defendant failed to renew his objection when Bobbi testified about other times Rose made the same statement to her. Thus, we review any alleged errors of admission under Rule 803(1) or Rule 803(3) for plain error . *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) (citations omitted) ("It is well established that admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character."). With regard to the court's admission of the statement under the residual exception, Defendant failed to renew his objection at trial. As above, although our Court does not typically apply plain error to issues

falling within the realm of the trial's court discretion, we address the merits of Defendant's argument to ensure he received a fair trial.

For the reasons stated above, the court erred in admitting the statements under the present sense impression exception to the rule against hearsay.[6] However, the court did not err, or abuse its discretion, in admitting the statements under Rule 804(b)(5). We conclude the court adequately met the steps of *Triplett* and Rule 804(b)(5) and the statements have sufficient guarantees of trustworthiness. Thus, although the court erred in admitting the statements as present sense impressions, Defendant failed to demonstrate reversible error because the court properly admitted the statements under Rule 804(b)(5).

iv. Rose's Statements to Mahaffey

[6] At trial, Defendant objected to Mahaffey's testimony regarding Rose's statements to her. The court overruled Defendant's objection. Thus, we review for prejudicial error. *Wilkerson*, 363 N.C. at 415, 683 S.E.2d at 197.

Rule 803(4) states:

> Statements for Purposes of Medical Diagnosis or Treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception of a general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C. R. Evid. 803(4). The rule "requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000) (citations omitted).

> Our Supreme Court in *Hinnant* pointed out the difficulty in determining whether a declarant—especially a young child—understood the purpose of his or her statements, and set forth the general rule that the court "should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she

6. We need not address any argument regarding any alleged error for admission under Rule 803(3), as we determine the court properly admitted the statement under Rule 804(b)(5).

> possessed the requisite intent under Rule 803(4)." Some factors to consider in determining whether a child had the requisite intent are whether an adult explained to the child the need for treatment and the important of truthfulness; with whom and under what circumstances the declarant was speaking; the setting of the interview; and the nature of the questions.

State v. Bates, 140 N.C. App. 743, 745, 538 S.E.2d 597, 599 (2000) (internal citations omitted). In reviewing the objective circumstances, the court must consider whether "the child understood the role in order to trigger the motivation to provide truthful information." *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 670 (citation and quotation marks omitted).

At trial, the court reasoned:

> I'm going to find that the statements of the victim to this witness are non-testimonial and that they fall into the hearsay exception in that they were given for purposes of medical diagnosis.
>
> I'm trying to remember which one that is. It's Number (4), 803(4), statements made for the purpose of a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Here, whether or not Rose had the intent required under *Hinnant* is a close call. First, we note the young age of Rose factors into our analysis. *See Smith*, 315 N.C. at 84, 337 S.E.2d at 840. On the one hand, the record indicates Mahaffey, a nurse, examined Rose in the emergency department of a hospital. Nothing indicates Rose's statements were in response to leading questions or a non-spontaneous statement. Additionally, Rose made the statements prior to and during a medical examination. *Compare Hinnant*, 351 N.C. at 290, 523 S.E.2d at 671 (holding the 803(4) exception did not apply when the interview took place after the initial medical examination, in a "child-friendly" room, in a non-medical environment, and with a series of leading questions), *with In re Clapp*, 137 N.C. App. 14, 21-22, 526 S.E.2d 689, 695 (2000) (concluding a statement fell within the Rule 803(4) exception when the child-victim made the statement in the hospital emergency room and after the mother informed doctors of the alleged incident). *See also State v. Burgess*, 181 N.C. App. 27, 35, 639 S.E.2d 68, 74 (2007). The

setting shows an atmosphere of "medical significance[.]" *State v. Lewis*, 172 N.C. App. 97, 104, 616 S.E.2d 1, 5 (2005).

On the other hand, nothing in the record indicates Mahaffey impressed the importance of truth telling to Rose. Additionally, Rose did not understand why she was at the hospital, and Mahaffey did not make it clear to Rose she needed treatment. *See State v. Isenberg*, 148 N.C. App. 29, 37-38, 557 S.E.2d 568, 573-74 (2001).

However, we need not decide whether the court erred in admitting this statement under Rule 803(4). Assuming *arguendo* the court erred in admitting the statement under Rule 803(4), Defendant fails to show prejudicial error. *Wilkerson*, 363 N.C. at 415, 683 S.E.2d at 197. As stated above, the court properly admitted substantially identical statements made by Rose to others. Thus, Defendant failed to show "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached[.]" N.C. Gen. Stat. § 15A-1443(a). Accordingly, we hold Defendant failed to show any prejudicial, reversible error.

B. Defendant's Confession

[7] Defendant next contends the court erred in denying his motion to dismiss the charges of statutory sexual offense and indecent liberties with a child because the State failed to prove the *corpus delicti* of the crimes. Specifically, Defendant contends the State relied solely on his uncorroborated confession to law enforcement officers, which is insufficient to establish guilt. We agree.

Corpus delicti means "the body of the crime," and typically describes "the material substance on which a crime has been committed." *Black's Law Dictionary* 419-20 (10th ed. 2014). "It is well established in this jurisdiction that a naked, uncorroborated, extrajudicial confession is not sufficient to support a criminal conviction." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986).

The State can satisfy the *corpus delicti* doctrine in one of two ways. First:

> [t]raditionally, our *corpus delicti* rule has required the State to present corroborative evidence, independent of the defendant's confession, tending to show that (a) the injury or harm constituting the crime occurred and (b) this injury or harm was done in a criminal manner. This traditional approach requires that the independent evidence touch or concern the *corpus delicti*—literally, the body of the crime, such as the dead body in a murder case.

State v. Cox, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013) (citations, quotation marks, and alterations omitted). Second, the State may satisfy the doctrine under the "trustworthiness" approach, adopted by our Supreme Court in *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985). Under this approach, the focus is "on the reliability of a defendant's confession rather than independent evidence of the *corpus deliciti*." *State v. Messer*, ___ N.C. App. ___, ___, 806 S.E.2d 315, 322 (2017) (citations and quotation marks omitted). Thus:

> when the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime.

Parker, 315 N.C. at 236, 337 S.E.2d at 495. However, "when independent proof of loss or injury is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice." *Id.* at 236, 337 S.E.2d at 495.

The State cites *State v. Sweat*, 366 N.C. 79, 727 S.E.2d 691 (2012). In *Sweat*, our Supreme Court analyzed defendant's confession under the *Parker* formulation. *Id.* at 85-86, 727 S.E.2d at 695-96. The Court considered the following factors: First, defendant had "ample opportunity" to commit the crimes. *Id.* at 86, 727 S.E.2d at 696. Although opportunity, alone, is insufficient, the Court considered it relevant evidence. *Id.* at 86, 727 S.E.2d at 696 (citations omitted). Second, defendant's confession "evidenced familiarity with corroborated details likely to be known only by the perpetrator." *Id.* at 86, 727 S.E.2d at 696. Specifically, defendant's confession matched the victim's extrajudicial statements regarding the number of times defendant assaulted the victim, whether the assault was vaginal or anal penetration, and where and when the assaults occurred. *Id.* at 87, 727 S.E.2d at 696. Third, his confession fit within "his pattern of sexual misconduct" with the victim. *Id.* at 87, 727 S.E.2d at 696-97. Fourth, the victim's statements corroborated defendant's confession. *Id.* at 87, 727 S.E.2d at 697.

Here, the only substantive evidence is Defendant's confession, and, thus, we review under the *Parker* formulation. Therefore, the dispositive question is whether Defendant's confession "is supported by substantial

independent evidence tending to establish its trustworthiness, including facts that tend to show [he] had the opportunity to commit the crime." *Parker*, 315 N.C. at 236, 337 S.E.2d at 495.

First, Defendant had "ample opportunity" to commit the crimes. Defendant, Rose's father, often spent time alone with Rose at their home. Defendant's opportunity corroborates "essential facts embodied in the confession." *Sweat*, 366 N.C. at 86, 727 S.E.2d at 696. However, Defendant's confession did not corroborate any "details related to the crimes likely to be known only by the perpetrator." *Id.* at 87, 727 S.E.2d at 696. Unlike in *Sweat*, Defendant's confession does not match any extrajudicial statements by Rose. Rose told others "Daddy put weiner in coochie." However, Defendant denied that allegation throughout his confession. Defendant confessed to other inappropriate sexual acts, but did not confess to putting his "weiner" in her "coochie." Third, Defendant's confession did not "fit within" a pattern of sexual misconduct. In contrast to *Sweat*, neither Rose nor any witness at the trial testified as to a pattern of misconduct by Defendant. *Id.* at 87, 727 S.E.2d at 696-97. Fourth, the confession was not corroborated by Rose's extrajudicial statements. In the interview, Defendant confessed to touching Rose inappropriately and watching pornography with her, but Defendant did not confess to raping Rose.

Upon a review of the rest of the record, we conclude the State failed to prove "*strong* corroboration of *essential* facts and circumstances[.]" *Parker*, 315 N.C. at 236, 337 S.E.2d at 495. Notably, Defendant spoke of watching pornography with Rose, but investigators did not find any pornography on Defendant's computer. We conclude the State failed to satisfy the *corpus delicti* rule.

Next, we turn to whether, even without Defendant's confession, the State presented sufficient evidence Defendant was the perpetrator of the crimes. The State does not address the three counts of sexual offense with a child by an adult offender. However, the State asserts it presented sufficient evidence of all four counts of taking indecent liberties with a child, even without Defendant's confession. In support of this argument, the State argues the jury *could have found* certain behaviors by Defendant constituted indecent liberties, beyond the occasions mentioned in Defendant's confession.[7] Nonetheless, at trial, the State relied on the instances relayed in Defendant's confession for the crimes. We

7. Specifically, the State alleges the jury "could have found that having sexual intercourse in front of the child . . . was an indecent liberty" or "having the child walk around with no bottoms on . . . was for the purpose of sexual gratification."

conclude the State failed to present sufficient evidence of the statutory sexual offense charges and the indecent liberties charges. Accordingly, the trial court erred in denying Defendant's motion to dismiss, and we reverse.

C. Ineffective Assistance of Counsel

[8] Alternatively, Defendant argues his trial counsel rendered ineffective assistance of counsel by (1) failing to object to the court's admission of hearsay at trial and (2) failing to renew Defendant's motion to dismiss.

At the outset, we note defense counsel's failure to renew the motion to dismiss did not waive appellate review, because Defendant did not present evidence. *See* N.C. R. App. P. 10(a)(3). However, with regard to counsel's failure to object at trial, we deem the cold record insufficient for direct review of Defendant's claims. *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524-25 (2001) (citation omitted). Accordingly, we dismiss his ineffective assistance of counsel claims, without prejudice to his right to file a motion for appropriate relief.

IV. Conclusion

For the foregoing reasons, we hold the court did not commit reversible error in admitting hearsay statements. Consequently, we hold no error in Defendant's conviction for rape. However, we reverse the trial court's denial of Defendant's motion to dismiss the three statutory sexual offense charges and four indecent liberties with a child charges. We remand this matter for resentencing. Additionally, we dismiss, without prejudice to file a motion for appropriate relief, Defendant's ineffective assistance of counsel claim.

NO REVERSIBLE ERROR IN PART; REVERSED IN PART; DISMISSED WITHOUT PREJUDICE IN PART; REMANDED FOR NEW SENTENCING.

Judge ELMORE concurs.

Judge DIETZ concurs in a separate opinion.

DIETZ, Judge, concurring.

I take issue with two portions of the majority opinion. First, although I concur in the result of the majority's hearsay analysis, I disagree with the reasoning. As the majority acknowledges, our Supreme Court has held that plain error review does not apply "to issues which fall within

the realm of the trial court's discretion." *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000). But that does not mean—as the majority holds—that this Court reviews those unpreserved arguments under the ordinary abuse of discretion standard. Under *Steen*, if an issue is unpreserved and is not subject to plain error review, that issue is "waived" and cannot be reviewed on appeal at all. *Id.* Thus, these unpreserved hearsay issues should either be reviewed for plain error or deemed waived—they should not be reviewed for abuse of discretion as if they were properly preserved.

Second, I am concerned by the application of the *corpus delicti* rule in this case. As the constitutional protections against coerced and unreliable confessions have strengthened, the justification for this common law principle has eroded. The rule still serves an obvious purpose when there is nothing to corroborate the defendant's confession at all. Consider, for example, a defendant confessing to sexually abusing his daughter when the daughter has no memory of the assault and there is no other evidence that a crime occurred.

Here, by contrast, the jury heard evidence that the victim repeatedly told family members and others that "daddy put his weiner in my coochie." Thus, the defendant's confession is far from the only evidence that a sex crime occurred in this case. But, because of the victim's young age, she could not provide more details of the specific sex acts at the time and, by trial, she could not remember the incidents at all. Thus, this seems like the sort of case in which the defendant's confession is sufficiently reliable to fill in the gaps in the victim's memory without running afoul of the *corpus delicti* rule.

But our Supreme Court implicitly rejected this relaxed view of *corpus delicti* in *State v. Sweat*, 366 N.C. 79, 82–83, 727 S.E.2d 691, 694 (2012). There, the ten-year-old victim testified that the defendant engaged in vaginal and anal intercourse with her. *Id.* at 87, 727 S.E.2d at 696. The defendant also confessed to four acts of fellatio with the victim. *Id.* The Supreme Court held that the confession could support the additional convictions only if there was "*strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession." *Id.* at 85, 727 S.E.2d at 695 (emphasis in original). That test was met in *Sweat* because the defendant "confessed to details likely to be known only to the perpetrator," the crimes to which the defendant confessed "fit within the pattern of defendant's other crimes," and the victim had described the incidents of fellatio "to third parties in extrajudicial statements." *Id.* at 85–86, 727 S.E.2d at 696.

None of these factors are present here. Moreover, if the mere fact that the child victim testified to other, different sexual acts with the defendant were enough standing alone to overcome the *corpus delicti* rule, the Supreme Court in *Sweat* would not have engaged in a lengthy analysis of these other factors. Thus, I agree with the majority that the *corpus delicti* rule requires that we vacate the statutory sexual offense and indecent liberties convictions in this case. But I question whether the Supreme Court intended this result when it decided *Sweat*.

STATE OF NORTH CAROLINA
v.
JEFFREY TRYON COLLINGTON, DEFENDANT

No. COA17-726

Filed 17 April 2018

Constitutional Law—effective assistance of counsel—appellate—failure to raise outcome-determinative caselaw

Defendant received ineffective assistance of counsel where his counsel in his appeal from a conviction for possession of a firearm by a felon failed to raise the applicable longstanding doctrine governing plain error review of improper alternative jury instructions, established in *State v. Pakulski*, 319 N.C. 562 (1987).

Appeal by the State from order entered 3 April 2017 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 7 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

North Carolina Prisoner Legal Services, Inc., by Christopher J. Heaney, for defendant-appellee.

ZACHARY, Judge.

The State appeals from the trial court's order granting defendant Jeffrey Tryon Collington's Motion for Appropriate Relief for ineffective assistance of counsel. For the reasons explained herein, we affirm.

Background

The present appeal arises from defendant's initial appeal to this Court ("*Collington I*") in which we issued an opinion dismissing defendant's challenge to his conviction of possession of a firearm by a felon. As explained in *Collington I*, the underlying facts of the case are as follows:

> . . . Christopher Hoskins ("Mr. Hoskins") testified for the State at trial as follows: Mr. Hoskins went to the recording studio ("the studio") of Dade Sapp ("Mr. Sapp") to "hang out" on the evening of 1 October 2012. Shortly after he arrived, two men — identified by Mr. Hoskins as Defendant and Clarence Featherstone [("Defendant's brother")]— entered the studio, passed by Mr. Sapp, and demanded to speak with someone named "Tony." Defendant asked Mr. Hoskins if he was "Tony" and pointed a gun ("the gun") at Mr. H[o]skins when he said he was not "Tony." A struggle for the gun ensued. According to Mr. Hoskins, both Defendant and [Defendant's brother] beat him up, went through his pockets, removed approximately $900.00 in cash that Mr. Hoskins had won in video poker earlier in the day, and then left the studio. At trial, Mr. Hoskins also identified the gun that reportedly was wielded by Defendant as belonging to Mr. Sapp.
>
> Defendant testified that he and [his brother] did go to the studio on the evening of 1 October 2012. However, Defendant maintained that they went to the studio for [Defendant's brother] to purchase a large quantity of oxycodone from Mr. Hoskins. According to Defendant,
>
> > Sapp set up the drug deal by calling Mr. Hoskins on the cellphone and asking him to come to the studio. Hoskins said . . . he would be there in about three minutes.
> >
> > When Mr. Hoskins came into the studio he was wearing a hoody. You could not see his face. He walked straight back past us and made a left in the side booth which was a soundproof booth used for a studio, and Sapp walked in behind him.
> >
> > During that time Mr. Hoskins had gave Mr. Sapp the pills to come give [my brother]. When Mr. Sapp gave [my brother] the pills, [my brother]

> started whispering to him that the money was short. Mr. Sapp said, "Don't worry about it, he can't count anyways." Mr. Sapp went and gave Mr. Hoskins his money.
>
> And at that time I believe Mr. Sapp actually told Mr. Hoskins that we had shorted him. Mr. Hoskins came out of the side booth demanding the rest of his money. When he started demanding the rest of his money, he got in between me and [my brother]. And at that point in time he started pointing his fingers in my face, and I hit him with a closed fist. And we started fighting. When we started fighting, [my brother] jumped into the fight and we started beating . . . Mr. Hoskins until Mr. Sapp ran out of the building, because Mr. Hoskins had told him to go get a gun.

Defendant testified he never had possession of a gun, let alone Mr. Sapp's gun, during the altercation.

Defendant also testified that he and [his brother] met Mr. Sapp in a McDonald's parking lot later in the evening of 1 October 2012, where [Defendant's brother] gave Mr. Sapp a "cut" of the oxycodone pills acquired from Mr. Hoskins. Defendant further testified that Mr. Sapp also gave the gun to [Defendant's brother] and asked him to hold onto it because Mr. Sapp "was scared due to the fact" that, during an investigation into the incident at the studio that evening, "he had gave the detectives and Mr. Hoskins a story about how he couldn't locate his gun." Defendant testified he did not know what [his brother] did with the gun afterwards.

Defendant was indicted for conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, possession of a firearm by a felon, and being an habitual felon. Defendant's indictment for possession of a firearm by a felon stated only that, on the evening of 1 October 2012, Defendant "did have in his control a black handgun, which is a firearm" and that Defendant "has previously been convicted of a felony." However, at trial, and without objection by Defendant, the trial court instructed the jury, in part, as follows:

> For a person to be guilty of a crime it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit the crime of robbery with a dangerous weapon and/or *possession of a firearm by a felon*, each of them, if actually or constructively present, is not only guilty of that crime if the other person commits the crime but also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a dangerous weapon and/or *possession of a firearm by a felon*, or as a natural or probable consequence thereof.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date Defendant acting either by himself or acting together with [Defendant's brother] with a common purpose to commit the crime of robbery with a dangerous weapon and/or *possession of a firearm by a felon*, each of them if actually or constructively present, is guilty of robbery with a dangerous weapon and/or *possession of a firearm by felon*.

(emphasis added).

State v. Collington, 2015 N.C. App. LEXIS 534 *1-7, *disc. review denied*, 368 N.C. 357, 776 S.E.2d 855 (2015) (alterations omitted).

The jury found defendant not guilty of conspiracy or robbery with a dangerous weapon, but did find him guilty of possession of a firearm by a felon. However, the verdict sheet did not indicate whether the jury convicted defendant of possession of a firearm by a felon under the theory of actual possession of the firearm by defendant or under the theory of acting in concert with his brother to possess the firearm.

Defendant appealed his conviction of possession of a firearm by a felon to this Court, arguing "that the trial court committed plain error by providing the jury with an instruction on acting in concert with respect to the charge of possession of a firearm by a felon." *Id.* at *7. Defendant specifically argued "that this instruction impermissibly allowed the jury to convict Defendant of possession of a firearm by a felon based on [his brother]—also a convicted felon—reportedly receiving the gun from Mr. Sapp in a McDonald's parking lot on the evening of 1 October 2012." *Id.*

In *Collington I*, this Court held that, "even assuming *arguendo* that the trial court erred by instructing the jury on an acting in concert theory[,]" "Defendant has not established plain error[.]" *Id.* at *8. Based on the victim's testimony at trial and the fact that "both Defendant and [the victim] testified that they engaged in a physical altercation[,]" "[t]he jury reasonably could have believed that Defendant was in possession of Mr. Sapp's gun at that time." *Id.* at *9. This Court continued:

> Finally, Defendant has not presented this Court with any arguments under *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987), which held that a trial court commits plain error when it instructs a jury on disjunctive theories of a crime, where one of the theories is improper, and "we cannot discern from the record the theory upon which the jury relied." "It is not the role of the appellate courts to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Therefore, Defendant has not met his "burden" of establishing that the trial court committed plain error in the present case. *See* [*State v.*] *Lawrence*, 365 N.C. [506,] 516, 723 S.E.2d [326,] 333 [(2012)].

Id. at *9-10 (alterations omitted).

Defendant filed a Motion for Appropriate Relief in the Transylvania County Superior Court, seeking a new trial on the grounds that he received ineffective assistance of appellate counsel in that "appellate counsel failed to raise the argument on appeal that plain error was committed because the trial court instructed the jury on disjunctive theories of a crime, one of which was improper, and the record does not show upon which theory the jury relied."

The Honorable Mark E. Powell denied defendant's Motion for Appropriate Relief. Judge Powell reasoned:

> Taking into consideration that the Court of Appeals found that no plain error was established in the trial of the Defendant, even assuming that an acting in concert instruction was improper, the undersigned judge finds that no actual prejudice has been shown by the failure of the Defendant's appellate counsel to argue *Pakulski*, and that failure now to consider said argument will not result in a fundamental miscarriage of justice.

Defendant petitioned for issuance of a writ of certiorari in this Court seeking review of the trial court's denial of his Motion for Appropriate

Relief. On 29 December 2016, this Court granted defendant's petition for writ of certiorari and entered the following order:

> It appearing that the trial court utilized the incorrect legal standard in assessing defendant's ineffective assistance of appellate counsel claim, *see State v. Simpson*, 176 N.C. App. 719, 627 S.E.2d 271 (2006), and it further appearing that this Court's decision in [*Collington I*] did not hold that defendant's claim of plain error was meritless irrespective of whether his appellate counsel raised any arguments under [*Pakulski*], the order of Judge [Powell] is hereby vacated and the matter remanded for the trial court to enter an appropriate dispositional order pursuant to N.C. Gen. Stat. [§] 15A-1420(c)(7) (2015).

Upon remand, Judge Powell concluded that defendant received ineffective assistance of appellate counsel and granted defendant's Motion for Appropriate Relief, vacated defendant's conviction, and ordered a new trial. The trial court made the following conclusions of law:

> . . .
>
> (4) A reasonable attorney would have been aware of *Pakulski*, its application to Defendant's case, and the remedy of a new trial that it would provide.
>
> (5) Appellate counsel's performance fell below an objective standard of professional reasonableness. While appellate counsel did argue that the instruction on acting in concert was invalid, he did not complete the argument by arguing that because disjunctive jury instructions were given, one of which was improper, and there was no finding as to the jury's chosen theory, there was plain error under *Pakulski* and Defendant is entitled to a new trial.
>
> (6) But for appellate counsel's error, there is a reasonable probability that the Court of Appeals would have found plain error and granted Defendant a new trial.
>
> (7) Defendant received ineffective assistance of counsel in violation of the Sixth Amendment.

The State filed its Petition for Writ of Certiorari and Petition for a Writ of Supersedeas and Motion for Temporary Stay in this Court, which we allowed.

Standard of Review

On review from a trial court's ruling on a Motion for Appropriate Relief, the trial court's findings of fact "are binding if they are supported by any competent evidence[.]" *State v. Pait*, 81 N.C. App. 286, 288, 343 S.E.2d 573, 575 (1986) (citing *State v. Stevens*, 305 N.C. 712, 291 S.E.2d 585 (1982)). "[T]he trial court's ruling on facts so supported may be disturbed only when there has been a manifest abuse of discretion . . . or when it is based on an error of law." *Id.* at 288-89, 343 S.E.2d at 575 (citations omitted).

Discussion

The State argues that the trial court's conclusion that defendant received ineffective assistance of appellate counsel was based on an error of law. The State maintains that "[a]lthough defendant has altered his argument in that he now cites to *Pakulski* . . . rather than to *Lawrence* . . . for the argument that there was plain error in the instruction of acting in concert, the result is the same; he is not entitled to relief and there is no plain error." Accordingly, the State argues that the trial court erred in granting defendant's Motion for Appropriate Relief and ordering a new trial.

In assessing the propriety of the trial court's grant of defendant's Motion for Appropriate Relief for ineffective assistance of counsel, we first find it necessary to examine the law at the center of the present dispute.

I. *State v. Pakulski*

A.

Where a defendant alleges on appeal that the trial court erred in some respect during his trial, but did not make the appropriate objection at trial, the defendant is limited to a plain error review of the issue. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "Generally speaking, the [plain error] rule provides that a criminal defendant is entitled to a new trial if the defendant demonstrates that the jury *probably* would have returned a different verdict had the error not occurred." *State v. Lawrence*, 365 N.C. 506, 507, 723 S.E.2d 326, 327 (2012) (emphasis added) (citing *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)). "[P]lain error review . . . is normally limited to instructional and evidentiary error." *Id.* at 516, 723 S.E.2d at 333 (citing *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003)).

To be entitled to a new trial under plain error review, the defendant must establish

> that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (citations, quotation marks, and brackets omitted). In the context of improper jury instructions, the plain error analysis typically involves an examination of the evidence to determine whether the jury would have probably returned a different verdict had it been instructed properly. *See e.g.*, *id.* at 519, 723 S.E.2d at 334-35. Where there was overwhelming evidence presented at trial to support the defendant's conviction despite the improper jury instruction, plain error is unlikely to be established and the defendant will not be entitled to a new trial. *See e.g.*, *id.* at 516, 723 S.E.2d at 333 (citing *United States v. Cotton*, 535 U.S. 625, 152 L. Ed. 2d 860 (2002)).

In *State v. Pakulski*, our Supreme Court established the proper application of the plain error standard of review where the jury received an improper alternative jury instruction:

> Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, *we resolve the ambiguity in favor of the defendant*.

State v. Pakulski, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) (citation omitted) (emphasis added). In such a case, plain error will be found because "we must assume the jury based its verdict on the theory for which it received an improper instruction." *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) (citations omitted); *see also State v. Martinez*, ___ N.C. App. ___, ___, 801 S.E.2d 356, 360 (2017).

Pakulski does not, however, stand for the proposition that a new trial is mandated *any* time an improper alternative instruction is given.

Plain error requires that the defendant establish that the instructional 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 333 (citation and quotation marks omitted). If one of the alternative theories of conviction submitted to the jury is proper but the other improper, and the verdict sheet does not indicate the theory upon which the jury relied, it may still be apparent from the record upon which instruction the jury relied. If it is apparent from the record that the jury did not convict the defendant based upon the improper instruction, it would contravene the purpose of the plain error rule for the reviewing court to nevertheless assume that the jury relied upon the improper instruction and mandate a new trial. *See Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."); *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 ("The adoption of the 'plain error' rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial."). Plain error review in the context of improper disjunctive jury instructions will in large part turn on an analysis of the probability that the jury relied upon the improper instruction as opposed to the proper instruction.

In certain circumstances, it may be clear that the jury did not rely upon the improper instruction. For instance, if there was ample evidence presented at trial to support the proper alternative theory of conviction, and the State presented no evidence at trial that would have supported the improper alternative theory, then the reviewing court may find it probable that the jury relied upon the proper instruction rather than the improper instruction that was wholly unsupported by the evidence at trial. *See e.g.*, *State v. Boyd*, 222 N.C. App. 160, 170-73, 730 S.E.2d 193, 199-201 (2012) (Judge Stroud dissenting), *reversed*, 366 N.C. 548, 742 S.E.2d 798 (2013) (reversing for the reasons stated in Judge Stroud's dissent); *Martinez*, ___ N.C. App. at ___, 801 S.E.2d at 360. In such a case, the reviewing court need not assume that the jury relied upon the improper instruction and order a new trial. *Martinez*, ___ N.C. App. at ___, 801 S.E.2d at 361 ("[A] reviewing court is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the jury relied on the inappropriate theory."). Instead, the reviewing court may apply the usual plain error standard of review to determine whether the evidence at trial was sufficient to support a conviction under the proper instruction. *See Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 ("The [plain error] standard . . . is unlikely to be satisfied, however, when evidence of the defendant's

guilt is overwhelming."); *Martinez*, ___ N.C. App. at ___, 801 S.E.2d at 361 ("[Rather than] assuming that the jury relied on the [improper] theory . . . , [the Court] cited the overwhelming evidence supporting the *other* kidnapping theories . . . to conclude that the defendant failed to show that, absent the error, the jury would have returned a different verdict.") (discussing *State v. Boyd*, 222 N.C. App. 160, 173, 730 S.E.2d 193, 201 (2013)) (citation, quotation marks, and alteration omitted).

In contrast, there may occasionally arise the uncommon case in which the verdict sheet fails to reveal whether the jury relied upon the proper instruction or the improper instruction, and the reviewing court cannot discern from the evidence in the record upon which of the two theories the jury relied. *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326. Where one of the alternative instructions was improper and the State presented substantial evidence that would support a finding of guilt under either the improper or the proper instruction, it would "seriously affect the fairness, integrity or public reputation of" the appellate process for the court to assume that the jury premised its verdict on the proper instruction. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Rather, such a case falls precisely within the category of " 'rare case[s] in which an improper instruction will justify reversal of a criminal conviction[.]' " *Id.* at 661, 300 S.E.2d at 378 (quoting *Henderson*, 431 U.S. at 154, 52 L. Ed. 2d at 212). Accordingly, *Pakulski* and the consequent cases provide that the tie must be broken in the defendant's favor, with the result that the defendant's conviction is vacated and a new trial is ordered.

B.

In the instant case, the trial court instructed the jury on alternative theories under which the jury could find defendant guilty of possession of a firearm by a felon. The first was that he could be guilty by a showing of actual or constructive possession of the firearm. This instruction was correct. *State v. Young*, 190 N.C. App. 458, 460, 660 S.E.2d 574, 576 (2008). The trial court also instructed the jury that it could find defendant guilty if he acted in concert with his brother in the commission of the crime of possession of a firearm by his brother, a convicted felon. Defendant argued that this instruction was improper in *Collington I*.

It is impossible to determine from the record upon which of the two alternative instructions the jury relied in finding defendant guilty of possession of a firearm by a felon. Under the first alternative, defendant could be found guilty if the jury believed him to have been in actual or constructive possession of the firearm while being a convicted felon. There was conflicting evidence on this issue at trial. Hoskins testified

that defendant held a gun to his head, but defendant testified that the altercation arose only after Hoskins confronted defendant and his brother for having shorted Hoskins in the drug deal. According to defendant, it was then that Hoskins and defendant began fighting. Defendant testified that:

> Sapp had set the whole deal up, and he had tried to cross us all up. He had taken warrants out on us for robbing his studio, when he had set up this whole ordeal . . . He told the cops that we came in and robbed his studio. But that's not what happened. He set up a drug deal and got half of the pills that were purchased, or at least somewhere near . . . I did admit that I got in a physical altercation after he tried to retaliate for the rest of the money. I do admit that.

Although defendant testified that at no point did he have a firearm during this encounter, Hoskins's testimony to the contrary would have been sufficient to justify defendant's conviction under the first alternative theory of actual or constructive possession.

The evidence presented at trial was also sufficient to support a finding of guilt under the alternative theory of acting in concert. At the close of the evidence, the jury was instructed that:

> [i]f you find from the evidence beyond a reasonable doubt that . . . defendant . . . acting together [with his brother] with a common purpose to commit the crime of . . . possession of a firearm by a felon, each of them if actually or constructively present, is guilty of . . . possession of a firearm by a felon.

Defendant testified that he never had possession of a firearm. Rather, defendant testified that:

> [l]ater that night . . . Sapp did meet me and my brother . . . and handed him a Glock pistol to hold for him, because he said he was scared due to the fact he had gave the detectives and [Hoskins] a story about he couldn't locate his gun. But [Hoskins] knew he had the gun, and so did the cops.

Given that evidence was admitted that Sapp handed defendant's brother the gun in front of defendant, and that defendant's brother was also a convicted felon, this admission would have been sufficient for the jury to find defendant guilty of possession of a firearm by a felon under a

theory of acting in concert, and not under a theory of actual or constructive possession.

The presence of conflicting evidence at trial sufficient to support either of the alternative instructions, along with the jury's verdict in favor of defendant on the related charges, would have rendered this Court unable to determine under which of the two theories defendant was convicted. Therefore, under *Pakulski*, if this Court in *Collington I* were to have determined that the instruction for the crime of possession of a firearm by a felon under the theory of acting in concert was improper, then defendant would have been entitled to a new trial.

However, on appeal, defendant's appellate counsel did not cite *Pakulski* or other consequent cases, or argue that because it could not be determined from the record whether the jury relied upon the improper or the proper instruction, plain error was established. Rather, appellate counsel proceeded to discount the evidence that would have supported the proper instruction on actual or constructive possession.

Where a defendant's appellate counsel fails to raise an argument on appeal, that argument is deemed abandoned, as "[i]t is not the job of this Court to make [a] [d]efendant's argument for him." *State v. Joiner*, 237 N.C. App. 513, 522, 767 S.E.2d 557, 563 (2014) (citing *Viar v. North Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts, however, to create an appeal for an appellant."")). This is the case even where the omitted argument may be dispositive of the defendant's appeal. Accordingly, in *Collington I*, this Court was left to determine whether "[t]he jury reasonably could have believed that Defendant was in [actual or constructive] possession of" a gun from the evidence presented, regardless of the impropriety of the acting in concert instruction. *Collington*, 2015 N.C. App. LEXIS at *9. Because we so concluded, we dismissed defendant's appeal.

II. Defendant's Motion for Appropriate Relief

In the case at bar, because defendant's appellate counsel neglected to raise the *Pakulski* case, which may have otherwise entitled defendant to a new trial, defendant sought to obtain a new trial by filing a Motion for Appropriate Relief in the trial court arguing that he received ineffective assistance of appellate counsel. The trial court agreed that defendant had received ineffective assistance in his appeal in *Collington I* and vacated defendant's conviction.

The State argues on appeal that the trial court erred in finding that defendant received ineffective assistance of appellate counsel despite

appellate counsel's failure to argue the holding in *Pakulski*. We disagree, and affirm the trial court's conclusion that appellate counsel's omission constituted ineffective assistance of counsel and that defendant is therefore entitled to a new trial.

Ineffective Assistance of Counsel

The right to counsel under Article I, Section 23 of the North Carolina Constitution and the Sixth Amendment to the United States Constitution "includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970)). This includes the right to effective assistance of *appellate* counsel. *Evitts v. Lucey*, 469 U.S. 387, 83 L. Ed. 2d 821 (1985); *See e.g.*, *Smith v. Robbins*, 528 U.S. 259, 285, 145 L. Ed. 2d 756, 764 (2000).

The burden is on the defendant to demonstrate that he received ineffective assistance of counsel "so . . . as to require reversal of [his] conviction[.]" *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). In order to satisfy that burden, the defendant must establish both of the elements of the analysis of a claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id.; *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248 (adopting the test laid out in *Strickland* for purposes of the North Carolina Constitution). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* The same standard applies to claims of ineffective assistance of appellate counsel. *State v. Simpson*, 176 N.C. App. 719, 722, 627 S.E.2d 271, 275, *disc. review denied*, 360 N.C. 653, 637 S.E.2d 191 (2006) (citing *Robbins*, 528 U.S. at 285, 145 L. Ed. 2d at 780).

The analysis of claims of ineffective assistance of counsel is guided by the underlying purpose of the requirement that defendants receive effective assistance of counsel, that is, "to ensure a fair trial[.]"

Strickland, 466 U.S. at 686, 80 L. Ed. 2d at 692. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," *Id.* at 686, 80 L. Ed. 2d at 692-93, or for purposes of appellate counsel, that the *appeal* cannot be relied upon as having produced a just result. *Robbins*, 528 U.S. at 285-86, 145 L. Ed. 2d at 780.

i. Deficient Performance

The State argues that the trial court erred in finding that defendant received ineffective assistance of appellate counsel because defendant failed to establish the first prong of ineffectiveness claims, *i.e.*, that his appellate counsel's performance was in fact deficient. According to the State, not only has it never been held that it is improper to instruct the jury on acting in concert for the crime of possession of a firearm by a felon, but that even if there were such legal precedent, such a mistake on the part of appellate counsel was reasonable.

The State's argument on this point is misplaced. The question is not whether appellate counsel's performance was deficient for failing to argue that the acting in concert instruction was improper. In fact, appellate counsel made that argument. The question is whether appellate counsel's performance was deficient for failing to support the argument that defendant was entitled to a new trial because of the improper instruction.

To show "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, a defendant must establish "that his counsel's conduct fell below an objective standard of reasonableness." *Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). In the appellate context, a claim of ineffective assistance of counsel requires a showing that the appellate representation did not fall "within the range of competence demanded of attorneys in [appellate] cases." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693 (citation and quotation marks omitted).

Generally, "the decision not to press [a] claim on appeal [is not] an error of such magnitude that it render[s] counsel's performance constitutionally deficient under the test of *Strickland*[.]" *Smith v. Murray*, 477 U.S. 527, 535, 91 L. Ed. 2d 434, 445 (1986). There is a presumption that "the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 695 (citation and quotation marks omitted). Nevertheless, the defendant may be able to establish

"that his counsel was objectively unreasonable in failing to find arguable issues[,]" and in failing to raise, relevant supporting legal authority on appeal. *See Robbins*, 528 U.S. at 285, 145 L. Ed. 2d at 780 (internal citation omitted). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694.

We note that the instant case does not raise an issue of trial strategy. Appellate counsel's omission of the arguments under the *Pakulski* line of cases was not the result of a "conscious[] elect[ion] not to pursue that claim before [this] Court." *Murray*, 477 U.S. at 534, 91 L. Ed. 2d at 444. As explained *supra*, in the absence of citation to the principles set forth under the *Pakulski* cases, appellate counsel had the exceptional task of establishing that absent the improper instruction, the jury probably would have acquitted defendant, despite the fact that the evidence presented at trial was sufficient to support a finding of guilt under the proper instruction. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. However, had appellate counsel proffered the arguments under *Pakulski*, defendant would have secured a new trial upon simply demonstrating that the acting in concert instruction was given in error—plain error would be shown irrespective of the evidence admitted at trial in support of defendant's actual or constructive possession of a firearm.

The task at hand is to examine appellate counsel's "duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694 (citation omitted). Under the prevailing professional norms, we conclude that appellate counsel "was objectively unreasonable in failing to find" and raise the key legal principle that may have secured a new trial for defendant. *Robbins*, 528 U.S. at 285, 145 L. Ed. 2d at 780.

The record reveals that *Pakulski* has been cited in over fifty cases since 1987. Further, not only did appellate counsel fail to cite *Pakulski* or one of the many cases reiterating the principles enumerated therein[1], but appellate counsel failed to raise the applicable doctrine governing improper alternative jury instructions. Appellate counsel simply argued that the theory of acting in concert is inapplicable to the crime of possession of a firearm by a felon, without proffering any supporting authority as to why such an error would require a new trial. Not

1. Among others, these cases include *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986); *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990); *State v. Gibson*, 333 N.C. 29, 424 S.E.2d 95 (1992); *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993) (citing *Williams v. North Carolina*, 317 U.S. 287, 87 L. Ed. 279 (1942)).

only would effective assistance of counsel in this case require citation to either *Pakulski* or its related principles, but attorneys are on notice through well-settled case law that an argument not supported by authority is deemed abandoned. *See e.g.*, *State v. Lloyd*, 354 N.C. 76, 87, 552 S.E.2d 596, 607 (2001).

Moreover, this is not a case where the implications of the omitted case law were uncertain at the time of defendant's appeal. *See e.g.*, *Simpson*, 176 N.C. App. at 723, 627 S.E.2d at 275 ("In light of the number of arguably reasonable jurists rejecting the notion that *Apprendi* and *Ring* had any effect on non-capital sentencing prior to *Blakely*, we hold that it was well within reason for Defendant's appellate counsel not to pursue this issue on appeal."). Appellate counsel's lack of professional diligence in uncovering the readily-available—and outcome determinative—legal principles enunciated in the *Pakulski* line of cases was so unreasonable as to constitute ineffective assistance of counsel. Such attorney diligence is needed in order "to justify the law's presumption that counsel will fulfill the role in the adversary process that the [Sixth] Amendment envisions." *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693.

Accordingly, the trial court did not err when it concluded that the performance of defendant's appellate counsel was deficient, and that defendant had satisfied the first prong of the analysis of defendant's claim that he received ineffective assistance of counsel.

ii. Prejudice

The State also argues that the trial court erred in concluding that defendant made a proper showing of prejudice so as to establish that he received ineffective assistance of appellate counsel. The State maintains that even if appellate counsel had cited *Pakulski* for the proposition that plain error had been established, this Court would have nevertheless been required to affirm defendant's conviction due to the evidence in support of the alternative instruction on actual or constructive possession. However, for the reasons explained in Section I, this argument is unpersuasive. *Pakulski* stands for the proposition that plain error is satisfied where an improper disjunctive jury instruction was given and the reviewing court is wholly unable to determine whether the jury rested its verdict upon the improper or the proper instruction. The appropriate inquiry is whether defendant was prejudiced by his appellate counsel's failure to argue plain error under the *Pakulski* principles.

To prevail on a claim of ineffective assistance of counsel, the defendant must show not only that his counsel's performance was deficient, but also that he was prejudiced thereby. *Strickland*, 466 U.S. at 692, 80

L. Ed. 2d at 696. "The fact that counsel made an error, or even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citation omitted). This analysis must be guided by the underlying purpose of the right to effective assistance of counsel, *i.e.*, "to ensure that a defendant has the assistance necessary to justify *reliance* on the outcome of the proceeding." *Strickland*, 466 U.S. at 691-92, 80 L. Ed. 2d at 696 (emphasis added). "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. Thus, for purposes of establishing prejudice, a "reasonable probability" that there would have been a different result simply means "a probability sufficient to undermine confidence in the outcome" of the appeal. *Id.*

In the instant case, we agree with the trial court that defendant made a proper showing of prejudice. Reliance on the outcome in *Collington I* is sufficiently undermined by the fact that, due to counsel's errors, defendant was denied the opportunity to have his case decided on the merits. *Cf. Evitts*, 469 U.S. at 395, 83 L. Ed. 2d at 829 ("Because the right to counsel is so fundamental to a fair [appeal], the Constitution cannot tolerate [appeals] in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."). If appellate counsel had argued that plain error was established pursuant to *Pakulski*, this Court would not have disposed of defendant's appeal on the grounds that there was sufficient evidence to support a conviction under the actual or constructive possession theory of guilt, for which the jury received an instruction. Instead, this Court would have, under the direction of *Pakulski*, been required to examine the underlying merits of defendant's appeal in the first instance; that is, whether the jury instruction on acting in concert was in fact improper. Moreover, given the persuasiveness of defendant's argument that acting in concert is not an appropriate theory upon which to base a conviction of possession of a firearm by a felon, there is a reasonable probability that, had appellate counsel cited *Pakulski*, this Court would have concluded that defendant was entitled to a new trial.

Accordingly, we conclude that defendant received ineffective assistance of appellate counsel, and affirm the trial court's order granting defendant's Motion for Appropriate Relief.

Conclusion

For the reasons explained herein, the trial court's order granting defendant's Motion for Appropriate Relief is

AFFIRMED.

Judges CALABRIA and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
RAMAR DION BENJAMIN CRUMP

No. COA17-488

Filed 17 April 2018

1. Criminal Law—assault with a deadly weapon with intent to kill—jury instructions—self-defense—contemporaneous felonious conduct

The trial court did not err in a case arising from a robbery committed during a poker game by overruling defendant's objections to instructions that barred him from claiming self-defense and by rejecting his proposed language for an assault with a deadly weapon with intent to kill (AWDWIK) charge. N.C.G.S. § 14-51.2(c)(3) does not have a causal nexus requirement, and self-defense was not available where defendant was contemporaneously engaged in felonious conduct. Moreover, any error by the trial court in including the AWDWIK charge as a disqualifying felony was not prejudicial where defendant had already admitted to possession of a firearm by a felon prior to the charge conference.

2. Jury—selection—stake-out questions—police officer shootings—racial bias

The trial court did not abuse its discretion in a case arising from a robbery committed during a poker game by disallowing an inquiry during voir dire into the opinions of potential jurors regarding an unrelated high-profile case involving a shooting by a police officer. The trial court also flatly prohibited questioning as to issues of race and implicit bias. A failure to exercise all peremptory challenges did not categorically bar defendant from showing prejudice on appeal.

3. Evidence—voir dire—stake-out questions—police officer shootings—racial bias

The trial court did not err in a case arising from a robbery committed during a poker game by permitting the State to present evidence that an internal police investigation of officers involved in the case resulted in no disciplinary actions or demotions. Defendant's line of questioning opened the door to the State's introduction of the results of the investigation.

Appeal by defendant from judgments entered 7 June 2016 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Peter A. Regulski, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

BRYANT, Judge.

Where the plain language of N.C. Gen. Stat. § 14-51.4(1) does not require a causal nexus between the disqualifying felony and the circumstances giving rise to the perceived need for the use of force, we find no error. Where defendant stipulated to a disqualifying felony before the charge conference, the trial court did not commit prejudicial error in giving a self-defense jury instruction. Where the facts of this specific case do not show that defendant was prejudiced by the trial court's limiting of the scope of defendant's questioning of prospective jurors during *voir dire*, we find no prejudicial erorr but express our concern that the trial court flatly prohibited questioning as to issues of race and implicit bias during *voir dire*. Where defendant opened the door to certain evidence, the trial court did not err in denying defendant's motion in limine and allowing the State to introduce rebuttal evidence. We find no prejudicial error in the judgments of the trial court.

Around 3:00 a.m. on 24 September 2013, defendant Ramar Crump and Jamel Lewis gained entrance to an illegal gambling house on Old Pineville Road in Mecklenburg County, North Carolina and held about a dozen patrons at gunpoint. Both defendant and Lewis had firearms. One by one, defendant and Lewis had the patrons hand over their valuables, including wallets, cell phones, identification cards, credit cards, debit cards, and cash. They also had each patron, except for a woman and a man with a bad leg, strip down to his underwear, and then marched

them all into the men's restroom and barricaded them in while defendant and Lewis escaped.

When smoke began to seep under the bathroom door, two people, including Matios ("Mat") Tegegne, went up through the false ceiling into the kitchen and let everyone out. The "smoke" had come from a fire extinguisher that had been sprayed around the room. Everyone's clothes and belongings were gone. With a cell phone provided by a passerby, calls were made requesting clothes and spare car keys or rides home. No one reported the robbery to the police.

Gary Smith, whose daughter had attended the poker game on Old Pineville Road on the night of the robbery, also knew Mat. Mat had his phone stolen during the robbery, but had purposefully not deactivated his phone in order to track it. Smith told Mat he had been receiving text messages from Mat's phone from people he believed to be the robbers who were looking for another poker game to rob. Smith told Mat he intended to invite them to a "fake poker game and report them, call the cops."

In the early morning hours of 29 September 2013, Smith received a response from Mat's phone to a group text he sent earlier about the location of a new, but nonexistent, poker game on North Tryon Road (the "bait game"). When Smith arrived at the bait game located at a mixed-use office and commercial building on North Tryon Street, he looked for a Silver Mustang, intending to confront the passenger whom he believed to be in possession of Mat's phone. However, as he approached the Mustang, he saw through the open window that the driver had a handgun.

Smith parked across the street in the Amtrak station lot, called 911, and told the emergency operator "there were two gentlemen in a car with loaded guns, and I thought they were intending to rob someone." From the Amtrak lot, Smith watched police cars arrive. Then, he heard gunshots. First, he heard what sounded like handgun fire, then he heard what sounded like shotgun and large-caliber handgun fire. He then watched the Mustang "screech" out of the lot. Smith walked across the street and told police officers he made the 911 call.

A police car with lights and sirens activated pursued the Mustang down Tryon Street. The owner and driver of the car was defendant. Lewis was in the back seat and another passenger was in the front seat. After a low-speed pursuit which continued for some distance, the Mustang ran over stop sticks that had been placed by police and came to a stop. All three men got out of the car and were taken into custody.

After the occupants of the car were placed under arrest, officers searched the Mustang. Both right side tires were missing, the passenger side window was shattered, and there was a series of bullet holes along the passenger side of the car. Officers found a six-shot .38-caliber revolver in the driver's seat with six spent shells in the chambers. Officers also found credit cards and the identification cards of several poker players who had been robbed. In the trunk of the car, officers found three firearms. They also found four cell phones and mail addressed to defendant. Victims of the 24 September robbery on Old Pineville road identified wallets, credit cards, and debit cards found in the Mustang as their own.

On 7 October 2013, the Mecklenburg County Grand Jury indicted defendant on five offenses committed on 29 September 2013: two counts of assault with a deadly weapon with the intent to kill ("AWDWIK"), two counts of assault on a government official with a firearm, and possession of a firearm by a convicted felon. On 28 October 2013, the grand jury indicted defendant on twenty-four offenses committed during the poker game robbery on 24 September 2013: eleven counts of armed robbery and eleven counts of second-degree kidnapping, conspiring with Lewis to commit armed robbery, and possession of a firearm by a convicted felon. All charges were joined for trial.

The case came on for trial at the 16 May 2016 Criminal Term of the Mecklenburg County Superior Court, the Honorable Gregory Hayes, Judge presiding. At the close of the State's evidence, the trial court dismissed the charges of armed robbery and second-degree kidnapping as to one victim as well as the charge of armed robbery as to another victim.

On 7 June 2016, the jury found defendant not guilty of two counts of assaulting a law enforcement officer with a firearm and guilty of all the remaining charges.

On appeal, defendant contends the trial court erred (I) in overruling his objections to the instruction on self-defense which barred defendant from claiming self-defense in circumstances where it was legally available; (II) by misapprehending the nature of the "stake-out" questions, thereby depriving defendant of his right to elicit information during *voir dire* relevant to the exercise of cause and peremptory challenges; and (III) by permitting the State to present evidence that the investigation of certain officers by homicide detectives and internal affairs agents resulted in no disciplinary actions or demotions for those officers.

I

[1] Defendant first argues the trial court erred in overruling his objections to the self-defense instructions and in rejecting defendant's proposed language. Specifically, defendant argues the language of the instruction, as a whole, had the legal effect of negating the defense of self-defense entirely, and the error was so prejudicial that he is entitled to a new trial. We disagree.

"Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) (citing *State v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999)). "However, an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation omitted) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

In the instant case, defendant raised the statutory justifications of protection of his motor vehicle and self-defense pursuant to N.C. Gen. Stat. §§ 14-51.2, -51.3 as to the AWDWIK charge. The trial court found that defendant's evidence, on the other hand, did not show his belief that entry to his motor vehicle was imminent, and gave N.C.P.I.-Crim. 308.45 ("All assaults involving deadly force") and not N.C.P.I.-Crim. 308.80 ("defense of motor vehicle"), as requested by defendant. The trial court instructed the jury pursuant to N.C.P.I.-Crim. 308.45 by incorporating the language of N.C. Gen. Stat. § 14-51.4(1), which indicates self-defense based on .1 and .2 is not available "to a person . . . who was attempting to commit, was committing, or was escaping after the commission of a felony." *See* N.C. Gen. Stat. § 14-51.4(1) (2017).

The State requested that the trial court also define for the jury those felonies which would disqualify defendant's claim of self-defense, arguing there was ample evidence of defendant's uncharged felonious conduct, including, *inter alia*, the fact that defendant and his accomplices used a stolen cell phone to ascertain the location of a poker game to rob. The trial court agreed and instructed the jury in the words of N.C.G.S. § 14-51.4(1) that self-defense was not available to one engaged in felonious conduct:

> Self-defense is also not available to a person who used offensive force and who was attempting to commit, was committing, or was escaping after the commission of a felony. Robbery with a dangerous weapon, attempted robbery with

> a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, possession of stolen goods, assault with a deadly weapon with intent to kill, and assault with a firearm on a law enforcement officer are felonies.

Per defendant's request, the trial court also instructed the jury according to N.C.P.I.-Crim. 38.10 and instructed that if defendant was not the aggressor and was in his motor vehicle at a place where he had the lawful right to be, he was under no obligation to retreat and could stand his ground and repel force with force, regardless of the character of the assault being made upon him.

Defendant makes two challenges relevant to the instruction the trial court gave. First, (1) defendant argues that N.C.G.S. § 14-51.4(1) requires both a temporal and causal nexus between the disqualifying felony and the circumstances which gave rise to the perceived need to use defensive force. He contends that the jury should have been instructed that commission of a felony only disqualifies self-defense when a defendant's "felonious acts directly and immediately caused the confrontation that resulted in the deadly threat to him."[1] Thus, defendant argues, the trial court erred by omitting the purported "causal nexus requirement" from the instruction. Second, (2) defendant contends the inclusion of AWDWIK as a qualifying felony was circular in nature and, therefore, erroneous.

1. "Causal Nexus Requirement"

Section 14-51.4 ("Justification for defensive force not available") states as follows: "The justification described in G.S. 14-51.2 and G.S. 14-51.3 [(self-defense)] is not available to a person who used defensive force and who: (1) Was attempting to commit, committing, or escaping after the commission of a felony." N.C.G.S. § 14-51.4(1). Furthermore, the presumption of objective reasonableness of the need to use defensive force established in N.C. Gen. Stat. § 14-51.2(b) does not apply when the person using force in defense of their home, workplace, or motor vehicle was "engaged in, attempting to escape from, or using the . . . motor vehicle . . . to further any criminal offense that involves the use or threat of physical force or violence against any individual." N.C. Gen.

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1. Indeed, before trial, defendant requested in writing that the self-defense instruction include the language from N.C.G.S. § 14-51.4(1) and that the jury be instructed on the felonies of possession of a firearm by a felon and possession of stolen goods. At trial, defendant argued that the felony of possession of a firearm by a convicted felon was the sole disqualifying felony on which the jury should be instructed. At that point at trial, defendant had admitted to his possession and discharge of a firearm, and had stipulated that he had a prior felony conviction.

Stat. § 14-51.2(c)(3) (2017). In other words, self-defense is not available to one who uses defensive force when contemporaneously engaged in felonious conduct. *See id.*

Defendant argues that N.C.G.S. § 14-51.4(1) requires both a temporal and a causal nexus between the use of defensive force and felonious activity in order for that defensive force to be "disqualified" as self-defense. In other words, defendant argues the disqualifying felony must have "directly and immediately produced the confrontation where the force was used." We agree with defendant that N.C.G.S. § 14-51.4(1) contains a temporal requirement but disagree that it contains a causal nexus one.

"It is well established that this Court's principal aim when interpreting statutes is to effectuate the purpose of the legislature in enacting the statute, and that statutory interpretation properly begins with an examination of the plain words of the statute." *State v. Mylett*, ___ N.C. App. ___, ___, 799 S.E.2d 419, 425 (2017) (quoting *State v. Williams*, 232 N.C. App. 152, 158, 754 S.E.2d 418, 423 (2014)). "If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls." *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)).

Section 14-51.4 plainly states that the defense of self-defense "is not available to a person who used defensive force and who: (1) Was attempting to commit, committing, or escaping after the commission of a felony." N.C.G.S. § 14-51.4(1). The plain language of this statutory provision makes clear that the disqualifying felony need not precipitate the circumstances giving rise to the perceived need to use force; there is no qualifying or limiting language in this provision modifying the word "felony." For example, section 14-51.2(c)(3), which denies the presumption of reasonableness of the perceived need to use defensive force to safeguard one's home, workplace, or vehicle to one using that place "to further any criminal offense *that involves the use of threat of physical force or violence* against any individual." N.C.G.S. § 14-51.2(c)(3) (emphasis added). Notably, section 14-51.4(1) does *not* state that self-defense is unavailable to a person who "[w]as attempting to commit, committing, or escaping after the commission of a felony" *that involves the use of threat of physical force or violence*. Thus, the plain language of section 14-51.2(c)(3) makes clear that the General Assembly knew how to explicitly articulate a causal nexus between the commission of a felony and circumstances attendant to the perceived need of the use

of force and deliberately chose not to articulate a similar causal nexus in section 14-51.4(1). *See also*, *e.g.*, N.C. Gen. Stat. § 14-17(a) (2017) (defining felony murder as any murder "committed in the perpetration or attempted perpetration" of certain defined felonies).

Accordingly, the absence of a plain and explicit causal nexus enunciated in section 14-51.4(1) makes manifest that the General Assembly omitted it purposefully and intended to limit the invocation of self-defense in this instance solely to the law-abiding. We decline to impose a causal nexus requirement and frustrate legislative intent. Defendant's argument is overruled.

2. AWDWIK as Qualifying Felony

Defendant argues the inclusion and identification of AWDWIK as a disqualifying felony is circular, triggering both the consideration and disqualification of his self-defense claim and thereby negating it. The State concedes—and we agree—that including the AWDWIK felony was a "circularity error," but we conclude that it was not prejudicial error.

Here, the State charged that on 29 September 2013, defendant was a convicted felon who possessed a firearm in violation of N.C. Gen. Stat. § 14-415.1. Defendant testified that on 29 September 2013, he possessed and discharged a firearm, and he stipulated that he was a convicted felon at the time. Thus, defendant admitted to a disqualifying felony in advance of the charge conference, and therefore, he was not entitled to a self-defense instruction pursuant to N.C. Gen. Stat. § 14-51.4(1) *in any event*. *See supra* § I.1.

It has long been recognized that

> [w]hen a trial court undertakes to instruct the jury on self-defense in a case in which no instruction in this regard is required, the gratuitous instructions on self-defense are error favorable to [the] defendant. As [the] defendant was not entitled to any jury instructions on self-defense, any mistakes by the trial court in its instructions on self-defense were, at worst, harmless error not necessitating a new trial.

State v. Reid, 335 N.C. 647, 672, 440 S.E.2d 776, 790 (1994) (citing *State v. Bush*, 307 N.C. 152, 161, 221 S.E.2d 563, 569 (1982)). In the instant case, at best, the contested instruction benefited defendant by permitting the jury to consider whether he had no duty to retreat and was entitled to stand his ground. At worst, the contested instruction was harmless error and was not prejudicial to defendant.

First, the instructions plainly identified disqualifying felonies of which there was sufficient evidence—i.e., possession of a firearm by a felon (to which defendant stipulated before the charge conference) and assault with a deadly weapon on a law enforcement officer. Second, the State did not argue that AWDWIK was a disqualifying felony, focusing on defendant's felony possession of a firearm and stolen goods and assault on a law enforcement officer. Accordingly, any error by the trial court in including the AWDWIK charge as a disqualifying felony was not prejudicial to defendant where there is no reasonable possibility that, had the error not been committed, a different result would have been reached at trial. Defendant's argument is overruled.

II

[2] Defendant next argues that the trial court's misapprehension of the nature of "stake-out" questions deprived him of his right to elicit information during *voir dire* relevant to the exercise of cause and peremptory challenges. Specifically, defendant challenges the trial court's decision disallowing any inquiry into the opinions of potential jurors regarding an unrelated and high-profile case involving a shooting by a police officer that resulted in a man's death wherein the officer was not ultimately convicted. Defendant contends these were not "stake-out" questions—questions which essentially ask jurors how they would vote in this case—and were properly a subject of inquiry during *voir dire*. We disagree based on the specific facts of this case, but nevertheless caution trial courts to consider "the importance of acknowledging issues of race and bias in voir dire." Patrick C. Brayer, *Hidden Racial Bias: Why We Need to Talk with Jurors About Ferguson*, 109 Nw. U. L. Rev. 163, 169 (2015).

The State contends that we need not consider this issue at all because defendant failed to exhaust his peremptory challenges, which failure forestalls his ability to demonstrate prejudice from the trial court's ruling. For the following reasons, we also disagree with the State's argument that a defendant must exhaust all of his peremptory challenges as a threshold for review of this issue on appeal.

A. Failure to Exhuast Peremptory Challenges

"The purpose of *voir dire* is to ensure an impartial jury to hear defendant's trial." *State v. Gregory*, 340 N.C. 365, 388, 459 S.E.2d 638, 651 (1995) (citing *State v. Bracey*, 303 N.C. 112, 119, 277 S.E.2d 390, 394 (1981)). In other words, "[t]he purpose of jury *voir dire* is to 'eliminate extremes of partiality and ensure that the jury's decision is based solely on the evidence presented at trial.' " *Haarhuis v. Cheek*, ___ N.C. App. ___, ___, 805 S.E.2d 720, 725 (2017) (quoting *State v. White*, 340

N.C. 264, 280, 457 S.E.2d 841, 850 (1995)). "The *voir dire* of prospective jurors serves a two-fold purpose: (i) to determine whether a basis for challenge for cause exists, and (ii) to enable counsel to *intelligently* exercise peremptory challenges." *Gregory*, 340 N.C. at 388, 459 S.E.2d at 651 (emphasis added) (citing *State v. Soyars*, 332 N.C. 47, 56, 418 S.E.2d 480, 486 (1992)).

Nevertheless, "[t]he trial court has broad discretion to ensure that a competent, fair, and impartial jury is impaneled." *Id.* (citation omitted). As such, "[r]egulation of the form of *voir dire* questions is vested within the sound discretion of the trial court . . . ." *State v. Chapman*, 359 N.C. 328, 346, 611 S.E.2d 794, 810 (2005).

The State argues that "[d]efendant did not exhaust his peremptory challenges and left one of his original six challenges unused[,] . . . he did not show his dissatisfaction with the jury, [and] he can never demonstrate prejudice, such that this Court need not consider this issue and ought to deny [d]efendant relief." However, by arguing that exhausting peremptory challenges is the threshold a defendant must cross in order to establish prejudice during voir dire and thus be entitled to review of this issue on appeal, the State's argument ignores the crucial difference between challenges for cause and peremptory challenges in impaneling a jury: the former is a challenge based on the views a juror has expressed *in open court* in response to lawyers' questions and which would "substantially impair the performance of his duties" as a juror and is ruled on by the trial court, *see State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851 (1985)); the latter is often a seemingly arbitrary exercise, it may be made for almost any reason at all (*but see Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986) (determining that the use of peremptory challenges for a racially discriminatory purpose is unconstitutional)) and is not (usually, *see id.* at 96–98, 90 L. Ed. 2d at 88–89) inquired into by the trial court.

In other words, the requirement that a defendant exhaust his peremptory challenges is a meaningless exercise where, as here, a defendant has been precluded from inquiring into jurors' potential biases on a relevant subject, leaving the defendant to assume or guess about those biases without being permitted to probe deeper; this requirement elevates form over function in that the exhaustion of peremptory challenges in a case like this does nothing to ameliorate defendant's dissatisfaction with the venire. As a result, any peremptory challenge made by a defendant (or any party) is an empty gesture once a trial court has ruled that an entire line of (relevant) questioning will be categorically prohibited.

For the foregoing reasons, we disagree with the State's argument that a failure to exercise all peremptory challenges categorically bars a defendant from showing prejudice on appeal. Instead, we are guided by the broader principle that the purpose of *voir dire* is "(i) to determine whether a basis for challenge for cause exists, and (ii) to enable counsel to *intelligently* exercise peremptory challenges." *Gregory*, 340 N.C. at 388, 459 S.E.2d at 651 (emphasis added) (citing *Soyars*, 332 N.C. at 56, 418 S.E.2d at 486). Accordingly, we review defendant's argument on appeal.

B. "Stake-Out" Questions

Defendant challenges the trial court's ruling prohibiting any inquiry into the opinions of potential jurors regarding an unrelated and high-profile case involving a police officer shooting that resulted in a man's death and wherein the officer was not ultimately convicted. Defendant also challenges the trial court's prohibition on his line of questioning regarding the specific police officer shooting mentioned above and on police officer shootings in general as based on a misapprehension of his questions as "stake-out" questions. On the very specific facts of this case, we disagree and conclude that defendant was not prejudiced by the rulings of the trial court.

"On appeal, we review the entire record of *voir dire* to determine 'whether the trial court abused its discretion and whether that abuse resulted in harmful prejudice to the defendant.' " *Haarhuis*, ___ N.C. App. at ___, 805 S.E.2d at 725 (quoting *State v. Cheek*, 351 N.C. 48, 66, 520 S.E.2d 545, 556 (1999)).

"Hypothetical questions that seek to indoctrinate jurors regarding potential issues before the evidence has been introduced and before jurors have been instructed on applicable principles of law are . . . impermissible." *State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997) (citing *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989)).

> On the *voir dire* . . . of prospective jurors, hypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. Counsel may not pose hypothetical questions designed to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. In the first place, such questions are confusing to the average juror who at that stage of the trial has heard no evidence and has not been instructed on the applicable law. More importantly, such questions tend to "stake out" the juror and cause him

> to pledge himself to a future course of action. This the law neither contemplates nor permits. The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.

Id. (citations omitted) (alteration in original) (quoting *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976)).

In *Haarhuis*, a wrongful death case involving a car accident where the defendant was intoxicated, the defendant challenged on appeal the "[p]laintiff's questioning of potential jurors during *voir dire* regarding their *general* attitudes about alcohol and drunk driving." ___ N.C. App. at ___, 805 S.E.2d at 724. This Court concluded that the plaintiff "had the right to question potential jurors regarding their *general* attitudes about alcohol and drunk driving in order to determine 'whether a basis for challenge for cause exist[ed]' and to allow both parties to 'intelligently exercise [their] peremptory challenges.' " *Id.* at ___, 805 S.E.2d at 725 (alterations in original) (quoting *Gregory*, 340 N.C. at 388, 459 S.E.2d at 651). Notably, this line of questioning was permitted (and affirmed on appeal) even though the parties had decided prior to trial "that no questions would be asked which tended to tie [the] [d]efendant to alcohol, but that [the] [p]laintiff could ask about alcohol-related issues so long as it was not too suggestive." *Id.* at ___, 805 S.E.2d at 726.

In the instant case, defendant was categorically denied the opportunity to question prospective jurors not only about a specific police officer shooting, but also even *generally* about their opinions and/or biases regarding police officer shootings of (specifically) black men in a case where defendant was a black male and police officers were involved in the shooting at issue. First, the trial court sustained the State's objection to a line of questioning by defendant regarding a specific incident of police violence (the police officer shooting death of Jonathan Ferrell):

> [Defense counsel]: Now, something else I want to talk about. This one is a difficult one. It's called implicit bias. [2] It's the concept that race is so ingrained in our culture that there's an implicit bias against people of a particular

2. *See* Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 846 (2015) ("Calling attention to implicit racial bias can encourage jurors to view the evidence without the usual preconceptions and automatic associations involving race that most of us make.").

> race, specifically African Americans, that people experience. What I'm going to do is I'm going to ask a couple of pointed questions of you all about that. So I'll start with you, [Ms. Harris[3]]. When you hear the statement the only black man charged with robbery, what's the first thing that pops into your head?
>
> [The State]: Objection.
>
> THE COURT: Sustained.
>
> . . . .
>
> [Defense counsel]: There have been some cases in the recent history of this country dealing with this issue, specifically as to some African-American men and police officers is the first thing that comes to mind. Additionally I expect there to be testimony regarding the Jonathan Ferrell case and what effect that impact -- that case had on [defendant's] mindset. Is anyone familiar with the Jonathan Ferrell case that happened here in Charlotte approximately September of 2013?

In sustaining the State's objection to this line of questioning, the trial court said it was "not going to get into an extraneous case that happened in Charlotte during jury selection . . . ." Then, when when defense counsel asked if he could "generally as to incidents . . . inquire of the jury if they have opinions related to incidents of cops firing on civilians that happened in the past couple years," the trial court responded that it thought that was "another stake-out question."

On the specific facts of the instant case, we believe the trial court's rulings were not ultimately prejudicial to defendant. This is because the evidence presented at trial showed the following.

Per defendant's own testimony, it was not until the car chase ensued that he was even aware the individuals he fired on were police officers. Defendant, who was driving the Mustang on the night in question, testified that he saw "a figure" in "black clothing" with "a gun aimed at [him]." Then he felt an "impact on [the] door, on the passenger door," which he took to be a gunshot, and he fired shots from his .38 towards the "figure" in order to have time to turn the car on and drive away. It was not until defendant drove the car onto North Tryon Street that he saw police

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3. A pseudonym has been used for this prospective juror.

lights flashing and realized he had been shooting at police officers. It was at this point that defendant testified he began to think he "might not make it out of this one[,]" as a result of being involved in a shootout with the police.

In another case—not this one—but in another case involving a black male defendant involved in a shooting with police officers, a line of questioning akin to the one proposed by this defendant at trial regarding police officer shootings could very well be a proper—even necessary—subject of inquiry as part of the jury *voir dire*, and the trial court should seriously consider allowing counsel to puruse this type of questioning in order to allow both parties—the State and defendant—"to 'intelligently exercise [their] peremptory challenges.' " *See Haarhuis*, ___ N.C. App. at ___, 805 S.E.2d at 725 (alteration in original) (quoting *Gregory*, 340 N.C. at 388, 459 S.E.2d at 651); *see also* Peter A. Joy, *Race Matters in Jury Selection*, 109 Nw. U. L. Rev. Online 180, 186 (2015) ("Especially in times when issues of race are on the minds of potential jurors, such as currently in the St. Louis area due to the shooting of Michael Brown and continuing protests in Ferguson and several other cities over racial injustices, failing to question about bias in some cases may result in stacking the jury against the accused."); Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. Irvine L. Rev. 843, 846 (2015). Indeed, we believe that "[a]s long as [a] defense attorney can tie these [types of] questions to an issue in the case, the court should permit the questioning." *See* Joy, *Race Matters in Jury Selection*, 109 Nw. U. L. Rev. at 185. However, on the precise facts of this case, we find no prejudicial error.

III

[3] Lastly, defendant contends the trial court erred by permitting the State to present evidence that the internal CMPD investigation of officers involved in the case resulted in no disciplinary actions or demotions. Specifically, defendant contends that the results of this kind of investigation constitute hearsay, and no hearsay exception permits these results to have been admitted when offered by the State at trial in a criminal case. We disagree.

"The trial court's determination as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal." *Castaneda*, 215 N.C. App. at 147, 715 S.E.2d at 293 (citation omitted). "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) (citation omitted).

However, "[t]he basis for the rule commonly referred to as 'opening the door' is that when a defendant in a criminal case offers evidence which raises an inference favorable to his case, the State has the right to explore, explain or rebut that evidence." *State v. Brown*, 310 N.C. 563, 571, 313 S.E.2d 585, 590 (1984) (citation omitted).

In the instant case, defendant filed a pretrial motion in limine to preclude the State from introducing evidence that an internal CMPD investigation of two officers—Holzhauer and Sussman, who responded to Gary Smith's 911 call and engaged in a shootout with defendant at North Tryon Street on 29 September 2013—did not result in disciplinary action. During the hearings on defendant's motion, the State explained it sought to introduce evidence only of the fact that an investigation had been conducted and no disciplinary action had been taken. Defendant, however, noted his intent to open the door during cross-examination and question the officers about their knowledge of the inner workings of such investigations, and whether they had conferred with an attorney prior to making their official statements. The trial court noted that defendant's proposed line of questioning was opening the door to the State's introduction of the results of the investigation and even afforded defendant the opportunity to close it. However, defendant maintained his intent to proceed with his proposed line of questioning, and the trial court denied his motion in limine.

During the State's direct examination of the officers, it elicited testimony only to the extent that a post-shooting internal investigation had taken place and no disciplinary action had resulted. The State did not call any internal investigators to testify about the propriety of the officers' conduct, and the State also addressed some of the issues defendant proposed to raise during the pretrial conferences. The State explained it did not want to appear to the jury as if it had suppressed the internal investigation. Defendant then cross-examined both officers about their knowledge of the inner workings of internal investigations, their pre-statment attorney communications, and Officer Holzhauer's pre-statement trip to the hospital for his panic attack sustained after the shooting.

Here, defendant indicated his intent to explore the circumstances under which the officers might have altered their official statements and testimony as to who fired the first shot in an attempt to avoid CMPD disciplinary action. Fundamental fairness dictates that the State be allowed to establish that no discipline was imposed so as not to appear as if it were suppressing the investigation or its results. Accordingly, where defendant established his intent to open the door to the State's

evidence that no disciplinary action resulted against Officers Holzhauer and Sussman, the trial court did not err in denying defendant's motion in limine and in ruling that the State would be allowed to present such evidence, given defendant's stalwart intention to open the door thereto. *See Brown*, 310 N.C. at 571, 313 S.E.2d at 590 (citation omitted). Defendant's argument is overruled.

NO PREJUDICIAL ERROR.

Judges DILLON and DIETZ concur.

STATE OF NORTH CAROLINA
v.
STACIE MICHELLE FINCHER

No. COA17-843

Filed 17 April 2018

1. Motor Vehicles—driving while impaired—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of driving while impaired where the State presented evidence that defendant rear-ended another car in a restaurant drive-thru, admitted that she had taken a prescribed central nervous system depressant drug, and demonstrated numerous signs of impairment.

2. Evidence—expert testimony—Rule 702—drug recognition evidence—under influence of central nervous system depressant—reliability

The trial court did not abuse its discretion in a driving while impaired case by admitting a police officer's expert testimony that defendant was under the influence of a central nervous system depressant, even though defendant contended the State did not lay a sufficient foundation to establish the reliability of the officer's methodology—the 12-step Drug Recognition Examination protocol—under Rule of Evidence 702.

Appeal by defendant from judgment entered 2 September 2016 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 6 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Tammera S. Hill, for the State.

Sean P. Vitrano for defendant-appellant.

BRYANT, Judge.

Where there was sufficient evidence to withstand defendant's motion to dismiss the charge of DWI and where the trial court did not abuse its discretion in admitting an officer's expert testimony pursuant to Rule 702, we find no error in the judgment of the trial court.

On 10 February 2015, defendant Stacie Michelle Fincher awoke around 7:30 a.m. and took her prescribed medications for her bipolar disorder—Abilify, Wellbutrin, and Lamictal. She had not slept well the previous evening, and around 2:00 a.m., she had taken a Xanax (alprazolam) to help her fall back to sleep. She had been taking Xanax under her doctor's care for seven years at that point. That morning, she helped her children get ready for school and then drove herself to her surgeon's office for a follow-up appointment for an ankle fusion surgery she had undergone in December 2014. Defendant wore a large immobilization boot on her left leg and foot and still needed crutches to walk.

At her doctor's appointment, the surgeon manipulated her ankle to check her range of motion, causing her so much pain that she cried. Asked to rate her pain on a scale of one to ten, she rated her pain as a ten. After the appointment, she drove to a pharmacy to have her prescription filled and then drove to a Long John Silver's restaurant in Asheville. While in the drive-thru lane, defendant was involved in a rear-end collision when her foot slipped off the brake and she collided with the vehicle in front of her.

Asheville Police Department Officers Brad Beddow and Matthew Ryan Craig were dispatched to the scene. Officer Beddow spoke with defendant and noticed that she had red, glassy eyes, slurred speech, and seemed a bit "off." Officer Craig also observed that defendant's eyes were red and glassy and that she had slurred speech. When asked if she had taken any medication, she responded that she was prescribed a "handful of different types of medication," and had taken Xanax the night before. Officer Craig, who was certified by the National Traffic Highway Safety Administration to give standardized field sobriety tests, including the Horizontal Gaze Nystagmus ("HGN") test, then requested defendant perform some tests to determine whether she was impaired.

Officer Craig administered the HGN test and observed six out of six clues of impairment. Because of her ankle injury and the boot on her leg, Officer Craig did not have defendant perform any other standardized field sobriety tests, but he did administer a breath test for alcohol which had negative results. Officer Craig determined that defendant was impaired based on her slurred speech, red and glassy eyes, admission to taking central nervous system ("CNS") depressants, and the HGN test results. Defendant was placed under arrest for DWI and transported to the Buncombe County Jail where defendant consented to a blood draw.

Officer Craig contacted Officer Scott Fry, a certified Drug Recognition Expert ("DRE") and asked for his assistance with defendant. As a DRE, Officer Fry performed a twelve-step evaluation to determine whether defendant was under the influence of drugs and, if so, what category of drugs were in her system. Officer Fry administered various tests and determined that defendant was impaired by a CNS depressant.

Defendant was found guilty of DWI in Buncombe County District Court on 9 August 2016, and she appealed for a trial *de novo* in superior court. Defendant was tried during the 31 August 2016 session of Buncombe County Superior Court, the Honorable Alan Z. Thornburg, Judge presiding. At trial, Officer Fry testified that on 10 February 2015, defendant's blood contained measurable amounts of alprazolam (Xanax), hydroxyzine buproprion (Wellbutrin), and lamotrigine (Lamictal). The judge advised the jury that alprazolam is an impairing substance.

Defendant moved to dismiss at the close of the State's case and again at the close of all the evidence, and the trial court denied both motions. The jury found defendant guilty of DWI, and the trial court sentenced defendant to a twelve-month suspended sentence of thirty days. Defendant filed written notice of appeal.

On appeal, defendant argues the trial court (I) erred in denying defendant's motion to dismiss; and (II) abused its discretion in admitting expert testimony where the State did not lay a sufficient foundation under Rule 702(a).

I

[1] Defendant argues the trial court erred in denying her motion to dismiss where the State submitted the case to the jury on a theory that defendant was under the influence of alprazolam, but where no evidence was presented that the amount of alprazolam found in defendant's blood was sufficient to cause appreciable impairment. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

Pursuant to N.C. Gen. Stat. § 20-138.1, "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) While under the influence of an impairing substance[.]" N.C.G.S. § 20-138.1 (2017). A person is under the influence of an impairing substance if "his physical or mental faculties, or both, [are] appreciably impaired by an impairing substance." N.C. Gen. Stat. § 20-4.01(48b) (2017).

An "impairing substance" is defined as "alcohol, controlled substance under Chapter 90 of the General Statutes, or any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances." *Id.* § 20-4.01(14a). Thus, to convict a defendant of driving while impaired, the State must prove "that defendant had ingested a sufficient quantity of an impairing substance to cause his faculties to be appreciably impaired." *State v. Phillips*, 127 N.C. App. 391, 393, 489 S.E.2d 890, 891 (1997) (citation omitted).

Here, the testimony of the State's witnesses at trial was sufficient to prove the elements of DWI. First, defendant was driving her vehicle in the public drive-thru area of a Long John Silver's restaurant when she collided with the rear end of another vehicle around 11:00 a.m. on 10 February 2015. Second, both responding officers noted her eyes were red and glassy and her speech was slurred. Third, defendant admitted to officers at the scene that she had consumed alprazolam, a Schedule IV controlled substance, earlier that morning. Fourth, Officer Craig testified that defendant presented six of the six clues indicating impairment after administering the HGN test, and Officer Fry testified that after performing his twelve-step DRE evaluation on defendant, he determined she was impaired by a CNS depressant.

"In order to overcome a motion to dismiss, the State must introduce more than a scintilla of evidence of each essential element of the offense and that the defendant was the perpetrator of the offense." *State*

v. Davy, 100 N.C. App. 551, 556, 397 S.E.2d 634, 636–37 (1990) (citation omitted). Accordingly, viewed in the light most favorable to the State, the trial court did not err in denying defendant's motions to dismiss where the State presented sufficient evidence to withstand defendant's motions. Defendant's argument is overruled.

II

[2] Defendant argues the trial court abused its discretion when it admitted an officer's expert testimony that defendant was under the influence of a central nervous system depressant. Defendant contends the State did not lay a sufficient foundation under Rule 702(a) to establish the reliability of the officer's methodology underlying his drug recognition examination and conclusion based thereon. We disagree.

"We review a trial court's ruling regarding the admission of expert testimony for abuse of discretion." *State v. Turbyfill*, 243 N.C. App. 183, 185, 776 S.E.2d 249, 252 (2015) (quoting *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 369, 770 S.E.2d 702, 707 (2015)). "Abuse of discretion results where the Court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 185–86, 776 S.E.2d at 252–53 (citing *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). "[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

Rule 702 of the North Carolina Rules of Evidence governs testimony by experts and states, in relevant part, as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion, 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.
>
> (2) Whether the person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. *A witness who has received training and holds a current certification as a Drug Recognition Expert*, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

N.C. Gen. Stat. § 8C-1, Rule 702 (2015) (emphasis added), *amended by* 2017 N.C. Sess. Laws ch. 212, § 5.3, eff. June 28, 2017.

Defendant argues that the State failed to lay a sufficient foundation under Rule 702 to establish the reliability of the Drug Recognition Examination to determine that alprazolam was the substance that had impaired defendant's mental or physical faculties. Defendant also argues that "Fry's testimony did not show that the 12-step DRE protocol was a reliable method of determining impairment."

In *State v. Godwin*, our Supreme Court concluded 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 court of this State." 369 N.C. 605, 613, 800 S.E.2d 47, 53 (2017) (citations omitted). Furthermore, this Court has "construed subsections (a) and (a1) [of Rule 702] together and reasoned that the General Assembly sought to 'allow testimony from an individual who has successfully completed training in HGN and meets the criteria set forth in Rule 702(a) . . . .' " *State v. Younts*, ___ N.C. App. ___, ___, 803 S.E.2d 641, 646 (2017) (quoting *Godwin*, 369 N.C. App. at 609, 800 S.E.2d at 50).

Lastly, pursuant to the text of subsection (a1)(2) of Rule 702, it is clear that the General Assembly has indicated its desire that Drug Recognition Evidence—like the evidence given by DRE Officer Fry—be admitted, and that this type of evidence has already been determined to

be reliable and based on sufficient facts and data. Accordingly, the trial court properly admitted the testimony of Officer Fry pursuant to Rule 702. Defendant's argument is overruled.

NO ERROR.

Judges DILLON and TYSON concur.

STATE OF NORTH CAROLINA
v.
KURT DEION FREDERICK, DEFENDANT

No. COA17-370

Filed 17 April 2018

Search and Seizure—search warrant—probable cause—residence—drugs—totality of circumstances

In a prosecution for possession and sale of illegal drugs, the trial court did not err by denying defendant's motion to suppress evidence obtained during a search of his residence pursuant to a warrant. The totality of circumstances showed that the magistrate had probable cause to believe controlled substances were located on the premises based on a detective's training and experience, the conduct of a middleman, and the detective's personal observations.

Judge ZACHARY dissenting.

Appeal by defendant from an order entered 7 June 2016 by Judge W. Osmond Smith III in Wake County Superior Court. Heard in the Court of Appeals 5 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Aldean Webster III, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for defendant-appellant.

BERGER, Judge.

On June 8, 2016, a Wake County jury found Kurt Deion Frederick ("Defendant") guilty of trafficking heroin, maintaining a dwelling used for keeping or selling heroin, and possession with intent to sell or deliver a Schedule I controlled substance. Prior to trial, Defendant moved to suppress evidence obtained pursuant to a search of his residence. Defendant appeals from the order denying his motion to suppress, contending that the search warrant was improperly issued because it lacked probable cause. We disagree.

Factual and Procedural Background

On April 8, 2015, Detective J. Ladd with the Raleigh Police Department applied for a warrant to search the premises of 3988 Neeley Street in Raleigh for heroin, firearms, drug transaction records, and cash. The residence belonged to Defendant.

Detective Ladd attached a sworn affidavit to the search warrant which testified to his more than thirteen years of law enforcement experience, his work with Raleigh's drug and vice unit, and his specific drug interdiction training. The affidavit also set forth the following facts:

> Over the last sixty days, I received information from a confidential source regarding a mid-level MDMA, heroin[,] and crystal methamphetamine dealer in the Raleigh, NC area. *This source has always been trustworthy and truthful with [d]etectives[,] and I consider his/her information reliable.* This confidential source is familiar with MDMA, heroin[,] and crystal methamphetamine and the way it is packaged and sold. *This confidential source has always provided [d]etectives with information in the past concerning other criminal drug investigations that I have been able to corroborate and determined to be truthful.*
>
> Within the last week, this confidential source was used to arrange a controlled purchase of a quantity of "Molly" (MDMA) from 3988 Neeley St[.] Raleigh, NC 27606. The confidential source met with [d]etectives prior to making the controlled purchase of "Molly". The confidential source and his/her vehicle were searched for any illegal contraband. There was none located. The confidential source was provided with a sum of money from the Raleigh Police Department's informant funds. The confidential source arranged to meet a middle man prior to going to 3988 Neeley St[.] Raleigh, NC 27606.

Detectives[] maintained constant surveillance on the confidential source while traveling to meet the middle man. Once the source met with the middle man, they traveled to 3988 Neeley St[.] Raleigh, NC 27606. *The middle man was observed entering 3988 Neeley St[.] Raleigh, NC 27606 and returning to the source approximately two minutes later. Based on my training and experience, this was indicative of drug trafficking activity.* The source met with me at a pre-determined meet location after the middle man was returned to his residence. The source provided me with a quantity of "Molly". The source and his/her vehicle were searched again for any illegal contraband. There was none located.

Within the last 72 hours, the confidential source was used to arrange a controlled purchase of heroin [from] 3988 Neeley St[.] Raleigh, NC 27606. The confidential source met with [d]etectives prior to making the controlled purchase of heroin. The confidential source and his/her vehicle were searched for any illegal contraband. There was none located. The confidential source was provided with a sum of money from the Raleigh Police Department's informant funds. The confidential source arranged to meet a middle man prior to going to 3988 Neeley St[.] Raleigh, NC 27606. Detectives[] maintained constant surveillance on the confidential source while traveling to meet the middle man. Once the source met with the middle man, they traveled to 3988 Neeley St[.] Raleigh, NC 27606. *The middle man was observed entering 3988 Neeley St[.] Raleigh, NC 27606 and returning to the source approximately three minutes later. Based on my training and experience, this was indicative of drug trafficking activity.* The source met with me at a pre-determined meet location after the middle man was returned to his residence. The source provided me with a quantity of heroin. The source and his/her vehicle was searched again for any illegal contraband. There was none located. A small sample of the heroin field tested positive for heroin.

While conducting surveillance during the controlled buy of heroin, two males were observed entering 3988 Neeley St[.] Raleigh, NC 27606. The two

> *individuals exited 3988 Neeley St[.] Raleigh, NC 27606 approximately two minutes later and returned to their vehicle. Based on my training and experience, this was indicative of drug trafficking activity.*

(Emphasis added).

This search warrant was granted by a magistrate, and officers executed it at the residence. More than 4.0 grams of heroin, 3.4 grams of MDMA, drug packaging materials, and $600.00 in cash were discovered in the residence. Officers observed Defendant leaving his residence with a Crown Royal bag, and detained him a short time later in his vehicle. Officers found heroin packaged for sale and more than $2,500.00 in cash in the Crown Royal bag located in the vehicle.

Defendant was arrested and charged with trafficking heroin, maintaining a dwelling for keeping or selling controlled substances, and possession of MDMA. The Wake County Grand Jury indicted Defendant on June 1, 2015 for trafficking in heroin by possession, maintaining a dwelling for keeping or selling controlled substances, and possession with intent to sell or deliver a Schedule I controlled substance.

Defendant filed a motion to suppress evidence obtained from the searches prior to trial in Wake County Superior Court. In his motion, Defendant conceded that during the first transaction, the middleman "entered the residence and approximately three minutes later came out with what appeared to be a Molly." For the second transaction, Defendant conceded that the middleman "entered the residence and returned in approximately three minutes with what appeared to be heroin." Defendant presented no evidence to support his motion, simply arguing the search warrant was facially insufficient. The trial court denied Defendant's motion, finding there was no conflict in the information provided in Detective Ladd's application for the search warrant, and the affidavit was sufficient to establish probable cause and justify issuance of the search warrant by the magistrate.

Defendant was convicted of trafficking in heroin by possession, maintaining a dwelling for keeping or selling controlled substances, and possession with intent to sell or deliver a Schedule I controlled substance. He was sentenced to a term of seventy to ninety-three months in prison. It is from the order denying his motion to suppress that Defendant timely appeals.

Standard of Review

"[A] reviewing court is responsible for ensuring that the issuing magistrate had a substantial basis for concluding that probable cause existed." *State v. McKinney*, 368 N.C. 161, 165, 775 S.E.2d 821, 825 (2015) (citation, quotation marks, brackets, and ellipses omitted). Our Supreme Court has stated, "[t]he applicable test is whether, given all the circumstances set forth in the affidavit before the magistrate, . . . there is a fair probability that contraband . . . will be found in a particular place." *State v. Riggs*, 328 N.C. 213, 218, 400 S.E.2d 429, 432 (1991) (citation and brackets omitted).

Analysis

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

U.S. Const. amend. IV. "Article I, Section 20 of the Constitution of North Carolina likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause." *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 303 (2016). "Probable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Campbell*, 282 N.C. 125, 128-29, 191 S.E.2d 752, 755 (1972) (citation omitted).

The quantum of proof required to establish probable cause is different than that required to establish guilt. *Draper v. United States*, 358 U.S. 307, 311-12, 3 L. Ed. 2d 327, 331 (1959). "Probable cause requires not certainty, but only *a probability or substantial chance* of criminal activity." *McKinney*, 368 N.C. at 165, 775 S.E.2d at 825 (emphasis in original) (citation and quotation marks omitted). "[The] standard for determining probable cause is flexible, permitting the magistrate to draw 'reasonable inferences' from the evidence . . . ." *Id.* at 164, 775 S.E.2d at 824-25 (citation omitted).

To determine if probable cause exists, we look at the totality of the circumstances known to the magistrate at the time the search warrant was issued. *State v. Arrington*, 311 N.C. 633, 638, 643, 319 S.E.2d 254, 257, 261 (1984); *see Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527, *reh'g*

denied, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983). This test asks "whether the evidence as a whole provides a substantial basis for concluding that probable cause exists." *State v. Williams*, 319 N.C. 73, 81, 352 S.E.2d 428, 434 (1987). In applying this test, "great deference should be paid a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258.

As stated above, an affidavit is sufficient to establish probable cause "if it supplies reasonable cause to believe that the proposed search for evidence *probably* will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *Id.* at 636, 319 S.E.2d at 256 (emphasis added) (citation omitted). Our Supreme Court noted that federal courts have found "direct evidence linking the crime to the location to be searched is not required to support a search warrant . . . ." *Allman*, 369 N.C. at 297, 794 S.E.2d at 305.

In *State v. Riggs*, the search warrant application provided that law enforcement officers obtained information from a confidential informant that the defendant was selling marijuana. *Riggs*, 328 N.C. at 214, 400 S.E.2d at 430. Officers used two different confidential informants to set up two drug transactions with the defendant. *Id.* at 214-15, 400 S.E.2d at 430. Prior to meeting a middleman, officers searched the confidential informant and his vehicle, provided him with money to purchase drugs, and equipped him with a recording device. *Id.* at 214, 400 S.E.2d at 430. The confidential informant met the middleman, and the two went to defendant's residence, where the middleman purchased drugs from defendant. *Id.* at 215, 400 S.E.2d at 431. A similar transaction with a separate confidential source was undertaken approximately one month prior. *Id.* at 215, 400 S.E.2d at 430. Our Supreme Court upheld the magistrate's determination of probable cause, stating:

> Where, as here, information before a magistrate indicates that suspects are operating, in essence, a short-order marijuana drive-through on their premises, the logical inference is that a cache of marijuana is located somewhere on those premises; that inference, in turn, establishes probable cause for a warrant to search the premises, including the residence.

Id. at 221, 400 S.E.2d at 434.

The only practical difference between *Riggs* and the case *sub judice* was the use of a recording device by the confidential informant. However,

the *Riggs* Court focused its discussion of probable cause, not on the communication between the middleman and the confidential source, but rather on the officers' experience, the conduct of the middleman, and the reasonable inferences drawn from the officers' observations. *Id.* at 219-21, 400 S.E.2d at 433-34.

Here, Detective Ladd received information from a reliable confidential source regarding a mid-level drug dealer who sold MDMA, heroin, and crystal methamphetamine. The confidential source had previously provided truthful information that Detective Ladd could corroborate, and the confidential source was familiar with the packaging and sale of MDMA, heroin, and crystal methamphetamine.

The same confidential source had assisted Detective Ladd with the purchase of MDMA one week prior to issuance of the search warrant. At the time of that purchase, Detective Ladd provided the confidential source with money to purchase MDMA, and he searched the confidential source and his vehicle prior to any interaction with the middleman. The confidential source met the middleman prior to going to Defendant's residence, and "[d]etectives[] maintained constant surveillance on the confidential source while traveling to meet the middle man." The confidential source and the middleman then traveled to Defendant's residence. Detectives observed the middleman enter Defendant's residence and return to the confidential source after approximately two minutes in Defendant's house. Detective Ladd swore in his affidavit that this conduct "was indicative of drug trafficking activity" based on his training and experience. The middleman returned to his residence, and the confidential source met Detective Ladd. The confidential source provided him with MDMA, and no other contraband was found on the confidential source or in his vehicle.

A subsequent purchase of heroin took place seventy-two hours prior to issuance of the search warrant. The details of that drug transaction are nearly identical to those set forth above, except the middleman was in Defendant's residence for approximately three minutes. Further, while observing the second transaction, Detective Ladd saw two males enter Defendant's residence and exit approximately two minutes later. Detective Ladd again indicated that the conduct he observed on this occasion was "indicative of drug trafficking activity" based on his training and experience.

On two occasions, Detective Ladd personally observed his confidential source meet the middleman and travel to Defendant's residence, where the middleman entered and exited shortly thereafter. The confidential source, who had been searched and supplied with money

to purchase controlled substances, provided Detective Ladd with MDMA and heroin after his interaction with the middleman. Detective Ladd also observed other traffic in and out of Defendant's residence. Detective Ladd's experience and personal observations set forth in the affidavit were sufficient to establish probable cause to believe that controlled substances would probably be found in Defendant's residence.

Based on Detective Ladd's training and experience, the conduct of the middleman, and Detective Ladd's personal observations, the magistrate here could reasonably infer that the middleman obtained MDMA and heroin from Defendant's residence. Further, the magistrate could reasonably infer that there would probably be additional controlled substances at that location. Moreover, the magistrate could reasonably infer that the middleman did not have the MDMA or heroin in his possession when he met the confidential source, and his purpose in traveling to Defendant's residence was to obtain the controlled substance the confidential source supplied to Detective Ladd. Based on the totality of the circumstances, the magistrate had a substantial basis for concluding probable cause existed to believe controlled substances were located on the premises of 3988 Neeley Street in Raleigh.

Conclusion

As our Supreme Court has stated, "[t]he resolution of *doubtful or marginal cases* in this area should be largely determined by the preference to be accorded to warrants." *Riggs*, 328 N.C. at 222, 400 S.E.2d at 435 (emphasis added) (citations and quotation marks omitted). That reasonable minds could disagree, as shown by the dissent, demonstrates that this may be a marginal case. As such, the magistrate's probable cause determination is upheld and the trial court's denial of Defendant's motion to suppress is affirmed.

AFFIRMED.

Judge DAVIS concurs.

Judge ZACHARY dissents with separate opinion.

ZACHARY, Judge, dissenting

The Fourth Amendment functions at its core to prohibit the government from subjecting its citizens to unreasonable searches and seizures. The existence of a warrant supported by probable cause

protects this right, but only if it is inherently dependable. *E.g.*, *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890 (1949). Because of the lack of information concerning the reliability of the unknown middleman, the lack of detail regarding the controlled purchases, and the lack of independently corroborated facts contained in the affidavit, probable cause to search defendant's home was not established, and I respectfully dissent.

I.

The majority quotes *State v. Riggs* and insists that our inquiry today is limited to determining "whether, given all the circumstances set forth in the affidavit before the magistrate, . . . there is a fair probability that contraband . . . will be found in a particular place." 328 N.C. 213, 218, 400 S.E.2d 429, 432 (1991) (citations and quotation marks omitted). The full scope of this Court's review, however, is "whether, given all the circumstances set forth in the affidavit before the magistrate, *including veracity and basis of knowledge of persons supplying hearsay information*, there is a fair probability that contraband . . . will be found in a particular place." *Riggs*, 328 N.C. at 218, 400 S.E.2d at 432 (citations and quotation marks omitted) (emphasis added). Probable cause to search "exists where 'the facts and circumstances within . . . the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar*, 338 U.S. at 175-76, 93 L. Ed. at 1890 (quoting *Carroll v. United States*, 267 U.S. 132, 162, 69 L. Ed. 543, 555 (1925)) (alterations omitted). The requirement that an inquiry be conducted into the "*veracity and basis of knowledge of persons supplying hearsay information*" provides the degree of reliability necessary to protect the security of citizens in their homes from the unwarranted intrusion of the government long contemplated by the Constitution. This is the basis of my dissent.

II.

In the instant case, the only information contained in the affidavit supporting the application for search warrant that ties this defendant's home to the sale of narcotics was the hearsay information related to the two controlled purchases. An unidentified "middleman" conducted the controlled purchases rather than the confidential informant, and no basis was provided which would justify reliance on the middleman. Nevertheless, in holding that the magistrate had a substantial basis for concluding that probable cause existed, the majority focuses on Detective Ladd's experience and his report that:

> [o]n two occasions, Detective Ladd personally observed his confidential source meet the middleman and travel to Defendant's residence, where the middleman entered and exited shortly thereafter. The confidential source, who had been searched and supplied with money to purchase controlled substances, provided Detective Ladd with MDMA and heroin after his interaction with the middleman. Detective Ladd also observed other traffic in and out of the residence.

This statement establishes merely that the unknown middleman entered defendant's home, and that the confidential informant provided law enforcement officers with drugs at some time thereafter. Under this analysis, the focus is on the drugs that the confidential informant delivered to the officers, which ostensibly were acquired inside Defendant's home. Without that connection, there can be no probable cause.

III.

To be sure, the facts provided in an application for a search warrant need not always have been personally observed or obtained by a law enforcement officer in order to support a finding of probable cause. Information gleaned from a third-party may support a finding of probable cause. *Jones v. United States*, 362 U.S. 257, 269, 4 L. Ed. 2d 697, 707 (1960). In the context of third-party information, however, the totality of the circumstances test requires that the nature of the third-party information "be such that a reasonably discreet and prudent person would rely upon [it.]" *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256-57 (1984); *see also Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983); *State v. Johnson*, 143 N.C. App. 307, 310, 547 S.E.2d 445, 448 (2001). Accordingly, where an officer applies for a search warrant in reliance upon information that was supplied by a third-party, probable cause demands an analysis of whether there is "a substantial basis for crediting the hearsay[.]" *Jones*, 362 U.S. at 269, 4 L. Ed. 2d at 707; *see also Alabama v. White*, 496 U.S. 325, 328, 110 L. Ed. 2d 301, 308 (1990) ("[A]n informant's 'veracity,' 'reliability,' and 'basis of knowledge' . . . remain 'highly relevant in determining the value of [the officer's] report.' ") (quoting *Gates*, 462 U.S. at 230, 76 L. Ed. 2d at 543); *Arrington*, 311 N.C. at 643, 319 S.E.2d at 261 (adopting *Gates* regarding "the sufficiency of probable cause to support the issuance of a search warrant").

There are various factors relevant to the determination of whether there is a substantial basis for crediting third-party information. A

recurrent consideration is whether the tip is accompanied by statements in the affidavit establishing that the informant is a reliable source. *See e.g.*, *Riggs*, 328 N.C. at 219, 400 S.E.2d at 433. The affiant's statement that the informant has provided law enforcement officers with accurate information in the past is usually sufficient to establish the informant's reliability under this standard. *E.g.*, *id.* at 218, 400 S.E.2d at 432 ("[T]he informant . . . had made two prior controlled purchases of drugs and also previously had given accurate information which resulted in the arrest of a 'narcotics violator.' Such evidence established that informant's reliability.").

In contrast, probable cause is more difficult to satisfy under the totality of the circumstances test where the information supporting an officer's application for search warrant was provided by an unverified or an anonymous source. In such a case, additional indicia of reliability must be present. *See Gates*, 462 U.S. at 237-38, 244, 76 L. Ed. 2d at 548, 552. A tip that was provided by an anonymous source will often be unable to satisfy the requisite indicia of reliability without a generous level of detail, or without essential facts that law enforcement officers were able to independently corroborate. *See e.g.*, *White*, 496 U.S. at 329, 110 L. Ed. 2d at 308 ("Some tips, completely lacking in indicia of reliability, would . . . require further investigation before a [search] would be authorized[.]") (citation and quotation marks omitted); *State v. Trapp*, 110 N.C. App. 584, 588-89, 430 S.E.2d 484, 487-88 (1993). The extent of the details provided in the tip and the officer's ability to corroborate the information will factor considerably into the totality of the circumstances to be reviewed. *Gates*, 462 U.S. at 241-42, 245, 76 L. Ed. 2d at 550-51, 552.

Likewise, where law enforcement officers apply for a search warrant based upon information gleaned from a controlled purchase that was executed by a third-party informant, the reliability of the controlled purchase itself must be analyzed in order to determine whether it was sufficient to support a finding of probable cause. Relevant indicia of reliability often include statements in the affidavit that either: (1) the source was reliable; (2) the source was searched for drugs immediately before and after the controlled purchase; (3) the source wore a hidden video or audio surveillance device during the controlled purchase; or (4) law enforcement officers observed the source engaging in the hand-to-hand sale with the defendant. *See e.g.*, *Riggs*, 328 N.C. at 214-16, 400 S.E.2d at 430-31; *State v. Stokley*, 184 N.C. App. 336, 341, 646 S.E.2d 640, 644 (2007). Where such protective measures are taken, this Court has generally held that information obtained from a controlled purchase was

sufficiently reliable under the totality of the circumstances to support the issuance of a search warrant. *See e.g.*, *Stokley*, 184 N.C. App. at 341, 646 S.E.2d at 644; *Johnson*, 143 N.C. App. at 311, 547 S.E.2d at 448; *Cf. State v. Collins*, 216 N.C. App. 249, 250, 716 S.E.2d 255, 255-56 (2011). Where such protective measures are circumvented, however, the courts become more concerned with the satisfaction of the constitutional requisites for issuance of a search warrant.

The reliability of a controlled purchase must be particularly scrutinized by magistrates where the reliability of the source of the operation cannot be shown. In such a case, a greater level of detail or independent corroboration must be present in order for the operation to support a finding of probable cause. *See State v. Brody*, ___ N.C. App. ___, ___, 796 S.E.2d 384, 388 (2017) ("The difference in evaluating an anonymous tip as opposed to a reliable, confidential informant's tip is that the overall reliability is more difficult to establish, and thus some corroboration of the information or greater level of detail is generally necessary.") (citation and quotation marks omitted) (alteration omitted).

IV.

While controlled purchases are often employed as a means to independently corroborate an anonymous tip, in the instant case, the operations are themselves the subject of the anonymity. Thus, the pertinent question is whether the controlled purchases offer sufficient indicia of reliability to support a finding of probable cause under the totality of the circumstances.

As the majority notes, the reliability of a narcotics operation that was conducted by an anonymous or unknown source has been addressed by this Court on only one prior occasion, in *State v. Riggs*. A comprehensive analysis of *Riggs* is necessary in order to understand its application to the instant case.

In *Riggs*, the application for search warrant provided that law enforcement officers had obtained information from a confidential informant that the defendant Bobby Riggs was selling narcotics. *Riggs*, 96 N.C. App. 595, 386 S.E.2d 599 (1989), *rev'd*, *Riggs*, *supra*. The confidential informant himself was shown to be reliable and, thus, so too was his tip. In light of that reliable tip, the officers subsequently conducted a controlled purchase in which the confidential informant arranged for an unwitting middleman to purchase narcotics from the defendant Bobby Riggs. *Riggs*, 328 N.C. at 214, 400 S.E.2d at 430. The confidential informant was searched before and after the operation and was equipped with an audio surveillance device during his interactions

with the middleman. *Id.* As officers watched, the middleman traveled by himself to the residence of defendants Bobby and Pamela Riggs and purchased narcotics from defendant Bobby Riggs outside in the driveway. *Id.* at 214-16, 400 S.E.2d at 430-31. The middleman then returned to his home and gave the narcotics to the confidential informant. *Id.*

On appeal from the trial court's denial of the defendants' motions to suppress, this Court concluded, in part, that a controlled purchase conducted outside of the defendants' home was insufficient to establish probable cause that narcotics would be found inside the home. *Riggs*, 96 N.C. App. at 598, 386 S.E.2d at 601. Our Supreme Court reversed and concluded that, because the magistrate was simply required to make a "common sense determination" of whether there was a fair probability that narcotics would be found in the home, the fact that the defendant had conducted the sale in the driveway to his home was sufficient to support the magistrate's finding of probable cause that narcotics would also be found inside the home. *Riggs*, 328 N.C. at 220-21, 400 S.E.2d at 434.

The majority maintains that "[t]he only practical difference between *Riggs* and the case *sub judice* was the use of a recording device by the confidential informant[.]" This distinction is, by itself, significant. However, it is also not the "only practical difference" involved. While the existence of the audio recordings alone certainly could have been sufficiently corroborative to support a finding of probable cause from the operation, the officers in *Riggs* were provided with reliable information tying the defendants to drug trafficking from the start. *Id.* at 215, 400 S.E.2d at 430. Thus, the controlled purchase in *Riggs* was both corroborated and corroborative. The combination of these factors provides the underpinning for our Supreme Court's determination in *Riggs* that the information in the affidavit was sufficient to support the magistrate's finding of probable cause. The initial suspicions were corroborated by the tips, the tips were corroborated by the controlled purchase, and the controlled purchase was corroborated by its own separate indicia of reliability.

The same cannot be said here. Although the confidential informant's veracity was established by his history of reliability with law enforcement, the confidential informant did not accompany the middleman into defendant's home. The confidential informant did not observe the alleged drug transactions taking place, nor is this a case in which any hand-to-hand transactions were observed by law enforcement officers. *Cf. Stokley*, 184 N.C. App. at 340-41, 646 S.E.2d at 644. Further, the affidavit does not contain information implicating defendant's home from the outset, such as, for example, that the confidential informant

had claimed to have purchased narcotics from defendant in the past. *Cf. id.* The middleman was not searched before or after the alleged purchases, and the confidential informant was not searched after he met privately with the middleman before traveling to defendant's home. The confidential informant did not wear an audio or video surveillance device during his interactions with the unknown middleman.

The existence of any one of these safeguards would have helped to establish the reliability of the operations. However, no further details concerning the events inside defendant's home are provided. Rather, the only corroboration provided in the affidavit is the fact that the middleman and two other individuals were observed entering defendant's residence. This alone is wholly insufficient to establish probable cause in the instant case. *E.g.*, *State v. Ford*, 71 N.C. App. 748, 752, 323 S.E.2d 358, 361 (1984); *State v. Hunt*, 150 N.C. App. 101, 107, 562 S.E.2d 597, 601 (2002). Beyond the middleman having entered defendant's home, the affidavit sets forth no basis to otherwise justify law enforcement officers' or the magistrate's reliance on the assumption that the unknown middleman purchased the narcotics while he was inside.

While probable cause may indeed be established where the reliability of the source of an operation is wanting, such is the case only where the operation itself furnishes highly detailed information, or where the presumptions gathered from the operation have been independently corroborated. *Gates*, 462 U.S. at 234, 76 L. Ed. 2d at 545. The reliability of the *operation* must be strong enough to compensate for lack of reliability of the source. Absent any such corroboration or additional detail, the essence of the affidavit in the case at bar established at most that the unknown middleman claimed to have purchased the drugs when he was inside defendant's home. I do not believe that it is constitutionally permissible for the officers or the magistrate to take an unknown middleman at his word, and I will not do so.

* * *

I am reluctant to allow an affidavit describing the anonymous purveyance of narcotics, and otherwise lacking in detail or corroboration, to serve as the primary justification for an intrusion into a private residence, "the most highly protected of all places under the Fourth Amendment[.]" *Riggs*, 328 N.C. at 222, 400 S.E.2d at 435. In upholding the issuance of the search warrant in the instant case, despite the insufficiency of the initial information leading to the operations and despite the use of a middleman whose identity and veracity remain a mystery, I fear that the majority has created a dangerous precedent allowing for the issuance

of search warrants upon a finding of less than probable cause. I would hold that, given the unusual facts of this case together with the absence of safeguards and indicia of reliability that are typically present in a controlled purchase, the application for a search warrant was insufficient to support the magistrate's finding of probable cause.

STATE OF NORTH CAROLINA
v.
BILLY DEAN MORGAN

No. COA17-428

Filed 17 April 2018

1. Appeal and Error—certiorari—improper notice of appeal—— intent to appeal—Inmate Grievance Form

The Court of Appeals exercised its discretion under Rule of Appellate Procedure 21(a)(1) in a probation revocation case to grant defendant's petition for writ of certiorari and consider the merits of his appeal. Although defendant's Inmate Grievance/Request Form was not effective to provide notice of appeal, it was evident that defendant intended to appeal.

2. Probation and Parole—probation revocation—probationary period expiration—good cause—new criminal offense—willfully absconded supervision

The trial court did not abuse its discretion by revoking defendant's probation and activating his suspended sentences after his probationary period expired where both the transcript and judgments reflected that the trial court considered the evidence and found good cause to revoke probation based on violations of N.C.G.S. §§ 15A-1343(b)(1) and 15A-1343(b)(3a).

3. Probation and Parole—attorney fees—notice—opportunity to be heard

In a probation revocation proceeding, the trial court's civil money judgment for costs and attorney fees under N.C.G.S. § 7A-455 was vacated where defendant was not given personal notice and an opportunity to be heard.

Chief Judge McGEE dissenting.

Appeal by defendant by petition for writ of certiorari from judgments entered 9 September 2016 by Judge Jeffrey P. Hunt in McDowell County Superior Court. Heard in the Court of Appeals 2 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Brenda Eaddy, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

CALABRIA, Judge.

Billy Dean Morgan ("defendant") appeals by petition for writ of certiorari from judgments (1) revoking his probation and activating his suspended sentences; and (2) imposing costs and attorneys' fees. After careful review, we affirm the revocation of defendant's probation. However, since defendant was not given notice and an opportunity to be heard as to the final amount of attorneys' fees that would be entered against him, we vacate the civil judgment entered pursuant to N.C. Gen. Stat. § 7A-455 (2017) and remand to the trial court.

I. Background

On 28 August 2013, defendant pleaded no contest in McDowell County Superior Court to two counts of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to two consecutive terms of 29-47 months in the custody of the North Carolina Division of Adult Correction. Pursuant to the terms of defendant's plea agreement, the trial court suspended his active sentences and placed him on 36 months of supervised probation.

On 12 May 2016, defendant's supervising officer ("Officer Poteat") filed reports alleging that defendant had willfully violated his probation by (1) failing to report as directed; (2) failing to pay his court and (3) supervision fees; and (4) committing a new criminal offense by incurring misdemeanor charges on 17 February 2016 for violating a domestic violence protective order ("DVPO"). An arrest warrant for a felony probation violation was issued that day. On 23 May 2016, Officer Poteat filed additional violation reports alleging that defendant had willfully absconded supervision. On 17 June 2016, defendant was arrested for violating his probation.

After defendant's probation expired on 28 August 2016, the trial court held a probation violation hearing on 9 September 2016. At the

beginning of the hearing, defendant admitted the allegations in the State's violation reports. When Officer Poteat subsequently testified for the State, he explained that defendant was admitted to Grace Hospital's mental health ward on 29 March 2016. After defendant failed to make himself available for supervision following his release from the hospital on 19 April 2016, Officer Poteat filed violation reports for absconding. In addition, Officer Poteat testified that defendant had been convicted of the DVPO violation "just two weeks ago."[1] Defendant's appointed attorney contended that his recent noncompliance with probation was related to his mental health concerns.

After hearing from both parties, the trial court revoked defendant's probation "for absconding and for the conviction" and activated his suspended sentences. Before concluding the hearing, the trial court stated that a civil judgment would be entered for defendant's costs and fees.

II. Petition for Writ of Certiorari

[1] On 16 September 2016, defendant filed a handwritten, *pro se* "Inmate Grievance/Request Form" with the McDowell County Jail stating, *inter alia*, that "[t]he Clerk of Supperior [sic] Court said this Notice of appeal must come to her. I wrote my appeal on Sep 10-16 why was this appeal gave back to me on 9-13-16." The record contains no other purported notice of appeal, and defendant's Inmate Grievance/Request Form is ineffective to serve that purpose. Defendant fails to "designate the judgment or order from which appeal is taken and the court to which appeal is taken[,]" and there is no evidence that the document was served upon the State. N.C.R. App. P. 3 (d)-(e); N.C.R. App. P. 4(b)-(c).

Despite his defective notice of appeal, on 30 May 2017, defendant filed a petition for writ of certiorari with this Court requesting review of the criminal and civil judgments entered by the trial court. Since it is evident from the Inmate Grievance/Request Form that defendant *intended* to appeal, in our discretion, we grant defendant's petition for writ of certiorari and proceed to the merits of his appeal. *See* N.C.R. App. P. 21(a)(1) (providing that "[t]he 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").

1. Defendant's attorney confirmed that he had entered an Alford plea to the DVPO violation and was sentenced to time served.

III. Probation Revocation

[2] "[O]ther than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term." *State v. Moore*, 240 N.C. App. 461, 463, 771 S.E.2d 766, 767 (2015) (citing *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980)). N.C. Gen. Stat. § 15A-1344(f) provides, in pertinent part:

> The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C. Gen. Stat. § 15A-1344(f)(1)-(3).

Following the enactment of the Justice Reinvestment Act of 2011 ("JRA"), trial courts may only revoke probation when a defendant (1) commits a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) willfully absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two periods of confinement in response to violations under N.C. Gen. Stat. § 15A-1344(d2). N.C. Gen. Stat. § 15A-1344(a).

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citations and quotation marks omitted).

On appeal, defendant first argues that the trial court erroneously revoked his probation after his 36-month probationary period expired on 28 August 2016, because the court failed to make any findings of "good cause" under N.C. Gen. Stat. § 15A-1344(f)(3). We disagree.

Defendant's argument is nearly identical to the one this Court rejected in *State v. Regan*, __ N.C. App. __, 800 S.E.2d 436 (2017). Relying on *State v. Love*, 156 N.C. App. 309, 576 S.E.2d 709 (2003), the *Regan* defendant challenged the trial court's failure to make written or oral findings of good cause under N.C. Gen. Stat. § 15A-1344(f) before revoking her probation. *Regan*, __ N.C. App. at __, 800 S.E.2d at 440. However, we determined that *Love* was inapposite, because it involved a different statute that requires the trial court to make "*specific findings* that longer or shorter periods of probation are necessary" before sentencing an offender to a period of probation beyond those expressly authorized by the statute. *Id.* (quoting N.C. Gen. Stat. § 15A-1343.2(d) (2003)). We observed that unlike the statute at issue in *Love*, N.C. Gen. Stat. § 15A-1344(f) "does not require that the trial court make any *specific findings*." *Id.* (emphasis added). Rather, the statute merely authorizes the trial court to "extend, modify, or revoke" probation after the defendant's probationary term has expired if the court finds "good cause shown and stated" for doing so. *Id.* (quoting N.C. Gen. Stat. § 15A-1344(f)(3)).

In *Regan*, we reasoned that "[t]he trial court complied with N.C. Gen. Stat. § 15A-1344(f)(3) by finding good cause to revoke" the defendant's probation because:

> Remaining in North Carolina was a condition of Defendant's probation. Defendant testified that she left the jurisdiction in 2011. Reporting for office meetings with her probation officer as directed was also a condition of Defendant's probation. The State presented competent evidence, the sworn affidavit of Officer Wiley, that Defendant failed to report as directed on 5 April 2011. Defendant testified that she did not return to North Carolina because "after talking to Ms. Woods, I mean, frankly, it scared the hell out of me, so I didn't come back."

Id. In open court, the trial court announced that it found the defendant "in willful violation of the terms and conditions of her probation." *Id.* The court's judgments included written findings that "[e]ach violation is,

in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence." *Id.* Accordingly, we concluded that "[b]oth the transcript of the probation violation hearing and the judgments entered reflect[ed] that the trial court considered the evidence and found good cause to revoke . . . probation." *Id.* at __, 800 S.E.2d at 440-41.

On appeal, defendant acknowledges *Regan*'s holding but nevertheless asserts that "the only reasonable and proper interpretation" of N.C. Gen. Stat. § 15A-1344(f)(3) "requires a trial court to make a specific finding of 'good cause shown and stated' in order to revoke probation . . . ." Yet, as defendant recognizes, we are bound by this Court's prior published opinions. *In re Appeal from 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.").

Alternatively, defendant argues that the trial court failed to comply with N.C. Gen. Stat. § 15A-1344(f)(3)—"even under the looser interpretation" set forth in *Regan*—because the judgments do not include findings that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence." We disagree.

The *Regan* defendant was placed on probation prior to the enactment of the JRA, when "trial courts had authority to revoke probation for a violation of any probation condition." *State v. Moore*, __ N.C. __, __, 807 S.E.2d 550, 554 (2017). "After the JRA, by contrast, only violations of any of the three conditions specified in N.C.G.S. § 15A-1344(a) are revocation-eligible." *Id.* Accordingly, the finding in *Regan* would have been erroneous in the instant case, given that only two of defendant's violations could have supported revocation. Instead, the trial court's judgments include the more appropriate finding that "[t]he Court may revoke defendant's probation . . . for the willful violation of the condition(s) that he[ ] not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a) . . . ."

Since defendant had not previously served any periods of confinement pursuant to N.C. Gen. Stat. § 15A-1344(d2), the trial court could only revoke his probation if he committed a new criminal offense or willfully absconded. N.C. Gen. Stat. § 15A-1344(a). The State alleged and the trial court found violations of both of these conditions. Although defendant challenges both violations on appeal, his arguments

are meritless. As previously explained, either violation would support revocation, and at the hearing, defendant admitted all of the State's allegations. After hearing from Officer Poteat and defendant's attorney, the trial court announced its decision to "revoke his probation for absconding and for the conviction." Consequently, "[b]oth the transcript of the probation violation hearing and the judgments entered reflect that the trial court considered the evidence and found good cause to revoke" defendant's probation. *Regan*, __ N.C. App. at __, 800 S.E.2d at 440-41. Therefore, the trial court did not abuse its discretion by revoking defendant's probation.

IV. Costs and Attorneys' Fees

[3] Defendant next argues that the trial court erred by entering a civil judgment for costs and attorneys' fees without providing him with notice and an opportunity to be heard as to the final amount of the attorneys' fees that may be imposed against him. We agree.

At sentencing, the trial court may enter a civil judgment against an indigent defendant for fees incurred by the defendant's court-appointed attorney. N.C. Gen. Stat. § 7A-455; *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005). "[C]ounsel'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.' " *State v. Friend*, __ N.C. App. __, __, 809 S.E.2d 902, 906 (2018) (quoting N.C. Gen. Stat. § 7A-455(b)).

Before entering judgment pursuant to N.C. Gen. Stat. § 7A-455, the trial court must give the defendant "notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317. This exchange in open court not only allows the trial court to inform the defendant, on the record, of the purpose and extent of the civil judgment that will be entered against him, but also provides the defendant with his sole opportunity to comment on the court's award of attorneys' fees. *See id.*

Unlike other stages of a criminal proceeding, when the trial court considers entering a money judgment pursuant to N.C. Gen. Stat. § 7A-455, "the interests of the defendant and trial counsel are not necessarily aligned." *Friend*, __ N.C. App. at __, 809 S.E.2d at 907. "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." *Id.* Therefore, to avoid injustice,

> 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.

Id.

At the hearing in the instant case, the trial court discussed attorneys' fees with defendant's appointed attorney immediately after revoking his probation:

> THE COURT: . . . I will make all [defendant's] fees a civil judgment. Are you appointed?
>
> [DEFENSE COUNSEL]: I am appointed, Your Honor.
>
> THE COURT: Including your attorney's fees.
>
> [DEFENSE COUNSEL]: I have seven hours.
>
> THE COURT: Good luck.

Although this discussion occurred in open court in defendant's presence, the trial court did not ask defendant personally, rather than through counsel, "whether [he] wish[ed] to be heard on the issue." *Id.* And while this exchange reveals that the appointed attorney claimed seven hours of work related to defendant's representation, the record contains no evidence that defendant was notified of and given an opportunity to be heard regarding the *total amount of fees* that would be entered against him. *Cf. Jacobs*, 172 N.C. App. at 235-36, 616 S.E.2d at 316-17 (vacating the judgment because although the trial court notified the defendant that he would be awarding attorneys' fees at the State-determined "rate of $65 an hour[,]" the defendant's appointed attorney "had not yet calculated his hours of work related to defendant's representation").

Accordingly, we vacate the civil judgment imposing costs and attorneys' fees and remand to the trial court. "On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that defendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Id.* at 236, 616 S.E.2d at 317; *see also Friend*, __

N.C. App. at __, 809 S.E.2d at 907 (emphasizing that *Friend* did "not announce a new rule of constitutional law" but merely "provide[d] further guidance on what trial courts should do to ensure that this Court can engage in meaningful appellate review when defendants raise this issue").

V. Conclusion

We affirm the trial court's judgments revoking defendant's probation and activating his suspended sentences, since "[b]oth the transcript . . . and the judgments entered reflect that the trial court considered the evidence and found good cause to revoke" his probation based on violations of N.C. Gen. Stat. §§ 15A-1343(b)(1) and 15A-1343(b)(3a). *Regan*, __ N.C. App. at __, 800 S.E.2d at 440-41. However, although the trial court asked the appointed attorney how many hours he claimed related to defendant's representation, defendant was not informed of the total amount of attorneys' fees that would be imposed, nor given an opportunity to personally address the court. Therefore, defendant was not given the requisite notice and opportunity to be heard on the issue. *Friend*, __ N.C. App. at __, 809 S.E.2d at 907. Accordingly, we vacate and remand the civil money judgment entered pursuant to N.C. Gen. Stat. § 7A-455.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judge DILLON concurs.

Chief Judge McGEE dissents by separate opinion.

McGEE, Chief Judge, dissenting.

There are three requirements that must be met before the trial court can enter an order revoking a defendant's probation after the term of the probationary period has ended:

> The court may . . . revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be . . . revoked.

N.C. Gen. Stat. § 15A-1344(f) (2017). These requirements are conditions precedent that must be met in order for the trial court to have jurisdiction to revoke a defendant's probation after the probationary period has ended. *State v. Krider*, COA17-272, 2018 WL 943444, at *2 (N.C. Ct. App. Feb. 20, 2018); *State v. Bryant*, 361 N.C. 100, 103–04, 637 S.E.2d 532, 535 (2006). It is the State's burden to establish the jurisdiction of the trial court in a probation revocation hearing. *State v. Peele*, __ N.C. App. __, __, 783 S.E.2d 28, 32-33 (2016).

In the present case, the first two conditions were clearly met. However, Defendant argues the trial court failed to "state," or make any finding of fact, that "good cause" was shown for revoking Defendant's probation after Defendant's probationary term had already expired.

Defendant, the State, and this Court all recognize the relevance of this Court's opinion in *State v. Regan*, __ N.C. App. __, 800 S.E.2d 436 (2017), on the facts before us. The majority opinion correctly cites *In re Civil Penalty* for the proposition that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted). Stated differently, a regular panel of this Court is without the authority to overrule a prior opinion of this Court. *Id.* That this Court is without the authority to overrule a decision of our Supreme Court is self-evident. Therefore, when this Court is confronted by two conflicting opinions of regular panels of this Court, we have determined that we are bound by the decision reached by the panel that had the authority to make the relevant holding – i.e. the holding made by the earlier panel – and that we are not bound by the holding made in violation of *In re Civil Penalty* – i.e. the conflicting holding made by the later panel. *Boyd v. Robeson Cty.*, 169 N.C. App. 460, 470, 621 S.E.2d 1, 7 (2005). It is axiomatic that any holding of this Court that directly conflicts with a valid holding of our Supreme Court –regardless of when the Supreme Court holding was made – must be disregarded in favor of our Supreme Court's precedent.

I. The Requirement for Findings of Fact

In order to reach its holding in *Regan*, this Court contrasted the language used in N.C. Gen. Stat. § 15A-1343.2(d) (2017) — that in order to sentence a defendant to a probationary term outside the statutorily defined limits, the trial court must make "specific findings" that such a deviation is necessary — with the language in N.C.G.S. § 15A-1344(f)(3) (2017) that prohibits revocation of a defendant's probation after the probationary term has ended unless "[t]he [trial] court finds for good cause shown and stated that the probation should be . . . revoked." *Id.*

In *Regan*, the Court held that the language of N.C.G.S. § 15A-1344(f)(3), unlike that in N.C.G.S. § 15A-1343.2(d), did not require any actual findings of fact, written or oral. *Regan*, __ N.C. App. at __, 800 S.E.2d at 440–41. Therefore, the *Regan* holding allows revocation pursuant to N.C.G.S. § 15A-1344(f) so long as a violation report was timely filed and the trial court makes a valid determination that the defendant violated a condition of probation for which revocation is an appropriate sanction:

> The trial court complied with N.C. Gen. Stat. § 15A-1344(f)(3) *by finding good cause to revoke Defendant's probation.* Remaining in North Carolina was a condition of Defendant's probation. Defendant testified that she left the jurisdiction in 2011. Reporting for office meetings with her probation officer as directed was also a condition of Defendant's probation. The State presented competent evidence, the sworn affidavit of Officer Wiley, that Defendant failed to report as directed on 5 April 2011. Defendant testified that she did not return to North Carolina because "after talking to Ms. Woods, I mean, frankly, it scared the hell out of me, so I didn't come back." From the bench, the trial court announced, "I find the Defendant's in willful violation of the terms and conditions of her probation."
>
> Each of the judgments . . . incorporates a corresponding violation report . . . and indicates the specific paragraphs of the violation report which the trial court found as the basis for the finding that Defendant willfully violated the terms of her probation. Each judgment also includes a box checked by the trial court indicating that "[e]ach violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence." Both the transcript of the probation violation hearing and the judgments entered reflect that the trial

> court considered the evidence and found good cause to revoke Defendant's probation.

Regan, __ N.C. App. at __, 800 S.E.2d at 440–41 (emphasis added).[1]

However, I find the *Regan* interpretation of the relevant language in N.C.G.S. § 15A-1344(f)(3) to be in direct conflict with our Supreme Court's interpretation of relevantly identical language in an earlier version of N.C.G.S. § 15A-1344(f). In 2008, the General Assembly made the following changes to N.C.G.S. § 15A-1344(f):[2]

> (f) Extension, Modification, or Revocation after Period of Probation. – The court may extend, modify, or revoke probation after the expiration of the period of probation ~~if~~: if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written ~~motion~~ violation report with the clerk indicating its intent to conduct a ~~revocation hearing; and~~ hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the ~~State has made reasonable effort to notify the probationer and to conduct the hearing earlier.~~[3] probationer did violate one or more conditions of probation prior to the expiration period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

Act of July 8, 2008, sec. 4, 2008 N.C. Sess. Laws 129.

In *Bryant*, our Supreme Court undertook the following analysis of the prior version of N.C.G.S. § 15A-1344(f):

> Initially, we address the State's argument that no finding was required to be made by the trial court in this case.

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1. As noted in the majority opinion, the probation violations in *Regan* were committed prior to enactment of the Justice Reinvestment Act.

2 The stricken through portions were deleted and the underlined portions were added by this amendment.

3. Although the notice language was removed from N.C.G.S. § 15A-1344(f), Chapter 15A still requires that a defendant be given proper notice before a revocation hearing is held, *see, e.g.*, N.C. Gen. Stat. §§ 15A-1345(d) and (e) (2017).

The General Assembly, in enacting the controlling statute, N.C.G.S. § 15A–1344(f), provided:

> "The court may revoke probation after the expiration of the period of probation if: (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and (2) *The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier*."

N.C.G.S. § 15A–1344(f) (2005) (emphasis added). In analyzing this statute, we use accepted principles of statutory construction by applying the plain and definite meaning of the words therein, as the language of the statute is clear and unambiguous. The statute *unambiguously requires the trial court to make a judicial finding* that the State has made a reasonable effort to conduct the probation revocation hearing during the period of probation set out in the judgment and commitment.

The *plain language of this statute leaves no room for judicial construction.* In the absence of statutorily mandated factual findings, the trial court's jurisdiction to revoke probation after expiration of the probationary period is not preserved. The State's argument asks us to substitute the unsworn remarks of defendant's counsel for a judicial finding of fact. This we will not do, as the statute requires the *trial court to make findings of fact*. Even in light of the somewhat informal setting of a probation revocation hearing, to accept defense counsel's remarks as a finding of fact violates the plain and definite meaning of the statute.[4]

The State argues that the unsworn remarks of defendant's counsel, along with the scheduled hearing date noticed on defendant's probation violation report, satisfy the statutory requirement. In doing so, the State contends the parenthetical statement made by the Court of Appeals in *State v. Hall only requires evidence in the record, not*

4. "*Black's Law Dictionary* defines a finding of fact as 'a determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record, [usually] presented at the trial or hearing.' *Black's Law Dictionary* 664 (8th ed. 2004)." This footnote is footnote "2" in the original.

> *an actual finding of fact.* 160 N.C. App. 593, 593–94, 586 S.E.2d 561, 561 (2003) (parenthetically stating "nor is there evidence in the record to support such findings"). Although this argument is creative, it is contrary to the explicit statutory requirement that "the court find . . . the State has made reasonable effort to notify the probationer and to conduct the hearing earlier." N.C.G.S. § 15A–1344(f). The statute makes no exception to this finding of fact requirement based upon the strength of the evidence in the record.

Bryant, 361 N.C. at 102–03, 637 S.E.2d at 534–35 (citations omitted) (some emphases added); *see also State v. Burns*, 171 N.C. App. 759, 763, 615 S.E.2d 347, 350 (2005).

Prior to *Regan*, this Court discussed the requirements of the current version of N.C.G.S. § 15A–1344(f) as follows:

> Pursuant to N.C.G.S. § 15A–1344(f), a trial court may extend, modify, or revoke a defendant's probation after the expiration of the probationary term only if several conditions are met, including findings by the trial court that prior to the expiration of the probation period a probation violation had occurred *and* a written probation violation report had been filed. *Also*, *the trial court must find good cause for the extension*, *modification*, *or revocation.* N.C.G.S. § 15A–1344(f).

State v. Moore, 240 N.C. App. 461, 463, 771 S.E.2d 766, 767 (2015) (second emphasis added); *see also State v. Sanders*, 240 N.C. App. 260, 263, 770 S.E.2d 749, 751 (2015). Our Supreme Court held in *Bryant* that the language "the court finds" was an unambiguously stated requirement that a specific "finding of fact" be made by the trial court, *not* simply a requirement that evidence before the trial court could support an unstated or implied "finding." *Bryant*, 361 N.C. at 103, 637 S.E.2d at 535; *see also State v. Daniels*, 185 N.C. App. 535, 536–37, 649 S.E.2d 400, 401 (2007) (citation omitted) ("In *State v. Bryant*, the Supreme Court held that N.C.G.S. § 15A–1344(f) '. . . unambiguously requires the trial court to make a judicial finding that the State has made a reasonable effort to conduct the probation revocation hearing during the period of probation set out in the judgment and commitment' "). I also note that this Court, in an unpublished opinion filed prior to *Regan*, recognized a finding of fact requirement for N.C.G.S. § 15A–1344(f)(3). *State v. Bailey*, 241 N.C. App. 173, 772 S.E.2d 875 (2015) (unpublished) (emphasis in original)

(suggesting that N.C.G.S. § 15A–1344(f)(3) requires a finding of fact because it "allows the court to alter probation after the expiration of the probation period only if the court '*finds* for good cause shown *and stated* that the probation should be extended, modified or revoked' "). N.C. Gen. Stat. § 15A-1345(e) (2017) also supports the position that actual findings of fact are necessary in order to support the statutory requirements for revocation: "Before revoking . . . probation, the [trial] court must . . . hold a hearing to determine whether to revoke . . . probation and *must make findings to support the decision* and a summary record of the proceedings." *Id.* (emphasis added).

Our Supreme Court has also indicated that the language "the court finds good cause" mandates that the trial court actually make the relevant findings of fact. *State v. Coltrane*, 307 N.C. 511, 515–16, 299 S.E.2d 199, 202 (1983) (emphasis added) (Reversing order revoking probation because "[u]nder N.C.G.S. 15A-1345(e), a defendant is entitled to 'present relevant information, and may confront and cross-examine adverse witnesses unless the [trial] court finds good cause for not allowing confrontation.' Defendant was allowed to confront neither [of the witnesses]. *No findings were made that there was good cause for not allowing confrontation.*").

The current version of N.C.G.S. § 15A–1344(f) requires that three things occur before the trial court may revoke a defendant's probation after expiration of the period of probation: (1) that a violation report is filed prior to expiration of the period of probation; (2) that the trial court "*finds* that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation[;]" and (3) that the trial court "*finds* for good cause shown and stated that the probation should be . . . revoked." *Id.* (emphasis added). The Court in *Bryant* clearly rejected any argument that we can presume a "finding" based upon the strength of the evidence in the record – the trial court *must* make the required finding of fact or it does not have the authority to revoke a defendant's probation pursuant to N.C.G.S. § 15A–1344(f). "The statute makes no exception to this finding of fact requirement based upon the strength of the evidence in the record." *Bryant*, 361 N.C. at 103, 637 S.E.2d at 535; *see also id.* at 103–04, 637 S.E.2d at 535 ("Like [*State v.*] *Camp*, [299 N.C. 524, 263 S.E.2d 592 (1980),] the trial court in the instant case was without jurisdiction to revoke defendant's probation and to activate defendant's sentence because it failed to make findings sufficient to satisfy the requirements of the statute.").

I believe we are bound by our Supreme Court's holdings construing language in criminal statutes that requires the trial court to "find" or

"find good cause" to mean the trial court is *required* to make findings of fact demonstrating it has made an independent determination, based on the evidence, that good cause existed for the mandated conclusion. Therefore, in the present case I would hold that the trial court was required to make a finding of fact that the State demonstrated "for good cause shown and stated that [Defendant's] probation should be . . . revoked." N.C.G.S. § 15A–1344(f)(3). Absent this finding, there is no record proof the trial court had jurisdiction to revoke Defendant's probation after the expiration of Defendant's period of probation. *Bryant*, 361 N.C. at 103–04, 637 S.E.2d at 535.

II. What Findings are Required Pursuant to N.C.G.S. § 15A–1344(f)(3)

Section (2) in the prior version of N.C.G.S. § 15A–1344(f), discussed in *Bryant* and other opinions cited above, was replaced in part by N.C.G.S. § 15A–1344(f)(3). Whereas the prior version required the State to present sufficient evidence indicating that it had given the defendant proper notice *and* had made a reasonable effort to conduct the revocation hearing earlier,[5] the current version of the statute does not require a *specific* showing by the State, or a related finding by the trial court, that the State could not have reasonably conducted the hearing at an earlier date. Instead, the current version of N.C.G.S. § 15A–1344(f) requires the State to prove (1) that it filed a violation report prior to the expiration of the period of probation; (2) that Defendant did, in fact, violate a condition of probation prior to the expiration of his period of probation; and (3) that there was "good cause" for the trial court to revoke Defendant's probation at that time – i.e., it is inferred that good cause existed to revoke Defendant's probation *even though* the period of probation had already ended. It is my belief that the General Assembly, through its 2008 amendment of N.C.G.S. § 15A–1344(f), intended to provide the trial court more discretion in making the determination of whether the State acted reasonably in holding a revocation hearing after the expiration of the period of probation. I do not believe the General Assembly intended to do away entirely with the State's burden to demonstrate that revocation of a defendant's probation after expiration of the period of probation was reasonable in light of the relevant facts of any particular case.

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5. The natural inference is that the State is expected to conduct the hearing before the end of the period of probation if possible, and as soon after expiration of the period of probation as is reasonable when it is not practicable to conduct the hearing before expiration of the defendant's period of probation.

Therefore, I believe the General Assembly intended the relevant language "[t]he court finds for good cause shown and stated that the probation should be . . . revoked[,]" N.C.G.S. § 15A–1344(f)(3), to require the State to satisfy the trial court that there was "good cause" for the trial court to revoke the defendant's probation *even though the period of probation had already ended* – and that the trial court make the appropriate associated findings of fact. If the timing of the revocation hearing is not included in the N.C.G.S. § 15A–1344(f)(3) analysis, at least two consequences arise that I do not believe were intended by the General Assembly. First, N.C.G.S. § 15A–1344(f)(3), in its entirety, becomes superfluous, in violation of the established rules of statutory construction.

> "[W]e are guided by the principle of statutory construction that a statute should not be interpreted in a manner which would render any of its words superfluous. We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation."

State v. Haddock, 191 N.C. App. 474, 482, 664 S.E.2d 339, 345 (2008) (quoting *State v. Coffey*, 336 N.C. 412, 417–18, 444 S.E.2d 431, 434 (1994)). In addition, " '[i]n construing ambiguous criminal statutes, we apply the rule of lenity, which requires us to strictly construe the statute' " in favor of the defendant. *Haddock*, 191 N.C. App. at 482, 664 S.E.2d at 345–46 (quoting *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007)). As I read *Regan*, that opinion appears to require only that there exist evidence to support N.C.G.S. §§ 15A–1344(f)(1) and (2). *Regan* appears to hold that, if the trial court finds that "the probationer did violate one or more conditions of probation prior to the expiration of the period of probation[,]" N.C.G.S. § 15A–1344(f)(2), then the "good cause shown" requirement of N.C.G.S. § 15A–1344(f)(3) is automatically satisfied. If satisfaction of the requirements of N.C.G.S. § 15A–1344(f)(2) serve to also satisfy the requirements of N.C.G.S. § 15A–1344(f)(3), N.C.G.S. § 15A–1344(f)(3) has been rendered superfluous.

Second, the *Regan* interpretation would also seem to violate the rule of lenity, as it disposes of any burden of the State to demonstrate it acted reasonably in seeking to revoke the defendant's probation after expiration of the period of probation. If N.C.G.S. § 15A–1344(f) has been stripped of any requirement that the State demonstrate good cause for the trial court to revoke a defendant's probation, *taking into consideration that the period of probation had already expired*, the intended protections

in N.C.G.S. § 15A–1344(f) have been almost completely stripped away. The Official Commentary to N.C.G.S. § 15A–1344 states:

> Subsection (f) provides that probation can be revoked and the probationer made to serve a period of active imprisonment even after the period of probation has expired if a violation occurred during the period *and if the court was unable to bring the probationer before it in order to revoke at that time.*

Id. (emphasis added).[6] As I understand the holding in *Regan*, so long as a violation report is filed before the expiration of a defendant's period of probation, the State could bring the defendant before the trial court for a revocation hearing *at any time* – five, ten, fifteen years or more after the defendant's probationary term ended. The State would have *no* burden to demonstrate that it had acted reasonably in allowing years to pass before initiating the revocation hearing. Whether the long delay was due to the defendant's actions, or was solely the fault of the State, would be irrelevant in the trial court's analysis. A finding by the trial court that the defendant violated a term of his probation warranting revocation would be all that was required to activate the underlying sentence. The "good cause shown and stated" requirement of N.C.G.S. § 15A–1344(f)(3) would require nothing more than the finding required by N.C.G.S. § 15A-1344(f)(2). This interpretation of N.C.G.S. § 15A–1344(f) results in the elimination of any meaningful difference between the requirements for revocation at a hearing conducted *during* the defendant's period of probation and revocation *after* the expiration of the defendant's period of probation – so long as a violation report is filed prior to the end of defendant's period of probation, the arrest and hearing pursuant to N.C.G.S. § 15A-1345 may occur at any time without any additional burden on the State. If this were the intent of the General Assembly when it amended N.C.G.S. § 15A–1344(f) in 2008, it could have greatly simplified the statute by eliminating N.C.G.S. § 15A–1344(f) entirely, and simply have stated that the *only* conditions precedent to holding a probation revocation hearing are the filing of a violation report prior to the expiration of the period of probation and timely notice to the

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6. The language of this comment suggests that it has not been changed since the amendment of N.C.G.S. § 15A–1344(f), but I believe the rationale is still valid and that the addition of N.C.G.S. § 15A–1344(f)(3) was intended to convey the same intent – that the trial court's finding of "good cause shown and stated" incorporated the reasonableness of the State's actions together with the amount of time that has passed since the expiration of the period of probation.

defendant of the hearing. The fact that the General Assembly did not repeal N.C.G.S. § 15A–1344(f) in its entirety suggests its intent was not to eliminate the additional requirement that the trial court find as fact that activation of a defendant's sentence after the expiration of the period of probation was appropriate based on the particular fact before it.

Although I disagree with the interpretation of N.C.G.S. § 15A–1344(f)(3) set forth in *Regan*, with respect to both the findings of fact requirement and what must be shown in order to for the State to prove "good cause shown," I believe this Court only has the authority to disregard the holding in *Regan* concerning the necessity of findings of fact in support of the "good cause shown and stated" requirement of N.C.G.S. § 15A–1344(f)(3). Because I find no contrary precedent from our Supreme Court, nor any contrary precedent from this Court pre-dating *Regan*, I believe we are bound by the holding in that opinion regarding what is required to satisfy the "good cause shown" requirement in N.C.G.S. § 15A–1344(f)(3). Specifically, that a proper finding of fact that Defendant violated a condition of his probation for which revocation was an appropriate sanction is all that is needed to satisfy the "good cause shown" requirement. *Regan*, __ N.C. App. at __, 800 S.E.2d at 440–41. I address this issue because I believe it merits consideration by our Supreme Court.

I would vacate and remand with direction to the trial court to either make appropriate findings of fact as required by N.C.G.S. § 15A–1344(f)(3), or enter an order denying revocation based upon the State's failure to prove all the jurisdictional requirements of N.C.G.S. § 15A–1344(f).

STATE OF NORTH CAROLINA
v.
COREY ALEXANDER THOMAS

No. COA17-520

Filed 17 April 2018

1. Evidence—expert opinion—fight or flight response—exclusion—ordinary experience of jurors

The trial court did not abuse its discretion in a voluntary manslaughter case by excluding the expert opinion of a forensic psychologist about the fight or flight response. The proffered testimony would not provide insight to the jurors beyond the conclusions that jurors could draw from their ordinary experience.

2. Criminal Law—self-defense—jury instruction—aggressor doctrine

The trial court did not err in a voluntary manslaughter prosecution by instructing the jury on the aggressor doctrine of self-defense where there was evidence that defendant was the aggressor, including defendant's own testimony on his intent to trick the victim into thinking that he had a gun, plus the fact that the victim was shot twice in the back.

3. Damages and Remedies—restitution—funeral costs—insufficient evidence of amount

The trial court's restitution order for funeral expenses to be paid to the victim's family in a voluntary manslaughter prosecution was vacated and remanded where no supporting receipts for funeral expenses were presented in support of the restitution worksheet.

Appeal by defendant from judgment entered 17 June 2016 by Judge Ronald L. Stephens in Onslow County Superior Court. Heard in the Court of Appeals 9 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Patrick S. Wooten, for the State.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant-appellant.

BRYANT, Judge.

Where the proffered expert testimony would not provide insight to the trier of fact beyond the conclusions that jurors could readily draw from their ordinary experience, the trial court did not abuse its discretion in excluding the testimony. Where there was evidence that defendant was the aggressor, the trial court did not err in instructing the jury on the aggressor doctrine as it relates to self-defense. Where there was insufficient evidence to support restitution in the amount of $3,360.00 in funeral expenses to Ward's family, we vacate and remand this portion of the trial court's order.

On 23 July 2014, Ronnie Williams was in the muffler shop that he ran on Bell Fork Road in Jacksonville, North Carolina, when he heard four gunshots. Williams testified that he could not recall the exact time of day he heard the gunshots, but that he believed it was in the afternoon. The first three shots were fired in rapid succession followed by a short pause before the fourth shot. Williams looked outside behind the shop and saw a man running from the area where the shots had been fired. A car pulled up, and the man got into the car. As gunfire was common in the area, Williams went back to work. Just before 7:00 p.m., Williams walked into the field behind his shop to retrieve a hoe he had left outside. He found a body and had his wife call the police.

Around 7:00 p.m., the first officer responded to the scene. He discovered a male body with blood visible on his back and around the body. He also noticed a shell casing near the victim's head. The victim had been shot in the upper chest, shoulder, abdomen, right flank, and twice in the back. Later, more shell casings were found, all from a 9mm weapon.

Jennifer Hankins arrived at the scene and related that she was the girlfriend of the deceased, Robert Ward. Ward, who was known to buy and sell drugs, had worked as an informant for one of the detectives who identified Ward as the victim at the scene and informed Hankins of the deceased's identity. Hankins told officers that at about 6:30 p.m. that day, Ward indicated he was going out with Antonio Best to rob a target, and as he did so, he put a 9mm pistol into the pocket of his waistband. Ward and Best hoped to steal as much as $20,000.00 from their target, defendant Corey Alexander Thomas. Hankins also recalled that Ward had put $80.00 in "flash money" in his pocket. Officers obtained an arrest warrant for Best, charging him with conspiring with Ward to commit robbery with a dangerous weapon.

Meanwhile, during the afternoon of 23 July 2014, defendant had been to the Liberty Inn to visit Lia Cassell, his sometime-roommate and sexual partner and to whom he also sold heroin. Later, defendant called

Cassell asking her to call him a cab but refusing to tell her where he was. Defendant sounded very panicky and said he had shot somebody.

Ten to fifteen minutes after the phone call, defendant showed up at Cassell's motel room very disheveled, panicky, and with blood on him. Surveillance video from the Liberty Inn showed a Yellow Cab arrive at the rear of the motel around 7:26 p.m.

Defendant went into the bathroom and cleaned up. He then told Cassell that he had shot someone multiple times and was sure the person was dead. Defendant told Cassell he "wanted to go on the run" and that he wanted Cassell to come with him. Cassell refused and told him she would only help him turn himself in. Defendant left, and Cassell went to the police, told them what she had heard, helped police identify the likely places to which defendant might have run, and allowed officers to search her motel room.

Defendant was ultimately located and arrested in a motel parking lot in Havelock, North Carolina. The officer who took him into custody testified that defendant complained of a shoulder injury and had a .32-caliber Kel-Tec semi-automatic handgun concealed in his front pocket.

On 6 June 2015, defendant was indicted by an Onslow County grand jury for first-degree murder. The case came on for trial during the 6 June 2016 session, the Honorable Ronald L. Stephens, Superior Court Judge presiding. Defendant testified at length about the events of 23 July 2014. Among other things, defendant testified that upon meeting Ward and Best, he knew he was being robbed. According to defendant, Ward struck defendant across the head with his pistol and, after a struggle, defendant got control of the gun and "three shots let off in succession: Pow! Pow! Pow!" while Ward was on his knees reaching for the gun. Defendant emptied Ward's pockets taking "everything that looked like it belonged to [defendant]."

The trial court submitted the case to the jury on second-degree murder and voluntary manslaughter. Defendant was convicted of voluntary manslaughter and sentenced to an active term of imprisonment for sixty-five months minimum to ninety months maximum. Restitution in the amount of $3,360.00 was entered as a civil judgment to be paid as a condition of post-release supervision or work release, if applicable. Defendant appeals.

On appeal, defendant argues the trial court erred (I) in excluding the testimony of a forensic psychologist about the phenomenon of "fight or

flight"; (II) in overruling defendant's objection to an instruction that he would not be entitled to a claim of self-defense if he was the aggressor where no evidence supported such an instruction; and (III) by imposing $3,360.00 in restitution where this amount was not supported by the evidence.

I

[1] Defendant argues the trial court erred in excluding the expert opinion testimony of a forensic psychologist about the phenomenon of "fight or flight" as it was relevant to defendant's defense to the charge of voluntary manslaughter. Specifically, defendant contends the trial court incorrectly ruled that this evidence was not relevant or reliable and that it would not assist the jury and that the trial court's exclusion of this testimony violated his constitutional rights. We disagree.

In contending that the trial court's exclusion of this testimony violated his constitutional rights, defendant argues the standard of review on appeal should be *de novo*. However, this Court has previously addressed and rejected such an argument. *See State v. McGrady* (*McGrady I*), 232 N.C. App. 95, 105–06, 753 S.E.2d 361, 369–70 (2014) (disagreeing with the defendant's contention that the exclusion of his witness's testimony under Rule 702 violated his constitutional right to present a defense under the Sixth Amendment of the United States Constitution and Article I, section 23 of the N.C. Constitution), *aff'd* 368 N.C. 880, 787 S.E.2d 1 (2016) ("*McGrady II*").[1] As such, we review for abuse of discretion. *See infra*.

"[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005) (citing *State v. Holland*, 150 N.C. App. 457, 461–62, 566 S.E.2d 90, 93 (2002)).

In affirming this Court's opinion in *McGrady II*, our Supreme Court set forth the grounds on which an abuse of discretion may be found when a trial court admits or excludes expert testimony:

> The trial court then concludes, based on these findings, whether the proffered expert testimony meets

1. The Supreme Court of North Carolina handed down its decision in *McGrady II* on 10 June 2016, on the fifth day of trial in the instant case. *State v. McGrady* ("*McGrady II*"), 368 N.C. 880, 880, 787 S.E.2d 1, 1 (2016).

> Rule 702(a)'s requirements of qualification, relevance, and reliability. This ruling "will not be reversed on appeal absent a showing of abuse of discretion." And "[a] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). The standard of review remains the same whether the trial court has admitted or excluded the testimony—even when the exclusion of expert testimony results in summary judgment and thereby becomes "outcome determinative."

368 N.C. at 893, 787 S.E.2d at 11 (alteration in original) (internal citations omitted). "In addition, even if expert scientific testimony might be reliable in the abstract, to satisfy Rule 702(a)'s relevancy requirement, the trial court must assess 'whether that reasoning or methodology properly can be applied to the facts in issue.' " *State v. Babich*, ___ N.C. App. ___, ___, 797 S.E.2d 359, 362 (2017) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593, 125 L. Ed. 2d 469, 482 (1993)). "This ensures that 'expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.' " *Id.* (quoting *Daubert*, 509 U.S. at 591, 125 L. Ed. 2d at 481). "The Supreme Court in *Daubert* referred to this as the 'fit' test." *Id.* (citation omitted).

Rule 702(a) states as follows:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015), *amended* by N.C. Sess. Laws 2017-212, § 5.3, eff. June 28, 2017. However,

> [w]hile "[Rule] 702 imposes a special obligation upon a trial judge to ensure that any and all scientific testimony . . . is not only relevant, but reliable," "*Daubert* did not work a seachange [sic] over . . . evidence law, and the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."

State v. Hunt, ___ N.C. App. ___, ___, 792 S.E.2d 552, 560 (2016) (alterations in original) (internal citation omitted) (quoting Fed. R. Evid. 702 (2012) (Advisory Committee notes)).

In *McGrady*,[2] the defendant appealed from his conviction for first-degree murder and argued the trial court abused its discretion in excluding the expert testimony offered by the defendant regarding the doctrine of "use of force," *McGrady I*, 232 N.C. App. at 98, 753 S.E.2d at 365, and the sympathetic nervous system's "fight or flight" response, *McGrady II*, 368 N.C. at 894, 787 S.E.2d at 11,[3] violating his right to present a defense. This Court disagreed, noting that the expert witness "was not even able to cite a single specific study, merely referring to the existence of studies and their authors generally[,]" "admitted that he knew nothing about the [relevant 'rate of error'] or how it related to his opinions[,]" "completely lacked medical credentials," and that the expert's testimony "was firmly within the realm of common knowledge and would not be helpful to the jury." *McGrady I*, 232 N.C. App. at 105, 753 S.E.2d at 369–70. Thus, this Court held that the trial court's decision to exclude his testimony "was well-reasoned, especially given the *Daubert* requirements invoked by amended Rule 702." *Id.* at 106, 753 S.E.2d at 370.

In *McGrady II*, the North Carolina Supreme Court noted the "[d]efendant testified at trial that he did not remember the number of shots that he fired" and "all of his attention was focused on the threat." 368 N.C. at 896, 787 S.E.2d at 13. "[The expert's] testimony on stress responses was therefore intended to show that the state of [the] defendant's memory and [the] defendant's description of what he experienced were consistent with having perceived a threat to his life and the life of his son." *Id.*

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2. We refer to both *McGrady I* and *McGrady II* collectively as "*McGrady*."

3. *McGrady I* referred more generally to the proffered expert's testimony as "Expert Witness Testimony on Use of Force," *State v. McGrady* ("*McGrady I*"), 232 N.C. App. 95, 98, 753 S.E.2d 361, 365 (2014), whereas *McGrady II* addressed the more specific aspects of the proffered witness's testimony, including the expert's intention to testify about the "the sympathetic nervous system's 'fight or flight' response[.]" 368 N.C. at 894, 787 S.E.2d at 11.

However,

> [t]he trial court excluded this portion of [the expert's] testimony because it concluded that he was not "qualified to talk about how something affects the sympathetic nervous system." [The expert] testified at voir dire that he was not a medical doctor but that he had studied "the basics" of the brain in general psychology courses in college. He also testified that he had read articles and been trained by medical doctors on how adrenalin affects the body, had personally experienced perceptual narrowing, and had trained numerous police officers and civilians on how to deal with these stress responses.
>
> Though Rule 702(a) does not create an across-the-board requirement for academic training or credentials, it was not an abuse of discretion in this instance to require a witness who intended to testify about the functions of an organ system to have some formal medical training.

Id. (internal citation omitted).

As a result, the North Carolina Supreme Court affirmed this Court's opinion in *McGrady II*, stating that "because [the expert] lacked medical or scientific training[,]" "he was far less qualified to testify about the sympathetic nervous system." *Id.* As a result, "[*i*]*n* [*that*] *context*, it was not 'manifestly without reason' for the trial court to exclude [the expert's] testimony . . . ." *Id.* (emphasis added). In other words, the North Carolina Supreme Court determined that the proffered expert's testimony in *McGrady* was not improperly excluded where the expert in question—who intended to testify about human physiology specifically—"lacked medical or scientific training." *Id.*

Like the excluded expert testimony at issue in *McGrady*, in the instant case, the excluded expert testimony focused on forensic psychologist Dr. Amy D. James's opinions as to "fight or flight response." Defendant argues the trial court applied *McGrady* in a "rote manner without carefully examining the proffered testimony and its scientific underpinning."

Dr. James testified that she is licensed to practice as a psychologist in the State of North Carolina, and she has a bachelor's degree in psychology, a master's degree in clinical psychology, and a PhD in clinical psychology. She testified that she is employed in private practice, consulting in forensic and clinical psychological evaluations. Dr. James also testified that she has a specialization within "the field of forensic psychology, as well as police and public safety psychology."

During her *voir dire*, Dr. James testified in relevant part about the "fight or flight response of the sympathetic nervous system," the principles and methods used, the facts or data upon which they were based, and how she applied these principles in her work as follows:

> I reviewed the processes and procedures by which these research articles were published, to include experiments on animals dating back to 1915, 1920, by Walter Cannon, to admit analyses that were conducted just in 2011, to summarize what the plasma level changes of stress hormones were following stressful events. I reviewed post-event research on victims of crime and on military personnel and law enforcement officers who responded to threats. Situations where they looked at the physiological changes during that time. And applied them to the changes that occurred in animals. There wasn't any research available where we subjected humans to acute stressful situations. . . .
>
> . . . .
>
> Q. . . . And what studies or experiments have been done to establish that this fight or flight response is an accepted theory or doctrine in the field of psychology?
>
> A. Walter Cannon, who was a physiologist at Harvard University . . . subjected live animals to stressful situations and measured empirically their response to that. That is where the fight or flight research began. Since then, an individual named . . . Selye . . . applied it to humans. Walter Cannon generalized it to humans.
>
> In the past 30 to 40 years, the fight or flight response has been studied more in the military communities. It has been studied on through the Center for Violence Policy through multiple schools. . . .
>
> So the research has been ongoing for approximately 90 years. There are hundreds of studies in that area. There are books on that. There's books by Mr. Grossman who has published on combat and on killing. There are people who study only that field of science.
>
> Q. Are there any variables that would make the straightforward application of the fight or flight response of the sympathetic nervous system unreliable? I mean,

> are there things that -- yeah -- inaccurate? Are there things that would make the application of this doctrine unreliable? Any variables you can think of?
>
> A. To this specific case or to any case?
>
> Q. In general.
>
> A In general. There would be situations in which someone may, you know, call me up and say, Hey, I think this is what's going on. But when I reviewed that individual's case record and their history, I would exclude it.
>
> . . . .
>
> A. . . . The fight or flight response is only activated if the person perceived a situation as threatful [sic]. And what one person perceives as a threat is different than what another person perceives as a threat. And if someone has been trained to exclude particular situations as a threat and then they wanted to say their fight or flight response kicked in in response to a threat they had trained to push through, I would question whether or not it could be applied.

When asked if she had an opinion as to whether defendant "used more force than reasonably appeared to be necessary" on the date of the shooting, she responded that she believed defendant's "perception was that he did what he needed to do to eliminate the threat."

In excluding Dr. James's expert witness testimony, the trial court made the following findings:

> THE COURT: . . . The Court is going to make the following findings in regards to the objection of the State, both in the motion in *limine* and in the trial itself in regard to certain aspects of this witness'[s] Dr. James, testimony.
>
> The Court rules that Dr. Amy D. James'[s] testimony regarding the fight or flight response doctrine and the sympathetic nervous system and her opinion of the defendant's response based on that doctrine, or those doctrines, does not meet the standard of admissibility set forth in Rule 702(a) of the North Carolina Rules of Evidence. The Court determines that Dr. James'[s] testimony, to the extent that it would be considered scientific testimony or evidence, is not relevant or reliable.

> The Court determines that Dr. James'[s] testimony is not based upon sufficient facts or data, number one; number two, nor is the testimony the product of reliable principles and methods; and number three, nor has the witness applied the principles and method reliably to the facts of this case.
>
> The Court further find [sic] that the expert's proffered method of proof is not scientifically reliable as an area for expert testimony nor is the expert's testimony relevant in this case.
>
> The Court further finds that Dr. James -- Dr. James'[s] testimony is not based on scientific, technical, or other specialized knowledge that will assist the trier of fact, the jury here, to better understand the evidence or to determine a fact in issue. The testimony does not meet the minimum standard for logical relevance required by Rule 401 of the Rules of Evidence. Dr. James'[s] testimony as an expert witness does not provide insight beyond the conclusions that jurors can readily draw from their own ordinary experiences in their own lives.
>
> Therefore, the Court determines that Dr. James'[s] testimony does not meet the three-prong reliability test mandated by the North Carolina Supreme Court in *State v. McGrady*. And discussed in that opinion and earlier opinions is the *Daubert* decision, which requires that testimony most be, one, based upon sufficient facts or data; number two, it must be the product of reliable principles and methods; and number three, the witness must have applied the principles and methods reliably to the facts of the case. The Court determines that Dr. James'[s] testimony would not assist the jury as required by Rule 702(a) of the North Carolina Rules of Evidence, and is therefore inadmissible as to an expert opinion in this area.

"As with other findings of fact, these findings will be binding on appeal unless there is no evidence to support them." *McGrady II*, 368 N.C. at 893, 787 S.E.2d at 11 (citing *State v. King*, 366 N.C 68, 75, 733 S.E.2d 535, 540 (2012)).

After a thorough review, we cannot say the trial court abused its discretion when it excluded Dr. James's proffered testimony regarding the "fight or flight" response. The expert testimony excluded in *McGrady*

was excluded largely because the expert "lacked medical or scientific training[,]" *Id.* at 896, 787 S.E.2d 13, and while Dr. James held several degrees, including a PhD in psychology, as well as a license to practice psychology in North Carolina, these were not medical or scientific degrees. Therefore, the trial court determined that her testimony

> [was] not based on scientific, technical, or other specialized knowledge that [would] assist the trier of fact, the jury here, to better understand the evidence or to determine a fact in issue. . . . Dr. James'[s] testimony as an expert witness does not *provide insight beyond the conclusions that jurors can readily draw from their own ordinary experiences in their own lives*.

(Emphasis added). The trial court acted well within its discretion to make this determination. *See State v. Campbell*, 88 A.3d 1258, 1276–77 (Conn. App. 2014) (noting that the trial court did not abuse its discretion when it excluded the proffered testimony of an expert witness regarding "fight or flight" responses where "the jury would likely be aware of such fight or flight responses as a result of their own experiences").

> In order to "assist the trier of fact," N.C. R. Evid. 702(a), expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience. An area of inquiry need not be completely incomprehensible to lay jurors without expert assistance before expert testimony becomes admissible. To be helpful, though, that testimony must do more than invite the jury to "substitute[e] [the expert's] judgment of the meaning of the facts of the case" for its own.

McGrady II, 368 N.C. at 889, 787 S.E.2d at 8 (alterations in original) (citation omitted) (quoting *Burell v. Sparkkles Reconstr. Co.*, 189 N.C. App. 104, 114, 657 S.E.2d 712, 719 (2008)).

Dr. James's testimony was not proffered in order for her to explain, for example, a highly technical and scientific issue in simpler terms for the jury. To the contrary, her testimony appeared to be proffered in order to cast a sheen of technical and scientific methodology onto a concept of which a lay person (and jury member) would probably already be aware. *See Campbell*, 88 A.2d at 1277. In other words, we conclude that Dr. James's proffered expert testimony did not "provide insight beyond the conclusions that jurors can readily draw from their ordinary experience." *McGrady II*, 368 N.C. at 889, 787 S.E.2d at 8.

> Under the abuse of discretion standard, our role is not to surmise whether we would have disagreed with the trial court, *see State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007), but instead to decide whether the trial court's ruling 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).

Id. at 899, 787 S.E.2d at 15. The trial court did not abuse its discretion in excluding defendant's proffered expert testimony regarding the "fight or flight" response, and defendant's argument is overruled.

II

[2] Defendant next argues the trial court committed reversible error by overruling defendant's objection to an instruction that he would not be entitled to a claim of self-defense if he was the aggressor where, defendant contends, no evidence supported such an instruction. We disagree.

"Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted).

> [T]he right of self-defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he abandons the fight, withdraws from it and gives notice to his adversary that he has done so.

State v. Marsh, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977) (citations omitted). "When there is no evidence that a defendant was the initial aggressor, it is reversible error for the trial court to instruct the jury on the aggressor doctrine of self-defense." *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016) (citations omitted); *see State v. Jenkins*, 202 N.C. App. 291, 298–99, 688 S.E.2d 101, 106–07 (2010) (ordering a new trial and holding the trial court erred in instructing the jury that the defendant could not avail himself of the benefit of self-defense if he was the aggressor where the victim had been argumentative, "initiated the fray," ignored the defendant's request that he leave, and tackled and choked the defendant before the defendant reached for a nearby gun and fired one time at the victim).

"Broadly speaking, the defendant can be considered the aggressor when []he 'aggressively and willingly enters into a fight without legal excuse or provocation.' " *State v. Vaughn*, 227 N.C. App. 198, 202,

742 S.E.2d 276, 279 (2013) (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971)); *see id.* at 203–04, 742 S.E.2d at 280 (holding that evidence presented at trial was insufficient to support the instruction that the defendant would lose the benefit of self-defense if she were the aggressor where she fled an altercation with the victim, then armed herself and left a place of relative safety (a vehicle), but where there was no evidence that she brought on the original difficulty "or intended to continue the altercation"). Additionally, where evidence presented at trial "reflects that the victim was shot from the side and from behind," this may "further support[ ] the inference that [the] defendant shot at the victim only after the victim had quit the argument and was trying to leave." *State v. Cannon*, 341 N.C. 79, 83, 459 S.E.2d 238, 241 (1995).

In the instant case, defendant testified that he had a pocketknife with him at the time of the incident, and that when it fell to the ground, he "immediately picked it up . . . not[ing], 'This is my joint.' " Defendant testified he said that "in order to keep the robbers at bay. Like having an ADT sign in front of your house without having the service. It's just in order to keep them at bay." Defendant clarified that when he said "This is my joint," he meant he was referring to the pocketknife as a pistol. Defendant testified that Ward "possibly assumed I had a pistol." Thus, from defendant's own testimony, it was possible for the jury to infer that defendant was the initial aggressor based on his intent to trick Ward into thinking he had a gun. Further, like the victim in *Cannon*, the victim in the instant case was shot twice in the back, which indicates either that defendant continued to be the aggressor, or shot the victim in the back during what he contended was self-defense. *See id.* at 83, 459 S.E.2d at 241. As a result, based "[o]n the evidence before it, the trial court properly allowed the triers of fact to determine [whether or not] [the] defendant was the aggressor." *See id.* (citing *State v. Terry*, 329 N.C. 191, 199, 404 S.E.2d 658, 663–64 (1991)). The trial court did not err in instructing the jury based on the aggressor doctrine. Defendant's argument is overruled.

III

[3] Lastly, defendant contends there was insufficient evidence to support restitution in the amount of $3,360.00 in funeral expenses to Ward's family. Because no receipts for the funeral costs were presented to the trial court in support of the restitution worksheet, a point the State concedes, we agree with defendant that this amount was not supported by the evidence introduced at the sentencing hearing.

"[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011) (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)). This Court "has repeatedly held that 'a restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution.' " *Id.* (quoting *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010)).

In the instant case, no evidence—documentary or testimonial—supports the restitution ordered. All that exists in this record is the restitution worksheet, which is insufficient to support a restitution order. In such a case, the proper remedy is to "vacate the trial court's restitution order and remand for rehearing on the issue." *Mauer*, 202 N.C. App. at 552, 688 S.E.2d at 778; *see also Moore*, 365 N.C. at 286, 715 S.E.2d at 850. Accordingly, we vacate the restitution order and remand for rehearing on this issue.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges BERGER and MURPHY concur.

STATE OF NORTH CAROLINA
v.
FLAVIO VELASQUEZ-CARDENAS

No. COA17-422

Filed 17 April 2018

1. Appeal and Error—post-conviction DNA relief—jurisdiction—Anders review

The Court of Appeals had both jurisdiction and discretionary authority to decide that review under *Anders v. California*, 386 U.S. 738 (1967), should be applied to appeals from the denial of post-conviction DNA-related relief under N.C.G.S. § 15A-270.1. The fact that defendant's attorney in this case filed an *Anders* brief was sufficient to raise the issue and present it for appellate review.

2. Appeal and Error—post-conviction DNA relief—Anders review—frivolous appeal

The trial court did not err in a first-degree murder case involving a post-conviction DNA issue by concluding under *Anders*

v. California, 386 U.S. 738 (1967), and *State v. Kinch*, 314 N.C. 99 (1985), that defendant's appeal was wholly frivolous. Defendant had not demonstrated how DNA testing could assist him in any post-conviction review of his case.

Judge DILLON concurring in separate opinion.

Appeal by Defendant from order entered 26 September 2016 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 16 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 Emily H. Davis, for Defendant-Appellant; and Flavio Jo Velasquez-Cardenas, pro se.

McGEE, Chief Judge.

I. Procedural and Factual Background

A jury found Flavio Velasquez-Cardenas ("Defendant")[1] guilty on 16 February 2012 of the first-degree murder of Patsy Barefoot ("Ms. Barefoot"), based on both premeditation and deliberation and the felony murder rule. This Court upheld Defendant's conviction on direct appeal in *State v. Velasquez-Cardenas*, 228 N.C. App. 139, 746 S.E.2d 22, 2013 WL 3131252 (2013) (unpublished) ("*Velasquez-Cardenas I*"), and additional facts can be found in that opinion.

As recounted in *Velasquez-Cardenas I*, Defendant gave a statement to police admitting that he killed and sexually assaulted Ms. Barefoot in her apartment in Wake County, North Carolina, before stealing her car and credit card and driving to Florida, where he was ultimately apprehended. *Id.* at *1-3. In *Velasquez-Cardenas I*, there was testimony that the State Bureau of Investigation ("SBI") also "confirmed that the hair found in Decedent's hand was a match to Defendant's hair[.]" *Id.* at *2. Testifying at trial, Defendant admitted to inadvertently killing Ms. Barefoot after they engaged in consensual sex, claiming he " 'put her

1. While the order spells Defendant's name as "Valasquez-Cardenas, we use the spelling of Defendant's name as reflected in the indictment and in Defendant's *pro se* Notice of Appeal and Defendant's other *pro se* filings in the record.

against the wall' in an attempt to calm her down" when she became upset that he was using cocaine in her bathroom. *Id.*

In April 2016, Defendant filed a motion to locate and preserve evidence and for post-conviction DNA testing pursuant to N.C. Gen. Stat. §§ 15A-268 and 269 (2017), which are sections of the DNA Database and Databank Act of 1993 (the "Act"). N.C. Gen. Stat. § 15A-266 *et seq.* The trial court denied Defendant's motion by order entered 26 September 2016. After reviewing the record, including Defendant's confession and the other evidence adduced at trial, the trial court concluded that Defendant had "failed to allege or establish that there [wa]s any reasonable probability that the verdict would have been more favorable to [him] had DNA testing been conducted on the evidence prior to [his] conviction." *See* N.C.G.S. § 15A-269(b)(2). Defendant appealed as a matter of right pursuant to N.C. Gen. Stat. § 15A-270.1 (2017), and Counsel was appointed to represent Defendant on appeal. *Id.* ("The defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal. The [trial] court shall appoint counsel in accordance with rules adopted by the Office of Indigent Defense Services upon a finding of indigency."). Upon reviewing the denial of Defendant's request for the preservation and testing of DNA, Defendant's appellate counsel perfected Defendant's appeal, but determined that she was unable to identify any issue with sufficient merit to support a meaningful argument for relief. Acting consistent with the requirements set forth in *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), Defendant's appellate counsel advised Defendant of his right to file written arguments with this Court and provided Defendant with the documents necessary for him to do so. She then filed an *Anders* brief with this Court stating she had been unable to find any meritorious issues for appeal, had complied with the requirements of *Anders*, and asked this Court to conduct an independent review of the record to determine if there were any identifiable meritorious issues therein. Defendant filed a *pro se* "Addendum in Support of *Anders* Brief" on 15 May 2017.

II. Analysis

A. *Applicability of Anders*

[1] In the State's brief, it does not argue that this Court should, upon *Anders* review, affirm the ruling of the trial court. Instead, apparently for the first time in an appeal, the State makes the argument that the protections provided in *Anders* and *Kinch* are not available to defendants

appealing orders denying post-conviction DNA-related relief pursuant to N.C.G.S. § 15A-270.1.[2]

In all prior opinions of this Court involving *Anders* briefs filed pursuant to an N.C.G.S. § 15A-270.1 appeal, the State has implicitly accepted the validity of the *Anders* procedure, and simply argued that the defendants' appellate counsel were correct in their determinations that no meritorious issues were identifiable from the trial records. *See State v. Riggins*, __ N.C. App. __, 809 S.E.2d 378 (2018) (unpublished); *State v. Bayse*, __ N.C. App. __, 808 S.E.2d 614 (2017) (unpublished); *State v. Sayre*, __ N.C. App. __, 803 S.E.2d 699 (2017) (unpublished); *State v. Rios*, __ N.C. App. __, 803 S.E.2d 698 (2017) (unpublished); *State v. Tapia*, __ N.C. App. __, 799 S.E.2d 909 (2017) (unpublished); *State v. Castruita*, __ N.C.App. __, 798 S.E.2d 440 (2017) (unpublished); *State v. Barrera*, __ N.C. App. __, 798 S.E.2d 440 (2017) (unpublished); *State v. Nettles*, __ N.C. App. __, 797 S.E.2d 715 (2017) (unpublished); *State v. Needham*, __ N.C. App. __, 781 S.E.2d 532 (2016) (unpublished); *State v. Harris*, 238 N.C. App. 200, 768 S.E.2d 63 (2014) (unpublished); *State v. Gladden*, 234 N.C. App. 479, 762 S.E.2d 531 (2014) (unpublished); *State v. Mickens*, 233 N.C. App. 789, 759 S.E.2d 711 (2014) (unpublished); *State v. Autry*, 215 N.C. App. 390, 716 S.E.2d 89 (2011) (unpublished). In all of those cases, this Court has conducted the *Anders* review requested without questioning its duty or authority to so do, including addressing the defendants' arguments when they have filed *pro se* briefs in accordance with *Anders* and *Kinch*.

The State now argues that, because "there is . . . no constitutional right to post-conviction proceedings[,]" " '[t]here is no constitutional right to an attorney in state post-conviction proceedings.' " (Citations omitted). Relying on the United States Supreme Court's opinion in *Pennsylvania v. Finley*, 481 U.S. 551, 95 L. Ed. 2d 539 (1987), the State concludes: "Thus, even when an indigent defendant has a state-created right to counsel at post-conviction, 'she has no constitutional right to insist on the *Anders* procedures which were designed solely to protect' the 'underlying constitutional right to appointed counsel.' *Finley*, 481 U.S. at 557, 95 L. Ed. 2d at 547."

While we agree with the State, as discussed below, that defendants who appeal pursuant to N.C.G.S. § 15A-270.1 have no constitutional right

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2. The State makes this same argument in two additional appeals currently before this Court, *State v. Ross*, COA17-442, and *State v. Tapia*, COA17-471, the decisions of which we file concurrently with this opinion.

to seek *Anders* review, we disagree with the clear implication of the State's argument – that this Court is prohibited from recognizing a right of *Anders*-type review separate from that constitutionally mandated pursuant to the *Anders* decision itself and its progeny.

1. Review Mandated by the United States Constitution

In *Finley*, the United States Supreme Court held that "*Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel." *Finley*, 481 U.S. at 555, 95 L. Ed. 2d at 545. The Court reasoned:

> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.

Id. at 555, 95 L. Ed. 2d at 545-46. For this reason, the Court held that the protections of *Anders* are not constitutionally mandated in post-conviction proceedings, even when defendants have been provided access to appointed appellate counsel by statute: "[W]e reject respondent's argument that the *Anders* procedures should be applied to a state-created right to counsel on postconviction review just because they are applied to the right to counsel on first appeal[.]" *Id.* at 556, 95 L. Ed. 2d at 546. As explained in *Finley*, "[s]ince [the defendant] has no underlying constitutional right to appointed counsel in state postconviction proceedings, [he] has no constitutional right to insist on the *Anders* procedures which were designed solely to protect that underlying constitutional right." *Id.* at 557, 95 L. Ed. 2d at 547.

The right to counsel on appeal from an order denying post-conviction DNA testing is not of constitutional origin. It is purely a creature of statute, specifically N.C.G.S. § 15A-270.1, which provides as follows:

> The defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal. The court shall appoint counsel in

> accordance with rules adopted by the Office of Indigent Defense Services upon a finding of indigency.

Id. For these reasons, appellate counsel representing defendants based upon the right of appeal granted pursuant to N.C.G.S. § 15A-270.1 are not *constitutionally mandated* to conform to the requirements established in *Anders* when they are unable to identify any meritorious grounds for appellate review. However, our review of this issue does not end here.

The United States Supreme Court is charged with determining what constitutes the *minimum* rights and protections guaranteed by the United States Constitution. States are of course free to permit, or require, procedures that afford protections beyond what is constitutionally mandated.[3] Therefore, because the General Assembly has created a general right of appeal from the denial of motions made pursuant to the Act, this Court clearly has *jurisdiction* to consider the request for *Anders*-type review made by Defendant's appellate counsel. *State v. Thomsen*, 369 N.C. 22, 25, 789 S.E.2d 639, 641–42 (2016) ("because the state constitution gives the General Assembly the power to define the jurisdiction of the Court of Appeals, only the General Assembly can take away the jurisdiction that it has conferred"). Absent some superseding statute, holding, or rule, this Court has the discretion to decide whether to conduct the review requested by Defendant's appellate counsel. The State directs us to no contrary authority.

2. The Authority of This Court to Recognize a Right to Anders-Type Review

The State first notes that "this Court has declined to apply *Anders* to civil proceedings, notwithstanding a defendant's statutory right to counsel at such proceedings."[4] The State then argues that "a motion for post-conviction DNA testing is comparable to a collateral civil action, much like a habeas petition[,]" and is therefore "not a criminal action[.]" In support, the State cites the statutory definitions of civil and criminal actions, and this Court's opinion in *State v. Gardner*, 227 N.C. App. 364, 742 S.E.2d 352 (2013). The State contends that in *Gardner* this Court applied "the general rule in civil cases to defendant's motion for post-conviction DNA testing[.]" However, we do not read *Gardner* as holding that actions pursuant to the Act are civil in nature. In *Gardner*, this Court

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3. Absent federal preemption.

4. As noted below, our Supreme Court *has* decided to afford *Anders*-type review to certain civil proceedings pursuant to Rule 3.1(d) of the North Carolina Rules of Civil Procedure.

stated that, as a general rule in civil cases, when the trial court rules on motions or enters orders *ex mero motu*, findings and conclusions are only required if specifically requested by a party. *Id.* at 370, 742 S.E.2d at 356 (citation omitted). This Court then stated: "N.C. Gen. Stat. § 15A–269 contains no requirement that the trial court make specific findings of facts, and we decline to impose such a requirement."[5] *Id.*

However, this Court, in an earlier opinion, introduced discussion of a defendant's right of appeal pursuant to N.C. Gen. Stat. § 15A–270.1 as follows: "In North Carolina, a defendant's right to appeal *in a criminal proceeding* is purely a creation of state statute. . . . . Generally, there is no right to appeal in a criminal case except from a conviction or upon a plea of guilty." *State v. Norman*, 202 N.C. App. 329, 332, 688 S.E.2d 512, 514–15 (2010) (quotation marks and citations omitted) (emphasis added); *see also State v. Rios*, __ N.C. App. __, 803 S.E.2d 698 (2017) (unpublished) and *State v. Carroll*, __ N.C. App. __, 797 S.E.2d 710 (2017) (unpublished) (both opinions applying N.C. R. App. P. 4(a)(2) in determining the defendants' notices of appeal from denial of motions for post-conviction DNA testing were not timely filed);[6] *State v. Patton*, 224 N.C. App. 399, 2012 WL 6590534 (2012) (unpublished) (the defendant's oral notice of appeal given immediately after the trial court denied his motion for post-conviction DNA testing preserved his right to appeal pursuant to N.C. Gen. § 15A–270.1);[7] *State v. Brown*, 170 N.C. App. 601, 605-06, 613 S.E.2d 284, 287 (2005) (emphasis added) (a case decided before the enactment of N.C.G.S. § 15A–270.1 and applying N.C. R. App. P. 4(a), holding that, because the right to appeal in criminal proceedings is a purely statutory right, no right of appeal existed from decisions of the trial court pursuant to the Act because no right of appeal was included in that section, and no "other statutes governing *criminal proceedings* provide a right to appeal in cases such as this one"). Appeal pursuant to N.C.G.S. § 15A–270.1 is an appeal from a criminal proceeding.

In the absence of precedent from criminal appeals, the State directs us to prior decisions of this Court in which we decided not to extend the right to *Anders* procedures to certain civil matters. For example, the State cites *In re Harrison*, 136 N.C. App. 831, 526 S.E.2d 502 (2000), an opinion in which we declined to extend the *right* to *Anders* review

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5. Chapter 15A is, of course, the Criminal Procedure Act.

6. "Rule 4. Appeal in Criminal Cases – How and When Taken" is the rule of appellate procedure that applies to criminal appeals. N.C.R. App. P. 4(a). If appeal from N.C.G.S. § 15A-270.1 was an appeal from a civil proceeding, we would apply Rule 3. N.C.R. App. P. 3.

7. Oral notice of appeal is only valid in an appeal from a criminal proceeding.

to parents who appeal from orders terminating their parental rights ("TPR" orders). It is instructive to conduct a review of this Court's opinion in *Harrison*, and to review other opinions addressing the issue of the availability of *Anders* review when the right to that review is not *constitutionally mandated*.

In deciding not to extend *Anders* protections to appeals from TPR orders, this Court in *Harrison* reasoned: " 'An attorney for a *criminal* defendant who believes that his client's appeal is without merit is permitted to file what has become known as an *Anders* brief.' However, this jurisdiction has not extended the procedures and protections afforded in *Anders* and *Kinch* to civil cases." *Id.* at 832, 526 S.E.2d at 502 (citation omitted).[8] In support of our decision not to extend *Anders* protections to TPR cases, this Court in *Harrison* noted: "The majority of states who have addressed this issue have found that *Anders* does not extend to civil cases, including termination of parental rights cases." *Id.* This Court decided to adopt what it then considered to be the "majority rule," and directly adopted the reasoning from an Arizona opinion, concluding that " 'counsel for a parent appealing from a juvenile court's severance order has no right to file an *Anders* brief.' " *Id.* at 833, 526 S.E.2d at 503 (quoting *Denise H. v. Arizona Dept. of Economic Sec.*, 193 Ariz. 257, 259, 972 P.2d 241, 243 (1998)). Despite holding that there was no right of *Anders* review in TPR appeals, this Court in *Harrison* exercised its discretion and conducted the requested *Anders* review anyway.[9] *Id.* Importantly, for our analysis in the present case, in *Harrison* this Court implicitly recognized that *it has the authority to decide whether to extend Anders protections and requirements beyond what is constitutionally mandated*. *Id.*

To the extent that this Court in *Harrison* included a general holding that we would not extend *Anders* review to civil cases, two very important facts were thereby established.[10] First, *Harrison* and

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8. It is important to note that the language in *Harrison* stating that *Anders* protections have not been extended to civil cases is *not* a holding — it is a statement of fact made to introduce this Court's subsequent analysis. Unfortunately, this language has been cited in some subsequent opinions as if it constituted binding precedent.

9. We note that in a number of opinions in which this Court determined *Anders* did not apply, this Court, in its discretion, still conducted the requested *Anders* review. This Court's authority to conduct *Anders* review in those cases was never challenged.

10. Although the holding in *Harrison* has been characterized as one denying *Anders* review in civil cases, *see In re N.B.*, *N.B.*, *J.B.*, *N.B.*, *& J.B.*, 183 N.C. App. 114, 116-17, 644 S.E.2d 22, 24 (2007) ("[i]n *Harrison*, this Court declined to extend the holding of *Anders* to civil cases, including termination of parental rights cases"), this Court in *Harrison* was

its progeny have always recognized the difference between civil and criminal appeals, and nothing in any of our opinions suggests that *Anders* related holdings in civil appeals should inform, much less bind, this Court when considering criminal appeals. *Harrison* itself mainly reaches its holding on the basis that the rights of the appealing parties and the burdens of proof required in termination of parental rights cases, which are civil, are not comparable to those in criminal appeals. *Harrison*, 136 N.C. App. at 833, 526 S.E.2d at 503 (citation omitted) (" 'the burdens of proof are neither "very similar" nor do they derive from the same source. Because a parent whose rights are terminated is not equivalent to a convicted criminal, we conclude that counsel for a parent appealing from a juvenile court's severance order has no right to file an *Anders* brief.' "). We can find no case in which an appellate court of this State has denied *Anders* review in a criminal appeal. The closest we come is in the satellite based monitoring ("SBM") context, where this Court relied on *dicta* from *Harrison* to deny *Anders* review:

> [C]ounsel appointed to represent defendant on appeal has filed an *Anders* brief indicating he "has been unable to identify any non-frivolous issue that could be raised in this appeal." He asks this Court to conduct its own review of the record for possible prejudicial error in accordance with *Anders* and *Kinch*. "Our Court has held that SBM hearings and proceedings *are not criminal actions*, *but are instead a 'civil regulatory scheme*[.]' " "[T]his jurisdiction has not extended the procedures and protections afforded in *Anders* and *Kinch* to civil cases." *In re Harrison*, 136 N.C. App. 831, 832, 526 S.E.2d 502, 502 (2000). Nevertheless, in the exercise of our discretion pursuant to N.C. R. App. P. Rule 2 (2012), we have reviewed the record and found no error. Consequently, we affirm the trial court's SBM order.

State v. Lineberger, 221 N.C. App. 241, 243, 726 S.E.2d 205, 207 (2012) (citations omitted) (emphasis added). This Court in *Lineberger* determined it was bound by *Harrison* because SBM proceedings are *civil* in nature. Neither *Harrison* nor any other opinion involving *Anders*

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specifically considering a termination of parental rights case, and it specifically adopted the reasoning of an Arizona case in support of its holding. The Arizona case was also limited to a termination of parental rights proceeding, and the portion of that opinion quoted and adopted in *Harrison* does not make any holding broader than that counsel for parents appealing an order terminating their parental rights have "no right to file an *Anders* brief." *Harrison*, 136 N.C. App. at 833, 526 S.E.2d at 503 (citation omitted). It is unclear that the holding in *Harrison* was intended to be applied outside the termination of parental rights context.

review in civil matters constitutes binding precedent in the criminal matter presently before us.

Second, this Court in *Harrison* – by the very act of conducting an analysis of the issue, considering the "majority" and "minority" rules from other jurisdictions, and adopting one of those rules – was exercising its *authority* to make that determination. Put differently, this Court in *Harrison could* have held that *Anders* applied in appeals from TPR proceedings, but *decided* not to. This Court in *Harrison* did not hold, state, or in any manner indicate that it was *without the authority to make that choice absent action by our Supreme Court or our General Assembly*. Further, as discussed further below, this Court has held, without any prior "right" created by our Supreme Court or our General Assembly, that the right to effective assistance of counsel – which is only a "right," in the constitutional sense, that applies to criminal defendants – also applies in civil TPR proceedings. *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996). This right, in the TPR context, was therefore "created" by this Court, acting alone.

Also of note, this Court, acting without prior permission or guidance from either our Supreme Court or the General Assembly, has held that *Anders* review applies in appeals from proceedings in which a juvenile has been adjudicated delinquent. *In re May*, 153 N.C. App. 299, 301, 569 S.E.2d 704, 707 (2002) ("an attorney for an indigent juvenile adjudicated to be delinquent may file an *Anders* brief in the appellate courts of this state"). Juvenile delinquency proceedings are generally considered civil proceedings. *See Turner v. Rogers*, 564 U.S. 431, 443, 180 L. Ed. 2d 452, 462 (2011) (referring to the "civil juvenile delinquency proceeding"). For this reason, the United States Supreme Court has held that not all constitutional protections required in a criminal proceeding are required in the analogous juvenile proceeding. *In re Gault*, 387 U.S. 1, 30-31, 18 L.Ed.2d 527, 548 (1967) (" 'We do not mean to indicate that the hearing to be held [in a juvenile proceeding] must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' "); *see also In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368 (1970).

Post-*Harrison*, this Court was again asked to extend the *Anders* procedures to TPR proceedings in N.B., 183 N.C. App. at 117, 644 S.E.2d at 24. After determining that we were bound by the holding in *Harrison*,[11]

11. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

and could not recognize a right that had already been specifically denied by *Harrison*, this Court stated:

> [W]e take this opportunity to urge our Supreme Court or the General Assembly to reconsider this issue. As Respondent's counsel has forcefully argued, an attorney appointed to represent an indigent client whose appeal is wholly frivolous is faced with a conflict between the duty to "zealously assert[ ] the client's position under the rules of the adversary position[,]" N.C. Rules of Professional Conduct, Rule 0.1, and the prohibition on advancing frivolous claims, N.C. Rules of Professional Conduct, Rule 3.1. Further, at the present time, courts in at least thirteen states have allowed attorneys to file no-merit briefs pursuant to *Anders* in juvenile appeals. *See* Wis. Stat. § 809.32(1)(a) (requiring appointed counsel to file a "no-merit report" in an appeal of a termination order if the appeal is frivolous); *In the Matter of Justina Rose D.*, 28 A.D.3d 659, 659, 813 N.Y.S.2d 229, 231 (N.Y. App. 2006) (applying the *Anders* procedure to an appeal of an order terminating an indigent parent's rights); *Linker–Flores v. Dept. of Human Services*, 359 Ark. 131, [141], 194 S.W.3d 739, 747 (Ark. 2004) (holding that the *Anders* procedure correctly balances the rights of indigent parents with the obligations of their appointed attorneys, and adopting the procedure for appeals of termination cases involving indigent parents)[.[12]] However, other than North Carolina, only four states that have addressed the issue continue to prohibit such a practice. Additionally, permitting such review furthers the stated purposes of our juvenile code. *See* N.C. Gen. Stat. § 7B–100 (2005).

Id. at 117–19, 644 S.E.2d at 24–25 (citations omitted). Our Supreme Court added a provision to our Rules of Appellate Procedure, effective for all cases appealed after 1 October 2009, allowing an *Anders*-like procedure for appeals taken pursuant to N.C. Gen. Stat. § 7B-1001, including from TPR orders. N.C. R. App. P. R. 3.1(d).[13] Thus, our Supreme Court has also

12. Following these three citations, *N.B.* includes ten more citations to opinions from different jurisdictions that affirmed or granted *Anders* review in TPR appeals.

13. We can find nothing in our Rules of Appellate Procedure that would prevent us from allowing *Anders*-type review in the matter before us. Further, our Supreme Court has repeatedly stated its preference that appeals be decided on the merits, and not be dismissed for non-jurisdictional rules violations. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198–99, 657 S.E.2d 361, 365–66 (2008).

recognized the authority of our appellate courts, even absent enabling legislation, to decide whether to extend *Anders* protections into areas, such as determinations of child custody, not constitutionally *required* by *Anders* or its progeny – such as *Finley*. This is in line with other jurisdictions that recognize this authority in their appellate courts. *See N.B.*, 183 N.C. App. at 117-19, 644 S.E.2d at 24-25 and cases cited therein; *see also In re NRL*, 344 P.3d 759, 760 (Wyo. 2015) and cases cited.

In the 2015 case of *NRL*, the Supreme Court of Wyoming noted that the majority of jurisdictions had decided to apply *Anders* protections to TPR cases, and adopted that majority position. *Id.* at 760. In so doing, the Court in *NRL* recognized that, in deciding to extend *Anders* protections, "many states reasoned that the nature of the case,"

> *i.e.*, civil rather than criminal, makes no difference in the duties court-appointed counsel owes his or her client. From counsel's perspective, counsel's duty to competently and diligently represent the client is exactly the same in a civil appeal from an order terminating parental rights as in an appeal from a criminal conviction. Moreover, in both criminal and termination of parental rights cases, counsel may conclude, after thoroughly and conscientiously examining the case, that a case lacks any nonfrivolous issues for appeal. Despite the civil or criminal nature of the appeal, counsel in such a situation faces the same dilemma of having to diligently represent the indigent client who wants to appeal while still complying with counsel's other ethical duties as a member of the Bar.

Id.

We also find the reasoning of the Texas Court of Appeals, 14th District, instructive:

> Although the Texas Supreme Court has not addressed the applicability of *Anders* to parental-termination appeals, its holdings in two recent cases are instructive. Last year, the Texas Supreme Court held that a Statutory right to effective assistance of counsel exists in parental-rights termination cases. In doing so, our high court extended the *Strickland* test used in the criminal context to civil parental-rights termination proceedings.[14] The procedure prescribed by

14. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

> the United States Supreme Court in *Anders* derives from the Sixth Amendment right to counsel. Therefore, it seems logical to conclude that the Texas Supreme Court would allow the filing of an *Anders* brief derived from this right in the parental-rights termination context.

In re D.E.S., 135 S.W.3d 326, 329 (Tex. App. – 14th Dist. 2004) (citations omitted).

This Court has also recognized that, where a statutory right to counsel exists, that right includes the right to effective assistance of counsel as set forth in *Strickland*:

> N.C. Gen. Stat. § 7A–289.23 (1995) guarantees a parent's right to counsel in all proceedings dedicated to the termination of parental rights. Given that this right exists, it follows that a remedy must also exist to cure violations of this statutory right. If no remedy were provided a parent for inadequate representation, the statutory right to counsel would become an "empty formality." *In re Bishop*, 92 N.C. App. at 664-65, 375 S.E.2d at 678. "Therefore, the right to counsel provided by G.S. 7A–289.23 includes the right to effective assistance of counsel." *Id.* at 665, 375 S.E.2d at 678.[15]

Oghenekevebe, 123 N.C. App. at 436, 473 S.E.2d at 396. The *Strickland* test is the appropriate test to demonstrate ineffective assistance of counsel in North Carolina as well, whether in a criminal or a civil setting. *Id.*; *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). N.C.G.S. § 15A-270.1 provides a statutory right to counsel, and thus the right to effective assistance of counsel as set forth in the Sixth Amendment based *Strickland/Braswell* test. We see no valid reason to deny *Anders*-type protections to defendants in criminal proceedings from which there is a statutory right of appeal, and can discern no compelling reason why this Court, or the State, would find it desirable to place appointed counsel in the position of choosing "between the duty to 'zealously assert[ ] the client's position under the rules of the adversary position[,]' N.C. Rules of Professional Conduct, Rule 0.1, and the prohibition on advancing frivolous claims, N.C. Rules of Professional Conduct, Rule 3.1." *N.B.*, 183 N.C. App. at 117, 644 S.E.2d at 24.

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15. We point out that in *Bishop*, this Court for the first time recognized a right to effective assistance of counsel in termination proceedings, and imposed the *Strickland/Braswell* test, even though this right is not constitutionally mandated.

We find the decision to apply *Anders* procedures to appeals pursuant to N.C.G.S. § 15A–270.1 even more compelling in light of this Court's recent opinion in *Sayre*. In *Sayre*, the defendant's counsel filed an *Anders* brief stating he could find no meritorious issues for appeal. *Sayre*, __ N.C. App. __, 803 S.E.2d 699, 2017 WL 3480951, *1 (2017). The defendant filed a *pro se* brief pursuant to *Anders*, and this Court conducted the appropriate review. *Id.* The majority affirmed, holding: "We have been unable to find any possible prejudicial error, and we conclude that the appeal is wholly frivolous." *Id.* at *2. Judge Murphy dissented, stating: "I respectfully dissent from the Majority's opinion because [the d]efendant made allegations sufficient under the plain language of the statute entitling him to the appointment of counsel to maintain his motion for post-conviction DNA testing." *Id.* at *4. *Sayre* is currently awaiting review by our Supreme Court. Absent this Court's decision to conduct an *Anders* review in *Sayre*, the defendant would not have had the opportunity to present his possibly meritorious argument once his counsel determined that he could not locate any non-frivolous arguments based upon the record before him.

In the present matter, the concurring opinion, relying on N.C.R. App. P. 28, argues that we should not address the *Anders* issue in this opinion because it was not first brought up and argued in Defendant's brief. We believe the fact that Defendant's attorney *filed an Anders brief* is sufficient to raise the issue and present it for appellate review. Further, the State's *sole* argument on appeal is that we should dismiss Defendant's appeal based on a determination that *Anders* review cannot be requested in an appeal pursuant to N.C.G.S. § 15A-270.1. The concurring opinion would have us refuse to address the State's argument on appeal. If this Court was to refuse to address the State's argument, our remaining option for review would be to simply conduct the requested *Anders* review, just as we have done in every prior appeal that requested *Anders* review pursuant to N.C.G.S. § 15A-270.1. However, the concurring opinion implicitly argues that we *should* conduct the review, but only to the point where we determine *Anders* review is not constitutionally mandated on appeal pursuant to N.C.G.S. § 15A-270.1, and *then* use our discretionary supervisory powers to conduct an *Anders* review in this case, without making any broader holding. As stated, we believe Defendant's brief requesting *Anders* review and the State's brief contending that we cannot apply *Anders* review to this appeal place this issue squarely before us and meet the requirements of Rule 28. Assuming, *arguendo*, this issue was not preserved for appellate review, in light of Defendant's clear reliance on the precedent of this Court in conducting *Anders* review, without reservation, whenever it has been asked to do

so on appeal pursuant to N.C.G.S. § 15A-270.1, we invoke Rule 2 of our Rules of Appellate Procedure to "suspend or vary the requirements" of Rule 28 in order to "prevent manifest injustice" and "expedite decision in the public interest," N.C.R. App. P. 2, address the State's sole argument in opposition to Defendant's appeal, and settle a question of law that would be certain to otherwise recur.

Our precedent establishes that this Court has *both* jurisdiction *and* the authority to decide whether *Anders*-type review should be prohibited, allowed, or required in appeals from N.C.G.S. § 15A-270.1. Exercising this discretionary authority, we hold that *Anders* procedures apply to appeals pursuant to N.C.G.S. § 15A–270.1. We wish to make clear, in order to avoid potential misapplication, that our holding is limited to the issue before us – appeal pursuant to N.C.G.S. § 15A–270.1. Having held that Defendant's counsel had the right to proceed in this matter pursuant to *Anders* procedures, we now address the merits of Defendant's arguments.

B. *Anders Review*

[2] "Under our review pursuant to *Anders* and *Kinch*, 'we must determine from a full examination of all the proceedings whether the appeal is wholly frivolous.' " *State v. Frink*, 177 N.C. App. 144, 145, 627 S.E.2d 472, 473 (2006) (citation omitted). "In carrying out this duty, we will review the legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous." *Id.* (citation omitted).

Based on our review, we agree with counsel that the appeal is wholly frivolous. Defendant asserts he did not act with premeditation and deliberation in killing Ms. Barefoot; nor did he "c[o]me to Ms. Barefoot's apartment with an intent to commit a felony therein." Defendant's averments bear no relation to the integrity of the DNA evidence presented at his trial or to the potential value of additional testing. Thus, they are not relevant to the issue currently before this Court: whether the trial court erred in denying Defendant's motion to locate and preserve evidence and for post-conviction DNA testing under N.C.G.S. § 15A-269. Defendant's argument is also wholly at odds with the theory presented in his motion to the trial court, *i.e.*, that further DNA testing would prove he was not the perpetrator of the crime. We note on that account that Defendant has not demonstrated how, based upon the facts of this case, DNA testing could possibly assist him in any post-conviction review. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judge CALABRIA concurs.

Judge DILLON concurs with separate opinion.

DILLON, Judge, concurring.

I concur in the result reached by the majority. I write separately, however, to address the majority's statement that "*Anders* procedures apply to appeals pursuant to N.C.G.S. § 15A-270.1." I agree with the majority's statement to the extent that it suggests that we have jurisdiction (i.e., the authority) to conduct an *Anders*-like review in the context of an appeal brought pursuant to N.C. Gen. Stat. § 15A-270.1. However, to the extent that the majority's statement suggests that we are *required* to conduct an *Anders*-like review, I respectfully disagree. I conclude that an appellant's *right* to have issues reviewed on appeal is limited by Rule 28 of our Rules of Appellate Procedure promulgated by our Supreme Court, which provides that "[t]he scope of review on appeal is limited to issues so presented in the several briefs." N.C. R. App. P. 28(a).

Our State Constitution provides that our "Supreme Court shall have exclusive authority to make rules of procedures and practice for the Appellate Division." N.C. Const. Art. IV, sec. 13(2). Pursuant to its exclusive authority, our Supreme Court has promulgated Rule 28(a), which limits *the right* to a review by our Court to those issues raised in the appellate briefs, though *in our discretion* we can waive Rule 28(a) by invoking Rule 2 of the North Carolina Rules of Appellate Procedure in order to review other issues. N.C. R. App. P. 2. Rule 28(a)'s limited right to review, however, is qualified somewhat by the United States Supreme Court decision in *Anders v. California*, 386 U.S. 738 (1967), in which the U.S. Supreme Court determined that an appellant has the right to review of issues not raised in his brief in certain circumstances. Specifically, in *Anders*, that Court held that indigent defendants are entitled under our federal constitution to certain procedures during a *first* appeal of right where appointed counsel fails to discern a non-frivolous appellate issue. *Anders v. California*, 386 U.S. at 744. These procedures include (1) a party's right to file a brief when his attorney has filed a "no merit" brief and (2) a party's right to a full search of the record by the appellate court, even if no meritorious issues were raised by the party or the party's attorney.

In a later case, the U.S. Supreme Court held that under our federal constitution, an indigent defendant is not entitled to *Anders* procedures

on *subsequent* post-conviction appeals even where state law provides such defendants a right to counsel for that appeal. *See Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987).

Our General Assembly has provided indigent defendants the right to appellate counsel when appealing an order denying post-conviction DNA testing. *See* N.C. Gen. Stat. § 15A-270.1. However, our General Assembly has not provided these defendants the right to *Anders* procedures, including any right to a full *Anders* review. Neither our State Constitution nor the federal constitution provides for such right. And our Supreme Court has not provided for such a right by appellate rule or otherwise. Our Court's authority to recognize such a right is limited by any controlling authority to the contrary. Therefore, I conclude that Rule 28(a) compels us to hold that an indigent appellant who appeals pursuant to N.C. Gen. Stat. § 15A-270.1 has no *right* to review by our Court of any issues not properly raised in the briefs.

I find instructive the process by which the right to certain *Anders* procedures were provided in the context of an indigent parent's appeal of a disposition order. Like in the current case, our General Assembly has provided the right to appellate counsel in that civil context. We held, though, that an indigent parent with this statutory right to counsel had no right to *Anders* procedures; but we urged "our Supreme Court or the General Assembly to reconsider this issue." *In re N.B.* 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007). Our Supreme Court responded by promulgating Rule 3.1(d), creating a right to *certain Anders*-type procedures in that context. N.C. R. App. P. 3.1(d). Specifically, Rule 3.1(d) grants an indigent parent the right to raise issues in a separate brief where appellant's counsel has filed a "no-merit" brief; however, Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised on appeal.

In any case, Rule 3.1(d) does not apply to this present criminal matter brought pursuant to N.C. Gen. Stat. § 15A-270.1. Further, neither our Supreme Court nor our General Assembly has created any *right* to an *Anders*-like review by our Court in the context of an appeal brought pursuant to N.C. Gen. Stat. § 15A-270.1. Therefore, until our Supreme Court, by rule or holding, or our General Assembly, by law, creates such a right, I conclude that we must follow Rule 28(a), which limits the right of appellants to review only of issues raised in their briefs. This is not to say that we cannot exercise our discretion to consider issues not properly raised in the briefs, as we have done here.

SUMMERVILLE v. SUMMERVILLE

[259 N.C. App. 228 (2018)]

KIMBERLY SUMMERVILLE, PLAINTIFF
v.
MARK KENNETH SUMMERVILLE, DEFENDANT

No. COA17-690

Filed 17 April 2018

1. Child Custody and Support—child custody—modification—permanent order—improperly labeled as temporary

Although a trial judge in a child custody case labeled a custody order as temporary, it was in fact permanent. The trial court was authorized to determine whether a custody modification was in the child's best interests only if it first determined that there had been a substantial change in circumstances.

2. Child Custody and Support—child custody—modification—substantial change in circumstances—time period—negative effect on child

The trial court did not err in a child custody modification case by finding a substantial change in circumstances where the findings demonstrated that the trial court properly considered the time period and also supported the conclusion that defendant father's actions toward his autistic child during this time had a negative effect on the child.

3. Child Custody and Support—child custody—sua sponte modification—no motion to modify

The trial court erred in a child custody modification case by making a sua sponte modification of defendant father's child support obligation where neither party had filed a motion to modify child support prior to the entry of a later order. Some action is required by the parties in order to satisfy the underlying purpose of N.C.G.S. § 50-13.7(a).

4. Contempt—criminal contempt—appeal to superior court—exclusive jurisdiction

The Court of Appeals lacked jurisdiction in a child custody modification case to review the trial court's finding of contempt against defendant father where, although a fine was imposed as a part of a purge condition, the trial court concluded that defendant should be held in criminal contempt. Defendant's sole recourse was an appeal to superior court.

5. Attorney Fees—child custody modification—statutory authorization

The trial court did not err in a child custody modification case by awarding attorney fees to plaintiff mother where the award was authorized under N.C.G.S. § 50-13.6 based on plaintiff's defense of defendant father's motion to modify custody. The fees were not connected to the trial court's decision to hold defendant in criminal contempt, and the trial court's findings were sufficient to support its reasonable award.

Appeal by defendant from orders entered 16 December 2016, 20 December 2016, and 30 December 2016 by Judge Lunsford Long in Chatham County District Court. Heard in the Court of Appeals 8 January 2018.

Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellee.

Ellis Family Law, P.L.L.C., by Gray Ellis and Jillian E. Mack, for defendant-appellant.

DAVIS, Judge.

This appeal raises several issues in connection with the divorce of Kimberly and Mark Kenneth Summerville. The questions specifically before us are whether the trial court erred by (1) modifying the parties' child custody arrangement despite the absence of sufficient evidence of a substantial change in circumstances; (2) making a *sua sponte* modification of Mr. Summerville's existing child support award; (3) holding Mr. Summerville in contempt for his violations of prior court orders; and (4) awarding attorneys' fees to Ms. Summerville without making necessary findings that the fees awarded were reasonable. After a thorough review of the record and applicable law, we affirm in part, vacate in part, and dismiss this appeal in part.

Factual and Procedural Background

The parties were married on 30 June 2001. One child ("Aaron")[1] was born of the marriage. Aaron was diagnosed with autism when he was in the first grade.

1. A pseudonym is used throughout this opinion to protect the privacy of the minor child and for ease of reading.

The parties separated on 15 August 2011 and divorced on 26 August 2013. On 12 August 2013, the parties entered into a consent custody order (the "12 August 2013 Order") in which they agreed to joint legal custody and equal physical custody of Aaron.

On 10 February 2015, Ms. Summerville filed a motion in the cause in Chatham County District Court asserting that Mr. Summerville was in violation of the 12 August 2013 Order because he had not provided appropriate medicine and therapy for Aaron. In her motion, she requested that Mr. Summerville be held in contempt for his violations of the order.

A hearing was held on 3 March 2015 before the Honorable James T. Bryan, III, and an order captioned "Temporary Custody, Visitation Order, and Contempt Order" (the "1 May 2015 Order") was subsequently entered. In this order, Judge Bryan found that Mr. Summerville had failed to provide prescription medicine for Aaron, repeatedly questioned the therapeutic approach taken by Aaron's therapist, and failed to bring Aaron to therapy 43% of the time.

Based on his findings, Judge Bryan determined a substantial change in circumstances had occurred that warranted modification of the 12 August 2013 Order, and he awarded Ms. Summerville "sole legal medical decision-making [authority] in the area of any medical care for the minor child . . . ." The parties retained joint legal custody, but the court modified the parties' physical custodial schedule. On 19 June 2015, the parties signed a consent order in which they agreed that Mr. Summerville would pay 60% of Ms. Summerville's attorneys' fees related to the filing of her 10 February 2015 motion.

On 4 March 2016, Mr. Summerville filed a motion to modify custody, alleging in pertinent part that Aaron had been "encouraged to defy [Mr. Summerville's] authority while . . . in [his] care" and "has spent an increasing amount of time out of the classroom due to the interventions by [Ms. Summerville] . . . ." Mr. Summerville's motion requested that the trial court grant him primary physical and sole legal custody.

On 14 March 2016, Ms. Summerville filed a motion in the cause and a motion for a show cause order. In her motion, she requested that the trial court hold Mr. Summerville in contempt based on his repeated failures to comply with the court's orders. She alleged, in part, that Mr. Summerville had failed to give Aaron his medications, discouraged Aaron from using coping mechanisms recommended by his therapist, and refused to allow Aaron to call Ms. Summerville while in Mr. Summerville's care. Her motion requested that the court grant her primary physical and sole legal custody of Aaron and order Mr. Summerville to pay her attorneys' fees.

Hearings were held in June 2016 and October 2016 before the Honorable Lunsford Long on the parties' pending motions. On 16 December 2016, the trial court entered an order (1) awarding primary physical and sole legal custody of Aaron to Ms. Summerville; (2) modifying Mr. Summerville's child support obligation; and (3) holding Mr. Summerville in contempt for his violations of the 1 May 2015 Order.

On 20 December 2016, the trial court entered an order requiring Mr. Summerville to pay $42,220 in attorneys' fees to Ms. Summerville with regard to her defense of his motion to modify custody. On 30 December 2016, the trial court entered an order captioned "Amendment of Judgment/Order" in which it clarified its 16 December 2016 order by stating its determination that criminal contempt — as opposed to civil contempt — was appropriate based on Mr. Summerville's conduct. On 13 January 2017, Mr. Summerville filed a notice of appeal as to all three orders.

Analysis

I. Modification of Child Custody

In his first argument, Mr. Summerville contends that the trial court lacked the authority to modify the parties' custody of Aaron absent sufficient evidence and accompanying findings of a substantial change in circumstances since the 1 May 2015 Order was entered. "When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted). If so, we "must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254 (citation omitted). "The issue of whether a trial court has utilized the correct legal standard in ruling on a request for modification of custody is a question of law that we review *de novo*." *Hatcher v. Matthews*, __ N.C. App. __, __, 789 S.E.2d 499, 501 (2016) (citation omitted).

Our Supreme Court has made clear that "[o]ur trial courts are vested with broad discretion in child custody matters." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253 (citation omitted). "Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary." *Id.* at 475, 586 S.E.2d at 253-54 (citation and quotation marks omitted).

A. Classification of Prior Custody Order as Permanent or Temporary

[1] As an initial matter, we must determine whether the 1 May 2015 Order was a permanent or temporary custody order. The distinction is important because

> [i]f a child custody order is final, a party moving for its modification must first show a substantial change of circumstances. If a child custody order is temporary in nature . . . the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change of circumstances.

LaValley v. LaValley, 151 N.C. App. 290, 292, 564 S.E.2d 913, 914-15 (2002) (internal citations and footnote omitted).

We observe that the 1 May 2015 Order was labeled by Judge Bryan as a temporary order. Mr. Summerville contends, however, that the order should nevertheless be deemed a permanent one. We agree.

"The issue of whether an order is temporary or final in nature is a question of law that is reviewed *de novo* on appeal." *Hatcher*, __ N.C. App. at __, 789 S.E.2d at 502 (citation omitted). 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." *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (citation, quotation marks, and brackets omitted), *disc. review denied*, 363 N.C. 375, 678 S.E.2d 670 (2009). "If an order does not meet any of these criteria, it is considered permanent." *Hatcher*, __ N.C. App. at __, 789 S.E.2d at 502 (citation omitted). Our case law demonstrates that "[a] trial court's designation of an order as 'temporary' or 'permanent' is not dispositive or binding on an appellate court." *Id.* at __, 789 S.E.2d at 502 (citation omitted).

Despite Judge Bryan's labeling of the 1 May 2015 Order as a "temporary order," it does not meet any of the characteristics that would make it so. It was not entered without prejudice to either party. Nor did it state a date for the parties to reconvene. Finally, the order did, in fact, determine all of the issues before the court at that time.

Thus, the 1 May 2015 Order was a permanent custody order. As such, the trial court was authorized to determine whether a modification of custody was in Aaron's best interests only if it first determined that there had been a substantial change in circumstances since the 1 May

2015 Order was entered. *See LaValley*, 151 N.C. App. at 292, 564 S.E.2d at 914-15 (holding that permanent custody orders require party moving for modification to show substantial change in circumstances before proceeding to best interests analysis).

B. Substantial Change in Circumstances

[2] Mr. Summerville contends that the trial court in its 16 December 2016 Order erroneously found a substantial change in circumstances because it (1) improperly examined events occurring before the 1 May 2015 Order was entered in assessing whether a substantial change in circumstances had occurred; and (2) failed to directly link any change in circumstances to an actual effect on the welfare of the minor child. We disagree.

In this order, the trial court made the following pertinent findings of fact:

> 47. . . . [T]he Court was very clear to [Mr. Summerville], by explicitly including in its 2015 Order that should he continue to fail to follow Dr. Meisburger's behavior plan and safety rules (as amended/modified) that would constitute a substantial change in circumstances affecting the welfare of the minor child which might result in a modification of his custodial rights.
>
> . . . .
>
> 63. Due to [Mr. Summerville]'s ongoing refusal to support the minor child's therapy and therapeutic strategies and recommendations after the May 2015 Order, Dr. Meisburger recently discontinued treating the minor child. As a result, the minor child lost his therapist of several years, with whom he had formed a trusting and therapeutic bond. As a result, the minor child must begin all over again bonding with and trusting a new therapist. This process is more difficult for the minor child due to his Autism diagnosis, thus this has negatively impacted the minor child after the entry of the last Court Order.
>
> . . . .
>
> 78. [Mr. Summerville]'s failure to follow the behavior plan and Safety Rules distressed the minor child[,] increased the child's anxiety and made him feel unsafe.

Further, [Mr. Summerville]'s disregard of the Safety Rules, the therapist's recommendations, the Parenting Coordinator's decisions, and the Court's Order modeled to the minor child a flagrant disregard for authority and rules. [Mr. Summerville]'s actions negatively impacted the minor child's therapeutic progress.

79. The child's progress has been limited by the professional recommendations being consistently implemented only during [Ms. Summerville]'s custodial time, but not [Mr. Summerville]'s.

. . . .

81. A significant psychiatric concern is the minor child's memory loss of events which are frightening to him, which is dissociation, a self-protective strategy the child uses when he feels unsafe. For instance, a physical and verbal altercation occurred in March 2016 between the minor child and [Mr. Summerville] over the course of two hours outside of a scouting event. The minor child's therapist heard the entire, approximately two hour recording. During the call, the minor child screamed, wailed loudly, and begged [Ms. Summerville] to pick him up. During the call, the minor child reported that [Mr. Summerville] had hit him on the head, kicked him, and thrown him to the ground, during which the child had hurt his head and scraped his elbow. However, [Mr. Summerville] refused to allow [Ms. Summerville] to pick up the child. By the next day, the child had no memory of the entire two hour incident.

82. The symptom of the child's dissociation shows he is experiencing a severe emotional crisis, which results in him removing an incident altogether from his memory. A significant concern is that if the minor child were mistreated he could not report it.

. . . .

85. After May 2015, on at least three separate occasions the minor child was injured while [Mr. Summerville] failed to follow the Safety Rules and other recommendations of the minor child's psychologist. These include [Mr.

Summerville] hitting the minor child, throwing or tackling the child to the ground although the child was not in danger of harming himself or others; physically pulling or dragging the minor child while the child was distraught; using excessive physical force; throwing a shoe at the minor child striking him in his head; refusing to allow the minor child to take his ten minute break when he was emotionally dysregulated; refusing to allow the minor child to call [Ms. Summerville] even though [Mr. Summerville] knows that [Ms. Summerville]'s call helps the minor child to use his adaptive calming strategies.

86. Since May 2015, the minor child has begged his therapist for someone, such as his therapist, the Parenting Coordinator, the Judge or even the police, [to] make [Mr. Summerville] follow the Safety Rules. Following these physical confrontations with [Mr. Summerville], the minor child regressed in his therapeutic progress, was emotionally distraught at school, and caused the minor child to have difficulty transitioning to [Mr. Summerville]. Also, following physical confrontation with [Mr. Summerville], at times the minor child became more susceptible to environmental triggers, such as a firm voice, feeling restrained, or discussions which he perceived to be an argument, which then led to aggressive outbursts by the child.

87. Since the entry of the last Order, there have been several incidents of [Mr. Summerville] failing to abide by the school's protocols including the child's individualized education plan (IEP). For instance, after the 2015 order [Mr. Summerville] has withheld designated rewards expected by the minor child because the minor child moved himself to a low stimulus environment to perform his calming techniques after a triggering event. [Mr. Summerville] did this even though the school's Behavior Intervention Plan calls for the child to use this exact strategy. The child became confused when teachers, school behavior specialists, his therapist, and [Ms. Summerville] congratulated and validated him for independently calming himself

> during that triggering event, but his father punished him for it by refusing to provide an earned reward.

Mr. Summerville does not challenge any of the above-quoted findings. 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.").

The court's unchallenged findings established that since the entry of the 1 May 2015 Order (1) Aaron's therapist stopped treating him due to Mr. Summerville's refusal to comply with — and be supportive of — therapeutic strategies and recommendations; (2) an altercation occurred in which, according to Aaron, Mr. Summerville hit him, kicked him, and threw him to the ground; (3) Aaron forgot this event the next day, tending to show that he had a dissociative disorder; (4) at least two other incidents occurred during which Mr. Summerville used excessive physical force and refused to allow Aaron to call his mother; (5) Aaron has felt more susceptible to environmental triggers due to Mr. Summerville's physical confrontations with him; and (6) Mr. Summerville has not followed Aaron's IEP, causing Aaron to feel he was being punished when he used calming techniques but received no reward from Mr. Summerville.

Contrary to Mr. Summerville's argument on appeal, these findings demonstrate that in making its changed circumstances determination the trial court did, in fact, properly consider the time period since the 1 May 2015 Order was entered. Moreover, the above-quoted findings clearly support the trial court's conclusion that Mr. Summerville's actions toward Aaron during this time period were having a negative effect on him. Therefore, we affirm the trial court's modification of custody in the 16 December 2016 Order.[2]

II. *Sua Sponte* Modification of Child Support

[3] Mr. Summerville next argues that the trial court improperly made a *sua sponte* modification of his child support obligation as it existed in the 12 August 2013 Order because neither party had filed a motion to modify child support prior to the entry of the 16 December 2016 Order. We agree.

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2. We also reject Mr. Summerville's argument that Judge Long simply relied on Judge Bryan's stated belief that a violation of the 1 May 2015 Order going forward would constitute a substantial change in circumstances. To the contrary, we interpret Judge Long's 16 December 2016 Order as containing his own determination on this issue.

The 16 December 2016 Order stated as follows with regard to the child support issue:

> 20. Counsel for both parties shall exchange copies of each party's 2015 tax returns along with copies of at least three recent paystubs and any other documentation evidencing his/her income not later than November 28, 2016. [Ms. Summerville]'s counsel shall calculate and provide to [Mr. Summerville]'s counsel his child support obligation pursuant to Worksheet A of the presumptive North Carolina Child Support Guidelines not later than December 1. Beginning December 5, 2016, and on the 5th of each month thereafter, [Mr. Summerville] shall pay to [Ms. Summerville] monthly child support of that amount via direct deposit into an account designated by [Ms. Summerville]. Should [Mr. Summerville]'s counsel disagree with said child support calculation, she shall immediately notify [Ms. Summerville]'s counsel of her reasons for her objection and provide her own worksheet A calculation and the matter shall schedule [sic] to be heard before the undersigned Judge in December 2016. Otherwise, the amount determined by [Ms. Summerville]'s counsel is hereby ordered to be [Mr. Summerville]'s permanent child support obligation to [Ms. Summerville] for the support of the minor child.
>
> 21. Each party shall submit an affidavit regarding all assets in which each party has any interest, as well as any debt balances in that party's name, (a net wort [sic] inventory) to the other party not later than November 20, 2016. . . .

N.C. Gen. Stat. § 50-13.7(a) provides in pertinent part that

> [e]xcept as otherwise provided in G.S. 50-13.7A, an order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested subject to the limitations of G.S. 50-13.10.

N.C. Gen. Stat. § 50-13.7(a) (2017).

In addition to the fact that neither of the parties had made a motion to modify Mr. Summerville's preexisting support obligation, no testimony or other evidence on the support issue was presented at the June 2016 or October 2016 hearings giving rise to the 16 December 2016 Order. Nevertheless, the trial court — despite the absence of a request from either party — included the above-quoted provisions changing Mr. Summerville's support obligation.

This Court has repeatedly held that "[a] court is without authority to *sua sponte* modify an existing support order." *Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 580 (1995) (citation omitted); *see also Miller v. Miller*, 153 N.C. App. 40, 47, 568 S.E.2d 914, 919 (2002) ("[A] court does not have the authority to *sua sponte* modify an existing support order." (citation omitted)); *Bogan v. Bogan*, 134 N.C. App. 176, 179, 516 S.E.2d 641, 643 (1999) (trial court was without authority to modify child support obligation absent existence of motion before it); *Smith v. Smith*, 15 N.C. App. 180, 183, 189 S.E.2d 525, 526 (1972) (trial court erred in modifying child custody and support where only question before court concerned alimony).

Our Supreme Court recently discussed the continuing jurisdiction possessed by trial courts in child support proceedings in *Catawba County v. Loggins*, __ N.C. __, 804 S.E.2d 474 (2017). In *Loggins*, a mother and father had signed a Voluntary Support Agreement and Order in 1999 (the "1999 VSA") agreeing that the father would not make any payments to the mother but would instead reimburse the State for the cost of public assistance paid on behalf of his two children. *Id.* at __, 804 S.E.2d at 476. In 2001, the mother and father signed a second Voluntary Support Agreement and Order (the "2001 VSA"). The parties attached to this document a child support worksheet listing the father's gross monthly income. In the 2001 VSA, the father agreed to pay a monthly sum in child support to the mother and a monthly reimbursement to the State for the amount he had previously neglected to pay. After it was signed by the parents, the 2001 VSA was approved by the court. *Id.* at __, 804 S.E.2d at 476.

The father failed to make several payments after entry of the 2001 VSA, and he was in arrears by 2007. *Id.* at __, 804 S.E.2d at 476. In 2014, the father moved to set aside the 2001 VSA pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, contending that the trial court had lacked jurisdiction to enter the consent order. He asserted that N.C. Gen. Stat. § 50-13.7(a) required the filing of a motion in the cause by a party in order for the trial court to possess jurisdiction to modify a child support obligation. The trial court agreed, finding that "there was no

precipitating motion filed by plaintiff or on her behalf, nor was there any proof of a change in circumstances; therefore, the order resulting from the 2001 VSA was void." *Id.* at __, 804 S.E.2d at 477.

Our Supreme Court reversed the trial court's ruling, holding that the court had improperly construed N.C. Gen. Stat. § 50-13.7(a). The Supreme Court ruled the statute's requirement that a motion in the cause be filed was "directory rather than mandatory." *Id.* at __, 804 S.E.2d at 482. "[C]onsequently, the absence of a motion to modify a child support order does not divest the district court of jurisdiction to act under the purview of the statute." *Id.* at __, 804 S.E.2d at 482.

The Court explained that the primary purpose of N.C. Gen. Stat. § 50-13.7(a) is "to make the court aware of important new facts unknown to the court at the time of the prior custody decree . . . ." *Id.* at __, 804 S.E.2d at 483 (citation and quotation marks omitted). The Court determined that this purpose was satisfied by the 2001 VSA. Thus, the Supreme Court concluded, "a VSA submitted to the district court without . . . a motion [in the cause] still serves the purpose" of N.C. Gen. Stat. § 50-13.7(a), including "the statutory provision requiring a showing of a change in circumstances in order for a child support order to be modified." *Id.* at __, 804 S.E.2d at 483.

In a concurring opinion joined by Justice Ervin, Chief Justice Martin stated that "the majority's reasoning should be read narrowly." *Id.* at __, 804 S.E.2d at 485 (Martin, C.J., concurring).

> [I]f the majority ruling is read to permit even sua sponte modifications, it would disturb several decades of Court of Appeals precedent that domestic relations parties and social services agencies throughout North Carolina have presumably come to rely on. *See Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 580 (1995) (concluding that a child support agreement could not be modified without a motion to modify the agreement); *Kennedy v. Kennedy*, 107 N.C. App. 695, 703, 421 S.E.2d 795, 799 (1992) (noting that a district court may modify a custody order only upon a motion by either party or by anyone interested); *Smith v. Smith*, 15 N.C. App. 180, 182-83, 189 S.E.2d 525, 526 (1972) (holding that it was error for the trial court to modify a custody and support order when the only question before the trial court at the time was alimony).
>
> . . . . [B]y focusing on continuing jurisdiction, the majority ducks the real issue: whether, in the absence of a motion or

> its functional equivalent, a district court has the power to modify a child support order, or instead lacks the power to do so unless and until it receives a request from an interested party to modify the order.

Id. at __, 804 S.E.2d at 485 (citations omitted).

This Court has not previously addressed in a published opinion the issue raised by the concurring opinion in *Loggins* — that is, whether *Loggins* should be construed as implicitly overruling the long line of cases from this Court prohibiting the *sua sponte* modification of child support orders. However, we recently addressed this precise issue in an unpublished opinion.

In *Mills v. Davis*, __ N.C. App. __, 808 S.E.2d 519, 2017 N.C. App. LEXIS 1047 (2017) (unpublished), a custody order was entered by the trial court providing for legal and physical custody of the minor child to be shared equally by the mother and father. A year after the order was entered, the mother filed a motion to show cause and modify custody, asserting that the father had waived his right to custody of the child by failing to participate in her life. *Id.* at *3. The trial court entered a custody order in which it modified *sua sponte* the existing child support order, requiring the father to claim the child as a dependent and requiring the parties to split the uninsured health expenses. *Id.* at *5.

On appeal, the mother argued that the trial court had erred by making a *sua sponte* modification of the original custody order's child support provisions. Distinguishing *Loggins*, this Court vacated the portion of the order containing the child support modification.

> Unlike the trial court in [*Loggins*], which entered a consent order sought by both parents, the trial court in this case acted of its own volition, absent the consent, knowledge, or urging of Mother or Father. No consent order or pleading was filed in this case sufficient to satisfy the purposes of N.C. Gen. Stat. § 50-13.7(a). . . .
>
> While we recognize, following [*Loggins*], that the trial court had jurisdiction to modify the Custody Order, we hold that it did not have the power and authority to *sua sponte* modify a child support order entered in a separate civil action. *See Ellis v. Ellis*, 190 N.C. 418, 421, 130 S.E. 7, 9 (1925) (holding that although a court retains jurisdiction over a case, it may still lack the power to grant the relief contained in its judgment); *see also State ex rel. Hanson*

> *v. Yandle*, 235 N.C. 532, 535, 70 S.E.2d 565, 568 (1952) (holding that where the court is without authority its judgment is void and of no effect). Because the majority in [*Loggins*] did not dispose of the necessity that a party satisfy the requirements of N.C. Gen. Stat. § 50-13.7(a), and in light of the concurring justices' cautioned approach, we will not extend the Supreme Court's decision to give the trial court unfettered authority to modify custody orders *sua sponte*. To hold otherwise would disturb several decades of precedent on which domestic relations parties and social service agencies throughout North Carolina have presumably come to rely. . . .

Id. at *16-17 (internal citations 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 believe *Mills* was correctly decided and reach a similar conclusion here.

The present case is materially distinguishable from *Loggins*. The analysis in *Loggins* makes clear that the existence of the voluntary settlement agreement signed by the parties and submitted to the trial court played a central role in the Supreme Court's decision, providing an adequate substitute for a motion in the cause. Here, conversely, there was neither a motion in the cause nor a consent agreement in which one or both of the parties sought a modification of Mr. Summerville's child support obligation. Thus, the trial court's 16 December 2016 Order constitutes a classic case of a *sua sponte* modification of a child support order despite the absence of any acts sufficient to satisfy the purpose of N.C. Gen. Stat. § 50-13.7(a).

Had the Supreme Court in *Loggins* intended to express its disapproval of this Court's longstanding prohibition of the *sua sponte* modification of child support obligations, we believe it would have said so overtly. Therefore, we read *Loggins* as continuing to require *some* action by the parties in order to satisfy the underlying purpose of N.C. Gen. Stat. § 50-13.7(a). Accordingly, we vacate the portion of the trial court's 16 December 2016 Order modifying the preexisting child support obligation of Mr. Summerville.

III. Appeal of Contempt Finding

[4] Mr. Summerville also seeks to challenge the trial court's decision to hold him in contempt. He asserts that (1) the court failed to make clear

whether the contempt was civil or criminal; (2) the court's clarification in its 30 December 2016 Order of its prior contempt finding was an impermissible attempt to amend its previous order under Rule 60; and (3) violations of a parenting coordinator's orders cannot form the basis for a finding of contempt.

As an initial matter, we must determine whether we possess jurisdiction to consider this portion of Mr. Summerville's appeal. Appeals from criminal contempt orders are governed by N.C. Gen. Stat. § 5A-17, which states as follows:

> A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge.

N.C. Gen. Stat. § 5A-17(a) (2017). "This statute vests exclusive jurisdiction in the superior court to hear appeals from orders in the district court holding a person in criminal contempt." *Michael v. Michael*, 77 N.C. App. 841, 843, 336 S.E.2d 414, 415 (1985), *disc. review denied*, 316 N.C. 195, 341 S.E.2d 577 (1986).

Thus, "in criminal contempt matters, appeal is from the district court to the superior court. . . . In civil contempt matters, appeal is from the district court to this Court." *Brooks v. Jones*, 121 N.C. App. 529, 530, 466 S.E.2d 344, 345 (1996) (internal citations omitted). Accordingly, we must determine whether the trial court's finding of contempt here was criminal or civil in nature.

> [W]e note that contempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. A major factor in determining whether contempt is criminal or civil is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order,

> the contempt is civil. The importance in distinguishing criminal and civil contempt lies in the difference in procedure, punishment and right of review.

Bishop v. Bishop, 90 N.C. App. 499, 503, 369 S.E.2d 106, 108 (1988) (citation and emphasis omitted).

The trial court's 16 December 2016 Order contained a handwritten paragraph that stated as follows:

> 23. [Mr. Summerville] may purge himself of his multiple acts of contempt detailed above by paying one fine of $500 within 10 days hereof and by complying with this order and with all other orders in this action which remain in effect hereafter.

In its 30 December 2016 Order, the trial court stated the following in seeking to clarify its prior finding of contempt against Mr. Summerville:

> The order of 12/16/16 is amended to add additional language in paragraph 23: "The Court finds that civil contempt does not provide a remedy for future compliance issues, and that the change of custody ordered herein will resolve future issues of noncompliance; accordingly, the Court finds that criminal contempt is appropriate and that [Mr. Summerville] is in criminal contempt, due to the multiple acts of wilful [sic] and deliberate disregard of and violation of the prior orders as detailed above, which findings support an order of criminal contempt beyond a reasonable doubt, and the Court so finds and orders."

In Paragraph No. 23 of the 16 December 2016 Order, the trial court imposed a fine on Mr. Summerville, which is generally associated with *criminal* contempt. *See Bishop*, 90 N.C. App. at 504, 369 S.E.2d at 109 (holding that a fine is generally "punitive when it is paid to the court" and therefore indicates a finding of criminal contempt (citation omitted)). However, the fine was imposed as part of a purge condition, which is indicative of a finding of *civil* contempt. *See id.* at 504, 369 S.E.2d at 109 ("[T]he addition of a 'purge' clause would render even a determinate jail sentence civil in nature . . . ." (citation omitted)). The trial court then clarified its intent in its 30 December 2016 Order, stating its determination that criminal — rather than civil — contempt was appropriate in light of Mr. Summerville's prior actions.

Therefore, because the trial court ultimately concluded that Mr. Summerville should be held in criminal contempt, we lack jurisdiction

over this portion of his appeal as his sole recourse was an appeal to superior court. *See Michael*, 77 N.C. App. at 843, 336 S.E.2d at 415 (dismissing appeal of criminal contempt order by district court due to lack of appellate jurisdiction).

IV. Reasonableness of Attorneys' Fees Award

[5] In his final argument, Mr. Summerville contends that the trial court erred by awarding attorneys' fees to Ms. Summerville. He argues that the court (1) did not possess statutory authority to award attorneys' fees stemming from its finding of criminal contempt; and (2) failed to make the requisite findings of reasonableness in connection with the fees awarded for Ms. Summerville's defense of his motion to modify custody.

This Court has held that "[i]n order to award attorney's fees in an action involving custody or support of a minor child, the trial court is required to gather evidence and make certain findings of fact." *Davignon v. Davignon*, __ N.C. App. __, __, 782 S.E.2d 391, 396 (2016); *see also Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 234 (2002) (holding that "award of attorney's fees is not left to the court's unbridled discretion; it must find facts to support its award" (citation omitted)). "The trial court must first determine if the party moving for attorney's fees has satisfied the statutory requirements for an award pursuant to N.C. Gen. Stat. § 50-13.6." *Davignon*, __ N.C. App. at __, 782 S.E.2d at 396.

N.C. Gen. Stat. § 50-13.6 states as follows:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. § 50-13.6 (2017).

Thus, based on this statute, the trial court is required to find "that the party seeking the award is (1) an interested party acting in good faith and (2) has insufficient means to defray the expense of the suit." *Cobb v. Cobb*, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986) (citation omitted). Moreover, in addition to the findings required by the express terms of N.C. Gen. Stat. § 50-13.6, this Court has also mandated that certain other findings be made in order to ensure that the amount of fees awarded is reasonable.

> Because [N.C. Gen. Stat. §] 50-13.6 allows for an award of *reasonable* attorney's fees, cases construing the statute have in effect annexed an additional requirement concerning reasonableness onto the express statutory ones. . . . Namely, the record must contain additional findings of fact upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers.

Id. at 595, 339 S.E.2d at 828 (internal citations omitted). "When the statutory requirements have been met, the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." *Burr*, 153 N.C. App. at 506, 570 S.E.2d at 234 (citation and quotation marks omitted).

The trial court's 20 December 2016 order made the following pertinent findings of fact in support of its award of attorneys' fees.

> 9. Paragraph 7 of [Mr. Summerville]'s March 2016 Motion to Modify Custody included multiple allegations which [Mr. Summerville] alleged constituted a substantial change in circumstances warranting a modification of custody, which he failed to prove or this Court did not find to be credible. These included that:
>
> a. "[T]he minor child has spent an increasing amount of time out of the classroom due to the interventions by [Ms. Summerville] and/or [Parent Coordinator]. The minor child's school performance has suffered enormously during the last school year as a result of these interventions, and these interventions have caused previously resolved behavioral issues to re-surface and escalate."

b. The minor child had been "forced to miss church youth group, Cub Scouts and other time with [Mr. Summerville] doing the varied activities [Mr. Summerville] participates in with the minor child due to interventions by [Ms. Summerville] and/or PC[,]" which caused "the minor child's anxiety and behavioral issues [to increase] both at home and in school."

c. "The minor child has had no less than twelve (12) instances of fecal incontinence" due to medications he takes which [Ms. Summerville] manages with the support of the Parenting Coordinator.

d. "[T]he minor child has been allowed, encouraged and/or ordered to call [Ms. Summerville] when he disagrees with [Mr. Summerville], and has been encouraged to defy [Mr. Summerville]'s authority while the minor child is in [Mr. Summerville]'s care, causing enormous behavioral issues to escalate beyond what has been the norm for this minor child."

e. "[Ms. Summerville] and Parent Coordinator consistently question [Mr. Summerville]'s parenting of the minor child, at times through the minor child himself" and that "[s]uch behavior has increased the minor child's already existent anxiety issues."

10. These allegations were proven to be untrue after the extensive efforts of [Ms. Summerville]'s counsel, including deposing [Mr. Summerville], preparing for and attending pretrials, drafting and arguing the order and this hearing on attorney fees, as well as in the final trial on these issues, which occurred over six days of trial in June and October 2016.

11. [Ms. Summerville] incurred significant legal fees in defending against [Mr. Summerville]'s Motion to Modify Custody, as well as in the final trial on these issues, which occurred over six days of trial in June and October of 2016.

12. Pursuant to the Affidavit of Attorney's Fees submitted by [Ms. Summerville]'s previous counsel, Melissa Averett, [Ms. Summerville] had incurred attorney's fees of in excess of $18,000 with Averett Family Law since March 4, 2016.

13. Pursuant to the Affidavit of Attorney's Fees and the Addendum to Affidavit of Attorney's Fees submitted by [Ms. Summerville]'s current counsel, [Ms. Summerville] has incurred attorney's fees of at least $87,118 to Gabriela J. Matthews & Associates, P.A. since March 4, 2016 as of November 30, 2016. She has been in court on three separate appearances since that day and expended additional fees thereafter through the present date.

14. In total, [Ms. Summerville] has incurred attorney fees in excess of $104,070 since March 4, 2016 thru [sic] November 20, 2016. After this hearing today, [Ms. Summerville] will have current outstanding legal bills in excess of $80,000.

15. Some of [t]he services rendered by counsel were reasonable given the motion filed by [Mr. Summerville], his failure to follow the Court's prior Orders, and the impact his actions had on the minor child. Further, the rates charged by said counsel were reasonable given the level of expertise and experience of both attorneys and common curate [sic] with the fees charged by attorneys practicing family law in this area. The award herein set forth is for the reasonably necessary portion of such time spent.

16. [Ms. Summerville] is an interested party and has acted in good faith in defending against [Mr. Summerville]'s motion and pursuing a custody modification given [Mr. Summerville's] actions.

17. [Ms. Summerville] submitted a sworn affidavit, filed with this Court, in which she affirmatively pled that she does not have the ability to defray her extensive legal fees. In her affidavit, [Ms. Summerville] fully disclosed to the Court all of her assets and debts as well as her income. [Ms. Summerville] has also incurred significant credit card debt in order to pay

> some of those legal fees. However, she has no ability to pay her outstanding legal fees given her income and current net worth. [Ms. Summerville] is without sufficient means with which to defray the expenses of this suit. Therefore, [Ms. Summerville] is entitled to reimbursement of her legal fees pursuant to N.C.G.S. §50-13.6.
>
> . . . .
>
> 19. [Mr. Summerville] should be ordered to pay the portion of [Ms. Summerville]'s reasonable attorney fees . . . set forth below pursuant to N.C. Gen. Stat. 50-13.6.

Based on these findings, the trial court ordered Mr. Summerville to pay Ms. Summerville's attorney "the sum of $20,220 as attorney's fees" and "the additional sum of $22,000 by paying her $1000 per month for the next 24 [sic] months beginning 2/1/17."

As noted above, Mr. Summerville initially contends that the trial court erred by awarding attorneys' fees in connection with the court's decision to hold him in criminal contempt. However, as established by the above-quoted findings, the order makes clear that the award of attorneys' fees was instead based on Ms. Summerville's defense of Mr. Summerville's motion to modify custody, which is expressly authorized under N.C. Gen. Stat. § 50-13.6.

Mr. Summerville next argues that the trial court's order lacked the required findings of reasonableness. Specifically, he contends that the trial court failed to make specific findings concerning (1) the ability of Ms. Summerville to defray the cost of the suit; (2) whether she acted in good faith; (3) her lawyer's skill; (4) her lawyer's hourly rate; and (5) the nature and scope of the legal services rendered. We disagree.

Finding Nos. 11, 12, 13, and 14 are supported by Ms. Summerville's affidavit and the evidence of record. Finding No. 15 establishes that the trial court considered the relevant affidavits and determined that the rates charged by her counsel were reasonable based on the level of expertise and experience of her attorneys and in light of the fees charged by comparable attorneys in the geographic area.

Moreover, Finding No. 16 sets out the trial court's determination that Ms. Summerville was an interested party acting in good faith, and Finding No. 17 contains the court's finding that she had insufficient means to defray the expenses of the action. Thus, we are satisfied that the trial court's findings were sufficient to support its award of attorneys' fees to

Ms. Summerville pursuant to N.C. Gen. Stat. § 50-13.6. *See Hennessey v. Duckworth*, 231 N.C. App. 17, 25, 752 S.E.2d 194, 200 (2013) (holding that trial court's findings in connection with attorneys' fees award were supported by plaintiff's affidavits and were sufficient to justify award of fees to plaintiff).

Conclusion

For the reasons stated above, we (1) affirm the portion of the trial court's 16 December 2016 Order modifying child custody; (2) vacate the portion of the trial court's 16 December 2016 Order modifying child support; (3) dismiss Mr. Summerville's appeal of the contempt findings contained in the 16 December 2016 and 30 December 2016 Orders; and (4) affirm the trial court's 20 December 2016 Order awarding attorneys' fees.

AFFIRMED IN PART; VACATED IN PART; DISMISSED IN PART.

Chief Judge McGEE and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 APRIL 2018)

BARRON v. RAFIDI No. 17-879	Mecklenburg (16CVS3810)	Dismissed
CHASE v. GREIF INC. No. 17-1005	N.C. Industrial Commission (14-060363)	Affirmed
DA SILVA v. WAKEMED No. 17-820	Wake (15CVS12051)	Reversed in Part; Vacated and Remanded in Part.
IN RE A.C.H. No. 17-1063	Guilford (15JT162-165)	Affirmed
IN RE B.D.A.I. No. 17-979	Randolph (12JA201) (16JA134-136)	Affirmed
IN RE C.A.B. No. 17-1164	Mecklenburg (16JT456)	Vacated and Remanded
IN RE C.B.T. No. 17-1209	Person (15J80)	Affirmed
IN RE COOKE No. 17-948	Northampton (10E124)	Dismissed
IN RE I.A. No. 17-877	Cumberland (14JA235) (14JA236)	Affirmed in part, Vacated and Remanded in Part
IN RE J.D.L. No. 17-1265	Lee (17JA13)	Affirmed in Part; Reversed and Remanded in Part
IN RE J.M. No. 17-1413	Mecklenburg (16JA89)	Dismissed
IN RE J.O. No. 17-1033	Mecklenburg (15JA613)	Reversed and Remanded
IN RE J.R. No. 17-977	Wake (15JT73)	Affirmed
IN RE K.R.R. No. 18-19	Catawba (17JT114)	Vacated and Remanded

IN RE R.R. No. 17-779	Wake (16SPC53126-DAVIDSON)	Reversed
IN RE R.S.O.S. No. 17-1098	Mecklenburg (16JT313-314)	Affirmed
IN RE S.C.N.C. No. 17-1202	Mecklenburg (14JT687) (16JT533)	Affirmed
KIGGINS v. CRAVEN No. 17-910	New Hanover (16CVS4261)	Dismissed
LEONARD v. TOJEIRO No. 17-895	Iredell (16CVD2131)	Affirmed
MILLER v. COOKE No. 17-949	Hertford (12SP104)	Dismissed
POWELL v. O'REILLY AUTO PARTS, INC. No. 17-1006	N.C. Industrial Commission (15-010508)	Affirmed
QUIET REFLECTIONS RETREAT, INC. v. BANK OF N.Y. MELLON No. 17-887	Yancey (16CVS222)	Vacated in part; reversed and remanded in part; and dismissed in part.
STATE v. AUDREY No. 17-1128	Buncombe (15CRS424)	Affirmed
STATE v. BITTLE No. 17-999	Mecklenburg (15CRS223054-55) (15CRS40811)	No Error
STATE v. BROOKS No. 17-768	Iredell (16CRS3509) (16CRS50784-85) (16CRS50788) (16CRS50791)	Affirmed
STATE v. CALABRESE No. 17-1001	Johnston (14CRS53524)	NO PREJUDICIAL ERROR
STATE v. CLORY No. 17-867	Mecklenburg (15CRS240671) (15CRS240674) (15CRS240675)	No Error
STATE v. DICK No. 17-1251	Guilford (15CRS84868-69)	No Error

STATE v. ENGLISH No. 17-961	Cumberland (16CRS55096)	No Error
STATE v. FIELDS No. 17-966	Wilson (16CR051731)	Vacated and Remanded
STATE v. FOY No. 17-239	Onslow (14CRS55329-30)	No Error
STATE v. FULGHUM No. 17-334	Buncombe (15CRS749-52) (15CRS83196-99) (15CRS87388-93)	No Error
STATE v. GILES No. 17-1068	Mecklenburg (15CRS212574-75)	No error, remand for correction of clerical errors.
STATE v. GLOVER No. 17-804	Cumberland (15CRS51067) (15CRS51071-74)	No Error
STATE v. GREENE No. 17-1074	Davidson (15CRS54482)	Affirmed
STATE v. HARRIS No. 17-964	Wilson (16CR050835)	Vacated and Remanded
STATE v. HENRICKSEN No. 17-953	Guilford (13CRS76500)	No Plain Error in Part, Vacated in Part and Remanded
STATE v. HOVIS No. 17-773	Dare (94CRS5532-33) (95CRS4955-57) (98CRS5753-54)	Vacated and Remanded
STATE v. JACKSON No. 17-939	Perquimans (14CRS50177-78)	No Error
STATE v. JOHNSON No. 17-364	Mecklenburg (15CRS235569-70)	No Error
STATE v. JORDAN No. 17-504	Mecklenburg (16CRS211087)	No Error
STATE v. KEATTS No. 17-1260	Rockingham (99CRS4551) (99CRS9781)	Affirmed

STATE v. LEATH No. 17-567	Alamance (13CRS2080) (13CRS50485)	NO PLAIN ERROR
STATE v. LEWIS No. 17-965	Wilson (15CR002022)	Vacated and Remanded
STATE v. McPHAUL No. 17-942	Robeson (00CRS16318) (00CRS16319) (00CRS16322) (01CRS4251) (01CRS4252)	Affirmed in Part and Vacated in Part
STATE v. RICHBOURG No. 17-1007	Davidson (12CRS4873)	Affirmed
STATE v. ROBINSON No. 17-839	Rowan (12CRS5113) (12CRS57359) (12CRS57501) (12CRS57503) (15CRS4570)	NO PREJUDICIAL ERROR
STATE v. ROSS No. 17-442	Lee (93CRS2782)	Affirmed
STATE v. RYCKELEY No. 17-200	Lincoln (15CRS52067) (16CRS212)	No Error
STATE v. SWAIN No. 16-1221	Mecklenburg (13CRS244937)	Remanded
STATE v. TAPIA No. 17-471	Forsyth (10CRS55393-94) (10CRS55398)	Affirmed
STATE v. VAN No. 17-923	Davidson (97CRS21108) (97CRS21109)	Remanded
STATE v. WILSON No. 17-917	Catawba (15CRS1250-51)	Affirmed

IN RE I.W.P.

[259 N.C. App. 254 (2018)]

IN THE MATTER OF I.W.P.

No. COA17-94

Filed 1 May 2018

1. Appeal and Error—preservation of issues—waiver—motion to dismiss

In a delinquency action involving a pulled fire alarm at a middle school, defendant waived appellate review of the denial of a motion to dismiss for insufficient evidence by failing to renew his motion at the close of all the evidence. Suspension of the appellate rules to allow review is not appropriate absent an indication of manifest injustice, which cannot be shown where sufficient evidence was presented for each element of a criminal offense.

2. Juveniles—delinquency—adjudication—sufficiency of findings—clerical error

In the order adjudicating defendant delinquent, the trial court made sufficient findings of fact which satisfied the requirements of N.C.G.S. § 7B-2411. However, the trial court made a clerical error by failing to mark the appropriate box in the conclusion of law section of the form order designating the offense as violent, serious, or minor, necessitating remand for correction given the importance that the record speak the truth.

3. Juveniles—delinquency—disposition—sufficiency of findings and conclusions

The trial court appropriately addressed three of the five factors contained in N.C.G.S. § 7B-2501(c) in its disposition order after adjudicating defendant delinquent, but the order was deficient because it failed to address the remaining two statutory factors. The Court of Appeals was bound to follow prior precedent, despite a deviation in a recent case, to require trial courts to consider all of the statutory factors in disposition orders.

4. Juveniles—delinquency—probation conditions—court's discretion—delegation of authority

The trial court properly exercised its discretion and did not improperly delegate authority in its disposition order when it directed the court counselor and the juvenile's parents to implement specific probationary conditions.

IN RE I.W.P.

[259 N.C. App. 254 (2018)]

Appeal by juvenile-defendant from order entered 10 August 2016 by Judge Deborah Brown in Alexander County District Court. Heard in the Court of Appeals 21 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for the defendant-appellant juvenile.

BERGER, Judge.

Juvenile-defendant, I.W.P. ("Roy"),[1] appeals from the trial court's order adjudicating him delinquent. Roy contends the trial court erred by (1) denying his motion to dismiss; (2) failing to make proper findings of fact in the adjudication order; (3) failing to make proper findings of fact in the dispositional order; (4) violating N.C. Gen. Stat. § 7B-2501(c); and (5) ordering the chief court counselor to direct him to complete community service. We dismiss in part, affirm in part, and remand in part.

Factual and Procedural Background

On June 8, 2016, a group of students at East Alexander Middle School decided to pull a fire alarm on the last day of school. Roy encouraged W.S. ("Wilson") several times to pull the fire alarm, which Wilson eventually did that afternoon. After the alarm sounded, Roy, Wilson, and other students ran away. According to the School Resource Officer, activation of the fire alarm resulted in "total chaos," causing children to be pushed and stepped on while attempting to exit the building. The officer swore out juvenile petitions against Roy and Wilson for disorderly conduct.

On August 10, 2016, an adjudication hearing was held in Alexander County District Court. Wilson testified that Roy and another student asked him four different times during at least two classes to pull the fire alarm. Around noon, Wilson pulled the fire alarm.

At the close of State's evidence, Roy made a motion to dismiss the charge based upon insufficiency of the evidence. The trial court denied his motion to dismiss. Roy decided to put on evidence and testified in his own defense, denying that he encouraged or forced Wilson to pull the fire alarm. Roy did not renew his motion to dismiss at the close of all of the evidence.

1. Pseudonyms are used throughout to protect the identity of the juveniles and for ease of reading.

Roy, who was already on juvenile probation, was adjudicated delinquent by the trial court. At disposition, the trial court continued Roy's prior probationary period, and entered a new dispositional order directing him to complete counseling; follow the counselor's recommendations; comply with a curfew set by his parents or counselor; not associate with anyone or be in any place deemed inappropriate by his parents or counselor; not violate any laws or rules at home; attend school on a regular basis; not possess any controlled substances, alcoholic beverages, or weapons; submit to random drug testing; and perform fifty hours of community service. The trial court also ordered a new probationary period for twelve months from August 10, 2016. The trial court also entered a specific dispositional provision that Roy not associate, assault, harass, or threaten Wilson because of a threat Roy had made. Roy entered notice of appeal in open court.

Analysis

I. Adjudication

Roy contends the trial court erred at the adjudication hearing by failing to grant his motion to dismiss at the close of the State's case-in-chief, and by failing to make sufficient findings of fact to prove he committed disorderly conduct. We affirm.

A. Sufficiency of the Evidence

[1] When denying a motion to dismiss for insufficient evidence, the "court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) of the juvenile[] being the perpetrator of such offense." *In re K.C.*, 226 N.C. App. 452, 456, 742 S.E.2d 239, 242 (2013) (citation, quotation marks, brackets, and ellipses omitted). " 'The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent's guilt.' " *Id.* (quoting *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986)). "If the evidence raises merely suspicion or conjecture as to either the commission of the offense or the identity of the juvenile as the perpetrator of it, the motion should be allowed." *In re R.D.L.*, 191 N.C. App. 526, 530-31, 664 S.E.2d 71, 73-74 (2008) (citation, internal quotation marks, and brackets omitted).

A defendant must properly preserve issues at trial to permit appellate review. For this court to review purported errors from a trial court's denial of a motion to dismiss for insufficiency of the evidence in criminal cases, a motion to dismiss must be made either at the close of the State's case, or at the close of all of the evidence. N.C.R. App. P. 10(a)(3) (2017).

> If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
>
> A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

Id. After putting on evidence, a "defendant may preserve [his] argument for appeal only by renewing the motion at the close of all evidence." *In re Hodge*, 153 N.C. App. 102, 107, 568 S.E.2d 878, 881, *appeal dismissed and disc. review denied*, 356 N.C. 613, 574 S.E.2d 681 (2002).

Here, the trial court denied Roy's motion to dismiss at the close of the State's evidence, finding the State had presented sufficient evidence of disorderly conduct based on the testimony of the School Resource Officer and another student. Roy then presented evidence, but failed to renew his motion to dismiss at the close of all evidence. Thus, Roy failed to preserve this issue for appeal. *See* N.C.R. App. P. 10(a)(3). Roy concedes that his trial counsel did not renew the motion to dismiss at the close of all the evidence, and he has waived appellate review of this assignment of error.

Roy does, however, request this Court to suspend appellate rules and review his argument pursuant to Rule 2. This Court can hear issues not properly preserved pursuant to Rule 2 in order "[t]o prevent manifest injustice to a party . . . 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 (2017). "The Supreme Court and this Court have regularly invoked [Rule 2] in order to address challenges to the sufficiency of the evidence to support a conviction." *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 590 (2009) (citation omitted). However, Rule 2 "should only be invoked rarely and in exceptional circumstances."

Id. at 134, 676 S.E.2d at 589 (citation and internal quotation marks omitted); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). Further, "precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017).

Notably, our Supreme Court stated invoking Rule 2 "must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether substantial rights of an appellant are affected." *Id.* at 603, 799 S.E.2d at 602 (citation and quotation marks omitted); *see also State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984); *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) ("Rule 2 'expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases *where this is necessary to accomplish a fundamental purpose of the rules*.' "(quoting N.C.R. App. P. 2 drafting comm. comment. (1975)).

Here, the State's evidence tended to show Roy encouraged Wilson to pull the fire alarm several times throughout the school day resulting in chaos on school grounds which endangered students. Roy's actions "[d]isrupt[ed], disturb[ed] [and] interfere[d] with the teaching of students . . . [and] disturb[ed] the peace, order or discipline" at the middle school. N.C. Gen. Stat. § 14-288.4(6) (2017). Moreover, Roy subsequently harassed Wilson about talking with law enforcement.

Where there is sufficient evidence for each element of a criminal offense, manifest injustice cannot exist and suspension of appellate rules is not justified. We decline to invoke Rule 2 and dismiss Roy's appeal on this issue.

B. Adjudication Order

[2] Roy next contends the trial court did not make sufficient findings of fact to sustain the delinquency adjudication of disorderly conduct. We disagree.

The General Assembly has established that adjudication orders must contain the following:

> If the court finds that the allegations in the petition have been proved as provided in G.S. 7B-2409,[2] the court shall

2. "The allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt. The allegations in a petition alleging undisciplined behavior shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-2409 (2017).

> so state in a written order of adjudication, which shall include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

N.C. Gen. Stat. § 7B-2411 (2017). Section 7B-2411 "does not specifically require that an adjudication order contain appropriate findings of fact." *In re J.V.J.*, 209 N.C. App. 737, 740, 707 S.E.2d 636, 638 (2011) (citation and internal quotation marks omitted). "Nevertheless, at a minimum, [S]ection 7B-2411 requires a court to state in a written order that the allegations in the petition have been proved beyond a reasonable doubt." *Id.* (citation, internal quotation marks, and brackets omitted).

The petition against Roy alleged that he was a delinquent juvenile by stating that on June 8, 2016, he

> did unlawfully and intentionally disrupt, disturb or interfere with the teaching of students or engage in conduct that disturbed the peace, order or discipline at East Alexander Middle School, a public or private educational institution, or on the grounds adjacent thereto, by encouraging [a] student to pull the fire alarm[.]

Consistent with N.C. Gen. Stat. § 7B-2411, the trial court found that, on June 8, 2016, Roy committed the offense of disorderly conduct and was a delinquent juvenile by "encourage[ing] another student to pull the fire alarm on the last day of class." The trial court properly classified the offense as a Class 2 misdemeanor, and concluded that Roy was a delinquent juvenile.

The trial court's adjudication order satisfied Section 7B-2411 because: (1) disorderly conduct was identified as the type of offense; (2) June 8, 2016 was listed as the date of the offense; and (3) July 15, 2016 was listed as the date the petition was filed. Additionally, the adjudication order contained delinquency hearing as the type of proceeding, the judge's signature, and date and proof of filing. The adjudication order also included a description of Roy's specific conduct, and made the subsequent conclusion of law indicating delinquency. Therefore, the adjudication order had the necessary requirements set forth in N.C. Gen. Stat. § 7B-2411.

The trial court did, however, make a clerical error by failing to mark the appropriate box in the conclusion of law section of the pre-printed form portion of the order to designate the offense as violent, serious, or minor.

"A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *In re J.C.*, 235 N.C. App. 69, 73, 760 S.E.2d 778, 781 (2014), *rev'd on other grounds*, 368 N.C. 89, 772 S.E.2d 465 (2015) (citation and quotation marks omitted). The discovery of a clerical error in the trial court's order requires this Court to "remand the case to the trial court for correction because of the importance that the record speak the truth." *Id.* (citation and internal quotation marks omitted).

As stated above, the trial court properly designated the offense as a Class 2 misdemeanor, but simply neglected to mark the appropriate box to again identify the offense in the conclusion of law section. Accordingly, we remand for correction of this clerical error.

II. Disposition

[3] Roy contends the dispositional order fails to comply with N.C. Gen. Stat. §§ 7B-2512(a) and 7B-2501(c). Specifically, Roy argues the trial court failed to consider the dispositional factors listed in Section 7B-2501(c), and the dispositional order as a whole did not contain appropriate findings of fact and conclusions of law. We agree.

At a disposition hearing, the trial court shall enter a dispositional order that seeks to "design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public." N.C. Gen. Stat. § 7B-2500 (2017). The disposition should "(1) [p]romote[] public safety; (2) [e]mphasize[] accountability and responsibility of both the parent, guardian, or custodian and the juvenile for the juvenile's conduct; and (3) [p]rovide[] the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community." *Id.*; *see In re Brownlee*, 301 N.C. 532, 551, 272 S.E.2d 861, 872-73 (1981).

When entering a dispositional order, "the court may consider written reports or other evidence concerning the needs of the juvenile. The court may consider any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-2501(a) (2017).

The trial court must comply with the following requirements when entering a dispositional order:

> (a) The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of

> law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.
>
> (b) The court shall include information at the time of issuing the dispositional order, either orally in court or in writing, on the expunction of juvenile records as provided for in G.S. 7B-3200 that are applicable to the dispositional order.

N.C. Gen. Stat. § 7B-2512(a)-(b) (2017). Further, the trial court

> shall select the most appropriate disposition both in terms of kind and duration for the delinquent juvenile. Within the guidelines set forth in G.S. 7B-2508, the court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:
>
> (1) The seriousness of the offense;
>
> (2) The need to hold the juvenile accountable;
>
> (3) The importance of protecting the public safety;
>
> (4) The degree of culpability indicated by the circumstances of the particular case; and
>
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2017).

The plain language of Section 7B-2501(c) compels us to find that a trial court must consider each of the five factors in crafting an appropriate disposition. The General Assembly mandated that trial courts "shall select a disposition" that protects the public and is in the best interest of the juvenile "based upon" consideration of a conjunctive list of factors. *Id.* "It is a common rule of statutory construction that when the conjunctive 'and' connects words, phrases or clauses of a statutory sentence, they are to be considered jointly." *Harrell v. Bowen*, 179 N.C. App. 857, 859, 635 S.E.2d 498, 500 (2006), *aff'd*, 362 N.C. 142, 655 S.E.2d 350 (2008) (citation and quotation marks omitted).

In fact, this Court has previously held the trial court must consider each of the factors in Section 7B-2501(c). *See In re Ferrell*, 162 N.C. App. 175, 177, 589 S.E.2d 894, 895 (2004); *In re V.M.*, 211 N.C. App. 389, 391-92, 712 S.E.2d 213, 215 (2011); *K.C.*, 226 N.C. App. 452, 462, 742 S.E.2d 239,

246; and *In re G.C.*, 230 N.C. App. 511, 519, 750 S.E.2d 548, 553 (2013). However, this Court recently held, contrary to precedent, that the trial court does not need to consider all of the Section 7B-2501(c) factors when entering a dispositional order. *In re D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 514 (2017). This inconsistency has created a direct conflict in this Court's prior jurisprudence and must be reconciled.

In *Ferrell*, the juvenile appealed from the entry of a dispositional order that removed him from the custody of his mother and placed him in the custody of his father pursuant to Section 7B-2506(1)(b), which allows the trial court to arrange for alternative placements for the juvenile. *Ferrell*, 162 N.C. App. at 176, 589 S.E.2d at 895; *see also* N.C. Gen. Stat. § 7B-2506(1)(b) (2017). On appeal, the juvenile contended the trial court failed to make findings of fact sufficient to support a change in custody. *Ferrell*, 162 N.C. App. at 176, 589 S.E.2d at 895. This Court agreed that the custody transfer "was not supported by appropriate findings of fact in the dispositional order." *Id.* at 177, 589 S.E.2d at 895. Moreover, this Court held that the trial court "based the decision to award custody to the father solely on the juvenile's school absences." *Id.* The trial court did not consider the factors in Section 7B-2501(c). *Id.*

In *V.M.*, the juvenile appealed from the entry of a dispositional order entered from a probation violation pursuant to Section 7B-2510(e), contending that the trial court did not sufficiently consider all of the Section 7B-2501(c) factors when entering the disposition. *V.M.*, 211 N.C. App. at 389-91, 712 S.E.2d at 214-15. This Court held "the trial court must consider" each Section 7B-2501(c) factor and failing to do so amounts to reversible error. *Id.* at 391-92, 712 S.E.2d at 215-16.

In *K.C.*, the juvenile appealed from the entry of a dispositional order pursuant to Sections 7B-2512 and 7B-2501. *K.C.*, 226 N.C. App. at 461-62, 742 S.E.2d at 246. This Court held the trial court "sufficiently addressed the first two [Section 7B-2501(c)] factors required by the statute, [but] the record before this Court does not establish that the trial court considered the last three factors." *Id.* at 463, 742 S.E.2d at 246. This Court remanded the dispositional order to the trial court to consider all Section 7B-2501(c) factors. *Id.*

In *G.C.*, the juvenile appealed from an initial dispositional order entered pursuant to Sections 7B-2512 and 7B-2501. *G.C.*, 230 N.C. App. at 519-20, 750 S.E.2d at 553-54. This Court stated that "trial courts must develop the final disposition by considering five different factors," i.e., the factors listed in Section 7B-2501(c). *Id.* at 519, 750 S.E.2d 553. This Court held that the trial court "adequately addressed all of the § 7B-2501(c) statutory factors." *Id.* at 521, 750 S.E.2d at 555.

In *D.E.P.*, however, a panel of this Court departed from the plain language of Section 7B-2501(c) and prior decisions of this Court. In that case, the juvenile appealed from a dispositional order that imposed a Level 3 disposition and commitment to a training school because the juvenile had violated probationary conditions pursuant to Section 7B-2510(e) as part of a previous Level 2 disposition from a previous delinquency adjudication. *D.E.P.*, ___ N.C. App. at ___, 796 S.E.2d at 511-12. *D.E.P.* recognized that prior cases had required the trial court to analyze and track each factor found in Section 7B-2501(c) in its dispositional order, but held that the trial court did not need to consider each of the Section 7B-2501(c) factors. *Id.* at ___, 796 S.E.2d at 513-14. The panel stated:

> Upon careful review of the statutory language and our prior jurisprudence, we find no support for a conclusion that in every case the "appropriate" findings of fact must make reference to all of the factors listed in N.C. Gen. Stat. § 7B-2501(c), including those factors that were irrelevant to the case or in regard to which no evidence was introduced.

Id. at ___, 796 S.E.2d at 514.

Despite holding that the trial court does not need to engage in an exhaustive discussion of all Section 7B-2501(c) factors, the Court in *D.E.P.* did analyze the appealed dispositional order and held that the trial court did consider all of the Section 7B-2501(c) factors appropriately in that case. *Id.* at ___, 796 S.E.2d at 515-16. Furthermore, *D.E.P.* also held that this Court did not apply *Ferrell* correctly, and that this "mischaracterization of *Ferrell* was repeated in several later cases" holding that the trial court must consider each Section 7B-2501(c) factor. *Id.* at ___, 796 S.E.2d at 513. *G.C.* and *K.C.*, however, were not based on *Ferrell*, but rather this Court's interpretation of the plain language of Section 7B-2501(c).

More importantly, our Supreme Court has instructed this Court, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). *D.E.P.* created a direct conflict in this area of the law by deviating from precedent. "[W]here there is a conflicting line of cases, a panel of this Court should follow the older of those two lines." *Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014) (citation and quotation marks

omitted). Accordingly, *Ferrell*, *V.M.*, *G.C.*, and *K.C.* are controlling, and we hold that a trial court must consider each of the factors in Section 7B-2501(c) when entering a dispositional order.

The trial court here ordered the following disposition: (1) a term of twelve months' probation; (2) cooperation with a specified community-based program of counseling; (3) fifty hours of community service; (4) curfew as set by parents or the juvenile court counselor; (5) not to associate with persons deemed inappropriate by parents or the juvenile court counselor, including Wilson; and (6) restricted access to particular locations deemed inappropriate by parents or the juvenile court counselor.[3] The trial court also incorporated by reference and attachment a Supplemental Order of Conditions of Probation, which addressed further details of Roy's Level 1 Disposition.

While the trial court appropriately addressed three of the Section 7B-2501(c) factors, it did not consider each factor in that section. Section 7B-2501(c)(2) addresses the need to hold the juvenile accountable. Here, the trial court held Roy accountable by imposing a twelve month probationary sentence for this offense, the maximum allowed pursuant to N.C. Gen. Stat. § 7B-2510(c). In addition, the trial court imposed probationary conditions that specifically addressed Section 7B-2501(c)(3) and (5): the need for public safety, and the treatment needs of the juvenile, respectively. The trial court's order of ongoing counseling, curfew and no contact provisions against specified persons directly addressed these factors.

The trial court's order failed to address the two remaining Section 7B-2501(c) factors. Section 7B-2501(c)(1) and (4) require findings that address the seriousness of the offense and the culpability of the juvenile. The form order used here specifically instructs the trial court to list any additional findings regarding the Section 7B-2501(c) factors if they are not found elsewhere in the order or incorporated documents. The supplemental reports and assessments do not address these factors. Accordingly, the dispositional order is deficient, and we remand for further findings of fact to address the seriousness of the offense and the culpability of the juvenile.

III. Improper Delegation of Authority

[4] Roy also contends the trial court impermissibly delegated its authority to the court counselor by not specifying with particularity probation conditions in the supplemental order. We disagree.

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3. Specific Level 1 Community Dispositions were entered pursuant to N.C. Gen. Stat. § 7B-2506(3), (6), (8), (10), and (11).

> A court exercising jurisdiction over a juvenile who has been adjudicated delinquent and for whom the dispositional chart in subsection (f) of this section prescribes a Level 1 disposition may provide for evaluation and treatment under G.S. 7B-2502 and for any of the dispositional alternatives contained in subdivisions (1) through (13) and (16) of G.S. 7B-2506.

N.C. Gen. Stat. § 7B-2508(c) (2017). "[T]he court, and the court alone, must determine which dispositional alternatives to utilize with each delinquent juvenile." *In re Hartsock*, 158 N.C. App. 287, 292, 580 S.E.2d 395, 399 (2003). "[A] judge could order certain dispositional alternatives apply upon the happening of a condition, since *the court*, and not another person or entity, would be exercising its discretion." *Id.*; *see also In re M.A.B.*, 170 N.C. App. 192, 194-95, 611 S.E.2d 886, 887-88 (2005) (holding the trial court did not improperly delegate its authority because the court itself exercised its discretion when ordering the juvenile " 'to cooperate and participate in a residential treatment program *as directed* by court counselor or mental health agency' ").

In the case *sub judice*, the trial court did not improperly delegate its authority to a third party. The trial court applied the following community dispositions: (1) probation pursuant to Section 7B-2506(8); (2) counseling pursuant to Section 7B-2506(3); (3) community service pursuant to Section 7B-2506(6); (4) curfew pursuant to Section 7B-2506(10); and (5) no association with particular individuals or places pursuant to Section 7B-2506(11). The trial court selected community dispositions within the allowed subdivisions permitted by the Level 1 designation. Unlike *Hartsock*, here the trial court made the determination that these dispositions are appropriate and did not delegate decisions on whether to enforce them to a third party. Instead, the trial court directed the court counselor and parents to handle the day-to-day implementation of the particular probationary conditions. The trial court exercised its discretion in implementing probationary conditions, and therefore did not impermissibly delegate its authority.

Finally, the trial court specified further conditions of Roy's probation in the supplemental order incorporated by reference, including the requirement to submit to random drug testing. However, within the supplemental order, the trial court made a clerical error specifying that the probation of twelve months was to terminate on August 10, 2016, instead of August 10, 2017. Accordingly, we remand for this clerical error to be corrected by the trial court.

Conclusion

For the foregoing reasons, we dismiss the issue regarding sufficiency of the evidence; affirm the adjudication order; affirm the probationary conditions; remand the dispositional order for further findings of fact; and remand for the correction of clerical errors in the adjudication and supplemental orders.

DISMISSED IN PART, AFFIRMED IN PART, AND REMANDED IN PART.

Chief Judge McGEE and Judge DIETZ concur.

TOKISHA M. INGRAM, PLAINTIFF

v.

HENDERSON COUNTY HOSPITAL CORPORATION, INC., D/B/A MARGARET R. PARDEE MEMORIAL HOSPITAL, RYAN CHRISTOPHER DAVIS, M.D., ROBERT C. BOLEMAN, M.D., HENDERSONVILLE EMERGENCY CONSULTANTS, PC, AMY K. RAMSAK, M.D., AND TST MEDICAL, PA., DEFENDANT

No. COA16-1016

Filed 1 May 2018

1. Evidence—expert testimony—continuing objection—objection not waived

Plaintiff, a patient in a medical malpractice action, did not waive her objection to expert testimony regarding three medical studies even though her attorney asked questions about the studies after the continuing objection. Plaintiff was permitted to attempt to limit or avoid any prejudice from the evidence without losing the benefit of the continuing objection.

2. Evidence—expert testimony—medical malpractice—causation—studies published after underlying events

The trial court did not abuse its discretion in a medical malpractice case by allowing expert testimony regarding three studies published several years after the events giving rise to the claims. The studies were relevant to show lack of causation regardless of timing of the treatments or other factors such as differences in the characteristics of the patients. The purpose of the studies was

to determine the strength of the protocol that plaintiff advocated as the standard of care. Furthermore, the jury was presumed to follow the trial court's limiting instruction.

3. Evidence—expert testimony—medical malpractice—standard of care—sepsis

The trial court did not err in a medical malpractice action by excluding plaintiff's expert's testimony concerning the applicable standard of care for emergency room physicians and physician assistants treating sepsis where plaintiff could not demonstrate prejudice.

4. Medical Malpractice—Rule 9(j) certification—negligence—nursing staff

The trial court's unchallenged findings of fact in a medical malpractice claim against a hospital supported its conclusion of law that a patient's claim for negligence should be dismissed for failure to comply with N.C.G.S. § 1A-1, Rule 9(j) where plaintiff did not identify experts who would offer opinions about nursing care.

5. Appeal and Error—preservation of issues—motion in limine—no additional evidence offered

Plaintiff did not preserve for appeal her objection to a motion in limine limiting and excluding certain testimony in a medical malpractice action where the trial court allowed the hospital's motion and plaintiff did not proffer evidence that she contended should have been allowed.

Appeal by plaintiff from order entered on or about 10 October 2014 by Judge Martin B. McGee and judgment entered on or about 24 February 2016 by Judge Mark E. Powell in Superior Court, Henderson County. Heard in the Court of Appeals 25 May 2017.

Ferguson Chambers & Sumter, P.A., by James E. Ferguson, II, for plaintiff-appellant.

Roberts & Stevens, P.A., by Ann-Patton Hornthal and Phillip T. Jackson, for defendant-appellees Henderson County Hospital Corporation, Inc. d/b/a Margaret R. Pardee Memorial Hospital.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Emma J. Hodson, for defendant-appellees Ryan Christopher Davis, M.D., Robert C. Boleman, M.D., and Hendersonville Emergency Consultants, PC.

Northup McConnell & Sizemore, PLLC, by Isaac N. Northup, Jr., for defendant-appellees, Amy K. Ramsak, M.D. and TST Medical, PA.

STROUD, Judge.

Plaintiff sued defendants for medical malpractice arising out of the care they provided to her for sepsis. A jury ultimately found all defendants not liable. On appeal, plaintiff contends the trial court erred in several evidentiary rulings and in dismissing her claim arising out of nursing care against defendant Henderson County Hospital Corporation, Inc., d/b/a Margaret R. Pardee Memorial Hospital. After careful review, we affirm.

Many witnesses testified regarding plaintiff's illness, the medical care she received, and the standards of care for the diagnosis and treatment of her condition. This overview of plaintiff's medical care omits many details and is based primarily upon plaintiff's medical records and the testimony of Dr. David P. Milzman, plaintiff's expert witness, who provided the initial summary of the facts to the jury. Defendants disputed the interpretation and meaning of some facts, but for purposes of the issues on appeal, we need not summarize defendants' evidence and contentions.

I. Factual Background

The factual background of plaintiff's case took place over 23 and 24 February 2010.

A. 23 February 2010

Plaintiff, then age 35, went to the emergency room at defendant Henderson County Hospital Corporation, Inc., d/b/a Margaret R. Pardee Memorial Hospital ("Pardee Hospital") on 23 February 2010 at about 9:17 p.m. Plaintiff reported that she had severe pain in her back right side, which she described as at a level of 10 out of 10. Plaintiff also had a fever, nausea, vomiting, fatigue, and shortness of breath. Hospital employees took plaintiff's blood pressure and temperature; plaintiff's heart rate was 103 and her blood pressure was 135/83.

Within about five minutes, plaintiff was seen by defendant Ryan Christopher Davis, M.D. Defendant Davis evaluated plaintiff and noted that she had abdominal cramps, vomiting, and body aches; he noted her pain was mild, even though she had identified her pain as level 10 out of 10 to a nurse a few minutes earlier. Defendant Davis did not note that plaintiff's pain was on her right side and noted no prior surgeries,

although plaintiff "had had her tubes tied." Defendant Davis did a physical examination of plaintiff and noted that plaintiff had tenderness but no "guarding and rebound" which would indicate a "really severe abdominal exam." Defendant Davis did not perform a pelvic examination; he did order two laboratory tests, one to check her urine and "basic chemistries" which shows "kidney function and . . . basic electrolytes, sodium, potassium chloride, serum bicarbonate and sugar." Defendant Davis prescribed, and plaintiff received, Toradol, an intravenous ("IV") pain medication; Zofran, for vomiting; and IV fluids.

By about 10:30 p.m., plaintiff's blood pressure was a little lower but her heart rate was still 103; plaintiff reported her pain as 7 out of 10. Defendant Davis received plaintiff's lab test results showing her creatinine was slightly elevated and her urine showed a trace of blood and "a little bit of sugar," and white blood cells. These results usually mean "you are fighting a bacterial infection" and indeed plaintiff's urine also had "a few bacteria." Defendant Davis returned to see plaintiff and reexamined her, noting that she felt better. Defendant Davis gave plaintiff an oral antibiotic, Levaquin 500 milligrams, and Vicodin for pain. Defendant Davis diagnosed plaintiff with vomiting and a urinary tract infection. Defendant Davis gave plaintiff prescriptions for Cipro, an oral antibiotic, and Vicodin for pain. Defendant Davis discharged plaintiff by 11:04 p.m.

Plaintiff's expert witness, Dr. Milzman, testified that Defendant Davis "got a lab result" but "ignored the signs and symptoms" plaintiff reported. Specifically, plaintiff did not report "the most common thing in a urine infection," burning while urinating nor did she report frequent urination, urgency, or pain in her bladder. Dr. Milzman further testified that if part of plaintiff's issue was dehydration from vomiting, plaintiff's heart rate should have dropped some after receiving the IV fluid, but it did not. Plaintiff was still in pain, and "[p]ain that bad, that's not a urine infection."

Dr. Milzman opined that Defendant Davis should have kept plaintiff in the hospital until he could get plaintiff's heart rate under 100 and get better pain relief. Dr. Milzman also testified that Defendant Davis needed to determine why plaintiff's right side was hurting so much by performing an ultrasound or a CAT scan. In addition, Defendant Davis should have "done a blood count" which may have indicated a high white blood cell count as based on the tests done, the elevated creatinine level could indicate kidney injury. Dr. Milzman ultimately testified that Defendant Davis failed to provide proper care by failing to "recognize the initial and progressive severity" of plaintiff's condition, failing "to properly evaluate changing values in her condition, including a heart rate and

her pain complaint," failing to give her IV antibiotics which would generally get "around faster to the body," failing to examine her properly on her right side pain, and failing to improve her condition before she was discharged.

B. 24 February 2010

The next day, 24 February 2010, plaintiff returned to Pardee Hospital ER at about 3:36 p.m.[1] A nurse noted plaintiff had a urinary tract infection and hypotension/tachycardia; hypotension is low blood pressure, and tachycardia is a high heart rate. The nurse noted plaintiff as a priority level 2 patient, which is one level higher than she was assigned the night before, but instead of having a physician see plaintiff, hospital personnel sent her to the "walk-in side" of the ER where she was seen by a physician assistant; this would indicate that they believed her condition to be "less emergent." Plaintiff's temperature was 97; her heart rate was 100, and her blood pressure was 99/51 – "a significant drop" from the night before; her pain level was still 10 out of 10. Mr. Ursin, a physician assistant, saw plaintiff at about 4:30 p.m. Mr. Ursin noted plaintiff's treatment from the night before and that plaintiff had an appointment with her doctor the next day. Plaintiff reported that she was still nauseated and vomiting and had vomited up her medication; she also felt dehydrated. Mr. Ursin noted plaintiff had body aches and chills.

Although it had been about an hour since plaintiff's blood pressure had been checked, Mr. Ursin did not recheck it nor did he note any problems from her physical exam. Mr. Ursin ordered 500 cc of IV fluid, some morphine, Toradol for pain (although he did not chart the pain), an IV antibiotic, and Zofran. Dr. Milzman noted that 500 cc of fluid would not be enough to raise plaintiff's blood pressure, giving plaintiff morphine could cause her blood pressure to drop, and Toradol could harm her kidneys; again, plaintiff's creatinine levels from the night before indicated she may have kidney injury. Mr. Ursin also ordered labs. A little more than an hour later, plaintiff's lab results came back showing her creatinine had gone up indicating "her kidney function is much worse . . . . [F]or the first time we have a blood count, and it's low. . . . [A] low blood count goes along with being severely infected in some patients."

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1. The trial court allowed a defense motion to preclude "testimony from Ms. Ingram, the plaintiff in this case, about her recollection of presenting to the emergency department on the *morning* of February 24th[.]" (Emphasis added.) But despite this ruling, plaintiff was allowed to testify that she had come to the ER in the morning, but was told to return "'home and give the medication time to work.'" There was no medical record of the visit.

About 6:00 p.m., a nurse went to check on plaintiff and could not get a blood pressure reading and could only feel a faint pulse; her blood pressure was 60 palpable, meaning she was in shock and did not have "enough blood pressure to adequately perfuse the body." Mr. Ursin directed that the remainder of the 500 cc of fluid be administered, but he did not direct any other care or consult a physician. Defendant Robert C. Boleman was on duty at the time.

At 6:50 p.m., plaintiff's blood pressure was even lower, 50/25. Mr. Ursin first consulted defendant Amy K. Ramsak, M.D. At about 7:56 p.m., defendant Boleman first saw plaintiff. Defendant Boleman ordered more antibiotics and started dopamine, a medication to help raise blood pressure. At this point, plaintiff started to receive critical care. Over the next hour, plaintiff received additional medication to raise her blood pressure, fluid, and antibiotics. At 9:01 p.m., defendant Ramsak who had previously provided other orders by phone, ordered a lactate level; the result was 5.6, which is "very high" and placed plaintiff at "50 percent, probably closer to 60 percent mortality at that time." By 11:00 p.m., plaintiff was given a breathing tube and placed on a ventilator; hospital personnel continued to work on resuscitating plaintiff through that night and into the next morning. Plaintiff had progressed from shock to septic shock; Dr. Milzman described this progression:

> [W]e have different criteria that we use for describing an infectious syndrome which takes into account any two of up to seventeen combinations of heart rate and temperature and white blood cell count and respiratory effort measurement. And so that's called what we call SIRS or systemic inflammatory response syndrome, which is basically an infectious series of information that we use to identify people at big risk. So you can have an infection.
>
> We talked about sepsis, when now the infection has created changes in the body's response. So not just a sore throat, a strep throat, but a -- maybe high fever and high heart rate, that will get you sepsis. . . .
>
> . . . .
>
> . . . So if you want to think of it as a spectrum . . . . there's regular infection and then what we calls SIRS, which is systemic inflammatory response syndrome. And then there's sepsis, a source of infection plus these criteria. So that's sepsis.
>
> And then there's severe sepsis which is you have the infection with all of these markers, plus the body is

> starting to fail. Either one or two organ systems start to fail. Like the kidneys start to fail. Like with Ms. Ingram, unfortunately. I told you her creatinine, which is a marker for kidney injury, is starting to go up. Later on she has trouble breathing, can't breathe on her own. They have to put a breathing tube in, put her on a ventilator which happens at 11:00 p.m. that night. So the body -- different organ systems in the body, the lungs, now are starting to fail.
>
> . . . .
>
> And you go from severe sepsis with a mortality rate of anywhere between 20 and 40, depending who you read, to septic shock, where now you have a mortality of 50 to 70 percent.

Dr. Milzman testified that Mr. Ursin did not provide adequate care because he did not make his supervising physician aware of plaintiff's 60 palp blood pressure when this was first discovered about 6:00 p.m., and he did not consult with the ICU and ask that plaintiff be admitted. Dr. Milzman also testified that defendants had missed the opportunities to intervene the night before or much earlier on 24 February after plaintiff returned to the ER. "[I]f you can intervene and prevent the patient from going into shock, you have a much better chance at survival."

C. Treatment at Mission Hospital

The next day, 25 February 2010, plaintiff was transferred to another hospital, Mission St. Joseph's Hospital in Asheville, because she needed "dialysis to get off the excess fluid."[2] Plaintiff was hospitalized for over a month. Upon discharge from Mission Hospital,

> [i]t was noted in the records that a tampon was left in her at the time of catheterization and it was not immediately discovered. She had many diagnoses including severe systemic inflammatory response syndrome, suggestive of overwhelming sepsis. She had extensive finger and toe necrosis and skin sloughing with necrosis on both calves. Her fingers were eventually surgically removed and she is to have her toes removed in the near future. She was discharged from Mission Hospital on March 29, 2010.

Plaintiff had additional medical treatment after her discharge from the hospital and eventually lost all of her fingers and both legs below the knee.

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2. Plaintiff did not bring any claims against Mission Hospital.

II. Procedural Background

Plaintiff filed a complaint against defendants in May of 2011, alleging that each defendant was negligent in providing care and this resulted in her devastating injuries. Defendants all filed answers, denying the substantive allegations. Defendants also filed various motions, but for purposes of this appeal, we will not discuss them all. In March of 2013, defendant Pardee Hospital moved to dismiss "[p]laintiff's complaint to the extent the complaint alleges or asserts that said Defendant is liable for the negligence of any health care provider except for Defendants Ryan Christopher Davis, M.D. and Robert C. Boleman, M.D., the health care providers that Plaintiff's 9(j) expert identified as being negligent." In October of 2014, the trial court allowed the motion and dismissed plaintiff's claims against defendant Pardee Hospital "to the extent the Complaint asserts a claim for negligence based upon the theory that the nursing staff of Defendant County Hospital Corporation, Inc., d/b/a/ Margaret R. Pardee Memorial Hospital failed to comply with the applicable standard of care."

The jury was impaneled on 29 January 2016, and the jury entered its verdict on 23 February 2016. The jury ultimately determined plaintiff had not been "injured by the negligence" of any defendant. In February of 2016, the trial court entered judgment determining plaintiff should "recover nothing" and her action was dismissed with prejudice. Plaintiff appeals both the October 2014 order and the February 2016 judgment.

III. Medical Malpractice Claims

In *Smith v. Whitmer*, this Court summarized the elements of a medical malpractice claim and how the plaintiff must prove those elements:

> In a medical malpractice claim, a plaintiff must show (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff. Section 90–21.12 of the North Carolina General Statutes prescribes the appropriate standard of care in a medical malpractice action:
>
> > In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is

> satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.
>
> Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony. Further, the standard of care must be established by other practitioners in the particular field of practice of the defendant health care provider or by other expert witnesses equally familiar and competent to testify as to that limited field of practice.
>
> Although it is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant, the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities. The same or similar community requirement was specifically adopted to avoid the imposition of a national or regional standard of care for health care providers.

159 N.C. App. 192, 195–96, 582 S.E.2d 669, 671–72 (2003) (citations and quotation marks omitted).

IV. Admission of Clinical Studies

Plaintiff first contends the trial court erred in allowing admission "into evidence, through defense questioning, of testimony by experts regarding three studies published four to five years after the events giving rise to plaintiff's claims[.]" (Original in all caps.)[3] Plaintiff contends the three studies "erroneously addressed the standard of care[,]" "the patients in the study were not comparable to plaintiff[,]" "the outcomes in the studies were irrelevant[,]" "the purpose of the studies was

3. Evidence about the three studies came before the jury through testimony, and thus plaintiff is not challenging the admission of the three studies themselves but rather the testimony regarding them. But the trial court considered the three studies themselves for purposes of ruling on plaintiff's evidentiary objections, so we will consider this issue based upon the same information.

irrelevant[,]" and "the probative value of the testimony was substantially outweighed by its prejudicial effect[.]" (Original in all caps.)

A. Preservation of Objection

[1] Defendants contend plaintiff failed to preserve her objection to the admission of evidence regarding the three studies -- ProCESS,[4] ProMISE,[5] and ARISE[6] (collectively "three studies") -- and has waived review on appeal because plaintiff also presented evidence related to the three studies on direct examination in questioning her own expert witness. Defendants agree they first mentioned and introduced evidence regarding the studies and also that plaintiff made a continuing objection which the trial court allowed. But defendants argue that despite the valid continuing objection, plaintiff later waived that objection when her counsel asked questions regarding the studies on direct examination. According to defendants' argument, plaintiff could not ask questions on direct examination regarding the three studies without waiving her objection.

Although defendants' argument focuses on a few lines of the transcript, we have reviewed all of the relevant testimony and full context of plaintiff's questioning regarding the three studies. Once the trial court had allowed the evidence regarding the three studies over plaintiff's objection, she was not required to avoid mention of the studies but was permitted to attempt to limit or avoid any prejudice from the evidence without losing the benefit of the continuing objection:

> The well established rule that when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost, but, as stated by *Brogden, J.*, in *Shelton v. Southern R. Co.*, 193 N.C.

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4. The ProCESS Investigators, A Randomized Trial of Protocol-Based Care for Early Septic Shock, The New England Journal of Medicine 370;18, p. 1683, May 1, 2014 ("ProCESS").

5. Paul R. Mouncey, M.Sc., Tiffany M. Osborn, M.D., G. Sarah Power, M.Sc., David A. Harrison, Ph.D., M. Zia Sadique, Ph.D., Richard D. Grieve, Ph.D., Rahi Jahan, B.A., Sheila E. Harvey, Ph.D., Derek Bell, M.D., Julian F. Bion, M.D., Timothy J. Coats, M.D., Mervyn Singer, M.D., J. Duncan Young, D.M., and Kathryn M. Rowan, Ph.D. for the ProMISE Trial Investigators, Trial of Early, Goal-Directed Resuscitation for Septic Shock, The New England Journal of Medicine, March 17, 2015 ("ProMISE").

6. The ARISE Investigators and the ANZICS Clinical Trials Group, Goal-Directed Resuscitation for Patients with Early Septic Shock, The New England Journal of Medicine, October 9, 2014 ("ARISE").

> 670, 139 S.E. 232, 235: The rule does not mean that the adverse party may not, on cross-examination, explain the evidence or destroy its probative value, *or even contradict it with other evidence upon peril of losing the benefit of his exception*.

State v. Godwin, 224 N.C. 846, 847–48, 32 S.E.2d 609, 610 (1945) (emphasis added) (quotation marks omitted).

Plaintiff's questioning regarding the three studies pointed out their limitations and differences and were intended to demonstrate her contention that they were not relevant to her case. Since the trial court allowed the evidence over her objection, plaintiff could attempt to "contradict" the studies with her witnesses' testimonies. *See id.* Because plaintiff properly preserved her continuing objection, her later questioning on direct examination of her witnesses regarding the three studies did not waive her objection.

B. EGDT and the Three Studies

During the trial, several medical studies were discussed. Plaintiff contended that she should have received early goal-directed treatment ("EGDT") and defendants countered with other studies. The EGDT protocol was described in an article published in 2001 in which Dr. Emanuel Rivers was the principal investigator ("Rivers study").[7] Dr. Rivers compared the outcomes in two groups of patients presenting with sepsis; this trial was done at a single hospital and enrolled 263 patients.[8] Rivers study at 1368. The control group was the "standard-therapy group" which was "treated at the clinicians' discretion according to a protocol for hemodynamic support . . . with critical-care consultation, and were admitted for inpatient care as soon as possible." *Id.* at 1370 (footnote omitted). The other group received the EGDT protocol. *See id.*

One of plaintiff's expert witnesses,[9] Dr. Daniel Snider, explained EGDT and the results of the Rivers study in his testimony. All of the

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7. Emanuel Rivers, M.D., M.P.H., Bryant Nguyen, M.D., Suzanne Havstad, M.A., Julie Ressler, B.S., Alexandria Muzzin, B.S., Bernhard Knoblich, M.D., Edward Peterson, Ph.D., and Michael Tomlanovich, M.D. for the Early Goal-Directed Therapy Collaborative Group, Early Goal-Directed Therapy in the Treatment of Severe Sepsis and Septic Shock, The New England Journal of Medicine, 345;19, p. 1368, November 8, 2001 ("Rivers study").

8. "Twenty-seven patients did not complete the initial six-hour study period (14 assigned to the standard therapy and 13 assigned to early goal-directed therapy)[.]" Rivers study at 1371.

9. The trial court allowed Dr. Snider "to testify as an expert in these fields" and seemed to be referring to the fields of internal medicine and emergency medicine. But

patients presented with sepsis, and one group received the EGDT protocol -- "from the beginning, starts IV fluid, starts antibiotics, aggressive IV fluids" -- and the other group received the "standard therapy" at that time. Dr. Snider testified that Dr. Rivers

> found that the patients that he had enrolled in his protocol which I called Early -- he identified them as soon as he saw SIRS, which is basically vital signs and a white blood cell count if he needs it -- Goal-Directed -- he had these goals, he wanted to get fluids in the patient a fast as he could. That was a goal. He wanted to maintain a blood pressure with pressors, dopamine or Levophed which is a brand name for norepinephrine which is a precursor to adrenaline. Probably more than you need know. Goal-Directed, by trying to achieve these goals, good blood pressure, good fluid resuscitation, antibiotics, those are all worthy goals in a septic patient -- Therapy. So that's EGDT that we've been hearing over and over.
>
> What did he find in the treatment of the early goal-directed therapy? He found that in six hours they had a lower heart rate, they had a higher blood pressure. That's significant. Blood pressure is where it's at. You want that blood pressure high. Because a low blood pressure, shock in the worst case, means you are not getting oxygen to the tissue, the tissue is dying, your lactate acid is going up, your kidneys are failing, your brain is starting to shut down, you're becoming lethargic or worse, comatose, your breathing is not functioning, you have to go on a ventilator. All bad things. But he found that the blood pressure was coming up at six hours in the treatment group that got the goal-directed therapy, early goal-directed therapy.
>
> So what else did he find? Well, ultimately following these patients out further he found that 46 percent survived from septic shock versus 30 percent in the treatment arm that did not get early goal-directed therapy. 46 percent versus 30. That's for every seven patients that would have died, one of those patients actually survived,

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the trial court went on to state, "[h]owever, in regard to the standard of care, I will not allow him to testify to the standard of care in regard to the emergency room physicians or emergency department physicians, except to the extent that they had some duty to report to someone else when certain symptoms or certain things were observed in regard to the plaintiff." Plaintiff contests this determination by the trial court, and we address that issue in a later section.

> they got to go home and with be their family. So it was a big deal saving one life that you would have lost out of every seven.
>
> So what happened next? Well, this was published in the *New England Journal of Medicine*. It's pretty prestigious, no matter what you've heard. I've certainly never been published in the New England Journal, and I would love to be. It's – the world took notice. Okay? In 2004 an international committee made up of doctors from all over the world, Germany, Latin America, Japan, United States of course, of all kinds of doctors, critical care doctors, emergency medicine doctors, surgeons, infectious disease doctors, all of these committees and doctors and countries got together and they came up with guidelines, much of what was based on Dr. Rivers' studies, *Guidelines For the Treatment of Sepsis*. And it was published in, I'm sure – I'm quite confident, more than one journal because it was just so far-reaching.
>
> And those guidelines recommended certain things. They recommended rapid fluids. They recommended antibiotics. They recommended all of this within six hours. They even recommended things that -- that Dr. Rivers had found would be helpful but have since found to be maybe not as helpful as he thought. But they recommended that in 2004. And by 2010 those were still the guidelines internationally.

The Rivers study noted that its "primary efficacy end point" was "[i]n-hospital mortality[,]" and secondary end points were "resuscitation end points, organ-dysfunction scores, coagulation-related variables, administered treatments, and the consumption of health care resources." *Id.* at 1370. The Rivers study concluded that EGDT

> provided at the earliest stages of severe sepsis and septic shock, though accounting for only a brief period in comparison with the overall hospital stay, has significant short-term and long-term benefits. These benefits arise from the early identification of patients at high risk for cardiovascular collapse and from early therapeutic intervention to restore a balance between oxygen delivery and oxygen demand.

Id. at 1376.

Defendants' witnesses presented evidence regarding the three studies, which plaintiff contends are not relevant. All three studies compared the EGDT protocol to other standard treatment; all note some controversy regarding the efficacy of the EGDT protocol. As described by the ProCESS study, the Rivers study was "[i]n a single-center study published more than a decade ago" which involved "patients presenting to the emergency department with severe sepsis and septic shock" which found that

> mortality was markedly lower among those who were treated according to a 6-hour protocol of early goal-directed therapy (EGDT), in which intravenous fluids, vasopressors, inotropes, and blood transfusions were adjusted to reach central hemodynamic targets, than among those receiving usual care. We conducted a trial to determine whether these findings were generalizable and whether all aspects of the protocol were necessary.

ProCESS at 1683.

The ProCESS study was done from 2008 to 2013 in 31 United States emergency departments with 1,341 patients enrolled. *See id.* at 1683, 1686. ProCESS considered differences in 90 day mortality, 1-year mortality, and "the need for organ support." *Id.* at 1683, 1685. The ProCESS study ultimately concluded that "protocol-based resuscitation of patients in whom septic shock was diagnosed in the emergency department did not improve outcomes." *Id.* at 1683.

The ProMISE trial was conducted in 56 hospitals in England from 2011 to 2014, with 1,260 patients enrolled. ProMISE at 1, 3. ProMISE concludes that "[i]n patients with septic shock who were identified early and received intravenous antibiotics and adequate fluid resuscitation, hemodynamic management according to a strict EGDT protocol did not lead to an improvement in outcome." *Id.* at 1.

The ARISE study tested "the hypothesis that EGDT, as compared with usual care, would decrease 90-day all-cause mortality among patients presenting to the emergency department with early septic shock in diverse health care settings." ARISE at 2. The ARISE trial was conducted from 2008 until 2014 at 51 hospitals in several countries, most in Australia or New Zealand, with 1,600 patients enrolled. *See id.* at 1-2. The ARISE study noted,

> EGDT was subsequently incorporated into the 6-hour resuscitation bundle of the Surviving Sepsis Campaign

> guidelines, and a number of nonrandomized studies showed a survival benefit with bundle-based care that included EGDT. Despite such successes, considerable controversy has surrounded the role of EGDT in the treatment of patients with severe sepsis. Concerns have included the potential risks associated with individual elements of the protocol, uncertainty about the external validity of the original trial, and the infrastructure and resource requirements for implementing EGDT.

Id. at 2 (footnotes omitted). ARISE concluded that "the results of our trial show that EGDT, as compared with usual resuscitation practice, did not decrease mortality among patients presenting to the emergency department with early septic shock." *Id.* at 10.

As noted in the summary of plaintiff's care, her evidence showed first that her diagnosis of sepsis was delayed, and second, she did not receive EGDT. Generally, plaintiff's evidence showed that her condition was not correctly diagnosed on 23 February, her diagnosis was delayed on 24 February, and her initial treatment on both days she came to the hospital was much less aggressive than treatment by EGDT. Plaintiff contended to the jury that if she had been promptly diagnosed with sepsis and received EGDT, her outcome would have been improved and she would not have suffered serious and permanent injuries, including amputations.

C. Relevance of Studies and Prejudicial Effect

[2] Plaintiff argues that the three studies are not relevant for several reasons. Plaintiff contends that the three studies "erroneously addressed the standard of care" and considered "mortality, not morbidity." Plaintiff also argues that the purposes and outcomes of the three studies were not relevant because the study patients were not similar to or in the same circumstances as plaintiff. Plaintiff's fifth argument is that even if the studies are relevant "the probative value of the testimony was substantially outweighed by its prejudicial effect[.]"

> [Under Rule 401 e]vidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. . . . Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better

> situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and quotation marks omitted).

1. Timing of the Three Studies

The primary basis for plaintiff's objection, as noted in her motion in limine and during argument of the motions, was her contention the three studies are not relevant to the issues in dispute because they were published in 2014 and 2015 and could not have been a consideration in determining the standard of care for treatment of sepsis in 2010. In other words, plaintiff contends the three studies are not relevant to the issues in dispute because they were published *after* her hospitalization:

> These studies that they are talking about came up in 2014, four years after Ms. Ingram had lost her fingers and her legs and her feet. And what they are trying to do -- we have a motion to prevent them from bringing this study in, because it doesn't inform anything about what happened to Ms. Ingram in 2010. And essentially what they are trying [to] do is to change in 2014 the standard of care in 2010. That's what these studies are about.[10]

In this part of plaintiff's argument on why evidence regarding the three studies should not have been admitted plaintiff also contends

> [t]o the extent that the studies addressed the standard of care, either directly or indirectly, they were grossly misleading to the jury in that they suggested that the standard of care at the time the studies were published was the same as the standard of care in 2010 when Ms. Ingram was injured. . . . [T]he studies purport to address the issue of causation, by implication the studies address the standard of care by concluding that Early Goal Directed Therapy (EGDT), an element of the standard of care according to

10. In addition, plaintiff contended that even if they were relevant to some extent, they were unfairly prejudicial due to the risk of misleading or confusing the jury as to the standard of care in 2010; we will address this contention below in this opinion.

> Plaintiff's experts, would have been of no benefit to . . . [plaintiff]. . . . In short, Defendants were saying by these studies that the standard of care didn't matter because Ms. Ingram would have had the same outcome if the standard of care had been followed.

Plaintiff is correct: "Defendants *were* saying by these studies that the standard of care didn't matter because Ms. Ingram would have had the same outcome if the standard of care had been followed." (Emphasis added). In other words, the three studies are relevant to show lack of causation no matter the timing, because they tend to show that the results from EGDT and "standard treatment" are about the same. *See generally* ProCESS, PROMISE, ARISE. The three studies have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Dunn*, 162 N.C. App. at 266, 591 S.E.2d at 17. This argument is overruled.

2. Mortality versus Morbidity

Plaintiff next contends that the three studies were irrelevant because they were comparing "mortality, not morbidity." This assertion is simply not borne out by the three studies. Plaintiff argues "the studies shed no light on what likely would have happened to her if she had been diagnosed earlier and treated accordingly." Plaintiff's own expert testified that the three studies did not find any difference in mortality or *morbidity* between EGDT as compared to "another protocol[.]" Even though the primary focus of the studies may have been on mortality, all of the studies address both mortality and morbidity to some extent, as a consideration of morbidity is only even possible if patients survive and thus necessitates some consideration of mortality. This argument is overruled.

3. Comparability of Patients in Studies

Plaintiff next argues "[t]he outcomes of the patients in the three studies offered by Defendants have no application to . . . [plaintiff] because the patients included in the studies were not comparable to" her. Plaintiff points out that

> [t]he health status of the patients varied from patient to patient and included a variety of patients, some of whom were older than Ms. Ingram, more advanced in sepsis than Ms. Ingram, younger than Ms. Ingram, and sicker than Ms. Ingram. There were no patients referenced in the studies

> who had come to the hospital under circumstances like Ms. Ingram[.]

It is probably true that no patient in any of the studies was exactly like plaintiff, but no two patients in any studies are exactly alike. According to plaintiff, the lack of almost identical patients would make all medical studies of no use in determining how to best treat other patients. Plaintiff's contentions regarding the characteristics of the patients enrolled in each study do not change the relevance of the three studies but go only to the weight and credibility of the evidence. Every patient in each study was unique but the physicians conducting the studies determined that the patients met the enrollment criteria of the particular study. Naturally, there were differences in the design, endpoints, methodology, and enrollment criteria for each study. The expert witnesses addressed these details on both direct examination and cross examination. This argument is without merit.

4. Prejudicial Effect

Last, plaintiff argues that even if the three studies had some relevance, the trial court should have excluded them under Rule 403 because they are misleading and unfairly prejudicial to plaintiff. Under Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2015).

> In general, the exclusion of evidence under the Rule 403 balancing test is within the sound discretion of the trial court. Abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision.

State v. Syriani, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993) (citations omitted).

Plaintiff argues the three studies were "dangerously misleading" because they have the "initial appearance of . . . addressing septic shock, which . . . [plaintiff] ultimately developed." Again, plaintiff's argument of unfair prejudice is premised upon the fact that the patients in the three studies were not "comparable to" plaintiff:

> There is nothing in the studies to suggest that any of the patients were Ms. Ingram's age, had a similar or comparable medical history, were otherwise healthy upon their

> presentation to the hospital or were turned away from the hospital at the earliest stages of sepsis and returned to the hospital on two additional occasions before any therapy was started.

Plaintiff's focus on the characteristics and circumstances of each patient in a medical trial is misguided. Again, by plaintiff's standard, there would be no medical study possible which could be admissible in a medical malpractice case; even the Rivers study cannot meet this standard. Some studies may have patients who more closely resemble plaintiff or some may have more differences, but the expert medical testimony is necessary to evaluate the strengths and weaknesses of each study and determine which studies are most applicable for a particular situation. The evidence here shows that the primary goal of each of the three studies was to determine the efficacy of the protocol for EGDT -- the very protocol plaintiff advocated as the standard of care for her treatment -- the three studies were relevant for this purpose, and again, plaintiff's arguments go to the weight and credibility of the three studies, not unfair prejudice. The trial court did not abuse its discretion in ruling that the probative value of the three studies was not "outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403.

In addition, based upon plaintiff's objection to use of the three studies to establish a standard of care, the trial court gave a limiting instruction as to the three studies: "Any medical literature published after February 23rd, 2010, cannot be considered for the purpose of establishing standard of care in this case. However, it may be used for other purposes in this case." Plaintiff argues this limiting instruction was not sufficient, since "advising the jury not to consider the studies on the issue of the standard of care, it is unrealistic to assume that jurors, in a complex case as this one was, would be able to appropriately apply the limitation." But we do not assume the jury failed to follow the instructions, despite the complexity of the case: "A jury is presumed to follow the court's instructions, and we must therefore presume that the jury based its verdict on these instructions." *Ridley v. Wendel*, ___ N.C. App. ___, ___, 795 S.E.2d 807, 813–14 (2016) (citation, quotation marks, and brackets omitted). This is argument is overruled.

V. Preclusion of Dr. Snider's Testimony Regarding Standard of Care

[3] Plaintiff next contends that

> the trial court erred in precluding plaintiff's expert, Dr. Daniel Snider, from testifying regarding the applicable

> standard of care for defendant emergency room physicians and physician assistant when plaintiff's expert was engaged in a similar practice which included patients with the same illnesses as plaintiff and the same treatment modalities and procedures as those applied to plaintiff and which gave rise to plaintiff's injuries.

We review the trial court's ruling excluding Dr. Snider's testimony as to standard of care for abuse of discretion:

> Rule 702 of the North Carolina Rules of Evidence governs the admissibility of expert testimony. It states:
>
> > 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.
>
> Our courts construe this Rule to admit expert testimony when it will assist the factfinder in drawing certain inferences from facts, and the expert is better qualified than the factfinder to draw such inferences. A trial court is afforded wide latitude in applying Rule 702 and will be reversed only for an abuse of discretion.

In re Hayden, 96 N.C. App. 77, 82, 384 S.E.2d 558, 561 (1989) (citations, quotation marks, ellipses, and brackets omitted).

We have reviewed the testimony at trial at length. Even if the trial court erred by precluding a portion of Dr. Snider's expert testimony, plaintiff cannot demonstrate prejudice since ultimately Dr. Snider testified regarding his opinion of how plaintiff should have been tested when she arrived at the emergency department and of the diagnosis suggested by her symptoms:

> Q. Dr. Snider, given the presentation, including the complaints and findings of Ms. Ingram's condition on the night of February 23rd *when she was at the emergency department* at Pardee, what were those signs, symptoms indicative of in your opinion?
>
> MR. CURRIDEN: Objection, Your Honor.
>
> THE COURT: Overruled.

A. *In my opinion I think she was presenting with early sepsis. And the only tests that we don't have to back that up is a complete blood count, a very simple test. A test that I want to know the results of when I see somebody with abdominal cramps, vomiting, generalized pain 10 of 10, shortness of breath, body aches.* I mean, that's – that's a constitutional whole body response, not something localized like a urinary tract infection, a simple urinary tract infection.

The only way -- well, let me rephrase that. One of the easiest ways to determine if this is much more serious than what we see on the record here is to get a CBC, a blood count. I would imagine everybody on the jury has had a blood count at some point in their life.

MR. CURRIDEN: Objection. Motion to strike, Your Honor.

THE COURT: Overruled. The motion is denied.

A. It provides basic information including a white blood cell count, which I mentioned is the body's way of fighting off infection. When you have infection, especially an infection that goes systemic, your white blood cell count would absolutely be expected to go up.

Q. Now – I'm sorry, go ahead. Finish your answer then I have another question for you.

A. We don't have a white count, a simple test. In my opinion if we had had a white count that night, it would have demonstrated findings very suggestive or conclusive for sepsis much like the white count the following day did. And that would have cleared the air very quickly.

This was not a simple UTI, and she needed to be admitted for IV antibiotics, IV fluids. If this had been done, I have to say in my opinion it would have overwhelmingly changed the outcome here. Way more than likely than not, to use a legal term, Ms. Ingram would not have lost her fingers, not have lost her toes. I doubt much of what took place the following day would have ever happened if she had been admitted that night, received IV antibiotics and more aggressive IV fluid resuscitation. *That was a crucial point in this whole course of*

> *events for Tokisha Ingram. Not getting a CBC that night changed the course of history for her.*

(Emphasis added.) Plaintiff cannot demonstrate that excluding testimony by Dr. Snider regarding the standard of care as to diagnosis of sepsis caused her any prejudice, considering the evidence permitted by the trial court. Furthermore, plaintiff's other expert witnesses also testified regarding the standard of care. This argument is overruled.

VI. Rule 9(j) Dismissal of Nursing Care Claim

[4] Plaintiff's complaint alleged negligence by hospital nursing staff for failing "to correctly triage" plaintiff and failing "to recognize the severity of . . . [plaintiff's] condition." The complaint also alleged that "[t]he medical care in this case has been reviewed by persons who are reasonably expected to qualify as expert witnesses under Rule 702 of the Rules of Evidence and who are willing to testify that the defendants' care did not comply with applicable standards of care." In Rule 9(j) discovery responses, plaintiff identified Dr. Sixsmith as her "reviewing expert[,]" although the response did not specifically identify nursing care.

In March of 2014, defendant Pardee Hospital moved to dismiss plaintiff's claim regarding nursing care because plaintiff's expert witness on this issue, Dr. Diane Sixsmith, testified in her deposition she did not believe that the nursing care fell below the applicable standard of care. The trial court entered an order on 10 October 2014 dismissing plaintiff's claims against defendant Pardee Hospital "to the extent the Complaint asserts a claim for negligence based upon the theory that the nursing staff of Defendant County Hospital Corporation, Inc., d/b/a/ Margaret R. Pardee Memorial Hospital failed to comply with the applicable standard of care."

Plaintiff contends that the trial court erred by

> dismissing under Rule 9(j) the plaintiff's claim of negligence against the Hospital involving nursing care when a qualified expert reviewed the medical care pursuant to Rule 9(j) and concluded that the hospital care fell below the standard, but did not specify the particular ways in which the care fell below the standard.

(Original in all caps.)

North Carolina General Statute § 1A-1, Rule 9(j) provides in relevant part:

> Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. §1A-1, Rule 9(j) (2015).

Compliance with Rule 9(j) is a question of law, which we review *de novo:*

> A plaintiff's compliance with Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury. Because it is a question of law, this Court reviews a complaint's compliance with Rule 9(j) *de novo*. When ruling on a motion to dismiss pursuant to Rule 9(j), a court must consider the facts relevant to Rule 9(j) and apply the law to them. A complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable. When a trial court determines a Rule 9(j) certification is not supported by the facts, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination.

Estate of Wooden v. Hillcrest Convalescent Ctr., 222 N.C. App. 396, 403, 731 S.E.2d 500, 506 (2012) (citations, quotation marks, and brackets omitted).

The trial court's October 2014 order includes detailed findings of fact regarding plaintiff's negligence claims arising from nursing care, plaintiff's responses to discovery on this issue, and Dr. Sixsmith's

deposition testimony; plaintiff's brief challenges none of these findings of fact as unsupported by competent evidence, so they are binding upon this Court. *See In re C.B.*, ___ N.C. App. ___, ___, 783 S.E.2d 206, 208 (2016) ("Unchallenged findings are binding on appeal.")

Plaintiff argues her complaint complied with Rule 9(j) because

> [t]here is no question in this case that the Complaint specifically asserts that the medical care at issue in this case was reviewed by a person who was reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who was willing to testify that the medical care did not comply with the applicable standard of care.

Plaintiff contends that she reasonably expected Dr. Sixsmith, her identified expert, to testify regarding nursing care. The trial court's findings of fact quoted Dr. Sixsmith's deposition where she stated that she had not believed nor would she testify that the nursing care provided by defendant Pardee Hospital fell below the standard of care. "[I]t is also now well established that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate." *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008).

Plaintiff further contends that even if Dr. Sixsmith was unwilling to testify

> Dr. David Milzman, Dr. Daniel Abbott and Dr. Daniel Snider were all willing to testify at trial that the nursing care fell below standard. Their willingness to testify was brought to the attention of the trial court before the trial court dismissed the action against Defendant Pardee as to nursing care. The particulars of the criticisms held by each of these witnesses, all of whom testified at trial, were contained in their respective depositions.

But plaintiff failed to identify Dr. Milzman, Dr. Abbott, and Dr. Snider as experts who would offer opinions regarding nursing care in response to discovery. In addition, plaintiff has failed to direct us to any place in the 678 page record, five depositions, or 2,930 pages of trial transcript where we might find verification of plaintiff's assertion that other experts were identified regarding nursing care before the trial court's May 2014 hearing on this issue to testify regarding nursing care; plaintiff's argument section on this issue contains no specific reference to the evidence

before us. Therefore, the trial court's unchallenged findings of fact support its conclusion of law that plaintiff's "claim for negligence based upon the theory that the nursing staff of" defendant Pardee Hospital did not comply with Rule 9(j) and should therefore be dismissed. This argument is overruled.

VII. Exclusion of Evidence of Morning Visit to the Hospital

[5] Last, plaintiff argues that the trial court erred in allowing defendant's motion in limine and thus "limiting and excluding testimony from plaintiff and plaintiff's witnesses regarding plaintiff's visit to defendant Pardee Hospital on the morning of 24 February 2010." (Original in all caps.)

> We review a trial court's rulings on motions *in limine* and on the admission of evidence for an abuse of discretion. This Court will find an abuse of discretion only where a trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

State v. Hernendez, 184 N.C. App. 344, 348, 646 S.E.2d 579, 582 (2007) (citations and quotation marks omitted).

Defendant Pardee Hospital filed a motion in limine seeking to prevent plaintiff from testifying about a visit to the hospital on the morning of 24 February 2010. According to the defendant's argument on the motion in limine[11], plaintiff testified in her deposition she returned to the hospital on the morning of 24 February 2010:

> Ms. Ingram recalled in her deposition, and there's no allegation about this in the complaint either, but during her deposition she said, "Well, I do remember coming to the hospital on the morning of the 24th." Her recollection or best timeframe was about 10:00 o'clock or 10:30 the morning of the 24th. And that she was basically taken back to a treatment room and then told -- she overheard someone say on the other side of the curtain or wall, quote, "she is just a popper."[12] And then someone, a nurse, who she describes as a nurse, came back into the room and told her "you just need to go home and give the medicine time

11. Plaintiff did not include her deposition in our record, so we will quote defendants' counsel's argument on this issue.

12. According to plaintiff's brief, she understood the term "popper" "to mean that she was a pill popper and was seeking medication and treatment."

to work." There's no medical records, there's no other evidence of any visit on the morning of the 24th.

Defendant then argued:

> Ms. Ingram's testimony is that she interacted with the nursing staff. And as we have established in the first motion in limine, which is that the Hospital nursing staff as a theory of liability cannot exist in light of the Court's order from October 2014 dismissing the complaint, and as plaintiff's counsel has already indicated the only issue they intend to submit to the jury as to the Hospital's liability is the issue of apparent agency for Boleman, Davis, Dr. Ramsak, and perhaps Ursin, understanding we left that issue open. This testimony about a visit on the morning the 24th has no relevance to any claim in the case and, therefore, should be excluded.

The trial court allowed the motion in limine, with a qualification that it may reconsider depending upon the evidence presented during the trial:

> Well, I'm going to allow that motion. But if you believe the door was opened by that argument she wasn't as -- the evidence might tend to show she wasn't as sick as she claimed or something similar, then I will reconsider that then. And I think I would probably allow that. Although, most likely not the comment that was overheard about being a popper.

At trial, plaintiff testified about her return to the hospital on the morning of 24 February 2010:

> A. On the sheet it said that, at the bottom of the sheet, I remember it said something about if you had these symptoms to come back. And then I was feeling really bad, so I went back that morning to the hospital.
>
> Q. Okay. Did you get any treatment when you got back?
>
> A. No, sir.
>
> MR. JACKSON: Objection.
>
> THE COURT: Overruled.

Q. What -- what happened when you went back? When I say what happened, did you stay at the hospital, did you get treatment or what? Tell us about that.

A. When I went back to the hospital and I had conversation with, I assume, the receptionist, and what I remember is someone, I don't remember who it was, telling me that I needed to give the medication time to work.

MR. JACKSON: Objection.

MR. CURRIDEN: We object.

THE COURT: Overruled.

Q. I'm sorry. There were some interruptions there. Could you repeat that? Somebody said what?

A. That I needed to give the medication time -- that I needed to go back home and give the medication time to work.

MR. JACKSON: Objection.

THE COURT: Mr. Ferguson, I want to say something to the jury.

MR. FERGUSON: Yes, sir.

The trial court then gave a limiting instruction to the jury, in accord with its ruling on defendants' motion in limine:

THE COURT: Members of the jury, as I said yesterday, there's no claim or allegation that anyone at the Hospital did anything wrong or negligent regarding this morning visit. Nobody, no nurse, no doctor or physician assistant. So when you get to the point of deciding whether negligence was committed, this has nothing to do with it. Please go ahead, Mr. Ferguson.

Plaintiff then resumed her testimony:

Q. So what did you do after this person told you to go back home and give the medication time to work?

A. I went back home and laid down.

Q. How did you feel when you got back home?

> A. I laid there for a little while, and I may have made some phone calls or something. I don't quite remember. But after awhile I went back to the hospital. My auntie told me that I needed to go back.

Plaintiff argues that her

> testimony of the details of this visit would have shed light on how sick the Plaintiff was and her efforts to get help as soon as possible. The evidence would have further shown that at the time the Hospital did not take her complaints seriously and demonstrated a reluctance to provide help.

But the testimony plaintiff actually gave showed exactly this – "how sick" she was, "her efforts to get help as soon as possible[,]" and "the Hospital did not take her complaints seriously and demonstrated a reluctance to provide help."

Furthermore, plaintiff made no proffer of additional evidence she contends the trial court should have allowed her to present, so she has not preserved this argument for appellate review. *See generally State v. Reaves*, 196 N.C. App. 683, 687, 676 S.E.2d 74, 77 (2009) ("Likewise, a party objecting to the grant of a motion in limine must attempt to offer the evidence at trial to properly preserve the objection for appellate review.") The only "limitation" or "exclusion" the trial court applied to plaintiff's testimony about her return visit to the hospital on the morning of 24 February 2010 was to instruct the jury that plaintiff had no claim for medical negligence arising from the alleged conduct of hospital staff from that morning, and, as discussed above, the trial court properly dismissed that claim. The trial court did not abuse its discretion by instructing the jury as to the limitation on the purpose of plaintiff's testimony. This argument is overruled.

VIII. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Chief Judge McGEE and Judge MURPHY concur.

LAMBERT v. TOWN OF SYLVA

[259 N.C. App. 294 (2018)]

CURTIS LAMBERT, PLAINTIFF
v.
TOWN OF SYLVA, DEFENDANT

No. COA17-84

Filed 1 May 2018

1. Immunity—governmental—defense not raised by defendant—raised ex mero motu by trial court

The trial court erred by dismissing plaintiff's state law claim for wrongful discharge based on governmental immunity where the trial court raised it ex mero motu. Governmental immunity is an affirmative defense that must be pled by the defendant.

2. Civil Rights—42 U.S.C. § 1983—firing for political activity—directed verdict

The trial court erred by granting a directed verdict for defendant on a 42 U.S.C. § 1983 claim at the close of plaintiff's evidence where plaintiff was a police officer who alleged that he was fired for running for sheriff. Taking plaintiff's evidence as true and drawing every reasonable inference therefrom, plaintiff presented sufficient evidence to survive the motion for directed verdict; although defendant contended that it could insulate itself from responsibility by leaving the final decisions to the police chief and town manager, such is not the law.

3. Parties—necessary—failure to join

The trial court erred by dismissing plaintiff's claims arising from his termination as a law enforcement officer (after he ran for sheriff) for failure to join a necessary party where defendant never requested joinder of any other parties and the Court of Appeals could not determine from the transcript, record, or order whom the trial court believed to be a necessary party or why they would be necessary even if they were proper.

Appeal by plaintiff from order entered 13 June 2016 by Judge Mark E. Powell in Superior Court, Jackson County. Heard in the Court of Appeals 23 August 2017.

David A. Sawyer for plaintiff-appellant.

Ridenour & Goss, P.A., by Eric Ridenour and Jeffrey Goss, for defendant-appellee.

STROUD, Judge.

Plaintiff Curtis Lambert ("plaintiff") appeals from the trial court's order of dismissal in favor of defendant Town of Sylva ("defendant"). At the close of plaintiff's evidence in a jury trial of the three claims in the complaint, the trial court granted a directed verdict for defendant on all claims. Plaintiff appealed, and for the reasons that follow, we reverse and remand for a new trial.

I. Facts

Because this case turns on legal issues, we will present only a brief summary of the facts based upon plaintiff's evidence. Plaintiff was employed by defendant as a police officer for the Town of Sylva. He was supervised by the Chief of Police Davis Woodard; Chief Woodard was under the supervision of the Town Manager, Paige Roberson Dowling. On 17 February 2014, plaintiff filed to run for Jackson County Sheriff, as a Republican. Plaintiff claims that Chief Woodard ridiculed him for running for sheriff and took other adverse actions against him for this reason. On 3 March 2014, Chief Woodard called plaintiff in to meet with him, the Town Manager, and an assistant chief and then demanded that plaintiff resign his position as a police officer. He refused, so Chief Woodard fired him. When he asked why, Chief Woodard and the Town Manager claimed to have received complaints about him, although plaintiff had never been informed of any complaints. Plaintiff then inquired about his personnel file and found it contained no complaints, reprimands, or counseling notifications, other than one undated and unsigned memo purportedly from a detective regarding a traffic checkpoint conducted in November 2013. Plaintiff sought to appeal his termination with the Town of Sylva, but the Town Manager affirmed the termination and told him that the decision was final.

Despite the absence of any complaints or disciplinary action in his personnel file, after plaintiff applied to receive unemployment benefits, defendant provided information to the North Carolina Employment Security Commission stating that plaintiff was terminated for excessive absenteeism and claimed that he had been warned about this, although his personnel file included no such warnings and showed that plaintiff's only absences had been for illness and the birth of his child -- all approved by defendant under the Town's usual policies for sick leave.

Plaintiff filed a complaint against defendant on 2 March 2015, alleging claims under 42 U.S.C. § 1983 based upon defendant's violations of his state and federal constitutional rights to free speech and association

and for his wrongful termination in violation of North Carolina public policy as expressed in N.C. Gen. Stat. § 160A-169, since he was fired based upon his political activity or beliefs. Plaintiff also alleged that defendant had purchased liability insurance coverage for employment cases and had waived any defense of "sovereign immunity to the extent of coverage under the policy."

On 7 April 2015, defendant filed its answer, which admitted a few allegations of the complaint and denied the others. The answer alleged that plaintiff's employment was at will and could be terminated at the will of the defendant, without regard to his performance. But the answer is most notable here for the total absence of any affirmative defenses, particularly any claim of any sort of governmental immunity. According to the record before this Court, defendant filed no motion to dismiss and never moved for summary judgment. The complaint, defendant's acceptance of service, and answer were the only documents filed in the case until the jury trial started.

Plaintiff's claims came on for a jury trial on 23 May 2016, with the jury impaneled on 24 May 2016. On 25 May 2016, at the close of plaintiff's evidence, defendant filed a written motion for directed verdict "pursuant to Rule 50, Rule 12(b)(6) and Rule 12(b)(7) of the North Carolina Rules of Civil Procedure." Defendant made four arguments for directed verdict, which we will summarize briefly:

(1) The doctrine of respondeat superior does not apply to plaintiff's claims under 42 U.S.C. § 1983 or termination in violation of public policy, because "the Town itself must have a custom or policy that is in violation of the law" and the Town had no policy that a "Town employee could not run for political office."

(2) Under Rule 12(b)(6), plaintiff's complaint failed to state a claim upon which relief could be granted due to the lack of a "pattern, practice, custom or usage" in violation of his constitutional rights.

(3) Under Rule 12(b)7), "Town Officials" made the decisions plaintiff alleges are in violation of his rights and they were not made parties.

(4) Plaintiff's evidence is too "speculative" to "rebut the Employment at Will presumption."

Once again, defendant did not mention any claim of governmental immunity in its written motion for directed verdict or in argument to the trial court. The trial court granted defendant's motion for directed verdict. We have had difficulty discerning why, although the trial court's order essentially tracks defendant's motion. The order says:

> [I]t appearing that after the Plaintiff had presented all of Plaintiff's evidence to the jury and Plaintiff had rested, the Defendant moved to dismiss the Plaintiff's case. Based upon the pleadings, facts and arguments of counsel, viewed in the light most favorable to the Plaintiff, the Court finds that Plaintiff has shown no lawful claim, and that Defendant's motion should be granted pursuant Rules l2(b)6, 12(b)7 and Rule 50 of the North Carolina Rules of Civil Procedure.

In seeking to understand this order, we have also considered the trial court's comments to the jury upon granting directed verdict. He stated:

> Members of the jury, I appreciate your attention to this case so far, but at the end of the plaintiff's evidence I've dismissed the lawsuit, so there will be nothing for you to hear. I want to explain why I did that because I -- well, you're probably wondering about it and you're entitled to an explanation.

He first addressed the § 1983 claims:

> [For] the Town of Sylva commissioners -- to be responsible for what their employees do that the plaintiff alleges was wrong, the commissioners either had to have a custom or policy that allowed it or directed it, they had to know it was happening -- these are alternatives -- or they had to know it was happening and did nothing about it, maybe a reckless indifference type standard, or perhaps they failed to adequately train their employees and that's why it was happening, but just because a municipal employee allegedly violated someone's rights under that federal statute does not make the town liable, and I think you understand what I'm saying.
>
> I've heard -- perhaps there's been some testimony about some communication from a commissioner, but I didn't hear any evidence that the commissioners were the moving force behind any of this.
>
> Now maybe employees, if you believe the plaintiff's evidence, were, but not the commissioners themselves, and that's why I dismissed the federal claims.

He then addressed the claim for wrongful discharge:

> Well, North Carolina law makes it clear you can't fire someone because of political things they do when they're not at work; that's wrong.
>
> But you've also heard of sovereign immunity. You've heard of the cases where a -- for example, a state employee was driving a truck during his business and he hit somebody and hurts them. So that person says, "I'm going to sue the state." And perhaps you've heard about those cases where that lawsuit was thrown out because the judge says, "You cannot sue the state without their permission."
>
> I remember I read some of those cases and I thought, well, that's kind of unfair. Well, it depends on who hits you, who runs over you, whether you get money back or not for your damages. And there's an exception for that. If the state or municipality has purchased liability insurance, then those lawsuits can proceed. But there's been no evidence about liability insurance in this case.
>
> So that doctrine goes back to the common law and the law concerning the King of England. You couldn't sue the king without his permission. And there's all kinds of exceptions. I know you want me to go into them, but I won't.

Plaintiff timely filed a notice of appeal from the trial court's order granting directed verdict.

II. Analysis

a. Standard of review

The order on appeal was entered after presentation of the plaintiff's evidence at trial and is based upon Rule 50, despite its reference to Rules (12)(b)(6) and (7), so we must consider all of the evidence presented at trial in the light most favorable to plaintiff.

> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence

> to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (citations omitted).

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke University, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). If the plaintiff has presented "more than a scintilla of evidence" to support each element of a claim, the trial court should deny directed verdict. *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 6, 437 S.E.2d 519, 522 (1993). The trial court's ruling presents a question of law which we review *de novo* and "[t]his Court's review is limited to those grounds asserted by the moving party at the trial level." *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 761-62 (2004) (citation and quotation marks omitted).

Our Supreme Court has noted that "where the question of granting a directed verdict is a close one, . . . the better practice is for the trial court to reserve its decision on the motion and allow the case to be submitted to the jury." *Turner*, 325 N.C. at 158, 381 S.E.2d at 710. If the case is submitted to the jury and the jury should return a verdict for the plaintiff, reserving the ruling on the motion for directed verdict and then granting a judgment notwithstanding the verdict also has the advantage of avoiding the need for another trial, should the directed verdict be reversed on appeal. *See* N.C. R. Civ. P. Rule 50 Comment, *Comment to this Rule as Originally Enacted* ("Under [Rule 50], whenever a motion for a directed verdict made at the close of all the evidence is not granted, it will be deemed that the judge submitted the case to the jury having reserved for later determination the legal question raised by the motion. Thus, if there is a verdict for the nonmovant or if for some reason a verdict is not returned, the judge can reconsider the sufficiency of the evidence and, if convinced that it is insufficient, can grant the motion. If, on appeal it should prove that the judge was correct, that is, that he properly granted the motion, then the appellate court can affirm and, in appropriate cases, order judgment entered for the movant. On the other hand, if it should

prove that the trial judge improperly granted the motion, the appellate court is not restricted to granting a new trial, as under the prior practice, but can order judgment entered on the verdict.").

b. Procedural posture

As we noted above, we need not dwell on details of the facts as presented at trial. Viewing the evidence in the light most favorable to plaintiff, he has presented "more than a scintilla" of evidence to support his claim he was fired because he was running for sheriff as a Republican. *Bryant*, 113 N.C. App. at 6, 437 S.E.2d at 522. His evidence also shows that the Chief's decision was supported by the Town Manager, so her review of the termination was just a "rubber stamping" of the Chief's decision, and that the defendant did not permit plaintiff to appeal this decision. Defendant certainly claims otherwise, but again, we must take plaintiff's evidence as true and must draw all reasonable inferences in his favor. *See Davis*, 330 N.C. at 322, 411 S.E.2d at 138.

In addition, this case comes to us in a very unusual procedural posture, particularly for the legal issues involved. Although there are other cases addressing wrongful termination and 42 U.S.C. § 1983 claims, we cannot find any other case in North Carolina in which a directed verdict has been granted for a defendant, primarily based upon governmental immunity, where the defendant has neither pled nor argued governmental immunity as a defense. Moreover, while Rule 12(b)(6) was noted in defendant's motion and the order granting directed verdict, a motion to dismiss under Rule 12(b)(6) considers whether the plaintiff's complaint has stated a claim upon which relief may be granted, and this case had already proceeded to trial. Nevertheless, with those caveats, we will address the arguments on appeal.

c. Governmental Immunity

[1] We will first address the trial court's ex mero motu dismissal of plaintiff's state law claim for wrongful discharge based upon governmental immunity.[1] Defendant did not plead governmental immunity as an affirmative defense and did not move to dismiss on this basis. In all fairness to defendant, defendant did not seek to defend the trial court's ruling on governmental immunity in its brief before this Court either. According to the trial court's rendition of the reasons for dismissal and

1. It is not clear if the trial court relied upon governmental immunity to dismiss the other claims, but to the extent that the trial court's rendition and order could be construed this way, the same analysis would apply.

reference in the order to Rule(12)(b)(6)[2], the trial court relied solely or primarily on governmental immunity for the dismissal of plaintiff's wrongful termination claim under state law, so we must address it.

Governmental immunity is an affirmative defense, and like other forms of immunity, must be plead by the defendant.

> First, as a complete bar to liability, governmental immunity constitutes an affirmative defense. As a defense, governmental immunity cannot, by definition, be raised until there is a lawsuit to defend against. Affirmative defenses are raised by a party's responsive pleading.

Clayton v. Branson, 170 N.C. App. 438, 449, 613 S.E.2d 259, 268 (2005) (citations omitted). Where a defendant does not raise the affirmative defense of governmental immunity, normally by a motion to dismiss or answer, it is waived. *See Burwell v. Giant Genie Corp.*, 115 N.C. App. 680, 684-85, 446 S.E.2d 126, 129 (1994) ("Qualified immunity is an affirmative defense that must be pleaded by the defendant. Ordinarily, the failure to plead an affirmative defense results in a waiver unless the parties agree to try the issue by express or implied consent. . . . Where a defendant does not raise an affirmative defense in his pleadings or in the trial, he cannot present it on appeal." (Citations and quotation marks omitted)).

Even if defendant had a potential affirmative defense of governmental immunity, *defendant* would have had to raise this defense or it is waived; the trial court cannot raise it for the defendant. And as defendant tacitly acknowledges and plaintiff notes, his 42 U.S.C. § 1983 claim under the United States Constitution would not be barred by governmental immunity absent an adequate state remedy. *See Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) ("This Court could hardly have been clearer in its holding in *Corum* [*v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992)]: '[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution.' *Id.* at 782, 413 S.E.2d at 289."). Whether

2. Although governmental immunity is normally raised under either Rule12(b)(1) or (2), it can be raised under Rule 12(b)(6) as well. *See, e.g.*, *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385, 677 S.E.2d 203, 207 (2009). In *Meherrin*, this Court addressed the defense of sovereign immunity under all three subsections of Rule 12, since the distinction was important in that case which involved an interlocutory appeal from an order denying the defendants' motion to dismiss based on sovereign immunity. *Id.* at 384-85, 677 S.E.2d at 207. The distinction is not important here, since the trial court granted the motion to dismiss and entered a final order.

defendant had waived immunity for this type of claim by purchasing liability insurance coverage is irrelevant, since for a constitutional claim of this type, defendant would have had no immunity either way.

d. Violation of constitutional rights under 42 U.S.C. § 1983

[2] Although we have determined that the trial court erred to the extent it dismissed plaintiff's claims based on governmental immunity, both the order and the trial court's explanation of its ruling included another reason for dismissal, so we must consider if another legal basis could support a directed verdict order. The trial court's order did not address the sufficiency of the evidence, but based upon its statements to the jury, it appears that the trial court did *not* find the evidence to be insufficient to support plaintiff's claim. The trial court stated to the jury, "if we would have gone forward, *I don't know what you would have decided*, whether you would have decided that the firing was in response to [plaintiff] filing for sheriff, or maybe you wouldn't, I don't know. So I'm not basing my decision on whether someone was treated correctly or incorrectly." This statement implies that plaintiff presented sufficient evidence that the jury could potentially have ruled in his favor, if they found his evidence to be credible. The trial court also noted that the evidence showed that town employees had taken certain actions, but "not the commissioners themselves, and that's why I dismissed the federal claims." The trial court granted directed verdict based upon the defendant's argument that the doctrine of respondeat superior does not apply to plaintiff's claims under 42 U.S.C. § 1983 or termination in violation of public policy, because "the Town itself must have a custom or policy that is in violation of the law" and no evidence was presented that the Town in this case had a policy that a "Town employee could not run for political office." But plaintiff did not need to prove that the Town had a policy that Town employees could not run for political office. Plaintiff's claim was based on his allegation and evidence that Chief Woodard was the official with final policy-making authority as to hiring or firing in the police department, and that the Town Manager also concurred in the allegedly unconstitutional firing.

The United States Supreme Court explained this distinction in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986), with an analysis of a prior United States Supreme Court case, *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978):

> *Monell* is a case about responsibility. In the first part of the opinion, we held that local government units could

be made liable under § 1983 for deprivations of federal rights, overruling a contrary holding in *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). In the second part of the opinion, we recognized a limitation on this liability and concluded that a municipality cannot be made liable by application of the doctrine of *respondeat superior*. *See Monell*, 436 U.S., at 691, 98 S. Ct., at 2036. In part, this conclusion rested upon the language of § 1983, which imposes liability only on a person who "subjects, or causes to be subjected," any individual to a deprivation of federal rights; we noted that this language "cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.*, at 692, 98 S.Ct., at 2036. . . .

The conclusion that tortious conduct, to be the basis for municipal liability under § 1983, must be pursuant to a municipality's "official policy" is contained in this discussion. The "official policy" requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality" -- that is, acts which the municipality has officially sanctioned or ordered.

With this understanding, it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body -- whether or not that body had taken similar action in the past or intended to do so in the future -- because even a single decision by such a body unquestionably constitutes an act of official government policy. . . . *Monell's language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," Monell, supra, 436 U.S., at 694, 98 S. Ct. at 2037-2038, and whose decisions therefore may give rise to municipal liability under § 1983.*

> *Indeed, any other conclusion would be inconsistent with the principles underlying § 1983*. . . . However, . . . a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.
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> . . . .
>
> Having said this much, we hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official -- even a policymaking official -- has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on the exercise of that discretion. *See*, *e.g.*, *Oklahoma City v. Tuttle*, 471 U.S., at 822-824, 105 S. Ct., at 2435-2436. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Pembaur, 475 U.S. at 478-83, 89 L .Ed. 2d at 462-65, 106 S. Ct. at 1297-1300 (emphasis added).

According to plaintiff's evidence, defendant provided no process for its Commissioners to review the decisions of the Chief or Town Manager. Essentially, defendant's position is that even if its chief of police and town manager knowingly violated the constitutional rights of an employee, defendant can insulate itself from responsibility by having a policy it leaves these final decisions to these employees and it will not review any appeal by the wronged employee. This is not the law as established by the United States Supreme Court.

> When, however, an allegedly unconstitutional decision is made by an official with "final policy making authority," then the municipality may be held liable for that official's decision, so long as the decision was made by "the official or officials responsible under state law for making policy in *that area* of the city's business." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988). Furthermore, as the Supreme Court explained in *Praprotnik*, the hallmark of municipal liability is the *finality* of the decision being reviewed: When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final. *Id.* at 127, 108 S. Ct. 915. In other words, even if the allegedly unconstitutional decision is initially made by a subordinate official, when that decision is appealed to and affirmed by an official with final authority over a matter, the municipality may be held liable for this affirmance.

Arendale v. City of Memphis, 519 F.3d 587, 601-02 (6th Cir. 2008).

We realize that defendant's evidence may present a very different picture of defendant's policies and procedures governing hiring and termination of employees, but unfortunately, since this case was dismissed after plaintiff's evidence, we do not have the benefit of that evidence. We must take the plaintiff's evidence as true and draw every reasonable inference in plaintiff's favor, and if we do so, plaintiff presented sufficient evidence to survive the motion for directed verdict on his claims under 42 U.S.C. § 1983.

e. Failure to Join Necessary Party

[3] The trial court also noted that its order was based upon Rule 12(b)(7) of the Rules of Civil Procedure. Rule 12(b)(7) provides that "[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the

following defenses may at the option of the pleader be made by motion: (7) Failure to join a necessary party." Just as for Rule 12(b)(6), this is a rule normally invoked at the very beginning of a lawsuit, at the pleading stage, and defendant never requested joinder of any other parties. But even though defendant never requested joinder of any other parties, the trial court has the authority, and even the duty, to order joinder *ex mero motu*. *See Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 668, 101 S.E.2d 679, 682 (1958) ("Whenever, as here, a fatal defect of parties is disclosed, the Court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the Court.").

Since joinder of necessary parties is the only issue addressed by Rule 12(b)(7), and the order cites this rule, we assume that the trial court determined that there was some other person who was a necessary party.

> A person is a necessary party to an action when he 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. When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in.

Booker v. Everhart, 294 N.C. 146, 156, 240 S.E.2d 360, 365-66 (1978) (citations omitted).

We cannot determine from the transcript, record, or order whom the trial court believed to be a necessary party or why, even if they may be proper parties, they would be *necessary*, so we cannot analyze whether they would be necessary parties. We express no opinion on whether any parties should be joined on remand. But in any event, if the trial court determined a necessary party had not been joined, dismissal of plaintiff's case with prejudice would not be the appropriate result. Instead, the trial court should have continued the trial and ordered that any necessary party be joined. "[D]ismissal under Rule 12(b)(7) is proper only when the defect cannot be cured, and the court ordinarily should order a continuance for the absent party to be brought into the action and plead." *Howell v. Fisher*, 49 N.C. App. 488, 491, 272 S.E.2d 19, 22 (1980).

There is nothing in the record to indicate that "the defect" (if any) could not be cured, since we do not know who the alleged necessary party or parties are. And if a necessary party is not subject to the court's

jurisdiction, dismissal with prejudice still would not be the appropriate result. Even if a party ordered to be joined as a necessary party is not subject to the court's jurisdiction, the

> dismissal for failure to join a necessary party is not a dismissal on the merits and may not be with prejudice. The same is true, of course, where the party ordered joined is not a necessary party but is a proper party which the court, in its discretion, decides should be joined. The following language relating to Rule 12(b)(7) of the Federal Rules of Civil Procedure is applicable also to our Rule 12(b)(7): When faced with a motion under Rule 12(b)(7), the court will decide if the absent party should be joined as a party. If it decides in the affirmative, the court will order him brought into the action. However, if the absentee cannot be joined, the court must then determine, by balancing the guiding factors set forth in Rule 19(b), whether to proceed without him or to dismiss the action. A dismissal under Rule 12(b)(7) is not considered to be on the merits and is without prejudice.

Carding Developments v. Gunter & Cooke, 12 N.C. App. 448, 453-54, 183 S.E.2d 834, 838 (1971) (citations, quotation marks, and ellipses omitted).

To the extent that the trial court dismissed plaintiff's claims based upon failure to join a necessary party, it erred, and we must reverse the order.

III. Conclusion

Because the trial court granted directed verdict based upon a misapprehension of the law regarding plaintiff's claims under 42 U.S.C. § 1983 and erred in dismissing any claims based upon governmental immunity since it was never pled by defendant, we reverse the order granting directed verdict and remand for a new trial on all claims. On remand, before proceeding with another trial, the trial court should allow the parties to be heard on whether any necessary or proper parties should be joined, and the trial court should enter any appropriate orders regarding those parties so all parties may be joined before the matter is set again for trial. But again, we express no opinion on whether any necessary or proper parties should be joined; we address this issue only because the trial court's order addressed it and to provide procedural guidance on remand.

REVERSED AND REMANDED.

Judges ELMORE and TYSON concur.

CARRA JANE PENEGAR, Widow and Executrix of the Estate of JOHNNY RAY PENEGAR, Deceased Employee, Plaintiff
v.
UNITED PARCEL SERVICE, Employer, LIBERTY MUTUAL INSURANCE CO., Carrier, Defendants

No. COA17-404

Filed 1 May 2018

1. Workers' Compensation—findings—injurious exposure—asbestos

The Industrial Commission's findings that decedent was exposed to asbestos at elevated levels while he was employed with defendant UPS and was injured as a result were supported by competent evidence, including witness testimony that the truck brakes used by UPS during decedent's employment contained asbestos and defendant was exposed daily during the course of his employment.

2. Workers' Compensation—last injurious exposure—asbestos—subsequent exposure

Where plaintiff (decedent's wife) presented evidence that decedent was injuriously exposed to asbestos during his employment at UPS, and where no evidence was presented that decedent was exposed to asbestos during his subsequent employment, the Industrial Commission's finding that decedent's last injurious exposure occurred during his employment with UPS was supported by competent evidence. In the absence of evidence that an employee was exposed to a hazardous material during subsequent employment, the burden shifts to the employer to produce some evidence of subsequent exposure.

3. Workers' Compensation—modification of award—by full Commission—average weekly wages—issue not raised by parties

The Industrial Commission had jurisdiction to revise the Deputy Commissioner's calculation of decedent's average weekly wage even though that issue was not raised by either party.

4. Workers' Compensation—average weekly wages—statutory factors—fifth method

The Court of Appeals affirmed the Industrial Commission's calculation of decedent's average weekly wages in an asbestos case where the first four statutory methods of calculation in N.C.G.S. § 97-2 were either inapplicable or would produce an unjust result and the Commission accordingly used the fifth method.

Appeal by Plaintiff and Defendants from an Opinion and Award entered 8 December 2016 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 18 October 2017.

Wallace and Graham, P.A., by Michael B. Pross, for Plaintiff-Appellant.

Goodman McGuffey, LLP, by Jennifer Jerzak Blackman, for Defendants-Appellants.

INMAN, Judge.

The North Carolina Industrial Commission (the "Commission") did not err in finding that an employee's last injurious exposure to asbestos, which contributed to his development of an occupational disease, occurred during the thirty years he worked for his primary lifetime employer, based on the testimony of his former co-workers and medical experts, and in the absence of any evidence that he was exposed to asbestos at any subsequent job. Nor did the Commission err in calculating the employee's average weekly wage based upon the employee's earnings in the year immediately preceding his diagnosis.

This case arises out of a workers' compensation claim filed by Johnny Ray Penegar ("Decedent") against United Parcel Service ("Employer" or "UPS") and Liberty Mutual Insurance Company ("Carrier") (collectively "Defendants"), asserting compensation for Decedent's mesothelioma. Carra Jane Penegar ("Plaintiff"), Decedent's wife and executrix of his estate, was substituted as Plaintiff following Decedent's death on 26 March 2015 during the pendency of this action. Both parties appeal from the opinion and award of the Full North Carolina Industrial Commission, which awarded Plaintiff compensation for all of Decedent's medical expenses associated with his diagnosis of mesothelioma, total disability compensation, burial expenses, and death benefits.

Defendants argue that the Commission's findings that Plaintiff was injuriously exposed to asbestos while employed by UPS and that Plaintiff's last injurious exposure to asbestos occurred at UPS are unsupported by competent evidence.

Plaintiff argues that the Commission lacked jurisdiction to revise the Deputy Commissioner's calculation of the average weekly wage, and, assuming jurisdiction, that the Commission's calculation was incorrect. Additionally, Plaintiff asserts that the Commission failed to address the issue, raised by Plaintiff on appeal from the Deputy Commissioner's

opinion and award, of the appropriate maximum compensation rate to be applied to Decedent's claim. After careful review, we affirm the Commission's finding that Decedent's last injurious exposure to asbestos occurred while Decedent was employed with UPS. We also affirm the Commission's recalculation of Decedent's average weekly wage. We dismiss as moot Plaintiff's appeal from the Commission's failure to address the Deputy Commissioner's calculation of the maximum compensation rate.

Factual and Procedural History

Decedent worked for UPS for thirty years, from 1967 until 1998, as a feeder driver based in UPS's Charlotte facility. Decedent's duties included driving a tracker-trailer to destinations within 200 miles and back each day. The Charlotte facility was a large, open building approximately the size of two or three football fields, in which the main area, referred to by employees as the "shop," consisted of various unseparated bays designated "tractor shop" or "package car shop" depending on what vehicles were being repaired or maintained in each. Decedent walked through the shop nearly every day to get from his truck to the employee locker room. Decedent would often stop in the shop to talk with mechanics while they worked.

UPS employed its own mechanics to service the vehicles in its fleet during the entirety of Decedent's employment. Standard service tasks included maintaining and repairing brakes. In any given week, between three and seven brake jobs were performed in the shop. A typical brake job included banging the brake drums on the ground and using compressed air to clear off the brake dust. The brake pads used by UPS during Decedent's employment contained asbestos, and would release asbestos fibers into the air during brake jobs. Starting in the mid-1980s, UPS provided protective masks to the mechanics, but did not at any time provide a protective mask to Decedent.

Following his employment with UPS, from 1999 until 2002, Decedent drove a transfer van for Union County. He also worked for a church and for Union County Schools. Decedent continued to work part-time until 2012.

On 8 February 2013, Decedent was diagnosed with mesothelioma. Prior to his death on 26 March 2016, Decedent filed a claim with the Commission alleging that his mesothelioma developed as a result of asbestos exposure during his employment with UPS.

Plaintiff presented testimony from two former UPS mechanics and two medical experts. The mechanics testified that asbestos was present

at the Charlotte facility. The medical experts testified that exposure to asbestos in the UPS facility caused Decedent to develop mesothelioma or contributed to him developing that disease. Defendants presented two expert witnesses—an expert in industrial hygiene and an expert in pathology.

The Deputy Commissioner issued an opinion and award finding that Decedent was last injuriously exposed to asbestos, and the hazards of developing mesothelioma, during his employment with UPS. The Deputy Commissioner awarded Plaintiff 500 weeks of wage compensation, calculated using Decedent's average weekly wage from 1998 of $690.10, the last year he worked for UPS, and limited by the maximum compensation rate for 1998, so that Plaintiff was awarded $532.00 per week. The opinion and award also compensated Plaintiff for the medical expenses incurred treating Decedent's mesothelioma.

Plaintiff filed a motion for reconsideration of the maximum compensation rate, arguing that the Deputy Commissioner should have used the maximum compensation rate from 2015—the date of Decedent's death. The Deputy Commissioner denied Plaintiff's motion.

Both parties appealed to the Full Commission. Defendants challenged a majority of the Deputy Commissioner's findings of fact and all but one of the conclusions of law. Plaintiff challenged only the Deputy Commissioner's calculation of the appropriate maximum compensation rate.

The Commission, on 8 December 2016, issued its opinion and award finding that Decedent's last injurious exposure to asbestos, and the hazards of mesothelioma, occurred while he was employed with UPS. The Commission recalculated and substantially reduced Decedent's average weekly wage, based on Decedent's earnings in the year prior to his diagnosis with mesothelioma, when he was no longer employed by UPS. Both parties appealed.

Analysis

I. Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citation omitted). Unchallenged findings of fact are presumed to be supported by competent evidence, and findings of fact supported by competent evidence are binding on

appeal. *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009). The Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

II. Defendants' Appeal

Defendants challenge the Commission's findings that (1) the brakes used by UPS at its Charlotte facility while Decedent was employed there contained asbestos and (2) Decedent was at an increased risk of asbestos exposure during his employment with UPS. Defendants also argue that Plaintiff failed to present evidence that Decedent was not exposed to asbestos during his subsequent employments, and therefore, the Commission's finding that Decedent's *last* injurious exposure to asbestos occurred at UPS is also unsupported by the evidence. We disagree.

A. Injurious Exposure

[1] Defendants challenge the following findings of fact made by the Full Commission:

> 9. Vernon Thomas Pond worked as a mechanic for defendant-employer from 1972 to 2003 in the same facility as decedent. Mr. Pond testified, based upon his work and experience as a mechanic, that all brake shoes he worked on while employed by defendant-employer contained asbestos.
>
> 10. Bobby Bolin also worked for defendant-employer in mechanics, mostly performing maintenance on tractors and trailers. He began working for defendant-employer in or about 1967. Mr. Bolin testified that the work environment was "pretty dusty" and, even though he knew brakes contained asbestos as early as 1967, he was not aware that asbestos dust "was bad" until the mid-1980s. Mr. Bolin testified that defendant-employer provided mechanics with masks to protect against dust exposure in the mid-1980s and restricted the blowing of dust in the shop, but other employees walking through the shop were not provided with protective masks.
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> . . .
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> 12. Based upon the preponderance of the evidence in view of the entire record, the Commission finds that the brakes utilized by defendant-employer in the maintenance of its trucks, tractors, and trailers contained asbestos. The

competent and credible evidence of record demonstrates that such brakes contained asbestos from the mid-1960s until at least the mid-1980s and, to the extent the brakes continued to contain asbestos from the mid-1980s until decedent's retirement, decedent was not supplied with a protective mask to curtail his exposure to asbestos fibers while in the shop.

. . .

23. Dr. Harpole testified that, although decedent did not have "a giant exposure" to the hazards of asbestos like someone who worked in an asbestos factory, being around aerosolized asbestos in the air daily, or even every few days over a period of years, led to significant asbestos exposure for decedent when he walked through defendant-employer's shop.

24. Dr. Harpole testified that decedent's mesothelioma was caused by exposure to asbestos and, more likely than not, that decedent's work for defendant-employer caused or significantly contributed to his development of mesothelioma. He further testified that decedent's exposure to asbestos in his employment with defendant-employer placed him at an increased risk, over that faced by the general public, for developing mesothelioma.

25. Dr. Harpole's opinions on causation and increased risk were based on his understanding that, although decedent did not perform brake work for defendant-employer, he did walk through the shop daily or every few days over the period of many years while brake jobs were being performed and brake dust was aerosolized. Dr. Harpole testified that if the mechanics were not "grinding" brakes, then it would make the causation and increased risk less likely, however, Dr. Harpole testified that, even if defendant-employer's mechanics did not grind brakes, the use of compressed air aerosolized the asbestos fibers in the brakes, which would have been the key to decedent's exposure.

26. From 1957 until 1960, decedent served in the U.S. Navy as a machinist mate aboard a ship, the U.S.S. Uhlmann, and was likely exposed to the hazards of asbestos during that time. However, Dr. Harpole testified that decedent likely

had a protracted exposure over time, which he explained "is much more of a risk for forming cancer than one giant exposure." Dr. Harpole further explained that the amount of plaque in decedent's lungs suggested a longer-term exposure than what decedent would have experienced during his three to four years in the Navy.

. . .

28. Dr. Barry Horn is a pulmonologist and critical care specialist with experience evaluating and treating asbestos-related diseases, including mesothelioma. Plaintiff tendered Dr. Horn as an expert in pulmonary medicine and asbestos-related diseases, including mesothelioma, without objection from defendants. Dr. Horn never personally evaluated decedent, but reviewed the medical records and deposition testimony related to this case and generated a written report summarizing his conclusions and opinions.

29. Dr. Horn understood that decedent incurred asbestos exposure in his employment with defendant-employer when he walked through the maintenance areas of the shop twice each work day, when he presented for work and then when he left work at the end of his shift, over a period of decades. Dr. Horn further understood that the brake work in the shop decedent walked through did not involve "grinding," but replacement work that would release asbestos fibers into the air for prolonged periods of time.

30. Dr. Horn testified that, "to get mesothelioma, it requires remarkably little exposure to asbestos." Dr. Horn explained that, even though residual brake dust contains anywhere between 1 and 10 percent of asbestos, that amount is still significant enough to cause mesothelioma. Dr. Horn testified, "When you blow out the dust, we're talking about a lot of fibers in the air, so even if it's one percent or less [than] one percent, we're talking about a lot of fibers now."

31. Dr. Horn testified that an individual's risk for developing asbestos-related illness is dose dependent, meaning "[t]he more asbestos you inhale and retain in your lungs, the more likely you'll develop an asbestos-related illness and that includes mesothelioma." Dr. Horn explained that,

because decedent walked back and forth in defendant-employer's premises and breathed asbestos fibers as a consequence of his job over a period of decades, his exposure to asbestos was a substantial contributing factor in his risk for developing mesothelioma.

32. Dr. Horn further testified that decedent's employment with defendant-employer placed him at an increased risk, over that faced by the general public, for the development of mesothelioma, because "the general public is not exposed to levels of asbestos that would have existed in [defendant-employer's] facility" where brake repair was being performed.

. . .

35. There was no question for Dr. Horn that the brake linings defendant-employer used in the 1960s, '70s, and '80s contained chrysotile asbestos. As he testified, these brake linings may also have contained the more potent form of tremolite, or amphibole, asbestos. Dr. Horn reviewed several publications during the course of his deposition that concluded that, regardless of whether brake linings contained amphibole asbestos, or only chrysotile asbestos, exposure to the asbestos dust of either form could cause mesothelioma, and he agreed with those conclusions. Dr. Horn also explained that all government agencies in the United States take the position that chrysotile asbestos, alone, can cause mesothelioma, and that the doses of chrysotile do not have to be extremely high to do so.

36. As to "background" asbestos exposures, Dr. Horn agreed with Dr. Harpole that everyone receives some level of exposure, but testified that in order for him to conclude that someone has asbestos-related disease, their asbestos exposure has to be greater than background exposure.

37. Dr. Horn testified, and the Commission finds as fact, that decedent was clearly exposed to hazardous levels of asbestos during his Navy service, but decedent continued to have asbestos exposure thereafter while working for defendant-employer, and it was the latter exposure that either caused or substantially contributed to decedent's development of mesothelioma.

. . .

47. Dr. Roggli testified that the brake products that were likely in use by defendant-employer during decedent's employment contained chrysotile asbestos, but it was his opinion that chrysotile asbestos from friction products could not cause mesothelioma. Dr. Roggli did allow, though, that exposure to chrysotile mined from Canada, which generally is contaminated with tremolite (a more potent amphibole type of asbestos) could cause mesothelioma.

. . .

50. The Commission accords greater weight to the causation and increased risk opinions of Dr. Harpole and Dr. Horn over that of Mr. Agopsowicz and Dr. Roggli. Drs. Harpole and Horn have extensive experience specializing in the diagnosis and treatment of mesothelioma. Dr. Harpole served as decedent's treating physician, which afforded him an opportunity to discuss directly with decedent his lifetime exposures to asbestos, and to form his opinions on causation and increased risk therefrom. Further, the Commission finds Dr. Horn's opinions are well-reasoned, supported by research and a lifetime of study in the field of pulmonology, and in accord with those opinions of Dr. Harpole.

51. The Commission finds Dr. Roggli's opinions regarding an individual's cumulative exposures to asbestos and risk of developing mesothelioma contradictory when applied to decedent specifically and, therefore, assigns little weight to the expert opinions of Dr. Roggli. The Commission also assigns little weight to the testimony of Mr. Agopsowicz, who admits he is not qualified to render an opinion on causation in connection with decedent's development of mesothelioma.

52. The preponderance of the evidence in view of the entire record establishes that decedent was exposed to greater than background levels of asbestos during his service in the Navy in the 1950s and throughout his employment with defendant-employer from 1967 through 1998.

> 53. Based on the preponderance of the evidence in view of the entire record, the Commission finds that decedent's last injurious exposure to the hazards of asbestos occurred during his employment with defendant-employer.
>
> 54. The preponderance of the evidence in view of the entire record establishes that decedent's work for defendant-employer exposed him to a greater risk of contracting mesothelioma over the general public, due to his above-background levels of asbestos exposure in the course of his employment, and that such exposure was a significant contributing factor to his development of mesothelioma.
>
> 55. The preponderance of the evidence in view of the entire record further establishes that mesothelioma caused or significantly contributed to decedent's death.

Defendants' challenge to the weight the Commission assigned to testimony is beyond our scope of review. *See Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) ("[O]n appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " (quoting *Anderson v. Lincoln Const. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). Instead, we review the challenged findings only to determine whether they are supported by competent evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

The Commission's findings are consistent with the witnesses' testimonies and therefore are supported by competent evidence. Mr. Pond testified that he worked with UPS as a mechanic at the Charlotte facility from 1972 until 2003. He further testified that it was his knowledge that all brake pads, including those used by UPS during Decedent's employment, contained asbestos, and that it was common practice for the mechanics to knock the brake drums on the floor and to use compressed air to clean the brake dust from the drums. Mr. Bolin testified that it was his understanding that the brake pads used by UPS contained asbestos, and that it was not until the 1980s that UPS began providing protective masks—and then only to the mechanics. Both witnesses testified that they frequently saw Decedent in the shop where these brake jobs were performed. Based on this testimony alone, the Commission's findings that (1) the brakes used by UPS during Decedent's employment contained asbestos and (2) Decedent was exposed to increased levels of asbestos beyond that of the general public are supported by competent evidence.

The testimonies of Drs. Harpole and Horn, the medical experts called by Plaintiff, also provide competent evidence to support the Commission's findings of fact. Defendants argue that their expert witnesses, Mr. Agopsowicz and Dr. Roggli, offered testimony that contradicts the testimony of Plaintiff's witnesses. However, as we mentioned above, it is not within this Court's authority to reweigh the evidence and credibility of the witnesses. The Commission explicitly found that Plaintiff's expert witnesses presented more credible testimony than Defendants' expert witnesses, and, because the Commission is the sole judge of credibility, the Commission's findings must stand. *See*, *e.g.*, *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 ("The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." (citation omitted)).

Accordingly, we hold that the Commission's findings that while employed with UPS, Decedent was exposed to asbestos at levels above those of the general public and was injured as a result are supported by competent evidence.

B. Last Injurious Exposure

[2] Defendants also challenge the Commission's finding that Decedent's last injurious exposure occurred while Decedent was employed by UPS.

"In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was *last injuriously exposed* to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable." N.C. Gen. Stat. § 97-57 (2015) (emphasis added). The North Carolina Supreme Court, in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983), explained that "[t]he statutory terms 'last injuriously exposed' mean 'an exposure which proximately augmented the disease to any extent, however slight.' " 308 N.C. at 89, 301 S.E.2d at 362-63 (citation omitted). Therefore, the Court concluded that to succeed, a plaintiff need only show: "(1) that she has a compensable occupational disease and (2) that she was 'last injuriously exposed to the hazards of such disease' in [the] defendant's employment." *Id.* at 89, 301 S.E.2d at 362.

The Commission found that "[t]here is no evidence of record that any of [Decedent's subsequent] jobs exposed decedent to the hazards of asbestos." Defendants concede that, as written, this finding is factually true. We note that this finding, in turn, is logically consistent with the Commission's finding that Decedent's last injurious exposure to asbestos

occurred at UPS—because if there is no evidence of later exposure, the last exposure must necessarily have occurred at UPS.

Defendants argue that it is precisely because there is no evidence of record regarding Decedent's asbestos exposure at his subsequent employment that the Commission erred in finding that "decedent's last injurious exposure to the hazards of asbestos occurred during his employment with defendant-employer." Defendants argue that Plaintiff failed to carry the burden to present evidence that Decedent was not exposed to asbestos in his employment subsequent to his employment with UPS.

Defendants' argument is premised on the theory that in order for the Commission to find that Decedent's last exposure was at UPS, it must first find, based on specific evidence presented by Plaintiff, that Decedent was not later exposed at his subsequent employers. We reject this argument based upon precedent and the legislative purpose of the Workers' Compensation Act.

Our courts have consistently held that the Workers' Compensation Act "should be liberally construed so that the benefits under the Act will not be denied by narrow, technical or strict interpretation." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972) (citation omitted). Moreover, the purpose of the "last injurious exposure" doctrine is "to eliminate the need for complex and expensive litigation of the issue of relative contribution by each of several employments to a plaintiff's occupational disease." *City of Durham v. Safety Nat. Cas. Corp.*, 196 N.C. App. 761, 764, 675 S.E.2d 393, 395 (2009). The doctrine provides a plaintiff with a reduced burden by requiring only a showing that the occupational exposure augmented a disease, "however slight[,]" as opposed to demonstrating how much each exposure resulted in the disease. *See Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362.

Defendants' assertion that the Commission's finding is not supported by the evidence misreads the Commission's finding. The Commission found that there was no evidence that Decedent was exposed to asbestos during his subsequent employment, not, as Defendants argue, that there was no evidence regarding Decedent's exposure during his subsequent employment. This distinction, however minor, is essential, as we are bound by the Commission's findings when those findings are supported by the evidence in the record. Here, the Commission's finding that there is no evidence that Decedent was exposed to asbestos is supported by the record because there is no evidence that he was exposed to asbestos. Moreover, this finding supports the Commission's

finding that Decedent's last injurious exposure to asbestos was while he was employed by UPS.

In sum, we hold that in the absence of evidence that an employee was exposed to a hazardous material at subsequent employers, the burden shifts to the employer to produce some evidence of a subsequent exposure. Shifting the burden of production does not shift the burden of proof. But before the Commission can find that an employee was exposed to a hazardous condition at some subsequent employment, the record must include some evidence of exposure in that employment.

In *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 524 S.E.2d 368 (2000), the plaintiff worked as a typist from 1988 until 1993 for the defendant-employer, during which time she began suffering from symptoms associated with overuse tendinitis of the arms. *Id.* at 352, 524 S.E.2d 370. The plaintiff resigned from her position and worked in several subsequent jobs, including at a department store, a fast food restaurant, and a gas and convenience store. *Id.* at 352-53, 524 S.E.2d at 370. Our Court held that the evidence in the record—the plaintiff's job duties, medical evidence indicating a worsening of her condition, and the plaintiff's own testimony that her symptoms were aggravated by her subsequent jobs—supported the Commission's finding that her last injurious exposure to carpal tunnel syndrome occurred while she worked with her subsequent employers, not while she worked with the defendant-employer. *Id.* at 359-60, 524 S.E.2d at 374.

In contrast to *Hardin*, this Court in an unpublished decision, *Richardson v. PCS Phosphate Co.*, 238 N.C. App. 198, 768 S.E.2d 64, 2014 WL 714977 (2014) (unpublished), affirmed an opinion and award of the Commission finding that a plaintiff's last injurious exposure to asbestos, which resulted in his diagnosis of mesothelioma, occurred during his time with the defendant-employer ("PCS") and not at his subsequent employment ("East Group"). The plaintiff worked for the defendant-employer, a phosphate products manufacturer, as a concentrator engineer before eventually rising to the rank of assistant mine manager. *Id.* at *1-*2. The only finding by the Commission addressing the plaintiff's subsequent employer stated:

> After retiring from PCS, [the] [p]laintiff began working for the East Group in 1995 on the same PCS job site. [The] [p]laintiff testified that in this position, he performed the same job duties as he had while employed as Assistant to the Mine Manager. [The] [p]laintiff does not believe that he was injuriously exposed to the hazards of asbestos while working for the East Group.

Id. at *8. Our Court explained that "[b]esides [the] plaintiff's own testimony that he performed essentially the same work at the same locations, there was no evidence presented as to whether asbestos was still present in the areas that [the] plaintiff visited while working for the East Group, whether there was asbestos maintenance or abatement projects going on after 1995, whether [the] plaintiff's activities in those same areas could have exposed him to asbestos after 1995, and no expert medical evidence linking [the] plaintiff's work at the East Group with his mesothelioma." *Id.* at *8. This Court held, in the absence of evidence "establishing the nexus between [the] plaintiff's continuing work at the PCS facility for the East Group and exposure to asbestos[,] . . . we are unable to conclude that the Full Commission erred in failing to find that [the] plaintiff's 'last injurious exposure' occurred while he was working for the East Group." *Id.* at *8. Defendants' appeal here, as the appeal in *Richardson*, challenges the Commission's finding that a plaintiff's last injurious exposure occurred with the defendant-employers. While *Richardson* is not binding authority, given the paucity of decisions regarding the issue before us, its reasoning is persuasive.

The purpose of the Workers' Compensation Act and our precedent support the Commission's finding that, in the absence of evidence that Decedent was exposed to asbestos or any other substance causing mesothelioma during his subsequent employment, Decedent's last injurious exposure to asbestos occurred at UPS. To require a plaintiff to present affirmative evidence that no exposure existed during all subsequent employment would impose a burden in stark conflict with purpose of the last injurious exposure doctrine and the general purpose of the Workers' Compensation Act.

Here, Plaintiff provided competent evidence that Decedent was injuriously exposed to asbestos during his employment with UPS and that his exposure contributed to his development of mesothelioma. While there is no affirmative evidence proving a lack of exposure to asbestos in his subsequent employment, nothing in the evidence regarding his subsequent employment—as a van driver and a church and school employee—suggests any inference to the contrary. Without any such evidence, it would have been error for the Commission to find that Decedent was later exposed.

We recognize that it is a plaintiff's burden to prove his claim is compensable, *see Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950), and hold that under the facts presented, Plaintiff has done so. Based on the record, and in the absence of any evidence establishing a nexus between Plaintiff's subsequent employment and

asbestos exposure, we conclude the Commission did not err in finding that Plaintiff's last injurious exposure to asbestos was at UPS.

III. Plaintiff's Appeal

Plaintiff argues that the Commission lacked jurisdiction to revise a determination made by a Deputy Commissioner in an opinion and award, when that issue was not raised by either party, and, assuming jurisdiction, that the Commission erred in calculating Plaintiff's average weekly wage and maximum compensation rate. We hold the Commission had jurisdiction and properly calculated Plaintiff's average weekly wage, but did not make a determination as to the proper maximum compensation rate.

A. Jurisdiction to Revise an Opinion and Award

[3] It is well-established in North Carolina that the Industrial Commission has the authority to review, modify, adopt, or reject the findings of fact found by a deputy commissioner. *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962). The Commission also has "the power to review the evidence, reconsider it, receive further evidence, rehear the parties or their representatives, and, if proper, *to amend the award* . . . ." *Id.* at 182, 123 S.E.2d at 613 (emphasis added). Inherent in these powers, our courts have long recognized the Full Commission's authority to "strike [a] deputy commissioner's findings of fact even if no exception was taken to the findings." *Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992).

Plaintiff argues that this Court's recent holding in *Reed v. Carolina Holdings*, __ N.C. App. __, 796 S.E.2d 102 (2017), restricts the scope of issues the Commission may address on appeal from a deputy commissioner's opinion and award. In *Reed*, we held that pursuant to Rule 701 of the North Carolina Industrial Commission we were without jurisdiction to address an argument raised, for the first time on appeal, by the defendant. *Id.* at __, 796 S.E.2d at 108. This holding, however, refers only to this Court's jurisdiction to hear arguments not asserted, or ruled upon, below; it does not address *the Commission's* authority to review, modify, or amend a deputy commissioner's opinion and award when an issue is not raised by the parties. The Commission's authority under the Rules promulgated by the Commission has previously been addressed by the North Carolina Supreme Court. In *Brewer*, the Court explained that "these rules do not limit the power of the Commission to review, modify, adopt, or reject the findings of fact found by a Deputy Commissioner . . . ." 256 N.C. at 182, 123 S.E.2d at 613. Accordingly, we hold that the Commission was well within its authority and therefore had jurisdiction

to amend an aspect of the Deputy Commissioner's opinion and award, even those not raised by either party on appeal.

B. Average Weekly Wage

[4] "The determination of the plaintiff's 'average weekly wages' requires application of the definition set forth in the Workers' Compensation Act, and the case law construing that statute[,] and thus raises an issue of law, not fact." *Boney v. Winn Dixie, Inc.*, 163 N.C. App. 330, 331-32, 593 S.E.2d 93, 95 (2004) (internal quotation marks and citations omitted). We therefore review the Commission's calculation of Decedent's average weekly wages *de novo*. *Id.* at 331-32, 593 S.E.2d at 95.

Section 97-2(5) of the North Carolina General Statutes " 'provides a hierarchy' of five methods of computing the average weekly wages[.]" *McAninch v. Buncombe Cty. Schools*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997) (citation omitted). "The five methods are ranked in order of preference, and each subsequent method can be applied only if the previous methods are inappropriate." *Tedder v. A & K Enterprises*, 238 N.C. App. 169, 174, 767 S.E.2d 98, 102 (2014) (citation omitted). Section 97-2(5) states in relevant part:

> [Method 1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52;
>
> . . .
>
> [Method 2] if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.
>
> . . .
>
> [Method 3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained.

. . .

> [Method 4] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> . . .
>
> [Method 5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2 (2015). "The final method, as set forth in the last sentence, clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods." *McAninch*, 347 N.C. at 130, 489 S.E.2d at 378 (citation omitted).

The first three methods calculate the average weekly wages for an employee based on the employee's actual employment with the employer in the 52-week time period immediately preceding the date of injury. Here, the Commission determined, and we agree, that these methods are inappropriate because of the length of time between Decedent's employment and his diagnosis. The Commission found that Decedent's date of injury[1] was 8 February 2013, and that Decedent had not worked for UPS at any time in the 52 weeks immediately prior this date.

Regarding the fourth method, the Commission found that "[t]he record contains no evidence by which calculation of decedent's average weekly wage can be made . . . ." This determination makes sense because the fourth method applies to employees who worked for only a short time for the defendant employer. Decedent worked for UPS for thirty years and had not worked for them in the fifteen years immediately prior to his diagnosis.

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1. The Commission correctly notes that "the date of diagnosis" with regard to an occupational disease constitutes the "date of injury[,]" for the purposes of calculating average weekly wages. *See Pope v. Manville*, 207 N.C. App. 157, 168-69, 700 S.E.2d 22, 30 (2010).

The Commission then found, consistent with the requirements of *McAninch*, 347 N.C. at 130, 489 S.E.2d at 378, that because "the first four statutory methods for calculating average weekly wage are either inapplicable or would produce a result that is not fair and just to both parties . . . the Commission finds that it is appropriate to use the fifth method to calculate average weekly wage." We agree with the Commission's findings.

The Commission, in applying the fifth method, sought to determine a way to produce a result that "most accurately reflects the wages decedent would have continued to earn, but for his diagnosis with mesothelioma, and [that] is fair and just to both parties." The Commission looked at Decedent's earnings for 2012 from his employment with Union County—$4,272.92—which were evidenced by Decedent's Social Security Earnings Statement.[2] The Commission then divided this amount by 52 weeks and obtained an average weekly wage of $82.17 with a resulting compensation rate of $54.78 for Decedent. Decedent's Social Security Earnings Statement is competent evidence that supports the Commission's findings, and therefore, we are bound by such findings on appeal.

Plaintiff argues that this calculation of average weekly wages is improper because it does not reflect Decedent's 2012 part-time post-retirement earning capacity. We reject this argument. Section 97-2 explicitly provides that the weekly calculation using the fifth method should "most nearly approximate the amount which the injured employee *would be* earning were it not for the injury[,]" not what the injured employee *could be* earning. N.C. Gen. Stat. § 97-2. Because there was evidence in the record of Decedent's actual earnings in the years prior to his diagnosis, the Commission's findings are supported by such evidence, and we affirm the Commission's calculation of Decedent's average weekly wages.

C. Maximum Compensation Rate

It is well established in North Carolina that "it is the duty and responsibility of the full Commission to decide all of the matters *in controversy* between the parties." *Hurley v. Wal-Mart Stores, Inc.*, 219 N.C. App. 607, 613, 723 S.E.2d 794, 797 (2012) (internal quotation marks and citation omitted) (emphasis added). Plaintiff's appeal to the Full Commission challenged the Deputy Commissioner's determination of the maximum compensation rate, but the Commission did not decide that issue. However, the average weekly wage calculated by the Commission fell far below the maximum compensation rate, so that

2. Decedent's Social Security Earnings Statement includes Decedent's earnings for the years prior to his diagnosis, which indicate a decline in earing from 2008, $9,774.78, to 2012, $4,272.92.

Plaintiff's award was not subject to any limitation by the latter. Because we affirm the Commission's calculation of the average weekly wage, and because the calculated average weekly wage falls far short of any of the argued maximum compensation rates, Plaintiff's appeal of the issue is moot. Accordingly, we dismiss as moot Plaintiff's appeal of the maximum compensation rate.

Conclusion

For the foregoing reasons, we affirm the Commission's finding of fact that Decedent's last injurious exposure to asbestos occurred while Decedent was employed by UPS and we affirm the Commission's recalculation of Decedent's average weekly wage. We dismiss as moot Plaintiff's appeal regarding the determination of the maximum compensation rate.

AFFIRMED IN PART AND DISMISSED IN PART.

Judges ELMORE and DIETZ concur.

ANN HARDY PORTER, TRUSTEE OF THE ANN HARDY PORTER LIVING TRUST, DATED MARCH 9, 2000; JANET S. WILKINS; MARY ANN CASE; VIRGINIA W. HAYES; SYBEL B. HOFFMAN; KATHLEEN HANDLEY, TRUSTEE OF THE HANDLEY LIVING TRUST; PHILLIPS CUTRIGHT AND KAREN CUTRIGHT; KARL LEBER AND HEIDI A. LEBER; PHYLLIS LANGTON, TRUSTEE OF THE DR. PHYLLIS A. LANGTON REVOCABLE TRUST, DATES MAY 1 2001; PLAINTIFFS

v.

BEAVERDAM RUN CONDOMINIUM ASSOCIATION, DEFENDANT

No. COA17-793

Filed 1 May 2018

Associations—condominium association—flood insurance—flood zone

A condominium association was obligated by its declaration and the Condominium Act to provide flood insurance for the community's buildings located within a FEMA flood zone each year when such insurance was reasonably available.

Appeal by Plaintiffs from order entered 31 March 2017 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 25 January 2018.

Adams Hendon Carson Crow & Saenger, P.A., by E. Thomison Holman, for the Plaintiffs.

Cranfill Sumner & Hartzog LLP, by John W. Ong, for the Defendant.

DILLON, Judge.

Plaintiffs are owners of residential condominiums in Beaverdam Run (the "Community"), located in Buncombe County. Plaintiffs brought this action seeking a declaration that the Community's owners' association, Beaverdam Run Condominium Association (the "Association"), is required to maintain flood insurance for its buildings located in a flood zone. The trial court entered an order granting summary judgment in favor of the Association and denying Plaintiffs' request for declaratory judgment. For the following reasons, we reverse and remand for action consistent with this opinion.

I. Background

The Association has a board of directors elected by the owners of units in the Community and is governed by a declaration (the "Declaration"). The Community consists of sixty-six (66) buildings. Five of these buildings are located within a flood zone as designated by the Federal Emergency Management Agency ("FEMA"). Each Plaintiff owns a unit in one of these five buildings.[1]

From approximately 2006-2012, the Association maintained flood insurance on each of the five buildings containing Plaintiffs' units. In 2012, the Association decided not to renew the flood insurance policy, citing concerns regarding cost and the allocation of the expense among the other members of the Association.[2] The Association notified all owners in the Community of its decision not to renew the flood insurance policy in a detailed letter, in accordance with the terms of the Declaration. The Association declined Plaintiffs' subsequent requests that the Association resume purchasing and maintaining flood insurance on the five buildings.

In September 2015, Plaintiffs filed a complaint seeking a declaratory judgment from the trial court regarding the Association's obligation to

1. There are ten individuals who own units in the five buildings. Nine of the ten individuals are plaintiffs in this action. Seven of the ten plaintiffs are parties on appeal.

2. The Association also declined to renew insurance policies protecting against mechanical equipment breakdown, earthquake, and acts of terrorism.

maintain flood insurance. The Association filed an answer and a motion for summary judgment.

In March 2017, the trial court entered an order granting the Association's motion for summary judgment and dismissing Plaintiffs' complaint with prejudice. Plaintiffs timely appealed.

II. Standard of Review

We review a trial court's grant of summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56.

III. Analysis

Plaintiffs' sole argument on appeal is that the trial court erred in granting the Association's motion for summary judgment, contending that the Association does, in fact, have a duty to maintain flood insurance in Plaintiffs' buildings.

A. The Condominium Act and the Declaration

Resolution of this appeal requires examination of *both* Section 47C-3-113 of the North Carolina Condominium Act (the "Condominium Act") *and* the Declaration.

Section 47C-3-113 of the Condominium Act requires a residential condominium association to maintain insurance "against all risks of direct physical loss commonly insured against," so long as the insurance is "available," specifically providing as follows:

> [T]he association shall maintain, *to the extent available*:
>
> (1) Property insurance on the common elements insuring against all risks of direct physical loss *commonly insured against* including fire and extended coverage perils. . . .

N.C. Gen. Stat. § 47C-3-113(a) (emphasis added).[3] The statute further provides that "[i]f the insurance described in subsection (a) . . . is not reasonably available, the association promptly shall cause notice of that

3. Subsection (d) mandates that "[i]nsurance policies carried pursuant to subsection (a) must provide that [] [e]ach unit owner is an insured person under the policy with respect to liability arising out of his [or her] interest in the common elements or membership in the association[.]" N.C. Gen. Stat. § 47C-3-113(d).

fact to be [communicated] . . . to all unit owners. *The declaration may require the association to carry any other insurance*, and the association . . . may carry any other insurance it deems appropriate to protect the association or the unit owners." N.C. Gen. Stat. § 47C-3-113(c) (emphasis added).

The Declaration contains two sections which govern the Association's purchase of insurance: Section 8.1 provides generally that the Association is to maintain insurance coverage in accordance with N.C. Gen. Stat. § 47 C-3-113 to the extent that such insurance is "reasonably available," and Section 8.2 addresses *property* insurance specifically and provides that the Association is to maintain property insurance against "all risks of direct physical loss." Specifically, these provisions state as follows:

> Section 8.1 Coverage. To the extent *reasonably available*, the Board shall obtain and maintain insurance coverage, as a common expense in accordance with Section 47C-3-113 of the Condominium Act and as set forth in this Article. If such insurance is not reasonably available, and the Board determines that any insurance described herein will not be maintained, the Board shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all Unit Owners at their respective last known addresses.
>
> Section 8.2 Property and Casualty Insurance. The Association shall procure and maintain property and casualty insurance on the Common Elements and Units insuring against *all risks of direct physical loss*, including fire and extended coverage, for and in an amount equal to the full replacement value of all structures within the Condominium, including all personal property and improvements thereto except for such personal property that is contained in but not attached to the Unit and is owned by the Owner personally.

(Emphasis added). The Declaration also explicitly provides that in the event of a conflict between the terms of the Declaration and the Condominium Act, "the provisions of the [Condominium Act] shall control."

B. The Association's Obligation to Maintain Flood Insurance

For the reasons below, we conclude that the Association is obligated by the Declaration and the Condominium Act to maintain insurance against *all risks of direct physical loss* which are *commonly insured*

against, to the extent that such insurance is *reasonably available*. We further conclude that flood is a risk of direct physical loss which is commonly insured against for residential buildings located in a FEMA-designated flood zone. Accordingly, we conclude that the Association has an obligation to provide flood insurance for the Community's buildings located within the FEMA flood zone each year when such insurance is reasonably available.

1. "Risk of Direct Physical Loss"

We conclude that damage by flood is a "risk of direct physical loss" to property.[4] Indeed, our Supreme Court has instructed that in the context of insurance policies, "[t]he term 'all risks' is *not* to be given a restrictive meaning." *Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 146, 195 S.E.2d 545, 546 (1973) (emphasis added).

The Association essentially argues that (1) the phrase "all risks of direct physical loss" is limited in the Declaration by the phrase which follows, "including fire and extended coverage [perils]" and (2) the risk of flood is *not* a risk of fire or a risk commonly understood as an "extended coverage" peril. The Association relies heavily on an affidavit from the attorney who drafted the Declaration. In the affidavit, the attorney essentially stated that flood is not an "extended coverage peril" and that the peril of flood is not "commonly insured against in property and casualty insurance policies."[5] However, the question is not whether the risk of flood is commonly insured against only *in property and casualty insurance policies*; rather, the question is whether the phrase "all risks of direct physical loss" is limited to only risks associated with fire and extended coverages.

We conclude that the phrase "all risks of direct physical loss" is not limited by the phrase "including fire and extended coverage [perils]." Had the intent been to limit the Association's obligation to maintain *only* those coverages contained in a standard fire and extended coverages policy, the Community's declarant could have stated as such. Our Supreme Court has consistently noted that the word "including"

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4. The standard FEMA flood insurance policy covers a "residential condominium building" for "*direct physical loss* by or from flood to [the] insured property[.]" *Residential Condominium Building Association Policy*, FEMA National Flood Insurance Program, *available at* https://www.fema.gov/media-library-data/1449522834627-6207ff14ab3d19b2a8d43b3aa6f6607d/F-144_RCBAP_SFIP_102015.pdf (emphasis added).

5. We note that to the extent the trial court's order relied upon the attorney's legal opinion in concluding that the Association's motion for summary judgment should be granted, that reliance was misplaced. It is the trial court's duty to resolve issues of law.

indicates an intent to enlarge, not limit, a definition. *See Polaroid Corp. v. Offerman*, 349 N.C. 290, 300-01, 507 S.E.2d 284, 292 (1998), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2001); *N.C. Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 120, 143 S.E.2d 319, 327 (1965) ("The term 'includes' is ordinarily a word of enlargement and not of limitation."); *see also Samantar v. Yousuf*, 560 U.S. 305, 317 (2010) ("[U]se of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive.").

2. "Commonly Insured Against"

We further hold that "flood" is a risk of direct physical loss that is "commonly insured against" for residential buildings located in flood zones. FEMA is responsible for administering the National Flood Insurance Program ("NFIP"), which was created by the United States Congress "in order to make flood insurance available on reasonable terms and conditions to those in need of such protection." *Guyton v. FM Lending Services, Inc.*, 199 N.C. App. 30, 37, 681 S.E.2d 465, 471 (2009) (internal marks omitted) (citing 42 U.S.C. § 4001). Plaintiffs' response opposing the Association's motion for summary judgment included documentation from the NFIP showing that from 2006-2015, the program administered over five million flood insurance policies in each calendar year. At the time of the writing of this opinion, FEMA's flood policy statistics show that there are approximately 134,126 flood policies in force in the State of North Carolina.[6] Approximately 1,062 of these policies are in force in Buncombe County, where the Community is located.

FEMA's Flood Insurance Manual details the methods of insuring residential condominiums. The manual provides that only a condominium's association may purchase flood insurance coverage on a residential building and its contents – individual unit owners are not eligible to purchase flood insurance through the NFIP. And due to federal lending regulations, owners of properties in special flood hazard areas are required to purchase flood insurance as a condition of receiving a federally backed mortgage. *See* 42 U.S.C. § 4012. In practice,

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6. *Policy Statistics Country-Wide*, FEMA National Flood Insurance Program, *available at* http:// bsa.nfipstat.fema.gov/reports/1011.htm. We take judicial notice of these statistics pursuant to Rule 201 of the North Carolina Rules of Evidence. N.C. R. Evid. 201 ("A judicially noticed fact must be . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); *see also State v. Wright*, 290 N.C. 45, 51-52, 224 S.E.2d 624, 628 (1976) (taking judicial notice of statistics on the operation of North Carolina's superior courts compiled by the Administrative Office of the Courts); *State v. Southern Ry. Co.*, 141 N.C. 46, 54 S.E. 294 (1906) (taking judicial notice of the rules and regulations adopted by the United States Department of Agriculture).

this means that any time a buyer purchases a property in North Carolina located in a special flood hazard area by way of a mortgage from a federally regulated lender, the property generally must be protected by a flood insurance policy. *See* U.S.C. § 4012(b)(2) ("A Federal agency lender may not make . . . any loan secured by improved real estate . . . in an area that has been identified [] as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act[.]"). At least one Plaintiff in this action has been unable to sell her unit, despite having an accepted offer to purchase, because the contract was dependent on the buyers obtaining a loan and they were unable to do so because the property was not covered by a flood insurance policy.[7]

3. "Reasonably Available"

Finally, for the following reasons, we hold that the Association's obligation to maintain flood insurance coverage on the Community's buildings located in a FEMA flood zone is not absolute for all time. Rather, we hold that the Association only has the obligation so long as flood insurance is "reasonably available."

The Declaration provides that the Association is required to obtain insurance coverage *only* to the "extent *reasonably available*."

The Declaration also states that the Association shall obtain insurance coverage "in accordance with Section 47C-3-113 of the Condominium Act[.]" The Condominium Act provides that an association "shall maintain [insurance], *to the extent available*." N.C. Gen. Stat. § 47C-3-113(a)(1). In interpreting this statutory provision, we are guided by the Official Comment to the statute, included with the printing of the Condominium Act. *See Miller v. First Bank*, 206 N.C. App. 166, 171, 696 S.E.2d 824, 827-28 (2010) (stating that "commentary to a statutory provision can be helpful in some cases in discerning legislative intent[,]" and where comments are "included with the printing of the statute[,] . . . [they are] relevant in construing the intent of the statute"); *see also Crowder Const. Co. v. Kiser*, 134 N.C. App. 190, 206, 517 S.E.2d 178, 189 (1999) ("Consistent with the practice of our Supreme Court, we have given the Commentary 'substantial weight[.]' "). The Official Comment to N.C. Gen. Stat. § 47C-3-113 clarifies that "[s]ubsections (a) and (b) provide that the required insurance must be maintained *only to the extent*

7. Of course, this requirement might not affect a cash buyer or a mortgage issued by a private mortgage company which is *not* ultimately sold on the secondary market to a federally regulated lender.

reasonably available. This permits an association to comply with the insurance requirements *even if* certain coverages are unavailable or *unreasonably expensive*." N.C. Gen. Stat. § 47C-3-113 (official comment).

IV. Conclusion

Flood is a hazard which is commonly insured against for residential properties located in a FEMA flood zone. Whether flood continues to be a hazard "commonly insured against" and whether such insurance is "reasonably available" are to be determined by the Association in the course of its diligent and good-faith execution of its duties. *See* N.C. Gen. Stat. § 47C-3-103 ("In the performance of their duties, the officers and members of the executive board shall be deemed to stand in a fiduciary relationship to the association and the unit owners and shall discharge their duties in good faith, and with that diligence and care which ordinarily prudent [persons] would exercise under similar circumstances in like positions."). We note that in the event the Association, in any given year, determines in the affirmative to both questions, the Declaration requires that such insurance be maintained *as a common expense*. Indeed, the buildings are owned by *all* of the unit owners in common.

In the present case, the issue of whether the Association made the proper determination based on the circumstances of the Community in any given year is not before us. Rather, Plaintiffs requested a declaratory judgment to resolve the issue of whether, in general, the Association is obligated to maintain flood insurance on any of its buildings located in a flood plain.

Accordingly, we hold that the trial court erred in granting the Association's motion for summary judgment. Although there was no genuine issue of material fact, the Association was *not* entitled to judgment in its favor as a matter of law. Therefore, we reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA
v.
DAVID WOODARD DANIEL, DEFENDANT

No. COA17-974

Filed 1 May 2018

Motor Vehicles—driving while impaired—probable cause to arrest

An officer had probable cause to arrest defendant for driving while impaired where defendant was speeding, made an abrupt unsafe movement almost resulting in a collision with another vehicle, had alcohol on his breath, had two positive readings on the portable alcohol test, had an open container his car, and admitted to heavy drinking just hours before.

Judge TYSON dissenting.

Appeal by the State from order entered 8 June 2017 by Judge Patrice Hinnant in Wilkes County Superior Court. Heard in the Court of Appeals 20 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for the State.

Vannoy, Colvard, Triplett & Vannoy, PLLC, by Jay Vannoy, for the Defendant-Appellee.

DILLON, Judge.

The State appeals from an order granting Defendant's motion to suppress evidence obtained subsequent to his arrest for driving while impaired. For the reasons stated below, we reverse and remand for further proceedings consistent with this opinion.

I. Background

On the morning of 11 June 2016, a trooper stopped Defendant's vehicle for speeding in Wilkes County. Based on his observations of Defendant, the trooper formed a belief that Defendant had consumed a sufficient quantity of alcohol to impair Defendant's faculties or his ability to safely drive a vehicle. Accordingly, the trooper placed Defendant under arrest for driving while impaired. The trooper also cited Defendant for speeding and for driving with an open container of alcohol.

Defendant was convicted in district court, but he appealed to superior court for a trial *de novo*. In superior court, Defendant filed a motion to suppress, contending that the trooper lacked probable cause to arrest him. Following a hearing on the matter, the superior court granted Defendant's motion. The State timely appealed.

II. Analysis

On appeal, the State contends that the superior court's findings *do* support a conclusion that the trooper had probable cause to arrest Defendant for driving while impaired.

The State does not challenge any of the superior court's findings of fact; therefore, these findings are binding on appeal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Accordingly, our standard of review is whether the superior court's findings support its conclusion that the trooper lacked probable cause to arrest Defendant.

Our Supreme Court has defined "probable cause for an arrest" as:

> . . . a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious [person] in believing the accused to be guilty[.]
>
> [T]he evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable [person] acting in good faith.

State v. Bone, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001).

Here, for the reasons stated below, we conclude that the findings made by the superior court support a conclusion that the trooper did have probable cause to arrest Defendant.

Specifically, the superior court found as follows: The trooper clocked Defendant traveling at a speed of 80 miles per hour in a 65 mile per hour zone on a multiple-lane highway. As the trooper approached Defendant, Defendant was traveling in the left-hand lane (on the correct side of the road). As the trooper drew close to Defendant, Defendant abruptly moved into the right-hand lane and nearly struck another vehicle before stopping on the shoulder of the highway. During the stop, the trooper noticed a moderate odor of alcohol emanating from Defendant and observed an open 24-ounce container of beer in the cup-holder next to the driver's seat. Defendant told the trooper that he had just purchased the beer, and was drinking it while driving down the highway. Defendant admitted that he had been drinking heavily several hours before the encounter with the trooper. The trooper did not have

Defendant perform any field sobriety tests; but the trooper did request that Defendant submit to two Alco-sensor tests, both of which yielded positive results for alcohol.

Admittedly, the trial court also made many findings tending to show that Defendant was not driving under the influence of alcohol: He did not have glassy eyes, exhibit slurred speech, or have any issues with balancing or walking. Further, Defendant was cooperative and responsive.

It may be that the superior court's findings are not sufficient to prove Defendant's guilt or to make out a *prima facie* case of Defendant's guilt. But we conclude that the findings are sufficient for a "cautious" police officer to believe that Defendant was driving under the influence. Defendant admitted to drinking, had an open container in his vehicle, had alcohol on his breath, was driving fifteen (15) miles per hour over the speed limit, and made an unsafe movement almost causing an car accident when he pulled across a lane of traffic while pulling over. True, Defendant's unsafe movement across a lane of traffic may have been caused by some factor unrelated to being under the influence of alcohol, such as the nervousness inherent in being pulled over by a police officer. But a "cautious" trooper could also reasonably believe that Defendant's abrupt change of lanes, nearly resulting in a collision, was caused, at least in part, by Defendant being under the influence of alcohol. Swerving alone does not give rise to probable cause, but additional factors creating dangerous circumstances may. *See State v. Wainwright*, 240 N.C. App. 77, 85, 770 S.E.2d 99, 105 (2015).

Therefore, though the findings might not make out a *prima facie* case of Defendant's guilt, the findings were sufficient to justify the trooper, acting cautiously, to arrest Defendant rather than take a chance by allowing Defendant to continue driving in his condition. *See State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) ("The existence of 'probable cause[]' . . . is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.").

In conclusion, the trial court's findings regarding Defendant's excessive speed, his abrupt unsafe movement almost resulting in a collision with another vehicle, the alcohol on his breath, the two positive readings on the portable alcohol screening test, the open container in his car, and his admission to heavy drinking just hours before – though maybe not enough to clear the "guilty beyond a reasonable doubt" hurdle necessary for a conviction where other findings tend to show that Defendant was sober – does clear the lower "probable cause" hurdle necessary for an

arrest as established by our Supreme Court. *Bone*, 354 N.C. at 10, 550 S.E.2d at 488.

III. Conclusion

The findings of the superior court support a conclusion that the trooper did have probable cause to arrest Defendant for driving while impaired. Accordingly, we reverse the order of the superior court suppressing evidence obtained as a result of the stop and remand this matter for further proceedings consistent with this opinion.

Judge CALABRIA concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge, dissenting.

The State does not challenge any of the findings of fact contained in the trial court's order. These unchallenged findings of fact support the trial court's conclusion of law that Trooper Berrong did not possess probable cause to arrest Defendant for driving while impaired ("DWI").

The State's appeal challenges only the trial court's conclusion, granting Defendant's motion to suppress the evidence obtained *subsequent to* his arrest for DWI. The majority's opinion concludes probable cause existed to support Defendant's DWI arrest, reverses the trial court's order and remands for further proceedings. I vote to affirm the trial court's order and respectfully dissent.

I. Background

On the morning of 11 June 2016, N.C. Highway Patrol Trooper Joe Berrong was stationary at the Windy Gap exit of Highway 421 in Wilkes County. Trooper Berrong was monitoring traffic coming from Winston-Salem towards Wilkesboro and running stationary radar in order to detect speeding drivers. Trooper Berrong observed a Chevrolet sport utility vehicle coming down the highway and clocked the vehicle's speed at 80 miles per hour in a 65 mile per hour zone.

Trooper Berrong activated his vehicle's lights and siren and pursued the vehicle northbound on Highway 421. As Trooper Berrong approached, the vehicle was traveling in the left-hand lane. When Trooper Berrong drew closer, Defendant abruptly moved out of his way into the right-hand lane and nearly struck another vehicle. Trooper Berrong managed to place his vehicle behind Defendant's vehicle, which had pulled over and stopped on the shoulder of Highway 421.

Trooper Berrong approached the vehicle and noticed a moderate odor of alcohol emanating from the driver and observed an open 24-ounce container of beer inside the cup holder next to the driver. Defendant was the driver, admitted he had just purchased the beer and was drinking it while driving down the road. Defendant also stated he had also drank heavily the previous night, but had not consumed very much that day.

Trooper Berrong requested Defendant to exit his vehicle. Trooper Berrong stated he still detected a moderate odor of alcohol emanating from Defendant after he exited his vehicle. Trooper Berrong did not ask Defendant to perform any of the standard field sobriety tests, but did request Defendant to submit to two alco-sensor alcohol screening tests. Defendant agreed and both tests yielded positive results for alcohol.

Based upon his observations of Defendant, Defendant's speeding and the manner in which Defendant had operated his vehicle, Trooper Berrong formed an opinion that Defendant had consumed a sufficient quantity of alcohol to impair Defendant's physical or mental faculties or ability to safely operate a vehicle. Defendant was placed under arrest for DWI and issued citations for speeding 80 miles per hour in a 65 mile per hour zone and for driving with an open container of alcohol. Trooper Berrong transported Defendant to the local courthouse where Defendant was administered an intoximeter test.

On 23 February 2017, Defendant pled guilty to all charges in Wilkes County District Court. The district court sentenced Defendant to 60 days imprisonment and suspended the sentence to twelve months of unsupervised probation. Defendant then entered notice of appeal to superior court for a trial *de novo*.

On 29 March 2017, Defendant filed a pre-trial motion to suppress evidence and asserted lack of probable cause for his arrest. Following a hearing on the motion, the superior court entered an order allowing Defendant's motion to suppress. The State filed timely notice of appeal to this Court.

II. Standard of Review

"The standard of review for a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Wainwright*, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015) (internal quotation marks and citation omitted). "[I]n evaluating a trial court's ruling on a motion to suppress . . . the trial court's findings of fact are conclusive on appeal

if supported by competent evidence, even if the evidence is conflicting." *State v. Allen*, 197 N.C. App. 208, 210, 676 S.E.2d 519, 521 (2009) (citation omitted). Findings of fact not challenged on appeal are deemed supported by competent evidence and are binding upon this Court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Analysis

The State does not challenge any of the trial court's findings of fact in the order granting Defendant's motion to suppress. These findings are based upon competent evidence and are binding upon appeal. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878.

With regard to the trial court's conclusions of law, the State argues that the trial court erred in granting Defendant's motion to suppress. It asserts the totality of the circumstances indicate Trooper Berrong had probable cause to arrest Defendant for DWI. Whether Trooper Berrong lacked probable cause to arrest Defendant for DWI and whether the trial court properly granted Defendant's motion to suppress must be reviewed in light of the trial court's unchallenged findings of fact.

A. Probable Cause

"Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *State v. Teate*, 180 N.C. App. 601, 606-07, 638 S.E.2d 29, 33 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 244 n. 13, 76 L. Ed. 2d 527, 552 n. 13 (1983)). "Probable cause exists if the facts and circumstances at that moment [that are] within the charging officer's knowledge[,] and of which the officer had reasonably trustworthy information[,] are such that a prudent man would believe that the suspect had committed or was committing an offense." *Moore v. Hodges*, 116 N.C. App. 727, 730, 449 S.E.2d 218, 220 (1994) (citation omitted).

"Whether probable cause exists to justify an arrest depends on the 'totality of the circumstances' present in each case." *State v. Sanders*, 327 N.C. 319, 339, 395 S.E.2d 412, 425 (1990) (citations omitted), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991).

B. Unchallenged Findings of Fact

Here, the trial court made the following unchallenged findings of fact:

1. On June 11, 2016, at approximately 9:30 a.m., Trooper Joe Berrong with the N.C. Highway Patrol was sitting stationary on the Windy Gap exit of Highway 421 in Wilkes County, North Carolina, watching traffic on Highway 421 for speeding and was running stationary radar. At this time, Trooper Berrong had worked for the Highway Patrol for approximately 14 years and had worked as a law enforcement officer for 19 years with at least 100 arrests for driving while impaired.

2. Trooper Berrong clocked the Defendant traveling at an estimated 80 mph in a 65 mph zone on Highway 421. The Trooper activated his lights and siren and pursued the Defendant.

3. When Trooper Berrong caught up to the Defendant, the Defendant was driving in the left lane. Trooper Berrong pulled up behind the Defendant with lights and sirens activated, then the Defendant made a sharp cut into the right-hand lane and cut off another vehicle nearly striking the other vehicle. Trooper Berrong followed the Defendant into the right hand lane and then the Defendant pulled off onto the shoulder at or near the next exit off of Highway 421 towards the rest area where he stopped.

4. Less than one minute passed from the time that Trooper Berrong started pursuit of the Defendant until the Defendant stopped.

5. Trooper Berrong was alerted to the Defendant's vehicle based on his speed.

6. Other that [sic] the Defendant's speed and his sharp turn into the right hand lane nearly striking another vehicle, Trooper Berrong did not notice anything else unusual or illegal about the Defendant's operation of his vehicle. It was described as 'a straight up speeding stop'.

7. When Trooper Berrong approached the Defendant's car, he noticed a moderate odor of alcohol coming from the Defendant's breath and an open container of alcohol, an Ice House beer, in the Defendant's car. The Defendant was the sole occupant of the vehicle.

8. The Defendant told Trooper Berrong that he drank heavily the night before and that he had not drank much

of the open container of alcohol, but what he had drank of the open container he drank while coming up the road.

9. Trooper Berrong was unable to recall what was done with the container, the temperature of the container or how much was in it. It was unknown when the Defendant bought the beer other than sometime that morning or how long the Defendant had been on the road. Defendant was on the way to Boone to work on his house.

10. Trooper Berrong requested the Defendant to get out of the vehicle and the Defendant complied with that request. They walked back to Trooper Berrong's patrol car and the Defendant sat in the patrol car with Trooper Berrong. Trooper Berrong observed there was nothing unusual about the Defendant's gait. In the patrol car, Trooper Berrong still noticed a moderate odor of alcohol coming from the Defendant's person.

11. On June 11, 2016, Trooper Berrong was certified to use the intoximeter FST alcohol screening device which was assigned to him by the Highway Patrol. This alcohol screening device had been calibrated and was working properly.

12. Trooper Berrong asked the Defendant to submit to an alcohol screening test and the Defendant complied. Trooper Berrong administered the first test at 9:36 a.m. and the second test at 9:42 a.m. and both tests yielded a positive result. The Trooper's notes did not include the FST to determine alcohol.

13. Trooper Berrong did not other present [sic] evidence of performance on standardized field sobriety tests. Trooper Berrong felt that the location of the vehicle stop was not practical to administer field sobriety tests. Specifically, the shoulder was uneven, very rough, and only partially paved. The Defendant stopped between the Windy Gap Road exit (exit 277) and the NC-115 exit (exit 282). A rest area was located approximately one mile past the NC-115 exit.

14. Trooper Berrong formed an opinion that the Defendant had consumed a sufficient amount of alcohol to impair the Defendant's physical and/or mental faculties.

15. The Defendant was arrested for driving while impaired. Trooper Berrong issued a citation to the Defendant for speeding 80 mph in a 65 mph zone and for driving with an open container of alcoholic beverage after drinking.

16. During the entire time that Trooper Berrong was interacting with the Defendant, the Defendant was polite, cooperative, and respectful to the Trooper.

17. Trooper Berrong observed the Defendant try to cover up the open container of alcohol before the Defendant got out of his car, but this did not affect Trooper Berrong's opinion that the Defendant was being very cooperative.

18. The Defendant did not have red glassy eyes or any slurred speech. Trooper Berrong was able to communicate with the Defendant clearly.

19. Trooper Berrong did not notice anything unusual about the Defendant's ability to walk, stand or maintain his balance.

C. The State's Argument

The State asserts Trooper Berrong had probable cause to arrest Defendant because he had sufficient knowledge to believe Defendant had committed or was committing the offense of DWI. The State argues, and the majority's opinion agrees, the totality of the circumstances supports a conclusion that Trooper Berrong had probable cause to arrest Defendant for DWI because:

(1) he clocked Defendant traveling 15 miles over the posted speed limit;

(2) Defendant almost struck another vehicle when attempting to pull over;

(3) Defendant had a moderate odor of alcohol emanating from his person;

(4) Defendant admitted to drinking heavily the night before;

(5) Defendant had an open container of alcohol in his vehicle that he attempted to cover up;

(6) Defendant admitted to recently drinking said alcohol while driving down the road; and

(7) Defendant registered two (2) positive readings on the portable alcohol screening test.

The State's argument relies in part on the case of *State v. Townsend*, 236 N.C. App. 456, 762 S.E.2d 898 (2014), to support its assertion that Trooper Berrong had probable cause to arrest Defendant for DWI. In *Townsend*, the defendant was stopped at a police checkpoint where a law enforcement officer had noticed the defendant had red, bloodshot eyes, emitted a strong odor of alcohol, and admitted to drinking several beers earlier in the evening. *Id.* at 458, 762 S.E.2d at 901. The officer administered two alco-sensor tests, which were positive for alcohol. *Id.* The officer also had the defendant perform several field sobriety tests, including a horizontal gaze nystagmus test, a "walk and turn" test, and a "one leg" stand test. *Id.* The defendant exhibited multiple signs of intoxication on each of those tests. *Id.* The defendant was arrested and later convicted of DWI. *Id.*

The defendant had filed a motion to suppress for lack of probable cause, which was denied by the trial court. *Id.* at 464, 762 S.E.2d at 904. On appeal, the defendant argued that because he did not exhibit signs of intoxication such as slurred speech, glassy eyes, or physical instability, there was insufficient probable cause for his arrest. *Id.* at 465, 762 S.E.2d at 905. This Court concluded there was probable cause because "[the officer] noted that defendant had bloodshot eyes, emitted an odor of alcohol, exhibited clues as to intoxication on three field sobriety tests, and gave positive results on two alco-sensor tests." *Id.*

The facts here are distinguishable from those in *Townsend*. The defendant in *Townsend* exhibited several signs of intoxication, in addition to the two positive alco-sensor results, odor of alcohol, and admission of consuming alcohol prior to driving. These additional signs included bloodshot eyes and indications of intoxication from the three administered standard field sobriety tests. *Id.* at 458, 762 S.E.2d at 901. In the instant case, although Defendant admitted to consuming alcohol, had an open container of beer in his vehicle, and emanated a moderate odor of alcohol, these were the only indications tending to show he could be impaired or intoxicated.

While Defendant's speeding and abrupt change of lanes may support probable cause to support the citation for speeding, these actions and the other observations of Trooper Berrong, do not support probable cause that Defendant's mental or physical faculties were "appreciably impaired" or that he had a "[blood] alcohol concentration of 0.08 or more." *State v. McDonald*, 151 N.C. App. 236, 244, 565 S.E.2d 273, 277 (2002); *see also* N.C. Gen. Stat. § 20-138.1(a) (2017).

According to the trial court's unchallenged and binding findings of fact in the order granting Defendant's motion to suppress, Trooper

Berrong initiated the stop solely based upon Defendant's speeding. Trooper Berrong did not observe anything unusual about Defendant's driving in addition to speeding, except his abrupt merging into the right-hand lane to pull over. Neither Defendant's speed nor his abrupt move into the right-hand lane in response to Trooper Berrong driving up behind him with activated lights and sirens tend to show probable cause that Defendant was driving while impaired.

Significantly, Trooper Berrong did not observe anything that would indicate probable cause of appreciable impairment or a .08 blood alcohol concentration or greater intoxication in Defendant's gait, manner of speaking or appearance. Additionally, Defendant acted politely, cooperatively, responsively and respectfully during their interaction. Also, and unlike the defendant in *Townsend*, Defendant was not asked to perform any standard field sobriety tests and did not have bloodshot eyes. *See id.*

As the fact finder, the trial court had the opportunity to observe all witnesses and their demeanor. The trial court's unchallenged findings of fact are based upon the competent evidence in the record. These findings support its conclusion that the totality of the circumstances did not provide probable cause for Trooper Berrong to arrest Defendant for DWI. *See Sanders*, 327 N.C. at 339, 395 S.E.2d at 425. The order of the trial court should be affirmed.

IV. Conclusion

Under the totality of the circumstances and the unchallenged findings of fact, the trial court properly concluded that Trooper Berrong lacked sufficient probable cause to arrest Defendant for DWI. The trial court's unchallenged and binding findings of fact support its conclusions of law.

The State failed to show Trooper Berrong possessed probable cause to support Defendant's arrest for DWI or carry its burden to overcome the presumption of correctness of the trial court's order on appeal. The order of the trial court granting Defendant's motion to suppress is properly affirmed. For these reasons, I respectfully dissent.

STATE v. ELDRED

[259 N.C. App. 345 (2018)]

STATE OF NORTH CAROLINA
v.
PAUL DAVID ELDRED, DEFENDANT

No. COA17-795

Filed 1 May 2018

Motor Vehicles—driving while impaired—sufficiency of evidence—gaps in evidence

The evidence was insufficient to establish that defendant was driving while impaired where he was found walking along the highway several miles from his wrecked car, admittedly "smoked up on meth," but no evidence was presented that defendant was impaired *while* he was operating his vehicle.

Appeal by Defendant from judgment entered 30 March 2017 by Judge Gary M. Gavenus in Avery County Superior Court. Heard in the Court of Appeals 25 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christina S. Hayes, for the State.

Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant.

INMAN, Judge.

One hundred feet of tire impressions veer off a highway, past a scuffed boulder, and end at a damaged, unoccupied vehicle whose registered owner is found walking along the same highway disoriented and unsteady on his feet. He admits that he is "smoked up on meth" and that he wrecked the vehicle "a couple of hours" earlier. Most anyone would surmise what happened, and might very well be right. But because the law prohibits imposing criminal liability based on conjecture, gaps in the evidence and controlling precedent require that we reverse Defendant's conviction for driving while impaired.

Paul Eldred ("Defendant") appeals from a judgment following a jury verdict finding him guilty of driving while impaired ("DWI"). Defendant argues that the trial court erred in denying his motion to dismiss because the State failed to present evidence that his admitted impairment began before or during the time he was operating his vehicle. After careful review, we agree.

Factual and Procedural History

The State's evidence at trial tended to show the following:

On 30 October 2015, between 8:20 and 8:30 p.m., law enforcement officers in Avery County received a radio communication of a reported motor vehicle accident on Highway 221 north of the intersection with Highway 105. Avery County Sheriff's Deputy Timothy Clawson ("Deputy Clawson") and State Highway Patrol Trooper J.D. Boone ("Trooper Boone") found a Jeep Cherokee stopped on the right shoulder of the highway. The vehicle was facing north, in the same direction as the right lane of travel, toward Grandfather Mountain. The vehicle's right side panel was damaged. Officers observed approximately 100 feet of tire impressions on the grass leading from the highway to the stopped vehicle. The first ten feet of the impressions led from the highway to a large rock embankment that appeared scuffed. Beyond the embankment, the impressions continued to where the vehicle was stopped. No one was in the vehicle or at the scene.

Deputy Clawson searched for information based on the vehicle's license plate and learned that the registered owner was Defendant. He then left the accident scene and drove on Highway 221 looking for the missing driver. Two or three miles north of the accident scene, he saw a man walking on the left side of Highway 221 and stopped to question the man, later identified as Defendant. Deputy Clawson noticed a mark on Defendant's forehead and observed that he was twitching and seemed unsteady on his feet. Asked his name, Defendant replied, "Paul." Asked what he was doing walking along the highway, Defendant replied, "I don't know, I'm too smoked up on meth." Deputy Clawson handcuffed Defendant for safety purposes and asked if he was in pain. Defendant said that he was, and Deputy Clawson called for medical help.

Deputy Clawson did not ask Defendant how he came to be in pain. Deputy Clawson did not ask Defendant about his admitted illegal activity or attempt to determine whether Defendant was impaired by a substance or as a result of the accident. Deputy Clawson instead focused on Defendant's medical wellbeing. When emergency medical personnel arrived, Deputy Clawson removed the handcuffs and allowed Defendant to leave in an ambulance.

Trooper Boone traveled from the accident scene to Cannon Hospital, where he learned Defendant had been taken by ambulance. He found Defendant in a hospital room at approximately 9:55 p.m. and explained he was investigating the reported accident. Answering Trooper Boone's questions, Defendant confirmed that he had been driving his vehicle and

said it had run out of gas. Defendant then said that "he was hurt bad and was involved in a wreck a couple of hours ago." Asked if he had been drinking alcohol, Defendant said no. Asked if he had taken any medications, Defendant "said he was on meth." Trooper Boone did not ask Defendant or medical personnel whether Defendant had been given any pain medication in the ambulance or in the hospital.

Trooper Boone observed that Defendant was twitching, appeared dazed, took several seconds to form words in response to questions, and shouted his answers to questions. Defendant said he was "messed up" and unable to perform any sobriety tests. Defendant did not know the date, the day of the week, or the time. Trooper Boone formed the opinion that Defendant had consumed a sufficient amount of an impairing substance to appreciably impair his mental and physical faculties. Trooper Boone then informed Defendant that he would be charged with driving while impaired and advised Defendant of his Miranda rights. After Defendant confirmed that he understood his rights, Trooper Boone asked further questions. Defendant again said that he had run out of gas while driving from Banner Elk. Defendant said he "was just driving" and did not have a destination. Defendant did not recall which highway he had been on or what city he was in. Trooper Boone did not ask Defendant when he had last consumed meth, when he became impaired, whether he had consumed meth prior to or while driving, or what Defendant did between the time of the accident and the time Deputy Clawson found him walking beside the highway.

Following an order by the trial court granting Defendant's motion to suppress, the State presented no evidence of any laboratory test reflecting the presence or concentration, if any, of any impairing substance in Defendant's blood or urine.

Analysis

This appeal requires us to examine the boundary between evidence supporting suspicion and conjecture, which is insufficient to submit a criminal charge to a jury, and, on the other hand, evidence allowing a reasonable inference of fact, which is sufficient to support a criminal conviction.

Defendant argues that the State failed to present substantial evidence of an essential element of DWI—that Defendant was impaired *while* he was driving.

This Court reviews a trial court's order denying a defendant's motion to dismiss *de novo*. *State v. McKinnon*, 306 N.C. 288, 289, 293 S.E.2d 118,

125 (1982). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

"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). "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).

Driving while impaired is a statutory offense in North Carolina. N.C. Gen. Stat. § 20-138.1(a) (2015) provides in pertinent part that "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . while under the influence of an impairing substance . . . ." The essential elements of DWI are therefore: "(1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance." *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002), *aff'd*, 357 N.C. 242, 580 S.E.2d 693 (2003) (per curium) (citing N.C. Gen. Stat. § 20-138.1).

Defendant compares the evidence in this case to that in *State v. Hough*, 229 N.C. 532, 50 S.E.2d 496 (1948), in which the North Carolina Supreme Court held the evidence was insufficient to raise more than a suspicion or conjecture of impairment. In that case, two officers arrived at the scene of an accident approximately 30 minutes after it was reported. *Id.* at 533, 50 S.E.2d at 497. One officer testified his opinion of the defendant's intoxication was based on the fact that he smelled something on the defendant's breath. *Id.* at 533, 50 S.E.2d at 497. The other officer testified that it was his opinion the defendant was intoxicated or under the influence of something. *Id.* at 533, 50 S.E.2d at 497. But neither officer could testify with certainty whether the defendant's condition was the result of intoxication or the result of the injuries he sustained in the accident. *Id.* at 533, 50 S.E.2d at 497. The Court, reversing the trial court's denial of the defendant's motion for judgment as of nonsuit, reasoned that "[i]f the witnesses who observed the defendant immediately after his accident, were unable to tell whether or not he was under the influence of an intoxicant or whether his condition was the result of

the injuries he had just sustained, we do not see how the jury could do so." *Id.* at 533, 50 S.E.2d at 497.

The State likens the evidence of this case with the facts of *State v. Collins*, 247 N.C. 244, 248 100 S.E.2d 489, 491 (1957), in which the North Carolina Supreme Court distinguished *Hough* and upheld a conviction for impaired driving. The defendant in *Collins* was thrown from his automobile after crossing the center lane and striking another vehicle. *Id.* at 246, 100 S.E.2d at 490. The driver of the second vehicle approached the defendant and asked if he could take the defendant to the doctor. *Id.* at 246, 100 S.E.2d at 490. The defendant was holding his head as if hurt, but when the second driver asked if he could take the defendant to a doctor, the defendant said no. *Id.* at 246, 100 S.E.2d at 490. The defendant then left the scene. *Id.* at 246, 100 S.E.2d at 490. The defendant returned to the scene approximately 45 minutes later and officers observed that he had a strong odor of alcohol on his breath, had urinated his pants, his speech was incoherent, and he was unable to stand without assistance. *Id.* at 246, 100 S.E.2d at 490. Officers noticed no cuts, bruises, or abrasions on the defendant's head, and the defendant said he was not hurt. *Id.* at 246, 100 S.E.2d at 490. The Court, considering the evidence in the light most favorable to the State, concluded that "the evidence of defendant's intoxication was not too remote in point of time, or too speculative, to permit a legitimate inference that the defendant was under the influence of intoxicating liquor at the time of the collision . . . ." *Id.* at 248, 100 S.E.2d at 491.

The record here contrasts sharply with the facts in *Collins*. The State presented no evidence of when Deputy Clawson encountered Defendant. Trooper Boone did not encounter Defendant until approximately 9:55 p.m., more than 90 minutes after the accident was reported. Defendant told Trooper Boone that he had been in a wreck "a couple of hours ago." That is more than twice as long as the delay which *Collins* held was "not too remote in point of time" between when a witness saw the defendant exiting his vehicle and law enforcement officers encountered him. Further, unlike in *Collins*, the State presented no evidence of how much time elapsed between the vehicle stopping on the shoulder and the report of an accident being made. Also, unlike in *Collins*, the State presented no testimony by any witness who observed Defendant driving the vehicle at the time of the accident or immediately before the accident.

Evidence of Defendant's physical condition also distinguishes this case from *Collins*. In *Collins*, the defendant denied being hurt and declined medical treatment. Here, by contrast, both Deputy Clawson

and Trooper Boone observed an injury on Defendant's head, emergency medical personnel transported Defendant to a hospital, and Defendant said he was "hurt bad."

The limited evidence in this case is more similar to *Hough* than to *Collins*. Deputy Clawson, who first found Defendant after he had walked two or three miles beyond his vehicle, did not determine whether Defendant's condition was caused by an impairing substance or by the injury that resulted in emergency medical personnel taking Defendant to the hospital. Trooper Boone, who interviewed Defendant in the hospital, did not obtain information concerning when or where Defendant had consumed meth or any other impairing substance. Neither officer even knew when Defendant's vehicle had veered off the highway.

The gaps in evidence in this case are also analogous to those in *State v. Ray*, 54 N.C. App. 473, 283 S.E.2d 823 (1981). In *Ray*, a law enforcement officer found the defendant, who was intoxicated, alone in a disabled vehicle, "halfway [in] the front seat." *Id.* at 474-75, 283 S.E.2d at 825. This Court held that the trial court erred in denying the defendant's motion to dismiss a driving while impaired charge because "[the] circumstantial evidence alone is insufficient to support a conclusion that the defendant was the driver." *Id.* at 475, 283 S.E.2d at 825. This Court noted that the State presented no evidence that the car "had been operated recently or that it was in motion at the time the officer observed the defendant . . . [n]or did the State offer evidence that the motor was running with the defendant sitting under the steering wheel at the time the officer came upon the scene . . . ." *Id.* at 475, 283 S.E.2d at 825.

Here, unlike in *Ray*, the State presented evidence that Defendant owned the vehicle, and Defendant admitted that he had been driving his vehicle and wrecked it "a couple of hours" earlier. But Defendant did not admit that he had been "smoked up on meth" or otherwise impaired when he was driving the vehicle. And the State presented no evidence, direct or circumstantial, to establish that essential element of the crime of driving while impaired.

"When the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt, they are insufficient to make out a case and a motion to dismiss should be allowed." *State v. Blizzard*, 280 N.C. 11, 16, 184 S.E.2d 851, 854 (1971). We are bound to follow our precedent.

Conclusion

Because the State presented insufficient evidence to establish that Defendant was impaired while driving, we hold that the trial

court erred in denying Defendant's motion to dismiss and reverse Defendant's conviction.

REVERSED.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
PAUL ARNOLD GRAY, DEFENDANT

No. COA17-508

Filed 1 May 2018

Evidence—expert opinion testimony—reliability—chemical drug analysis

The trial court did not commit plain error by admitting an expert's opinion that rocks found in defendant's possession contained cocaine where the expert laid a proper foundation under N.C.G.S. § 8C-1, Rule 702 regarding the chemical analysis process used.

Appeal by Defendant from judgment entered 13 December 2016 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Lauren Tally Earnhardt, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

MURPHY, Judge.

In a criminal prosecution for possession of a controlled substance, when an expert in forensic chemistry provides testimony that establishes a proper foundation under Rule 702(a) of the Rules of Evidence, the expert's opinion is otherwise admissible, and any unpreserved assignments of error related to the trial court's "gatekeeping" function is only reviewed for plain error. Furthermore, when plain error is assigned to a trial court's admission of expert testimony on the grounds that the testimony is not "reliable," we do not consider data or theories advanced

in a defendant's appellate brief which were neither before the trial court when the expert opinion was admitted nor made part of the record on appeal.

Paul Arnold Gray ("Defendant") appeals his 13 December 2016 conviction for felony possession of cocaine in violation of N.C.G.S § 90-95(d)(2). On appeal, he argues that the trial court committed plain error by admitting the expert opinion of a forensic chemist because her testimony failed to demonstrate that the methods she used were "reliable" under the current version of Rule 702. Defendant specifically maintains that the particular testing process used by the Charlotte-Mecklenburg Police Department Crime Lab ("CMPD Crime Lab") to identify cocaine creates an unacceptable risk of a false positive, and, this risk, standing alone, renders expert testimony based on the results of this testing process inherently unreliable under Rule 702(a). We do not consider this theory as it goes beyond the record and conclude that Defendant received a trial free from error.

BACKGROUND

On 30 August 2014, Defendant was arrested for possession of a stolen motor vehicle. After placing Defendant under arrest, Sergeant Rollin Mackel ("Sergeant Mackel") searched Defendant, and found two small "rocks" in Defendant's pants pocket. Sergeant Mackel believed the "rocks" were crack cocaine, so he seized them and placed them in an evidence envelope for storage and later testing. Lillian Ngong ("Ngong"), a forensic chemist with the CMPD Crime Lab, performed a chemical analysis on the substance in the envelope. Defendant was indicted for felony possession of cocaine in violation of N.C.G.S. § 90-95.

At trial, the State tendered Ngong as an expert in the field of forensic chemistry without objection. During direct examination, Ngong testified that she was employed by the CMPD Crime Lab and that she was the analyst who tested the substance in the evidence envelope. Ngong then described the methods the CMPD Crime Lab uses to identify controlled substances:

- First, the substance is weighed.
- Then, a presumptive test is performed by dropping an indicator chemical on a sample of the substance and observing if the sample changes color. For a presumptive test for cocaine, if the sample turns blue, the analyst performs additional testing on the substance with a gas chromatography mass

spectrometer ("GCMS") to confirm the result of the presumptive test.

- Next, to ensure that the GCMS is in working condition, analysts first run a chemical solvent that does not contain any prohibited substances through the instrument. This is called a "blank."
- After running the "blank" through the GCMS, the subject substance, which is believed to contain a controlled substance (such as cocaine or heroin), is tested with the GCMS.
- Finally, CMPD Crime Lab analysts evaluate the results of the test and determine whether or not the substance tested is a controlled substance.[1]

After explaining the CMPD Crime Lab's drug identification methods without objection, Ngong testified to how she tested and identified the substance seized from Defendant. She weighed the substance and conducted the presumptive test for cocaine. She then analyzed the substance seized from Defendant in the GCMS. Ngong also testified that the GCMS was working properly the day she analyzed the substance. Based on her analysis, Ngong testified that it was her opinion that the substance she tested contained cocaine, and Defendant did not object to her expert opinion.

On cross and re-direct examinations, Ngong testified about another step of testing utilized by the CMPD Crime Lab. Specifically, after testing the sample, the lab analysts test a "standard," which is a substance known to contain cocaine (or another relevant drug) in the GCMS. Ngong testified that "before we put out any conclusion" the results of the sample test are compared to the test results of the known standard. She also testified that she tested a "standard" that was cocaine after testing the "sample" (the substance seized from Defendant) and that this was standard practice in forensic chemistry.

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1. Ngong provided testimony that demonstrated how CMPD Crime Lab analysts identify specific drugs using the GCMS. Generally speaking, each drug has a unique molecular signature, like a fingerprint, that is revealed during testing. Ngong testified that "[w]hen it gets to the end of the gas chromatography it is introduced into the mass [spectrometer] . . . It breaks down into ions . . . And each ion is unique to the drug. It's like a fingerprint. Cocaine will break up in a different way. Marijuana or THC . . . will break up in a different way . . . Heroin will break up in a different way. That's how we identify."

Ngong's opinion testimony was the only evidence that established that the substance seized from Defendant contained a controlled substance. On appeal, Defendant contends that Ngong's expert testimony was unreliable, and therefore inadmissible under Rule 702(a). However, Defendant did not object to Ngong's testimony during trial on these grounds and now requests that this court review this issue for plain error. On appeal, Defendant argues that the CMPD Crime Lab's GCMS process is flawed because it requires an analyst to test the "sample" (which is believed to contain cocaine) and then test a "standard" (which is known to contain cocaine) without running another blank to clean out the GCMS and remove any residue possibly left by the "sample."[2] According to Defendant, by not running another blank before testing the standard, the CMPD Crime Lab's drug identification process creates an unacceptable risk of a false positive, and renders Ngong's methods inherently unreliable under Rule 702(a).

STANDARD OF REVIEW

Defendant's issue on appeal is that the trial court erred in admitting Ngong's expert opinion testimony because her "testimony showed that scientific principles and methods were not reliably applied" as required by Rule 702(a). Since Defendant failed to object to Ngong's testimony during trial, this issue is unpreserved. *See* N.C. R. App. P. 10(a)(1). However, we recently held that an unpreserved challenge to the performance of a trial court's gatekeeping function under Rule 702 in a criminal trial is subject to plain error review. *State v. Hunt*, ___ N.C. App. ___, ___, 792 S.E.2d 552, 559 (2016). We review the admission of Ngong's expert opinion testimony for plain error.

To establish plain error, a defendant must show that the error "was a fundamental error—that the error had a probable impact on the jury verdict." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal citations, quotation marks, and alterations omitted).

ADMISSIBILITY OF EXPERT TESTIMONY UNDER RULE 702

"Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule

2. However, CMPD Crime Lab analysts do run a blank before testing the sample to make sure the GCMS is in working condition.

104(a)." *State v. McGrady*, 368 N.C. 880, 892, 787 S.E.2d 1, 10 (2016). In 2011, the General Assembly amended Rule 702 of the Rules of Evidence and adopted the Federal *Daubert* standard, which gives trial court judges a "gatekeeping" role when admitting expert opinion testimony. *See id.* at 885-89, 787 S.E.2d at 8-11. However, the 2011 amendment did not categorically overrule all judicial precedents interpreting Rule 702, and "[o]ur previous cases are still good law if they do not conflict with the *Daubert* standard." *Id.* at 888, 787 S.E.2d at 8. Rule 702 does not "mandate particular procedural requirements," *id.* at 893, 787 S.E.2d at 11, and its gatekeeping obligation was "not intended to serve as a replacement for the adversary system." *Hunt*, ___ N.C. App. at ___, 792 S.E.2d at 559. Rather, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" continue as the "traditional and appropriate means of attacking shaky but admissible evidence." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 461, 597 S.E.2d 674, 688 (2004) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596, 113 S. Ct. 2786, 2798 (1993)).

Additionally, since the 2011 amendment became effective, we have observed that:

> [w]e can envision few, if any, cases in which an appellate court would venture to superimpose a *Daubert* ruling on a cold, poorly developed record when neither the parties nor the . . . court has had a meaningful opportunity to mull the question.

Hunt, ___ N.C. App. at ___, 792 S.E.2d at 560 (internal citations and quotation marks omitted). Our jurisprudence wisely warns against imposing a *Daubert* ruling on a cold record, and we limit our plain error review of the trial court's gatekeeping function to the evidence and "material included in the record on appeal and the verbatim transcript of proceedings[.]" *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524-25 (2001) (quotations omitted) ("on direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated."); *see also* N.C. R. App. P. 9(a) (" . . . review is solely upon the record on appeal[.]").

The burden of satisfying Rule 702(a) rests on the proponent of the evidence, and the testimony must satisfy three general requirements to be admissible. *See McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (citing N.C. R. Evid. 702(a)). "[T]he area of proposed testimony must be based on scientific, technical or other specialized knowledge that will assist the

trier of fact to understand the evidence or to determine a fact in issue." *Id.* at 889, 787 S.E.2d at 6 (internal quotations omitted). The witness must also be "qualified as an expert by knowledge, skill, experience, training, or education." *Id.* "Third, the testimony must meet the three-pronged reliability test . . . : '(1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case.' " *Id.* at 890, 787 S.E.2d at 9 (citing N.C. R. Evid. 702(a)(1)–(3)). "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony [and] . . . the trial court has discretion in determining how to address the three prongs of the reliability test." *Id.*

ANALYSIS

Defendant argues that the process used by Ngong and the CMPD Crime Lab to identify drugs using a GCMS is unreliable under Rule 702(a) because it creates an unacceptable risk of a false positive. However, this specific argument is based on documents, data, and theories that were neither presented to the trial court nor included in the record on appeal. They are only raised in Defendant's brief.[3] Therefore, our plain error review of Defendant's Rule 702 argument is limited solely to the record on appeal and the question of whether or not an adequate foundation was laid before Ngong's expert opinion was admitted.

After careful review, we conclude that a proper Rule 702(a) foundation was established at the time Ngong provided her opinion because her testimony demonstrated that she was a qualified expert and that her opinion was the product of reliable principles and methods which she reliably applied to the facts of the case. Ngong was tendered as an expert in the field of forensic chemistry and testified that she had a degree in Chemistry with over 20 years of experience in the field of drug identification. She also testified about the type of testing conducted on the substance seized from Defendant and the methods used by the CMPD Crime Lab to identify controlled substances. Ngong then testified that she was the analyst who tested the substance seized from Defendant, that she used a properly functioning GCMS, and that the results from that test provided the basis for her opinion. Furthermore, her testimony indicates that she complied with CMPD Crime Lab procedures and the methods she used were "standard practice in forensic chemistry." Ngong's

3. For example, Defendant's brief claims that "after considerable legal research" he has concluded that no other crime lab uses the exact process for testing substances in a GCMS.

testimony demonstrated that she was an experienced forensic chemist who competently performed a chemical analysis using a properly functioning GCMS to determine if the two "rocks" seized from Defendant contained cocaine. This testimony was sufficient to establish a foundation for admitting her expert opinion testimony under Rule 702.

Defendant also maintains that the trial court erred "by failing to conduct any further inquiry" when Ngong's testimony showed Ngong used scientifically unreliable methods. We disagree. While in some instances a trial court's gatekeeping obligation may require the judge to question an expert witness to ensure his or her testimony is reliable, *sua sponte* judicial inquiry is not a prerequisite to the admission of expert opinion testimony. *See McGrady*, 368 N.C. at 893, 787 S.E.2d at 11 ("[t]he trial court has the discretion to determine whether or when special briefing or other proceedings are needed to investigate reliability."); *see also Hunt*, ___ N.C. App. at ___, 792 S.E.2d at 560 ("*Daubert* did not work a seachange [sic] over . . . evidence law, and the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."). Moreover, "[i]n simpler cases . . . the area of testimony may be sufficiently common or easily understood that the testimony's foundation can be laid with a few questions in the presence of the jury." *Id.* Here, in the presence of the jury, Ngong's testimony adequately established a Rule 702(a) foundation for her opinion that the rocks seized from Defendant contained cocaine. Therefore, the trial court was not required to conduct further inquiry into the reliability of her testimony.

Finally, we note that Defendant's argument does not claim that Ngong's testimony is unreliable because GCMS is an inherently unreliable method for identifying controlled substances.[4] Defendant attacks the particular GCMS testing process used by the CMPD Crime Lab. However, because a proper Rule 702(a) foundation was established, any procedural shortcomings of the CMPD Crime Lab, had they been raised during trial, would go to the weight of Ngong's expert opinion, not its admissibility. *See State v. Hunt*, ___ N.C. App. at ___, 790 S.E.2d at 880 (holding that when a qualified expert witness relies on chemical analysis to identify a controlled substance, any deviation the expert "might have taken from the *established methodology* went to the weight of his testimony, not the admissibility of the testimony" (emphasis added)), *review denied*, 369 N.C. 197, 795 S.E.2d 206 (2016).

4. Defendant admits that using GCMS to identify controlled substances is considered to be a scientifically valid method. Under *Daubert* "[w]idespread acceptance can be an important factor in ruling particular evidence admissible[.]" *Daubert*, 509 U.S. at 594, 113 S. Ct. at 2797.

Based upon the evidence presented through the adversarial process, the trial court did not err by admitting Ngong's expert testimony. Since there was no error in admitting Ngong's testimony, Defendant is unable to show plain error. *State v. Baker*, 338 N.C. 526, 554, 451 S.E.2d 574, 591 (1994) ("Since there was no error, there could be no plain error.").

CONCLUSION

The trial court did not commit error by admitting Ngong's expert opinion testimony under Rule 702.

NO ERROR.

Judges BRYANT and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
DAVID HINES, JR.

No. COA17-968

Filed 1 May 2018

1. Motor Vehicles—driving while impaired—corpus delicti rule—evidence sufficient

The trial court did not err in an impaired driving prosecution by denying defendant's motion to dismiss based on the corpus delicti rule. A Highway Patrol Trooper was called to the scene of a one-car accident where he found defendant's vehicle nose down in a ditch and defendant sitting on the tailgate of his vehicle exhibiting signs of intoxication. Defendant told the Trooper that he was the only person in the vehicle and that he had "hit the ditch" after running a stop sign. The State offered sufficient corroborating evidence independent of defendant's statement that he was the driver of the wrecked vehicle, including that one shoe was found in the truck and that defendant was wearing the other, and that the wreck could not otherwise be explained.

2. Motor Vehicles—habitual impaired driving—driving with revoked license

There was sufficient evidence to deny defendant's motion to dismiss charges of habitual impaired driving and driving with

a revoked license where defendant stipulated to three previous convictions of DWI within ten years and that his license had been revoked for an impaired driving conviction.

3. Motor Vehicles—reckless driving to endanger—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of reckless driving to endanger. The State's evidence satisfied the corpus delicti rule and showed that defendant's single-vehicle accident resulted in both property damage to the vehicle and personal injury to defendant.

Appeal by defendant from judgments entered 16 March 2017 by Judge W. Douglas Parsons in Johnston County Superior Court. Heard in the Court of Appeals 3 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General William H. Harkins, Jr., for the State.

William D. Spence for defendant-appellant.

BRYANT, Judge.

Where defendant's admitted that he was the driver of the vehicle, and the State presented sufficient independent corroborating evidence that defendant was the driver of the vehicle, the *corpus delicti* rule is satisfied and the State did not err in denying defendant's motion to dismiss the charges against him. We find no error in the judgments of the trial court.

Around 10:00 p.m. on 9 April 2016, volunteer firefighter Brent Driver ("Brent") was off duty when he saw an unknown female standing in the middle of the road waving her arms back and forth on Princeton Kenly Road in Johnston County. Brent stopped, and the woman told him that a wreck had occurred, and that she had already called 911. Brent's passenger, another firefighter, went and checked the car—a white Rodeo SUV which was nose-down in a ditch on the side of the road—"to see if there was [sic] any fluids leaking from the vehicle, gas or anything like that." Brent then observed defendant David Hines, Jr., leaning against the back of the white Rodeo. Brent testified that defendant "smelled [of a] real high odor of alcohol and couldn't maintain his balance or anything." Brent asked defendant to come and sit in the back of Brent's truck "so [defendant] didn't fall and hurt himself."

Brent noted that defendant was wearing only one white shoe. An identical white shoe was found in the driver's side floorboard of the white Rodeo. Brent also observed a cut on defendant's forehead.

Trooper Chris Bell with the North Carolina State Highway Patrol responded to the scene of the accident. He first spoke with Brent, who told him that the driver of the white Rodeo—defendant—was sitting in the tailgate of his truck. As Trooper Bell approached defendant, he noticed that defendant had "a distinct sway," "bloodshot" and "glassy eyes," and he also "[d]etected a very strong odor of alcohol."

Trooper Bell asked defendant for his driver's license, and defendant responded that he did not have one. Instead, he provided Trooper Bell with an ID card containing defendant's picture, name, and date of birth. When Trooper Bell asked about the accident, defendant told him he was not familiar with the area, he was the only person present in the vehicle at the time of the accident, and that he "hit the ditch" when he ran a stop sign driving approximately sixty miles per hour.

Trooper Bell then asked defendant to fill out a standard witness statement form, which he handed to defendant as he sat on the tailgate of Brent's truck. Trooper Bell stepped away to call a tow truck, and when he returned to retrieve the witness statement from defendant about ten to fifteen minutes later, he discovered defendant "laying in the bed of the truck, passed out."

Trooper Bell retrieved the witness statement form, noting that defendant had only signed and dated the form without providing a statement. Based on the information given him by defendant, Trooper Bell proceeded to fill out the witness statement in his own handwriting.

At some point, Trooper Bell asked defendant to submit to a portable breath test, and defendant refused. Defendant was then arrested for driving while impaired ("DWI"), handcuffed, placed in the front passenger seat of Trooper Bell's patrol car, and driven to the Johnston County courthouse's Intoximeter room. Once there, defendant was read his rights but refused to provide "any kind of sample" for analysis and also refused standardized field sobriety testing later at the jail. Trooper Bell obtained a warrant for defendant's blood sample, and defendant was transported to Johnston Medical Center in Smithfield. Defendant's blood was drawn, and the sample was submitted to the State crime lab for analysis.

On 9 April 2016, defendant was charged with DWI, driving while license revoked ("DWLR"), and careless and reckless driving. The case

was called for trial before the Honorable W. Douglas Parsons, Judge presiding, during the 13 March 2017 Criminal Session of Johnston County Superior Court. The trial court denied defendant's pretrial motion to suppress, and defendant was tried before a jury.

Defendant stipulated that he had been previously convicted of DWI three separate times, with his counsel acknowledging that "[h]e's eligible for habitual DWI." Defendant also stipulated that his license was revoked at the time of the accident on 9 April 2016.

Erin Cosme, a forensic toxicologist with the North Carolina State Crime Laboratory, was qualified as an expert witness without objection. Cosme testified about the chain of custody regarding defendant's blood sample taken the day of the accident and testified that defendant's sample revealed a blood ethanol concentration of 0.33 grams of alcohol per 100 milliliters.

At the close of the State's evidence, defendant moved to dismiss all charges for insufficiency of the evidence pursuant to N.C. Gen. Stat. § 15A-1227 and the *corpus delicti* rule. The trial court denied the motion to dismiss, noting that in addition to defendant's own admission to Trooper Bell that he was driving the white Rodeo on the day of the accident, there was also corroboration of the *corpus delicti*, the crime. Defendant did not present any evidence.

The jury found defendant guilty of DWI, DWLR, and careless and reckless driving. Defendant admitted to aggravating factors, and he was sentenced to twenty-four months minimum, thirty-eight months maximum on the felony DWI. Defendant was also sentenced to 120 days for the misdemeanors of DWLR and careless and reckless driving. Defendant appeals.

On appeal, defendant argues the trial court erred in denying his motion to dismiss the charges of (I) habitual impaired driving; (II) driving while license revoked; and (III) reckless driving to endanger.

I & II

[1] Defendant first argues the trial court erred in denying his motions to dismiss the charges of (I) habitual impaired driving and (II) driving while license revoked. Specifically, defendant contends that the trial court erred in denying his motions to dismiss under the *corpus delicti* rule, where a trooper testified that defendant admitted at the scene that he was the driver of the wrecked car but where there was otherwise

no corroborative evidence, independent of defendant's extra-judicial confession. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

"When the State relies upon a defendant's extrajudicial confession, we apply the *corpus delicti* rule 'to guard against the possibility that a defendant will be convicted of a crime that has not been committed." *State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013) (quoting *State v. Parker*, 315 N.C. 222, 235, 337 S.E.2d 487, 494 (1985)). "This inquiry is preliminary to consideration of whether the State presented sufficient evidence to survive the motion to dismiss." *Id.*

> The *corpus delicti* rule is historically grounded on three policy justifications: (1) to "protect[ ] against those shocking situations in which alleged murder victims turn up alive after their accused killer has been convicted and perhaps executed"; (2) to "ensure[ ] that confessions that are erroneously reported or construed, involuntarily made, mistaken as to law or fact, or falsely volunteered by an insane or mentally disturbed individual cannot be used to falsely convict a defendant"; and (3) "to promote good law enforcement practices [by] requir[ing] thorough investigations of alleged crimes to ensure that justice is achieved and the innocent are vindicated."

Id. (alterations in original) (quoting *State v. Smith*, 362 N.C. 583, 591–92, 669 S.E.2d 299, 305 (2008)). "Traditionally, our *corpus delicti* rule has required the State to present corroborative evidence, independent of the defendant's confession, tending to show that '(a) the injury or harm constituting the crime occurred [and] (b) this injury was done in a criminal manner.' " *Id.* (citation omitted) (quoting *Smith*, 362 N.C. at 589, 669 S.E.2d at 304).

> [T]he [*corpus delicti*] rule requires the State to present evidence tending to show that the crime in question

> occurred. The rule does not require the State to logically exclude every possibility that the defendant did not commit the crime. Thus, if the State presents evidence tending to establish that the injury or harm constituting the crime occurred and was caused by criminal activity, then the *corpus delicti* rule is satisfied and the State may use the defend-ant's [sic] confession to prove his identity as the perpetrator.

Id. at 152, 749 S.E.2d at 275 (citing *State v. Trexler*, 316 N.C. 528, 533, 342 S.E.2d 878, 881 (1986)). "Significantly, however, 'a confession identifying *who committed the crime* is not subject to the *corpus delicti* rule.' " *State v. Sawyers*, ___ N.C. App. ___, ___, 808 S.E.2d 148, 152 (2017) (citation omitted) (quoting *State v. Ballard*, 244 N.C. App. 476, 480, 781 S.E.2d 75, 78 (2015)).

In *Trexler*, a DWI case, the defendant admitted that he wrecked his car after drinking, left the scene, and returned a short time later. 316 N.C. at 533, 342 S.E.2d at 881. The trial court concluded that the following independent evidence established the *corpus delicti*, the crime: an overturned car was lying in the middle of the road; when the defendant returned to the scene, he appeared impaired from alcohol; the defendant measured a .14 on the breathalyzer; and the wreck was otherwise unexplained. *Id.* The North Carolina Supreme Court held that the trial court did not err when it denied the defendant's motion to dismiss based on the defendant's argument that the State failed to prove the *corpus delicti* of impaired driving. *Id.* at 535, 342 S.E.2d at 882.

In the instant case, in addition to defendant's statement to Trooper Bell that he was the driver of the wrecked vehicle and defendant's appearance of intoxication, the State presented sufficient independent corroborating evidence that defendant had been driving the wrecked vehicle while impaired: (1) the wrecked vehicle found nose down in a ditch; (2) one shoe was found in the driver's side footwell of the vehicle, and defendant was wearing the matching shoe; (3) no one else was in the area at the time of the accident other than defendant, who appeared to be appreciably impaired; (4) defendant had an injury—a cut on his forehead—consistent with having been in a wreck; and (5) the wreck of the white Rodeo could not otherwise be explained. As to independent evidence of defendant's impairment, the State's expert witness in toxicology testified that defendant's blood sample taken the date of the accident had a blood ethanol concentration of 0.33 grams of alcohol per 100 milliliters as defined by N.C. Gen. Stat. § 20-4.01.

Accordingly, pursuant to *Trexler*, the State offered sufficient corroborating evidence independent of defendant's own admission to Trooper Bell that he was the driver of the wrecked vehicle, and the trial court did not err in denying defendant's motion to dismiss based on the *corpus delicti* rule.

[2] As for defendant's motion to dismiss based on the insufficiency of the evidence, this argument also fails.

> A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date of this offense.

N.C. Gen. Stat. § 20-138.5(a) (2017). "To convict a defendant under N.C. Gen. Stat. § 20-28(a) of driving while his license is revoked the State must prove beyond a reasonable doubt (1) the defendant's operation of a motor vehicle (2) on a public highway (3) while his operator's license is revoked." *State v. Richardson*, 96 N.C. App. 270, 271, 385 S.E.2d 194, 195 (1989) (citing *State v. Atwood*, 290 N.C. 266, 271, 225 S.E.2d 543, 545 (1976)).

At trial, defendant stipulated that on 9 April 2016, his license was revoked for an impaired driving conviction. He also stipulated to three previous convictions for DWI within ten years of 9 April 2016: on 11 January 2013 in Wilson County; on 3 April 2008 in Nash County; and on 17 October 2008 in Wilson County. As such, defendant has met the statutory requirements for habitual DWI pursuant to N.C. Gen. Stat. § 20-138.5(a) and DWLR pursuant to N.C. Gen. Stat. § 20-28(a), and the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence pursuant to N.C. Gen. Stat. § 15A-1227. Defendant's arguments are overruled.

III

[3] Defendant argues the trial court erred in denying his motion to dismiss the charge of reckless driving to endanger for the same reasons enunciated in Sections I & II, or in the alternative, because the State's evidence was insufficient to withstand defendant's motion to dismiss.

The essential elements of the charge of reckless driving to endanger include the following:

> (a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in

willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

(b) Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

N.C. Gen. Stat. § 20-140(a)–(b) (2017).

For the reasons stated in Sections I & II, the *corpus delicti* rule was satisfied by the State's evidence presented in the trial court. Defendant admitted to Trooper Bell that he was the driver of the wrecked vehicle and that he was not familiar with the area and ran a stop sign going sixty miles per hour before crashing, and defendant appeared intoxicated at the scene. Thus, the State presented sufficient independent corroborating evidence that defendant was recklessly driving the vehicle while impaired.

In *Sawyers*, the defendant was charged with and convicted of, *inter alia*, DWI, DWLR, and reckless driving. ___ N.C. App. at ___, 808 S.E.2d at 151–52. On appeal, the defendant argued the State presented insufficient evidence, independent of the defendant's own extrajudicial confession to a state trooper, to establish that he was driving the car. This Court noted that the "[d]efendant's argument demonstrate[d] a common misunderstanding of the *corpus delicti* rule[,]" and that the State had "presented substantial evidence to establish that the cause of the car accident was criminal activity, i.e. reckless and impaired driving." *Id.* at ___, 808 S.E.2d at 152. This Court reasoned that "[w]hile it may have been unclear at that time whether [the] defendant or [another individual] was the driver, the *corpus delicti* rule merely 'requires the State to present evidence tending to show that the crime in question occurred.' " *Id.* (quoting *Cox*, 367 N.C. at 152, 749 S.E.2d at 275). The State's evidence included the fact that the driver of the car had been speeding and driving in an unsafe manner and both of the vehicle's occupants were emanating an odor of alcohol. *Id.* Accordingly, this Court determined the *corpus delicti* rule had been satisfied. *Id.* (citation omitted).

In the instant case, the State presented sufficient evidence that defendant's single-vehicle accident, which resulted from impaired driving, speeding, and running a stop sign, resulted in both property damage to the wrecked vehicle and personal injury to defendant. As such, the State presented sufficient evidence that defendant operated the white Rodeo on 9 April 2016 while impaired and in a reckless manner, sufficient to satisfy the elements of that crime. *See* N.C.G.S. § 20-140(a)–(b). Accordingly, the

trial court did not err in denying defendant's motion to dismiss the reckless and careless driving charge, and defendant's argument is overruled.

NO ERROR.

Judges CALABRIA and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
ROBERT DWAYNE LEWIS

No. COA17-888

Filed 1 May 2018

1. Search and Seizure—search warrant—probable cause—vehicles

A warrant application established probable cause to search two cars for evidence of armed robberies where the accompanying affidavit described witnesses' accounts of four similar robberies and the fact that the two makes and models of the getaway cars were found at the residence where the suspect was arrested.

2. Search and Seizure—search warrant—probable cause—residence—connection between suspect and residence

A warrant application failed to establish probable cause to search a residence for evidence of armed robberies where the only information in the accompanying affidavit connecting the suspect (defendant) to the residence was a statement that defendant was arrested at the location. Nothing suggested that defendant may have stowed incriminating evidence in the residence.

Appeal by defendant from judgments entered 7 February 2017 by Judge Richard T. Brown in Hoke County Superior Court. Heard in the Court of Appeals 22 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind Dongre, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant.

DIETZ, Judge.

Defendant Robert Dwayne Lewis appeals his convictions for three counts of armed robbery, one count of attempted armed robbery, and five counts of kidnapping related to a string of robberies at businesses in Hoke County. After the trial court denied his motion to suppress, Lewis pleaded guilty to all charges, reserving his right to appeal the denial of his motion to suppress.

On appeal, Lewis argues that the trial court erred in denying his motion to suppress because the affidavit law enforcement submitted with its search warrant application was insufficient to establish probable cause for a search of the cars and house where the evidence was found. As explained below, the warrant application and accompanying affidavit contained sufficient information to establish probable cause to search the two vehicles allegedly involved in the crimes. But we agree with Lewis that the warrant application did not contain sufficient information to establish probable cause to search the home. We therefore vacate Lewis's convictions and remand this case for further proceedings consistent with this opinion.

Facts and Procedural History

On 21 September 2014, a man wearing a blue mask, dark clothing, and carrying a handgun robbed a dollar store in Hoke County and fled in a blue Nissan Titan. Witnesses described the suspect as calm and composed. Five days later, another dollar store was robbed. Again, witnesses described the suspect as a composed man, wearing a blue mask and dark clothing, and carrying a handgun. The man ordered two people into a bathroom before fleeing the scene. Two days later, a third dollar store was robbed. Once again, witnesses described the suspect as a man in a blue mask, carrying a handgun. And again, the man ordered people into a bathroom before fleeing.

Detective William Tart of the Hoke County Sheriff's Office was assigned to the case. Tart got a break in the case several weeks later on 19 October 2014, when law enforcement in Smithfield notified him that a man in a blue head cover, dark clothing, and carrying a handgun robbed a business in neighboring Johnston County. The Smithfield police reported that they saw the suspect flee in a Kia Optima and were able to identify him from a previous encounter as Defendant Robert Dwayne Lewis. The same day, Smithfield police issued an arrest warrant for Lewis.

Hoke County Sheriff's Deputy Tim Kavanaugh, acting on information from the Johnston County investigation, drove to Lewis's address, 7085 Laurinburg Road in Hoke County, and saw a blue Nissan pickup

truck parked in the yard matching the description of the Nissan Titan witnesses saw during the first robbery. Deputy Kavanaugh did not see the Kia Optima that officers saw during the fourth robbery.

Deputy Kavanaugh continued his normal patrol duties and then drove past 7085 Laurinburg Road again later in the day. This time he saw a Kia Optima in the yard of the house. Kavanaugh parked nearby and watched the house until he observed a man matching Lewis's description walk from the house out to the mailbox and take mail out. Kavanaugh approached the man and asked him for his name. The man said "Robert Lewis" and Kavanaugh placed him under arrest.

After arresting Lewis, Deputy Kavanaugh walked up to the front door of the home at 7085 Laurinburg Road and spoke to a man who identified himself as Waddell McCollum, Lewis's stepfather. Kavanaugh asked McCollum if Lewis lived at the residence and also asked who owned the vehicles parked in the yard. McCollum told Kavanaugh that Lewis lived there, that the Nissan truck belonged to McCollum but Lewis sometimes drives it, and that the Kia belonged to Lewis. After speaking with McCollum at the front door of the house, Kavanaugh "went over to the Kia that was in the yard, and looked inside of the passenger area, the rear of the vehicle" and saw "a BB&T money bag on the passenger floor of the vehicle" as well as some dark clothing. The Kia was "backed into the yard, in front of the residence, not in the driveway but in the grass" about twenty feet from the front porch where Kavanaugh spoke to McCollum.

After law enforcement arrested Lewis, Detective Tart prepared a search warrant application to search the residence at 7085 Laurinburg Road where Lewis was arrested and the blue Nissan Titan and Kia Optima on the premises.

The affidavit accompanying the application provided a detailed description of each of the two vehicles, including color, year, make and model, NC registration number, and VIN number. The affidavit also described the three September 2014 Hoke County robberies and the October 2014 Johnston County robbery, including the similarities between the four robberies and the descriptions of the suspect in each robbery. It further provided that Smithfield police identified the suspect in the Johnston County robbery as Lewis, that officers saw Lewis flee the scene in a Kia Optima, and that Hoke County officers then arrested Lewis at a residence located at 7085 Laurinburg Road. The affidavit stated that a witness observed the suspect in the first robbery flee in a dark blue Nissan Titan and that the witness's description of that vehicle

was consistent with a dark blue Nissan Titan officers observed at the 7085 Laurinburg Road address while arresting Lewis. The search warrant application did not include any reference to what Deputy Kavanaugh had observed when he walked into the yard and looked in the window of the Kia Optima.

Based on the information provided in the affidavit, a magistrate issued a search warrant for the residence and the two vehicles. Hoke County officers executed the warrant the same day and seized various evidence. In the Kia, officers found a BB&T bank bag containing documents connected to the Smithfield business that was robbed, a blue helmet liner that was consistent with the blue head covering worn by the suspect in the Hoke County robberies, and a rusted handgun.

On 21 September 2015, the State indicted Lewis for three counts of robbery with a dangerous weapon, one count of attempted robbery with a dangerous weapon, and five counts of second degree kidnapping related to the three September 2014 Hoke County robberies.

Lewis filed a motion to suppress the evidence recovered during the execution of the search warrant, arguing that the search warrant application did not provide probable cause for the search. Lewis argued that the warrant affidavit failed to establish a sufficient nexus between the evidence being sought and the places to be searched. Lewis also argued that the evidence Deputy Kavanaugh saw through the window of the Kia Optima was not admissible under the plain view doctrine.

The trial court heard the motion to suppress on 7 April 2016. Detective Tart and Deputy Kavanaugh both testified at the hearing. Tart described the steps he took in his investigation of the robberies, how he determined the four robberies were connected, and how he obtained Lewis's name, the 7085 Laurinburg Road address, and identified the two vehicles linked to the robberies. Deputy Kavanaugh described his actions on 19 October 2014, including receiving information about the fourth robbery, which lead to his arrest of Lewis and his observations through the window of the Kia.

On 3 June 2016, the trial court denied Lewis's motion to suppress, finding that the search warrant affidavit was sufficient to establish probable cause for the search and that the evidence Deputy Kavanaugh observed through the window of the Kia was admissible under the plain view doctrine. On 7 February 2017, Lewis pleaded guilty to all of the charges, reserving his right to appeal the denial of his motion to suppress. The trial court sentenced Lewis to three consecutive terms of 103-136 months in prison. Lewis timely appealed.

Analysis

Lewis argues that the trial court erred in denying his motion to suppress because the affidavit Detective Tart submitted with the search warrant application was insufficient to establish probable cause for a search of the house and two cars at 7085 Laurinburg Road, rendering the search warrant and search invalid. Lewis contends that the affidavit failed to establish a connection between him, the address on Laurinburg Road, the two cars listed on the warrant, and the crimes. As explained below, we hold that the warrant established probable cause to search the two vehicles located at 7085 Laurinburg Road, but not the home itself.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "We review *de novo* a trial court's conclusion that a magistrate had probable cause to issue a search warrant." *State v. Worley*, __ N.C. App. __, __, 803 S.E.2d 412, 416 (2017).

A search warrant affidavit must contain sufficient information to establish probable cause "to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984). "A magistrate must make a practical, common-sense decision, based on the totality of the circumstances, whether there is a fair probability that contraband will be found in the place to be searched." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015). "[T]he affidavit in support of a search warrant must establish a nexus between the objects sought and the place to be searched." *State v. Oates*, 224 N.C. App. 634, 644, 736 S.E.2d 228, 235 (2012).

"This standard for determining probable cause is flexible, permitting the magistrate to draw reasonable inferences from the evidence in the affidavit supporting the application for the warrant." *McKinney*, 368 N.C. at 164, 775 S.E.2d at 824–25 (citations omitted). "That evidence is viewed from the perspective of a police officer with the affiant's training and experience and the commonsense judgments reached by officers in light of that training and specialized experience." *Id.* at 164–65, 775 S.E.2d at 825 (citations omitted). "When reviewing a magistrate's determination of probable cause, this Court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that articles searched for were probably

present." *State v. Parson*, __ N.C. App. __, __, 791 S.E.2d 528, 536 (2016). In doing so, this Court "should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016). "The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 435 (1991). "[A]s long as the pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched, a magistrate has probable cause to issue a warrant." *Allman*, 369 N.C. at 294, 794 S.E.2d at 303.

With this precedent in mind, we turn to Lewis's arguments on appeal. At the outset, we acknowledge that the warrant application is missing a key fact known to law enforcement that, if included, would have made this a far easier case. Specifically, the warrant application did not describe how the officers linked Lewis to the 7085 Laurinburg Road address—for example, there is no statement in the warrant application that, after identifying Lewis as the suspect, law enforcement searched records and determined that 7085 Laurinburg Road was Lewis's current residence. The only information in the affidavit linking Lewis to 7085 Laurinburg Road is the fact that officers arrested Lewis at that location.

[1] We begin with the probable cause to search the two vehicles located at that residence. Although the affidavit could have been more detailed, we hold that it contained enough information, together with reasonable inferences drawn from that information, to establish a substantial basis to believe that the evidence sought probably would be found in the blue Nissan Titan and Kia Optima located at 7085 Laurinburg Road. *Parson*, __ N.C. App. at __, 791 S.E.2d at 536; *Allman*, 369 N.C. at 294, 794 S.E.2d at 303; *see also State v. Spillars*, 280 N.C. 341, 350, 185 S.E.2d 881, 887 (1972).

Specifically, Detective Tart's affidavit described the four robberies in detail including similarities in the manner of the crimes and the descriptions of the suspect. All four robberies involved a suspect with a blue cover over his head and face, wearing dark clothing, and carrying a handgun who robbed retail locations in a relatively close geographic area. The affidavit also stated that witnesses saw the suspect in the first robbery leave the scene in a dark blue Nissan Titan with North Carolina registration. A law enforcement officer saw the suspect in the fourth robbery flee the scene in a Kia Optima. That officer identified the suspect as Lewis based on a previous encounter with him in which the officer was concerned that Lewis was casing a different retail location.

Finally, the affidavit stated that officers located and arrested Lewis at 7085 Laurinburg Road and, while making the arrest, saw a dark blue Nissan Titan at that location.

The affidavit also contained much more detailed information about the two vehicles to be searched, including the color, year, make, model, NC registration, and VIN number for each vehicle. The affidavit did not explain how law enforcement obtained this information.

But even setting this detailed information aside, the affidavit contained sufficient information to justify a search of a dark blue Nissan Titan and a Kia Optima found at 7085 Laurinburg Road. The affidavit established probable cause to believe Lewis was the suspect who committed four robberies at retail establishments in Hoke and Johnston counties while wearing a blue face cover and dark clothing, and carrying a handgun. In the first robbery, witnesses saw the suspect flee in a dark blue Nissan Titan. In the fourth robbery—which occurred the same day that Detective Tart submitted the warrant application and affidavit—a law enforcement officer saw Lewis flee the scene of the robbery in a Kia Optima. Later on the same day of the fourth robbery, officers arrested Lewis at 7085 Laurinburg Road and saw a dark blue Nissan Titan at that location during the arrest.

Simply put, the "pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched." *Allman*, 369 N.C. at 294, 794 S.E.2d at 303. There was evidence that the same suspect committed four robberies, the first while driving a dark blue Nissan Titan and the fourth while driving a Kia Optima. Later on the same day of the fourth robbery, officers arrested Lewis. When they located him they saw—of all the makes, models, and colors of all the vehicles in the world—a dark blue Nissan Titan, matching the description of the vehicle used in the first robbery. These facts were more than sufficient for the magistrate to conclude that, if officers returned to that location and found a dark blue Nissan Titan and a Kia Optima there, there was probable cause to believe those vehicles contained evidence connected to the robberies. *Parson*, __ N.C. App. at __, 791 S.E.2d at 536; *Allman*, 369 N.C. at 294, 794 S.E.2d at 303. Accordingly, we hold that there was probable cause to issue a search warrant for the dark blue Nissan Titan and Kia Optima located at 7085 Laurinburg Road.

[2] Lewis also challenges the search of the residence at 7085 Laurinburg Road. We agree with Lewis that the warrant application and affidavit fail to establish probable cause to search this home. As the State concedes, although Lewis resided at 7085 Laurinburg Road, the affidavit does

not say that. The only information in the affidavit tying Lewis to 7085 Laurinburg Road is the statement that Hoke County officers observed a dark blue Nissan Titan "at the residence of 7085 Laurinburg Road . . . when serving a felony arrest warrant on Robert Lewis issued by Smithfield Police Department." As explained above, this statement is sufficient to establish that Lewis was *found* at that location; but it does not follow from that statement that Lewis also must *reside* at that location. Indeed, from the information in the affidavit, 7085 Laurinburg Road could have been a someone else's home with no connection to Lewis at all. That Lewis visited that location, without some indication that he may have stowed incriminating evidence there, is not enough to justify a search of the home. *See McKinney*, 368 N.C. at 165–66, 775 S.E.2d at 825–26; *State v. Campbell*, 282 N.C. 125, 131–32, 191 S.E.2d 752, 756–57 (1972). Accordingly, we agree with Lewis that the trial court should have granted his motion to suppress with respect to the search of the home.

On appeal, neither party addressed which evidence officers seized from the vehicles and which evidence they seized from the home, and the record on appeal is insufficient for this Court to answer the question. Accordingly, we vacate Lewis's convictions and remand this case with instructions for the trial court to allow Lewis's motion to suppress the evidence seized from the residence located at 7085 Laurinburg Road. The trial court properly denied the motion to suppress with respect to the vehicles, and any evidence seized in those separate searches is admissible. *See State v. Edwards*, 185 N.C. App. 701, 704, 649 S.E.2d 646, 649 (2007); *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006).

In light of our ruling, we need not address Lewis's argument that a separate search of the Kia Optima was not supported by the plain view doctrine. The incriminating evidence that this other officer saw through the car window (a bank bag from BB&T and dark clothing) was not included in the warrant application and accompanying affidavit. Thus, even if this search through the car window was impermissible, it would not render the search warrant, based on separate evidence, invalid. *McKinney*, 361 N.C. at 59, 637 S.E.2d at 873.

Conclusion

For the reasons discussed above, we vacate the trial court's judgments and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges HUNTER, JR. and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
KELLY LOCKLEAR

No. COA17-982

Filed 1 May 2018

1. Criminal Law—flight—instructions—sufficiency of evidence—prejudice

There was insufficient evidence to support an instruction on flight in a prosecution for charges including insurance fraud which arose from the burning of defendant's house where there was no more than a suspicion or conjecture that defendant fled the scene and no evidence that defendant took steps to avoid prosecution. However, giving the instruction was not prejudicial error because it was most directly related to the charge of setting fire to a dwelling house, of which defendant was found not guilty.

2. False Pretense—obtaining property—instruction—indictment

The trial court erred in a prosecution for obtaining property by false pretense in a case arising from the burning of defendant's house where the trial court failed to mention the misrepresentation specified in the indictment. There was a probable impact on the jury's finding because the erroneous instruction allowed the jury to convict defendant on a theory not alleged in the indictment, and it was unlikely that the jury would have convicted defendant on the theory alleged in the indictment.

3. Fraud—insurance—burning building—denying setting fire

The trial court's instructions in an insurance fraud case were plain error where the instructions allowed the jury to convict defendant of insurance fraud on a theory not alleged in the indictment and it was unlikely that the jury would have convicted on the theory alleged in the indictment.

Appeal by defendant from judgments entered 2 May 2016 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 21 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Lynne Weaver, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.

ARROWOOD, Judge.

Kelly Locklear ("defendant") appeals from judgments entered on her convictions for obtaining property by false pretense and insurance fraud. For the following reasons, defendant is entitled to a new trial.

I. Background

On 10 October 2011, defendant was indicted by a Robeson County Grand Jury on charges of occupant or owner setting fire to a dwelling house, making a false report to a law enforcement officer or agency, insurance fraud, and obtaining property by false pretense. The charges stem from a fire at defendant's house on 5 March 2010 and defendant's ensuing insurance claims.

Defendant's case was tried before a jury in Robeson County Superior Court beginning on 18 April 2016, the Honorable James G. Bell, Judge presiding. On 2 May 2016, the jury returned verdicts finding defendant not guilty of setting fire to a dwelling house and making a false report to a law enforcement officer and finding defendant guilty of obtaining property by false pretense and insurance fraud. The court entered orders on the not guilty verdicts and entered judgments on the guilty verdicts. For both convictions, the court determined mitigated sentences were justified. The court sentenced defendant to a term of 5 to 6 months for obtaining property by false pretense and suspended the sentence on condition that defendant be placed on supervised probation for 36 months. The trial court sentenced defendant to a consecutive term of 5 to 6 months for insurance fraud and suspended the sentence on condition that defendant be placed on supervised probation for 36 months. On 11 May 2016, defendant filed a *pro se* notice of appeal, followed by a *pro se* amended notice of appeal.

II. Discussion

On appeal, defendant challenges her convictions by raising three issues concerning the trial court's jury instructions and one issue concerning the trial court's response to a jury question. However, before reaching defendant's arguments, we must first address deficiencies in defendant's notices of appeal.

Pertinent to this case, Rule 4 of the North Carolina Rules of Appellate Procedure provides that

> [a]ny 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 . . . filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order . . . .

N.C.R. App. P. 4(a)(2) (2018). Rule 4 further provides

> [t]he notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C.R. App. P 4(b).

In this case, there is nothing in the record to show that defendant served her *pro se* notices of appeal on the State. Furthermore, although defendant listed case numbers in the notices of appeal, defendant failed to indicate the judgments appealed from. Defendant has candidly acknowledged these deficiencies in a petition for writ of certiorari filed contemporaneously with her brief to this Court on 13 October 2017. Defendant requests that, if the deficiencies are fatal to her appeal, we allow the petition to reach the merits of her arguments.

Our appellate rules provide that "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1) (2018). The State acknowledges that this Court has discretion to allow defendant's petition to review the judgments entered 2 May 2016. In this instance, we exercise our discretion to allow defendant's petition and we review the merits of the appeal.

A. Jury Instructions

The first three issues raised by defendant concern the trial court's jury instructions. "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009); *see also State v. Barron*, 202 N.C. App. 686, 694, 690

S.E.2d 22, 29, ("Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*."), *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "However, an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

Moreover, "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires . . . ." N.C.R. App. P. 10(a)(2) (2018); *see also State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000).

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve . . . errors in the judge's instructions to the jury . . . ." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

1. Flight Instruction

[1] Defendant first contends the trial court erred in instructing the jury on flight. Defendant also asserts the flight instruction was prejudicial to her case.

The defense objected to the flight instruction during the charge conference. The trial court overruled defendant's objection and, prior to instructing the jury on the elements of any of the offenses, instructed the jury on flight as follows:

> Flight. The State contends and the Defendant denies that the Defendant fled. Evidence of flight may be considered by you together with all other facts, and evidence, and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish Defendant's guilt.

"[F]light from a crime shortly after its commission is admissible as evidence of guilt, and a trial court may properly instruct on flight [s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after the commission of the crime charged[.]" *State v. Tucker*, 329 N.C. 709, 722, 407 S.E.2d 805, 813 (1991) (internal quotation marks and citations omitted). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991). "The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Norwood*, 344 N.C. 511, 534, 476 S.E.2d 349, 359 (1996). "Where there is some evidence supporting the theory of the defendant's flight, the jury must decide whether the facts and circumstances support the State's contention that the defendant fled." *Id.* at 535, 476 S.E.2d at 360. "[E]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so . . . should not be left to the jury." *State v. Lee*, 287 N.C. 536, 540, 215 S.E.2d 146, 149 (1975) (quotation marks and citation omitted).

Defendant contends the evidence in this case "raises no more than suspicion or conjecture that [she] engaged in behavior constituting

'flight', or reflecting an admission or consciousness of guilt of the crimes charged."

The evidence in this case was that defendant was at the house on the evening of 5 March 2010 prior to the fire. Defendant testified that she was only there several minutes to let the horses in the barn and she did not go in the house. Defendant said that she then left to look for her daughter and then went to her boyfriend's house in Hoke County. Defendant stated that she did not pass anyone on her street as she left. The only evidence of flight was testimony from defendant's neighbor, who lived in one of the three houses on the narrow dirt street. The neighbor testified that when he came home around "ten-ish" the evening of the fire, he spotted a car ahead of him as it came around the curve. The neighbor pulled over to the right side of the street to allow the car to pass and "a little white car passed [him] pretty quickly." The car did not slow and the neighbor did not have time to look into the car as it passed. The neighbor knew that defendant drove a white Saturn but could not tell what type of white car passed him. The neighbor testified that the car that passed him was similar to defendant's car and he assumed it was defendant's car, but he could not see who was driving. As the neighbor rounded the curve, he thought he saw the house on fire and called 911. As the neighbor approached defendant's house, he could no longer see the fire and thought he was mistaken. The neighbor later confirmed that the house was on fire and called 911 again.

We agree with defendant that this evidence raises no more than suspicion and conjecture that she fled the scene. Moreover, there is no evidence that defendant took steps to avoid apprehension. The evidence was that defendant was at her boyfriend's house when her uncle, also a neighbor of defendant's, called to tell her that her house was on fire. When defendant received the call, she immediately went back to her house with her boyfriend, where she spoke with first responders at the scene. Defendant then returned to the scene the following morning.

Because the evidence raises only a suspicion that defendant fled the scene of the fire and because there is no further evidence that defendant took steps to avoid apprehension, we hold there was insufficient evidence to support issuance of a flight instruction in this case. That error, however, was not prejudicial to defendant's case. Although the flight instruction was given prior to any of the instructions for the charged offenses, it was most directly related to the charge of setting fire to a dwelling house, of which the jury found defendant not guilty. We are not convinced that the jury considered flight, found defendant not guilty of setting fire to a dwelling house, and then found defendant guilty of obtaining property by false pretense

and insurance fraud based on defendant's alleged flight from the scene of the fire. Thus, we find no reasonable possibility of a different outcome had the flight instruction not been given. Defendant was not prejudiced by the erroneous flight instruction.

2. Obtaining Property by False Pretense Instructions

[2] Defendant also challenges the trial court's jury instructions for obtaining property by false pretense. Defendant contends the jury instructions for obtaining property by false pretense allowed the jury to convict on a theory not alleged in the indictment. Defendant did not object to the instructions below and, therefore, our review on appeal is limited to plain error, which defendant asserts.

"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. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016) (internal quotation marks and citation omitted). Thus, "[i]f the indictment's allegations do not conform to the 'equivalent material aspects of the jury charge,' this discrepancy is considered a fatal variance." *State v. Ross*, 249 N.C. App. 672, 676, 792 S.E.2d 155, 158 (2016) (quoting *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986)).

In this case, the indictment for obtaining property by false pretense specified the false pretense and charged defendant as follows:

> defendant . . . unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, did obtain or attempt to obtain $331,500.00 from North Carolina Farm Bureau Mutual Insurance Company by means of a false pretense which was calculated to deceive and did deceive. *The false pretense consisted of the following: filing a fire loss claim under the defendant's home owner insurance policy, when in fact the defendant had intentionally burned her own residence*, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

(Emphasis added.)

During the charge conference, the parties agreed that the court would instruct the jury on obtaining property of value of $100,000 or greater by false pretense and the lesser offense of obtaining property by false pretense where value is not at issue. The trial court was informed that both offenses were included in the same pattern jury instruction.

The trial court then instructed the jury pursuant to pattern instruction N.C.P.I.–Crim. 219.10A without specifying the false pretense alleged in the indictment. The instructions for the first three elements of the offense provided only that the jury must find "that the Defendant made a representation to another[,]" "that the representation was false[,]" and "the representation was calculated and intended to deceive."

The jury ultimately convicted defendant of the lesser obtaining property by false pretense offense. The portion of the jury instructions directly related to that lesser offense provided as follows:

> Obtaining property by false pretense differs from obtaining property worth $100,000 or more by false pretense in that the value of the property need not be worth $100,000 or more. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant made a representation, the representation was false, the representation was calculated and intended to deceive, that the victim was in fact deceived by it, and the Defendant thereby obtained or attempted to obtain property from the victim, it would be your duty to return a verdict of guilty of obtaining property by false pretense. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Despite her failure to object below, defendant now contends these jury instructions "allowed the jury to find [her] guilty based on any and all possible misrepresentations that induced the insurance company to pay any money to her" and, therefore, "allowed the jury to convict [her] on a theory not alleged in the indictment." Because the indictment specified that the false pretense consisted of "filing a fire loss claim under the defendant's home owner insurance policy, when in fact the defendant had intentionally burned her own residence," defendant argues the "pattern jury instruction should have been adapted to reflect the specific misrepresentation in the indictment" and "[t]he instruction should have required the jury to determine whether [she] obtained money from the insurance company based on the representation that she did not set fire to the house."

Defendant relies on *State v. Linker*, 309 N.C. 612, 308 S.E.2d 309 (1983), in asserting the trial court erred. In *Linker*, our Supreme Court explained that

> [t]he gist of obtaining property by false pretense is the false representation of a subsisting fact intended to and which does deceive one from whom property is obtained. The state must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. If the state's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the state's proof varies fatally from the indictments. . . . This rule protects criminal defendants from vague and nonspecific charges and provides them notice so that if they have a defense to the charge as laid, they may properly and adequately prepare it without facing at trial a charge different from that alleged in the indictment.

Id. at 614-15, 308 S.E.2d at 310-11 (internal citations and footnote omitted). The *Linker* Court then reversed the defendant's conviction for obtaining property by false pretense and remanded with instructions to dismiss the indictments, with leave to the State to obtain other indictments, because the State's proof varied fatally from the allegations in the indictment. *Id.* at 616, 308 S.E.2d at 311.

In response to defendant's argument, the State distinguishes this case from *Linker*, arguing that in this case "there was no fatal variance between the offense charged and the proof, and the trial court was not required to set out each alleged misrepresentation in its instructions to the jury." The State asserts the indictment provided ample notice of the offense charged and that evidence was produced at trial to support the charged offense.

Upon review, we agree with the State that the indictment was sufficient to charge defendant with obtaining property by false pretense by "filing a fire loss claim under defendant's home owner insurance policy, when in fact the defendant had intentionally burned her own residence[.]" Additionally, we agree that the State put on evidence to support that charge. The issue on appeal, however, is not whether the indictment was sufficient to charge the offense or whether there was a fatal variance between the indictment and the proof; the issue raised on appeal is whether there is a fatal variance between the indictment and the jury instructions.

Although *Linker* addressed a fatal variance between the allegations in the indictment and the State's proof, we find the law in *Linker*, quoted above, is relevant in addressing a fatal variance between the indictment

and the jury instructions. Namely, "[t]he state must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. If the state's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the state's proof varies fatally from the indictments." *Linker*, 309 N.C. at 615, 308 S.E.2d at 311 (footnote omitted). Because "a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment[,]" *Barnett*, 368 N.C. at 713, 782 S.E.2d at 888, and "[t]he state must prove . . . that defendant made the misrepresentation as alleged[,]" *Linker*, 309 N.C. at 615, 308 S.E.2d at 311, it only makes sense that the trial court must instruct the jury on the misrepresentation as alleged in the indictment. It did not do so in this instance.

"It is clearly the rule in this jurisdiction that the trial court should not give instructions which present to the jury possible theories of conviction which are . . . not charged in the bill of indictment." *State v. Taylor*, 304 N.C. 249, 274, 283 S.E.2d 761, 777 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *rehr'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983). Nevertheless, this Court has stated that "[a] jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds 'no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury.' " *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005) (quoting *State v. Clemmons*, 111 N.C. App. 569, 578, 433 S.E.2d 748, 753 (1993)). In *Clemmons*, this Court held the trial court did not err in failing to mention the exact misrepresentation alleged in the indictment in the jury instruction because the State's evidence corresponded to the allegation in the indictment. *Clemmons*, 111 N.C. App. at 578, 433 S.E.2d at 753. Similarly, in *Ledwell*, this Court held the trial court did not err in failing to instruct the jury as to the specific misrepresentation it needed to find based on the indictment, explaining that "[t]he State presented evidence of a single misrepresentation. There is no other misrepresentation that the jury could have found; therefore, there is no need to instruct the jury on the specific misrepresentation." *Ledwell*, 171 N.C. App. at 320, 614 S.E.2d at 566-67.

In contrast to *Clemmons* and *Ledwell*, evidence was introduced at defendant's trial of various misrepresentations in defendant's insurance claim besides her denial that she had anything to do with setting the fire. Precisely, in addition to evidence of the misrepresentation alleged in the indictment—"filing a fire loss claim under the defendant's home owner insurance policy, when in fact the defendant had intentionally

burned her own residence"—evidence was introduced that defendant signed her ex-husband's name on a deed, overstated the personal items allegedly destroyed in the fire, and sought money for rent that was not used for rent. Both defendant and the State have acknowledged evidence of these misrepresentations.

Where there is evidence of various misrepresentations which the jury could have considered in reaching a verdict for obtaining property by false pretense, we hold the trial court erred by not mentioning the misrepresentation specified in the indictment in the jury instructions for the offense. The fact that the trial court instructed pursuant to the pattern instructions does not change our holding. As defendant points out, and as our Supreme Court has recognized, "the pattern jury instructions themselves note, '*all pattern instructions should be carefully read and adaptations made, if necessary, before any instruction is given to the jury*.' " *State v. Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) (quoting 1 N.C.P.I.--Crim. at xix ("Guide to the Use of this Book") (2014)).

The State further asserts that even if the trial court erred by not including the misrepresentation alleged in the indictment in the jury instructions, the error does not amount to plain error. The State quotes *State v. Barker*, 240 N.C. App. 224, 235, 770 S.E.2d 142, 150 (2015), which notes that "this Court has consistently found no plain error where a trial court has given the pattern jury instruction for the offense of obtaining property by false pretenses." However, the portion of this Court's decision in *Barker* relied on by the State is dicta, as this Court had already determined the trial court's instructions in that case were not error based on *Ledwell* and *Clemmons*. *Id.* Moreover, we find the present case to be an exceptional case.

The State does not address defendant's argument that the jury's verdict would have been different had the trial court's instructions included the specific misrepresentation alleged in the indictment. Upon review, we agree with defendant that absent the trial court's error, it is likely the jury would have reached a different verdict for the obtaining property by false pretense charge. If the trial court's instructions had limited the jury's consideration to "filing a fire loss claim under the defendant's home owner insurance policy, when in fact the defendant had intentionally burned her own residence," it is unlikely the jury would have found defendant guilty because the jury found defendant not guilty of occupant or owner setting fire to a dwelling house. The instructions given by the trial court allowed the jury to consider any misrepresentation by defendant as a basis for a guilty verdict for obtaining property by false pretense. Furthermore, bearing in mind that

the jury found defendant guilty of the lesser obtaining property by false pretense offense for which the value of the property acquired is not at issue, it is likely the jury's guilty verdict resulted from the consideration of defendant's misrepresentations regarding the personal items destroyed in the fire and rent money. Because the trial court's erroneous instructions allowed the jury to convict defendant on a theory not alleged in the indictment and it is unlikely the jury would have convicted defendant on the theory alleged in the indictment, we hold the error had a probable impact on the jury's finding defendant guilty of obtaining property by false pretense. The trial court plainly erred.

3. Insurance Fraud Instructions

[3] Similar to defendant's argument regarding the jury instructions for obtaining property by false pretense, defendant argues the trial court also erred in instructing the jury on insurance fraud because the trial court did not specify the false statement alleged in the indictment. Based on the instructions given, defendant contends the jury could have found her guilty based on any false statement that was material to the insurance claim. Because defendant did not object to the challenged instructions, our review is again limited to plain error, which defendant asserts.

The same fundamental principles of law cited above apply in the review of the insurance fraud instructions. "[D]efendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *Barnett*, 368 N.C. at 713, 782 S.E.2d at 888 (internal quotation marks and citation omitted). The trial court should not give instructions that allow conviction on theories not charged in the indictment, *Taylor*, 304 N.C. at 274, 283 S.E.2d at 777, and if the jury charge does not conform to the allegations in the indictment, there is a fatal variance, *Ross*, __ N.C. App. at __, 792 S.E.2d at 158.

The indictment for insurance fraud was similar to the indictment for obtaining property by false pretense in that the false statement alleged in the indictment was defendant's denial that she set fire to her residence. Specifically, the indictment for insurance fraud alleged as follows:

> defendant . . . unlawfully, willfully and feloniously did with the intent to defraud and deceive an insurer, North Carolina Farm Bureau Mutual Insurance, present a written and oral statement as part of and in support of a claim for payment pursuant to an insurance policy, home owner's policy number HP5921697-01, knowing that the statements contained false and misleading information, *the defendant claimed that she had had nothing to do with the cause*

> *of the fire when in fact, she set the fire and caused the dwelling to be burned*, concerning a fact our [sic] matter material to the claim, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

(Emphasis added). The trial court instructed the jury pursuant to pattern jury instruction N.C.P.I.–Crim. 228.30 without specifying the false or misleading statement alleged in the indictment, as follows:

> [T]o find the Defendant guilty of this offense the State must prove five things beyond a reasonable doubt: first, that an insurance policy existed between Linda Locklear and the Estate of Linda Locklear and North Carolina Farm Bureau Mutual Insurance; second, the Defendant presented or caused to be presented a written or oral statement as part of or in support of a claim for payment or a benefit pursuant to the insurance policy; third, that the statement contained false or misleading information concerning a fact or matter material to the claim; fourth, the Defendant knew the statement contained a false or misleading information concerning a fact or material -- matter material to the claim; fifth, that the Defendant acted with the intent to injure, or defraud, or deceive North Carolina Farm Bureau Mutual Insurance.
>
> So I charge you that if you find from the evidence beyond a reasonable doubt that on or about the alleged date an insurance policy existed between Linda Locklear, Estate of Linda Locklear, and North Carolina Farm Bureau Mutual Insurance, and that the Defendant knowingly and with the intent to injure, or defraud, or deceive the North Carolina Farm Bureau Mutual Insurance presented or caused to be presented a statement that contained false or misleading information concerning a fact or matter material to the claim for payment of the claim pursuant to the policy or to obtain some benefit under the policy, it would be your duty to return a verdict of guilty. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Both parties assert that defendant's challenge to the jury instructions for insurance fraud is substantially similar to her challenge above

regarding the instructions for obtaining property by false pretense. Upon review, we agree the issues are substantially similar. Therefore, the analysis is the same and we reach the same result—because the trial court's instructions allowed the jury to convict defendant of insurance fraud on a theory not alleged in the indictment and it is unlikely the jury would have convicted defendant on the theory alleged in the indictment, we hold the trial court's instructions for insurance fraud were plain error.

B. Response to Jury Questions

In the final issue raised on appeal, defendant argues the trial court erred in responding to questions by the jury during deliberations. However, because we hold the trial court plainly erred in instructing the jury on the obtaining property by false pretense and insurance fraud charges, we do not address this last issue.

III. Conclusion

For the reasons discussed, we hold the trial court committed various errors in instructing the jury. The erroneous flight instruction was not prejudicial to defendant's case. The erroneous instructions for obtaining property by false pretense and insurance fraud amount to plain error, entitling defendant to a new trial.[1]

NEW TRIAL.

Judges STROUD and DAVIS concur.

1. Given that we have found the jury instructions were in error, we are sending the case back for a new trial. However, because the jury has already determined defendant was not guilty of burning the dwelling, we are unable to see a way the State can survive a motion to dismiss at the close of the State's case should it choose to attempt to retry the case.

STATE OF NORTH CAROLINA
v.
RAMELLE MILEK LOFTON

No. COA17-716

Filed 1 May 2018

Indictment and Information—fatally defective indictment—manufacture of controlled substance—intent to distribute

Defendant's indictment for the manufacture of marijuana was fatally defective for failing to include the element of intent to distribute where the jury was given the option to convict based on multiple methods of manufacture, including preparation or compounding. N.C.G.S. § 90-95(a)(1) exempts preparation or compounding for personal use from the crime of manufacturing a controlled substance.

Appeal by Defendant from judgment entered 20 July 2016 by Judge Martin B. McGee in Superior Court, Wayne County. Heard in the Court of Appeals 22 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison A. Angell, for the State.

William D. Spence for Defendant.

McGEE, Chief Judge.

Ramelle Milek Lofton ("Defendant") was indicted 2 May 2016 on charges of manufacturing a controlled substance pursuant to N.C. Gen. Stat. § 90-95(a)(1), possession of marijuana, and possession of drug paraphernalia.[1] These charges arose out of events that occurred on 20 January 2015, when officers from the Goldsboro Police Department executed a search warrant for Defendant's residence. Defendant was tried at the 18 July 2016 criminal session of Wayne County Superior Court. The jury was instructed on possession of marijuana and drug paraphernalia, as well as manufacturing a controlled substance and the lesser included offense of attempting to manufacture a controlled substance. *See State v. Clark*, 137 N.C. App. 90, 96–97, 527 S.E.2d 319, 323 (2000) (attempt is a lesser included offense of the underlying charge).

1. In the indictment, the State erroneously cites N.C.G.S. § 90-95(a)(3) in support of the manufacturing charge.

Defendant was found guilty on 20 July 2016 on the charges of attempting to manufacture a controlled substance and possession of marijuana. He was acquitted on the charge of possession of drug paraphernalia. Defendant appeals.

In Defendant's sole argument, he contends that "[t]he trial court erred in denying [his] motion to dismiss the charge of attempting to manufacture a controlled substance[.]" We agree, though on jurisdictional grounds not raised by Defendant.

We hold that the indictment charging Defendant with manufacturing marijuana was fatally defective.

> "North Carolina law has long provided that '[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity.' " "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." This Court "review[s] the sufficiency of an indictment *de novo*."

State v. Harris, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) (citations omitted) (alterations in the original). Defendant was indicted on the manufacturing charge by the following relevant language:

> [O]n or about the 20th day of January, 2015 in Wayne County, [Defendant] unlawfully, willfully and feloniously did manufacture a controlled substance in violation of the North Carolina Controlled Substances Act, by producing, preparing, propagating and processing a controlled substance. The controlled substance in question consisted of marijuana[.]

(Emphasis added).[2]

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2. We note that the use of the conjunction "and," instead of "or," placed an additional burden on the State. The indictment as written required the State to prove that Defendant produced marijuana, prepared marijuana, propagated marijuana, *and* processed marijuana in order to prove that Defendant *manufactured* marijuana. As discussed in detail below, the relevant statute only requires the State to prove one basis – e.g. preparing marijuana – in order to sustain a charge of manufacturing marijuana. The State's use of the word "and" does not impact our jurisdictional analysis.

N.C. Gen. Stat. § 90-95(a)(1) (2017) is the statute pertaining to the illegal manufacture of controlled substances:

> N.C.G.S. § 90-95(a)(1) makes it unlawful to "manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." The intent of the legislature in enacting N.C.G.S. § 90-95(a)(1) was twofold: "(1) to prevent the manufacture of controlled substances, and (2) to prevent the transfer of controlled substances from one person to another."

State v. Moore, 327 N.C. 378, 381, 395 S.E.2d 124, 126 (1990) (citation omitted). Our Supreme Court determined "the language of N.C.G.S. § 90-95(a)(1) creates three offenses: (1) *manufacture* of a controlled substance, (2) *transfer* of a controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver* a controlled substance." *Id.* (emphasis in original). Therefore, a defendant may be indicted, separately, for manufacturing a controlled substance, transferring a controlled substance, or possessing with intent to manufacture or transfer a controlled substance. *Id.*

In *Moore*, the defendant was convicted of "selling" hallucinogenic mushrooms and "delivering" hallucinogenic mushrooms pursuant to a single transfer. *Id.* at 379-80, 395 S.E.2d at 125-26. Each of these convictions was treated as a separate offense. *Id.* Our Supreme Court held that, pursuant to N.C.G.S. § 90-95(a)(1), "selling" and "delivering" constitute two ways in which the crime of *transferring* a controlled substance may be proven, but that "selling" and "delivering" in this context did not constitute separate offenses for which a defendant may be convicted based upon a single transaction. *Moore*, 327 N.C. at 381, 395 S.E.2d at 126. Therefore, the Court in *Moore* held: "The jury in this case was improperly allowed under each indictment to convict the defendant of two offenses – sale and delivery – arising from a single transfer." *Id.* at 383, 395 S.E.2d at 127. Because the defendant in *Moore* was convicted of both "selling" and "delivering" the same mushrooms in a single transaction, one of the defendant's convictions based upon transferring a controlled substance was vacated. *Id.*

Our Supreme Court was careful to explain that its reasoning did not implicate issues of unanimity:

> Our conclusion regarding the proper interpretation of N.C.G.S. § 90-95(a)(1) does not create a risk of a defendant being convicted by a nonunanimous verdict. The legislature intended that there be one conviction and punishment

> under the statute for defendants who transfer, *i.e.*, "sell or deliver," a controlled substance. The transfer by sale or delivery of a controlled substance is one statutory offense, the gravamen of the offense being the transfer of the drug. So long as each juror finds that the defendant transferred the substance, whether by sale, by delivery, or by both, the defendant has committed the statutory offense, and no unanimity concerns are implicated.

Id. (citations omitted).

In the present case, Defendant was indicted for manufacturing marijuana in violation of N.C.G.S. § 90-95(a)(1). As with a charge of transferring pursuant to N.C.G.S. § 90-95(a)(1), a charge of manufacturing may be proven in multiple ways. N.C.G.S. § 90-95(a)(1) states:

> (a) Except as authorized by this Article, it is unlawful for any person:
>
> > (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]

Relevant to this appeal, "manufacture" is defined by statute as follows:

> "Manufacture" means the production, preparation, propagation, compounding, . . . or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally[.] [However, "manufacture"] does *not include the preparation or compounding* of a controlled substance by an individual *for his own use*[.]

N.C. Gen. Stat. § 90-87(15) (2017) (emphasis added). Therefore, the State could have indicted Defendant on a *single* count of manufacturing marijuana, based on the *multiple* bases of production, preparation, propagation, or processing which, pursuant to *Moore*, could have been proven by evidence that Defendant *either* produced, prepared, propagated, *or* processed the marijuana. *Moore*, 327 N.C. at 383, 395 S.E.2d at 127. The fact that the jury could thereby convict Defendant based upon different *methods* of "manufacturing" – i.e. some jurors could find that Defendant produced marijuana, some could find that he prepared marijuana, some could find that he propagated marijuana, and some could find that he processed marijuana – does not raise any unanimity concerns.[3]

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3. As noted above, because the indictment in this case used the language "producing, preparing, propagating and processing," instead of "producing, preparing, propagating,

However, Defendant's indictment for manufacturing marijuana is fatally flawed. Defendant was indicted pursuant to the "manufacturing" prong of N.C.G.S. § 90-95(a)(1) based upon the following relevant language: "[O]n or about the 20th day of January, 2015 in Wayne County, [Defendant] unlawfully, willfully and feloniously did manufacture a controlled substance in violation of [N.C.G.S. § 90-95(a)(1)], by producing, preparing, propagating and processing [marijuana]." Our Supreme Court has held that proof of intent to distribute is required by portions of the "manufacturing" prong of N.C.G.S. § 90-95(a)(1), stating that "the offense of manufacturing a controlled substance does not require an intent to distribute *unless* the activity constituting manufacture is *preparation* or compounding." *State v. Brown*, 310 N.C. 563, 568, 313 S.E.2d 585, 588 (1984) (emphasis added); *see also Id.*, (emphasis added) ("the plain language of [N.C.G.S. § 90-87(15)] makes it clear that these activities ["packaging," "repackaging," "labeling," and "relabeling"] are not included within the limited exception of those manufacturing activities (*preparation*, compounding) *for which an intent to distribute is required*"); *State v. Muncy*, 79 N.C. App. 356, 362, 339 S.E.2d 466, 470 (1986) (citation omitted) (emphasis added) ("intent to distribute is not a necessary element of the offense of manufacturing a controlled substance *unless the manufacturing activity is preparation or compounding*"). It is clear that intent to distribute is a required element if the manufacturing charge is based upon either preparation or compounding because preparation or compounding for personal use is specifically exempted under N.C.G.S. § 90-95(a)(1) and, therefore, the State must prove that a defendant's intent was not personal use, but distribution. *Id.*

In the present case, Defendant moved to dismiss the manufacturing charge based in part on the following argument:

> Judge, we'd move to dismiss the allegation of preparation for a fatal defect in the indictment, which takes the jurisdiction from this [c]ourt. Judge, preparation, pursuant to General Statute[§ 90-87(15)], requires that the State charge preparation with the intent to distribute, intent to distribute being an essential element of that offense.

The trial court denied Defendant's motion to dismiss the manufacturing charge in its entirety, and instructed the jury on attempt to manufacture

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or processing," the indictment as written required the State to prove all four of these bases in order to convict Defendant of manufacturing marijuana.

marijuana on all four indicted bases: producing, propagating, processing, and preparing.

Because Defendant's indictment for the charge of manufacturing a controlled substance pursuant to N.C.G.S. § 90-95(a)(1) included preparation as a basis, it failed to allege a required element – intent to distribute. A valid indictment is a requirement for jurisdiction, and the fact that Defendant does not argue this issue on appeal does not relieve this Court of its duty to insure it has jurisdiction over Defendant's appeal. *Harris*, 219 N.C. App. at 593, 724 S.E.2d at 636; *State v. Helms*, 247 N.C. 740, 745, 102 S.E.2d 241, 245 (1958).

Because the State chose to allege four separate bases pursuant to which it could attempt to prove Defendant's guilt of the single count of manufacturing a controlled substance, it was necessary that *all four* of those bases were alleged with sufficiency to confer jurisdiction on the trial court for the manufacturing charge. Because one of those bases — "preparation" — required the unalleged element of "intent to distribute," and the jury was instructed on all four bases alleged in the indictment, including "preparation," the jury was allowed to convict Defendant on a theory of manufacturing a controlled substance that was not supported by a valid indictment. The omission of the element of intent from the indictment charging Defendant of manufacturing a controlled substance constituted a fatal defect. This Court cannot now, on appeal, isolate the defect in the indictment in a manner that does not taint the entire indictment.[4] The fact that the indictment as written would have supported the charge of manufacturing a controlled substance had the State only included the underlying theories of "production," "propagation," and "processing" as bases for proving "manufacturing" does not save the indictment. Because the underlying basis of "preparation" was also alleged in the indictment and presented to the jury, "intent to distribute" became a necessary element of the manufacturing charge, and its absence constituted a fatal defect.

"An arrest of judgment is proper when the indictment wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *Harris*, 219 N.C. App. at 593, 724 S.E.2d at 636 (quotation marks and citations omitted). "The legal effect of arresting the judgment is to

4. Because this issue is not before us, we do not consider whether the trial court could have cured the defect by allowing amendment of the indictment or only instructing the jury on the production, propagation, and processing theories of manufacturing a controlled substance alleged by the State.

vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment." *Id.* (quotation marks and citations omitted). Because the indictment for the charge of manufacturing a controlled substance failed to include a necessary element of that crime as alleged by the State, the indictment failed to confer subject matter jurisdiction upon the trial court for that charge, and we vacate Defendant's conviction for that charge. *Id.* at 598, 724 S.E.2d at 639. Defendant has not challenged his conviction for possession of marijuana, and that conviction is unaffected by this opinion.

NO ERROR IN PART, VACATED IN PART.

Judges DAVIS and TYSON concur.

STATE OF NORTH CAROLINA
v.
JONATHAN SANTILLAN

No. COA17-251

Filed 1 May 2018

1. Criminal Law—insufficient findings—motion to suppress—waiver of counsel—communication with law enforcement

The trial court failed to address key factual issues before denying defendant's motion to suppress in a first-degree murder case involving a gang-related shooting at a residence. Without facts addressing communication between defendant and a law enforcement officer between the time defendant invoked his right to counsel and the time he agreed to waive his right to counsel, the appellate court cannot meaningfully determine whether the officer's comments were reasonably likely to elicit an incriminating response from defendant.

2. Criminal Law—sufficient findings—waiver of counsel—voluntariness

The trial court's findings of fact regarding defendant's second waiver of his right to counsel were supported by competent evidence that the waiver was voluntary, and addressed the fact that defendant was fifteen years old at the time of the interrogation, among other factors.

3. Evidence—character evidence—rap lyrics—prejudice

The trial court did not commit plain error by allowing the admission of rap lyrics written by defendant into evidence without objection. Sufficient other evidence was presented which made it unlikely the jury would have reached a verdict other than guilty.

4. Constitutional Law—effective assistance of counsel—not ripe for direct appeal

Defendant's argument that his counsel was ineffective for failing to object to the admissibility of rap lyrics written by defendant should be raised in a motion for appropriate relief where the record is silent regarding a possible strategic reason for not making an objection.

5. Sentencing—sufficiency of findings—mitigating factors—consecutive life sentences

The trial court failed to make findings stating the evidence supporting or opposing statutory mitigating factors before imposing two consecutive life sentences without parole.

Appeal by defendant from judgments entered 1 September 2015 and 12 October 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 1 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Danielle Marquis Elder, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant.

DIETZ, Judge.

Defendant Jonathan Santillan appeals his convictions and sentences stemming from a gang-related home invasion in which Santillan and others murdered an innocent working couple. The victims lived in a home once occupied by a rival gang member who was the intended target. Santillan was fifteen years old at the time of the crime.

As explained below, the trial court's order denying Santillan's motion to suppress fails to address a key underlying fact: that a law enforcement officer communicated with Santillan between the time Santillan invoked his right to counsel and the time he agreed to waive his right to counsel. Without findings acknowledging and addressing the

impact of that communication, this Court cannot meaningfully review whether Santillan's waiver of his right to counsel was voluntary. We therefore remand this issue to the trial court for further proceedings. We reject the remainder of Santillan's challenges to his convictions.

With respect to Santillan's sentence, the State concedes that the trial court failed to make sufficient findings to support the two sentences of life without parole. We therefore vacate those sentences and remand for a new sentencing hearing for those convictions, if one is necessary after the trial court resolves the issues concerning the suppression order.

Facts and Procedural History

On 5 January 2013, Maria Saravia Flores and Jose Mendoza Flores were shot to death in their home during a gang-related attack. The attackers kicked in the couple's front door and sprayed every room in the home with gunfire from an AK-47 rifle and a .45 caliber handgun. Mr. Flores was shot sixteen times while lying on the couch and Ms. Flores was shot seven times in the back and legs at the doorway to the kitchen.

The couple were not the intended targets of the shooting. They lived in a home previously occupied by a gang member named "Sancho." Sancho had been the target of a previous shooting by a rival gang member named "Trigger," who was accompanied by his brother, Moises, and two teenagers, Isrrael Vasquez and Defendant Jonathan Santillan.

At the time of this earlier shooting, Sancho refused to provide much information to law enforcement about his attackers. But after reports of the Floreses' killings, Sancho contacted law enforcement and told them he believed he was the intended victim. He explained that he had lived at that residence a year earlier, before the Floreses moved in, and "Trigger" had visited him when he lived there. Law enforcement contacted Trigger's girlfriend, who identified Moises, Vasquez, and Santillan as Trigger's associates, and informed police that they carried a .45 caliber handgun and an AK-47 rifle.

Police found Santillan and Vasquez in the attic of Vasquez's house and arrested them. After searching the attic, law enforcement also found an AK-47, a .45 caliber handgun, and several rounds of .45 caliber ammunition. The .45 caliber ammunition had scratch marks on the shell casings to obscure identifying information, and those scratch marks matched those found on casings at the Floreses' home and the earlier shooting involving Sancho.

On 15 January 2013, officers interrogated Santillan in four separate interviews over an eight-hour period. At the time, Santillan was fifteen

years old. Santillan initially denied his involvement in both the Sancho shooting and the Floreses' killings, but later confessed to being present at the Sancho shooting. Santillan denied any involvement in the Floreses' killings, but he gave a detailed description of the murders and made a sketch of the Floreses' home based on information he claimed to have learned from Moises. Law enforcement videotaped each of the four interviews.

The State indicted Santillan on two counts of first degree murder, conspiracy to commit murder, first degree burglary, conspiracy to commit burglary, and possession of a firearm with altered serial number. At trial, the State sought to admit Santillan's videotaped interrogation and his sketch of the Floreses' home into evidence. Santillan moved to suppress this evidence on the ground that it was obtained in violation of his Sixth Amendment rights. The trial court denied the motion.

Over Santillan's objection, the trial court also admitted rap lyrics found in a notebook in Santillan's room. The lyrics describe someone "kick[ing] in the door" and "spraying" bullets with an AK-47.

The jury convicted Santillan on all charges. The trial court sentenced him to two consecutive sentences of life without parole and other, lesser sentences. Santillan timely appealed.

Analysis

I. Santillan's Motion to Suppress

[1] Santillan first challenges the denial of his motion to suppress, arguing that the trial court's order lacks key findings concerning law enforcement's communications with him after he invoked his right to counsel. As explained below, we agree that the trial court's order did not address key factual issues and we therefore remand for the trial court to do so.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

"[D]uring custodial interrogation, once a suspect invokes his right to counsel, all questioning must cease until an attorney is present or the suspect initiates further communication with the police." *State v. Quick*, 226 N.C. App. 541, 543, 739 S.E.2d 608, 610 (2013). The questioning

prohibited under this rule includes "not only express questioning, but also any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 544, 739 S.E.2d at 611.

"Factors that are relevant to the determination of whether police should have known their conduct was likely to elicit an incriminating response include: (1) the intent of the police; (2) whether the practice is designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion." *State v. Fisher*, 158 N.C. App. 133, 142–43, 580 S.E.2d 405, 413 (2003), *aff'd*, 358 N.C. 215, 593 S.E.2d 583 (2004).

In *Quick*, for example, the defendant invoked his right to counsel. Later, an officer told him that the police had more warrants to serve on him, that an attorney would not be able to help with these new warrants, and that defendant would be served with the warrants regardless of whether the attorney was there or not. 226 N.C. App. at 544, 739 S.E.2d at 611. The defendant then responded, "We need to talk." *Id.* at 542, 739 S.E.2d at 610. The officer again read the defendant his *Miranda* rights and the defendant signed a waiver form. *Id.* The trial court found that the officer knew or should have known his comments would elicit an incriminating response and therefore amounted to further questioning. This Court affirmed the trial court's suppression order based on that finding. *Id.* at 544, 739 S.E.2d at 611.

By contrast, in *State v. Thomas*, the defendant invoked his right to counsel and the officer responded that "he should be sure and tell his attorney [that] he had a chance to help himself and did not do so." 310 N.C. 369, 377, 312 S.E.2d 458, 463 (1984). Five minutes later, the defendant told the officer he wanted to make a statement and agreed to waive his right to counsel. *Id.* Our Supreme Court affirmed the denial of the motion to suppress, holding that "we are unable to conclude that [the officer] should have known that his 'off-hand' remark was reasonably likely to provoke defendant into making an incriminating statement." *Id.* at 377–78, 312 S.E.2d at 463.

With this precedent in mind, we turn to the trial court's suppression order in this case. As noted above, our review of the denial of a motion to suppress is strictly limited to the facts found by the trial court. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. In other words, "it is not our role to make factual findings, but rather, only to consider whether the trial

court has engaged in the appropriate legal analysis, made findings of fact which are supported by competent evidence, and made conclusions of law supported by those findings." *State v. Council*, 232 N.C. App. 68, 75, 753 S.E.2d 223, 229 (2014).

Here, the video recording of Santillan's interrogation shows that Santillan initially waived his right to counsel and spoke to the officers. But, after lengthy questioning by law enforcement, Santillan re-invoked his right to counsel and the officers ceased their interrogation and left the room. During that initial questioning, law enforcement told Santillan they were arresting him on drug charges. The officers also told Santillan they suspected he was involved in the Floreses' killings, but they did not tell him they were charging him with those crimes, apparently leaving Santillan under the impression that he was charged only with "drug possession."

Then, before being re-advised of his rights and signing a second waiver form, Santillan engaged in the following exchange with Chief Johnson, who was standing outside the interrogation room:

> SANTILLAN: Excuse me. Excuse me, sir. When can I make my phone call? When can I make my phone call?
>
> CHIEF JOHNSON: In about two hours.
>
> SANTILLAN: All right. So, what are—
>
> CHIEF JOHNSON: (*Inaudible*) booked.
>
> SANTILLAN: Huh?
>
> CHIEF JOHNSON: You got to be booked.
>
> SANTILLAN: What do you mean?
>
> CHIEF JOHNSON: You've been arrested for a shooting.
>
> SANTILLAN: I had nothing to do with that.
>
> CHIEF JOHNSON: All right. You'll be told. Hold on.
>
> SANTILLAN: No, they already told me, but I already told them what I know.
>
> CHIEF JOHNSON: Son, you f***** up.
>
> SANTILLAN: I did?
>
> CHIEF JOHNSON: You did.

> SANTILLAN: Nah, I didn't. So, they have to get transport? They're going to get transport? They're getting transport right now?
>
> CHIEF JOHNSON: Oh, yeah.
>
> SANTILLAN: All right. Thank you.
>
> (Santillan sits back down.)
>
> SANTILLAN: Aw, f*** this. I know (*inaudible*). F*** this, man. They better put me in protective custody, dog. (*Inaudible*).

Later, officers re-entered the interrogation room and Santillan told them that he again wanted to waive his right to counsel and make a statement.

The trial court's order does not address this exchange with Chief Johnson quoted above. The court's order finds that, during the initial interview, Santillan "read and reviewed a juvenile rights waiver form" and "eventually signed the rights form" before speaking to the officers. The court's findings do not expressly acknowledge that Santillan later invoked his right to counsel, at which point the officer ceased questioning him and left the room. But that finding can be inferred from the court's next finding, which notes that "[a]pproximately 40 minutes later, [Santillan] knocked on the door of the interview room and asked to speak with the investigators again. Investigator Scott Barefoot returned to the room with Chief Richard Johnson . . . and they explained that they cannot talk with him anymore unless he waives his rights. They then go through another juvenile rights waiver form . . . , which [Santillan] also signed."

These findings are insufficient for this Court to meaningfully review the trial court's legal conclusions. Because the trial court did not even address the exchange between Santillan and Chief Johnson in its findings, this Court cannot examine the relevant legal factors applicable to this exchange such as "(1) the intent of the police; (2) whether the practice is designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion." *Fisher*, 158 N.C. App. at 142–43, 580 S.E.2d at 413.

When a trial court's order fails to resolve fact issues necessary to assess the trial court's legal conclusions, "an appellate court may remand the cause for appropriate proceedings without ordering a new trial." *State v. Lang*, 309 N.C. 512, 523–24, 308 S.E.2d 317, 323 (1983). We therefore remand this matter for a new suppression hearing with

instructions for the trial court to address the exchange between Santillan and Chief Johnson in light of the relevant factors identified in this opinion. The trial court, based on those new findings, may again deny the motion to suppress, leaving Santillan's convictions intact, or may grant the motion to suppress in whole or in part and order a new trial. *See State v. Hammonds*, __ N.C. __, __, 804 S.E.2d 438, 441 (2017).

[2] Santillan also argues that, even ignoring Chief Johnson's communication with him, his second waiver was involuntary because of factors including his young age, the officers' interrogation tactics, and his lack of sleep, food, and medication. *See State v. Martin*, 228 N.C. App. 687, 691–92, 746 S.E.2d 307, 311 (2013). The trial court's order addressed these factors and, based on facts supported by competent evidence in the record, the court concluded that Santillan's "actions and statements show awareness and cognitive reasoning during the entire interview" and Santillan "was not coerced into making any statements, but rather made his statements voluntarily." Because the trial court's fact findings on these issues are supported by competent evidence, and those findings in turn support the court's conclusions, we reject these other challenges to the trial court's determination of voluntariness.[1]

II. Admission of the Rap Lyrics

[3] Santillan next challenges the trial court's admission of rap lyrics found in a notebook in Santillan's room. The lyrics, which were written before the Floreses were killed, described someone "kick[ing] in the door" and "spraying" bullets with an AK-47 in a manner that resembled how the Floreses were killed. Santillan argues that the rap lyrics are irrelevant, prejudicial, and improper character evidence in violation of Rules 401, 403, and 404(b) of the North Carolina Rules of Evidence.

Santillan concedes that his trial counsel did not object to the admission of the rap lyrics and we therefore review the question of admissibility for plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice–that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* In other words,

1. We recognize that some of these findings are relevant to assessing whether Chief Johnson's statements to Santillan were likely to elicit an incriminating response. The trial court may, but need not, supplement these findings on remand as well.

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. In addition, plain error review is inapplicable to discretionary decisions of the trial court, such as a decision to exclude evidence under Rule 403. *State v. Cunningham*, 188 N.C. App. 832, 836–37, 656 S.E.2d 697, 700 (2008). We therefore limit our review to Santillan's challenge under Rules 401 and 404(b).

Applying the plain error standard, we reject Santillan's argument because he fails to show that, absent the alleged error, the jury probably would have returned a different verdict. The jury heard testimony establishing that the Floreses were murdered with a .45 caliber handgun and an AK-47 rifle; that Trigger's girlfriend identified Santillan as someone who possessed those kinds of weapons; and that the attic where police found Santillan contained guns and casings matching those from the crime scene. Santillan also gave a statement to police from which the jury could infer his involvement in the killings.

Santillan categorically asserts that the rap lyrics had "enormous prejudicial effect," but he does not explain why, had the rap lyrics not been admitted, the jury probably would have rejected the State's other evidence and found Santillan not guilty. Accordingly, we hold that Santillan has failed to satisfy his burden to establish plain error.[2]

[4] Santillan also asserts that his counsel was ineffective for failing to object to the admissibility of this evidence. We decline to address this issue on direct appeal. This Court will address the merits of an ineffective assistance of counsel claim "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). Our Supreme Court recently emphasized that

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2. Because Santillan did not object to the lyrics' *admission* into evidence, we have reviewed his objection for plain error. However, Santillan timely objected to the State's request to *publish* the rap lyrics to the jury after they were admitted into evidence. The trial court's decision to publish already-admitted evidence to the jury is a matter that rests within the trial court's sound discretion. *State v. Harris*, 315 N.C. 556, 562, 340 S.E.2d 383, 387 (1986). Santillan has not shown that the court's decision to publish this admitted evidence was an abuse of discretion—that is, an act "so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005).

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. *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017).

Here, there is nothing in the record to indicate why Santillan's counsel chose not to object to the admission of the rap lyrics, whether there was a valid strategic reason for that decision, or whether that decision was reasonable. Accordingly, we dismiss this claim without prejudice to pursue it in a motion for appropriate relief. *Thompson*, 359 N.C. at 123, 604 S.E.2d at 881.

III. Sentencing under N.C. Gen. Stat. §§ 15A-1340.19A-C

[5] Finally, Santillan argues that the trial court erred by imposing two consecutive sentences of life without parole without making sufficient fact findings. Specifically, Santillan argues that, although the trial court listed each of the statutory mitigating factors under N.C. Gen. Stat. § 15A-1340.19B(c), the court failed to expressly state the evidence supporting or opposing those mitigating factors as required by *State v. Antone*, 240 N.C. App. 408, 412, 770 S.E.2d 128, 130–31 (2015), and *State v. James*, __ N.C. App. __, __, 786 S.E.2d 73, 83–84 (2016). On appeal, the State concedes that the trial court erred by failing to make these findings.

We agree with the parties that the trial court's findings are insufficient under *Antone* and *James*. We therefore vacate Santillan's two sentences of life without parole and remand for a new sentencing hearing.

Santillan also challenges the constitutionality of N.C. Gen. Stat. § 15A-1340.19A *et seq.*, both facially and as applied to him. Because we vacate his two life sentences for insufficient factual findings, we need not address Santillan's as-applied challenge, which may be mooted based on the trial court's new findings or the new sentences imposed. Santillan's facial challenge is precluded by this Court's holding in *James*, but we acknowledge that it is preserved for further review in our Supreme Court if necessary. __ N.C. App. at __, 786 S.E.2d at 84.

Conclusion

In sum, we remand the trial court's order denying Santillan's motion to suppress for additional proceedings consistent with this opinion. We find no plain error with respect to Santillan's evidentiary challenges and we dismiss Santillan's corresponding ineffective assistance of counsel claim without prejudice to pursue that issue in a motion for appropriate

relief. We vacate Santillan's two sentences of life without parole and remand for a new sentencing hearing with respect to those convictions, should that sentencing hearing be necessary following resolution of the remanded motion to suppress.

REMANDED IN PART; NO PLAIN ERROR IN PART; DISMISSED IN PART; VACATED AND REMANDED IN PART.

Judges ELMORE and INMAN concur.

STATE OF NORTH CAROLINA
v.
QUINCY JEROME SOLOMON, DEFENDANT

No. COA17-295

Filed 1 May 2018

Evidence—relevancy—defendant's purported medical conditions—second-degree murder—no foundation

The trial court did not err by excluding defendant's testimony where defendant failed to provide the appropriate foundation regarding the relevancy of his purported medical conditions to his state of mind in a case involving a high-speed car chase that resulted in the death of his passenger.

Appeal by defendant from judgment entered 18 October 2016 by Judge Eric L. Levinson in Davidson County Superior Court. Heard in the Court of Appeals 5 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

BERGER, Judge.

On October 18, 2016, a Davidson County jury found Quincy Jerome Solomon ("Defendant") guilty of second degree murder and fleeing to elude arrest. Defendant appeals contending the trial court erred by excluding testimony regarding Defendant's purported diagnosed mental disorders. We disagree.

Factual and Procedural Background

On the night of May 28, 2014, Defendant transported a group of his friends in his Mitsubishi Eclipse from Thomasville, North Carolina to a friend's home in High Point, North Carolina. Defendant was never issued a driver's license, and his privilege to drive was suspended in October 2013 due to a conviction for driving by a person less than twenty-one years old after consuming alcohol or drugs. Defendant's vehicle had no insurance, registration, or license plate.

After staying in Thomasville for approximately one hour, Defendant attempted to return to High Point with Keith Sheffield ("the victim") sitting in the front-passenger seat and Justin Walker ("Justin") sitting on the rear floor as there were no seats in the back of Defendant's vehicle. At that time, the Thomasville Police Department had established a license check station on National Highway. Around 1:00 a.m. on May 29, 2014, Sergeant Jason Annas observed Defendant's vehicle travel towards the license check station, crest over a hill, and make an illegal U-turn. Defendant traveled away from the license check station at a high rate of speed with a rear taillight out.

Officer Dustin Gallimore activated the lights and siren on his marked patrol car and pursued Defendant's vehicle heading northeast on National Highway. Officer Gallimore's patrol car reached speeds in excess of 100 miles per hour in a forty-five mile-per-hour zone in his effort to apprehend Defendant. During the seven-mile pursuit, Defendant: (1) drove his vehicle between fifteen and fifty-five miles per hour over the speed limit while driving through multiple residential areas where he passed both pedestrians and vehicles parked on narrow streets; (2) drove into a private driveway, turned around, and then drove towards the oncoming officer's patrol car while revving his engine; (3) drove left of the center lane and straddled the middle double yellow lines; (4) lost control of his vehicle on a curve in the road and went off of the road; (5) traveled at speeds of seventy to eighty miles per hour; (6) avoided stop sticks deployed by law enforcement; and (7) failed to stop at five stop signs during the pursuit. Defendant ultimately lost control of the vehicle and crashed into a ravine.

Officers arrived on scene shortly thereafter to find the vehicle upside down in the ravine, Justin standing behind the vehicle with a laceration to his arm, and Defendant on the ground holding the victim's head in his hands. Defendant told officers on scene, "This is all my fault. They were telling me to slow down and stop. I did not. I was driving. These other guys did not have anything to do with this. They were telling me to slow

down and stop." The victim died on May 31, 2014 from injuries sustained in the crash.

On June 2, 2014, Defendant was indicted by the Davidson County Grand Jury for second degree murder, speeding to elude arrest, and attempted assault with a deadly weapon on a law enforcement officer. The charge of attempted assault with a deadly weapon on a law enforcement officer was dismissed.

At trial, Defendant attempted to testify to his cognitive impairments and behavioral problems on direct examination. The State objected to Defendant's testimony, arguing that Defendant had failed to provide notice of an insanity or diminished capacity defense, and he had failed to provide an expert witness or medical documentation for any of the purported conditions. On *voir dire*, Defendant testified that he suffered from several mental disorder including Attention Deficit Disorder ("ADD"), Attention Deficit Hyperactivity Disorder ("ADHD"), Pediatric Bipolar Disorder ("PBD"), and Oppositional Defiant Disorder ("ODD"). Defendant's counsel stated they were not offering the testimony as a defense, but instead "offering it so the jury would be aware of [Defendant's] condition and state of mind."

The trial court determined that lay testimony from Defendant regarding his various purported mental disorders would not be allowed because it was not relevant pursuant to Rule 401 of the North Carolina Rules of Evidence. However, the trial court did allow Defendant to testify to his general behavioral issues and academic performance.

On October 18, 2016, the jury found Defendant guilty of second degree murder and fleeing to elude arrest. Defendant was sentenced to 162 to 207 months in prison for the second degree murder offense, and the trial court arrested judgment on the fleeing to elude arrest offense. Defendant gave notice of appeal in open court upon entry of final judgment.

Analysis

Defendant contends on appeal that the trial court erred by excluding Defendant's testimony concerning his purported medical diagnoses as irrelevant under N.C. Gen Stat. § 8C-401, Rule 401. We disagree.

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of

> a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the "abuse of discretion" standard which applies to rulings made pursuant to Rule 403.[1]

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and quotation marks omitted).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-401, Rule 401 (2017). "The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citations and quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000).

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-701, Rule 701 (2017).

Defendant contends that informing the jury of his medical diagnoses would have been "helpful to [give a] clear understanding of his testimony or the determination of a fact in issue." *See id.* Specifically, Defendant argues it was essential that the jury hear evidence of Defendant's inability to comprehend the gravity of his actions and the danger that his conduct presented to the victim because of his purported medical diagnoses.

Defendant attempted to offer specific medical diagnoses through his own testimony to lessen his culpability or explain his conduct without any accompanying documentation, foundation, or expert testimony. Defendant's testimony regarding the relationship between his

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1. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-403, Rule 403 (2017).

medical diagnoses and his criminal conduct was not relevant without additional foundation or support. Such evidence would have required a tendered expert witness to put forth testimony that complies with the rules of evidence. Without a proper foundation from an expert witness and accompanying medical documentation, Defendant's testimony would not make a fact of consequence more or less probable from its admittance. *See* N.C. Gen. Stat. § 8C-401, Rule 401; *Griffin*, 136 N.C. App. at 550, 525 S.E.2d at 806.

Accordingly, we find no error in the exclusion of Defendant's opinion testimony regarding his medical conditions and its impact on his conduct as it was more confusing than helpful to the jury without further supporting evidence demonstrating its relevance.

Assuming, *arguendo*, the trial court improperly excluded Defendant's testimony under Rule 401, the purported error was not prejudicial against Defendant.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2017); *see also State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012) (citation omitted) ("North Carolina harmless error review requires the defendant to bear the burden of showing prejudice."). Defendant has presented no evidence to indicate the likelihood that the jury would have reached a different verdict had the testimony been allowed. *See State v. Weeks*, 322 N.C. 152, 163, 367 S.E.2d 895, 902 (1988).

> [T]o prove malice in second-degree murder prosecutions involving automobile accidents, it is necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind.

State v. Bethea, 167 N.C. App. 215, 218-19, 605 S.E.2d 173, 177 (2004) (citation, quotation marks, and brackets omitted). "[W]hat constitutes proof of malice will vary depending on the factual circumstances in each case." *Id.* (citation and quotation marks omitted). In North Carolina, our

Supreme Court has recognized that "malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (citation omitted). "In the context of an automobile accident, this requirement [of malice] means that the State must prove that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *State v. Mack*, 206 N.C. App. 512, 517, 697 S.E.2d 490, 493-94, *disc. review denied*, 364 N.C. 608, 704 S.E.2d 276 (2010) (citation and quotation marks omitted).

The State presented evidence that tended to show Defendant (1) drove while his license was suspended, (2) fled to elude law enforcement, and (3) drove at speeds nearly double the posted forty-five mile per hour speed limit. Defendant testified at trial: "There was a road block. I decided to turn around and leave. I decided because the car was not legal, the car had no tags, no insurance, and I don't have a license because they suspended my license for drinking alcohol." Defendant concedes there was sufficient evidence to submit the charge of second degree murder to the jury.

Further, Defendant admitted on cross-examination:

> [The State]: Tell us about the stop sticks. You saw the stop sticks. You saw the blue lights and avoided those?
>
> [Defendant]: Yes, ma'am. I saw the blue lights on the left-hand side of the intersection and the right-hand side of the intersection. The only way I saw the spikes, [the victim] said "spikes," pointed them out to me. I went to the right side of the road, slowed down through the intersection, kept going.
>
> [The State]: You kept going and you kept speeding and you lost control of the car again at Will Johnson Road?
>
> [Defendant]: Yes, ma'am.
>
> [The State]: And crashed into the ravine?
>
> [Defendant]: Yes, ma'am.
>
> [The State]: And [the victim] and Justin were asking you to stop, weren't they?
>
> [Defendant]: Yes, ma'am, after the first time. We sped out that first time. About 35 minutes down [the] road they

> asked me to stop and I told them I got you, meaning, that's slang for you know I'm going to do it.
>
> [The State]: So you kept driving even though they asked you to stop?
>
> [Defendant]: I was looking for a straight to pull over on. We was in that residential area. I didn't know which was streets or which was driveways.
>
> . . . .
>
> [The State]: You could have stopped back at the road block?
>
> [Defendant]: I could have stopped, yes, ma'am, you are right.
>
> [The State]: They asked you to slow down, too, didn't they?
>
> [Defendant]: Yes, ma'am, and I did.
>
> [The State]: You told the officers that you did it, you were responsible, nobody but me?
>
> [Defendant]: That is true. I am responsible. I was the driver.

Defendant's testimony on cross-examination demonstrates that he understood and appreciated the increased risk that resulted from his conduct. Defendant admitted he was driving the vehicle without a license, intentionally did not stop for police, did not drive safely while in residential neighborhoods or on state roads, failed to stop at stop signs, and lost control of the vehicle several times. Defendant further admitted that he ignored his passengers' pleas to slow down and stop fleeing from law enforcement, knowing that his operation of the vehicle was extremely dangerous. *See Mack*, 206 N.C. App. at 517, 697 S.E.2d at 493-94. Defendant's testimony and statements showed he had the requisite "knowledge that injury or death would likely result" from his actions, satisfying the malice element of the crime charged. *Id.*

Accordingly, we hold that any possible error in the preclusion of Defendant's medical testimony would have been harmless because the State presented evidence tending to show malice through Defendant's conduct leading to the victim's death. *See id.* Defendant did not put forth evidence to satisfy the burden of showing prejudice from the trial court excluding his opinion testimony regarding specific medical diagnoses. *See Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331.

Conclusion

Defendant received a fair trial free from error. The trial court did not err in precluding Defendant from testifying about his purported diagnosed mental disorders without documentation, evidence, or proper foundation. Furthermore, even if the trial court erred, the purported error was harmless.

NO ERROR.

Judges DAVIS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DOMINIC RASHAUN STROUD

No. COA17-762

Filed 1 May 2018

1. Indictment and Information—validity—spelling of middle name—race and date of birth—prejudice

An indictment was not fatally flawed as a result of misspelling defendant's middle name and misidentifying his race and date of birth. The minor spelling error of one letter did not prejudice defendant, and the erroneous race and date of birth information were mere surplusage that did not prejudice him.

2. Conspiracy—criminal—sufficiency of evidence—conspiracy to commit robbery with a dangerous weapon

There was sufficient evidence to convict defendant of conspiracy to commit armed robbery where defendant and two other individuals robbed the victim and defendant confirmed that the robbery was in retaliation for the victim previously having robbed the cousin of one of defendant's co-robbers.

3. Appeal and Error—appealability—preservation of issues—not raised at trial—witness's compelled appearance

Defendant waived his argument that a witness's compelled appearance at his trial for robbery violated his due process right to a fair trial where he failed to raise the issue at trial.

STATE v. STROUD

[259 N.C. App. 411 (2018)]

Appeal by defendant from judgment entered 20 February 2017 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 8 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Anne Bleyman for defendant-appellant.

DAVIS, Judge.

In this appeal, we consider whether (1) the defendant's indictment was fatally defective because it misspelled his middle name and misidentified his race and date of birth; (2) the State presented sufficient evidence of an agreement between the defendant and another person to rob the victim in order to support a conspiracy charge; and (3) the defendant's right to due process was violated by the compelled appearance of the mother of his child as a witness for the prosecution. Dominic Rashaun Stroud ("Defendant") appeals from his convictions for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from error.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: On 4 January 2015 at approximately 5:00 p.m., Terry Maddox, Jr. went to Optimist Park in Shelby, North Carolina to meet a woman that he knew only though Facebook as "Shay." Following his arrival at the park, the two of them sat on benches in the picnic shelter area, and Maddox prepared to smoke marijuana that the woman had brought with her.

Maddox was suddenly struck on the head and fell to the ground. He saw two masked men holding firearms. One of them held a rifle, and the other possessed a handgun. One of the men told Maddox to remove his shoes, and he did so. The men then took his car keys, cell phone, and gold watch.

That afternoon, Officer Donald Bivins of the Shelby Police Department was dispatched to a house at 904 Hampton Street — which was located approximately 100 yards from Optimist Park — after dispatch received a call of "shots fired" in the area of the park. Upon entering the house, Officer Bivins and another officer observed a white

male and a black male in the living room. The officers also encountered a black male sleeping in one bedroom and a white female lying on the floor of another bedroom.

As a means of securing the house, the officers instructed the occupants of the home to go into the living room. While in the living room, Officer Bivins observed a bullet from a rifle on the floor next to the couch. When he leaned down to inspect the bullet, he discovered that a rifle was also present underneath the couch. Officer Bivins further observed a second bullet located between the cushions of a loveseat in the living room. Behind the loveseat was a .9 millimeter Glock handgun that was not loaded. Under a blanket in the carport, Officer Bivins found a .45 caliber Glock handgun.

Officer Matthew Dyer of the Shelby Police Department was also dispatched to the Optimist Park area that evening. He encountered Maddox, who informed Officer Dyer that he could identify the persons who had robbed him. After coordinating with the officers at 904 Hampton Street, Officer Dyer took Maddox to the residence "for a show-up to identify the suspects that robbed him." An officer stationed at the home directed three persons to step outside the house, and Maddox identified all three of the individuals as the persons who had robbed him. The persons identified by Maddox were Defendant, Abreanne LaShea Bowen (the mother of Defendant's child), and Joey Raborn (a friend of Defendant). All three were placed into custody and taken to the Shelby Police Department for questioning.

Shortly thereafter, Bowen was interviewed by Detective Matt Styers of the Shelby Police Department. During the interview, she admitted that she was with Defendant at 904 Hampton Street prior to contacting Maddox and arranging a meeting with him at Optimist Park. She stated that she had set up the meeting in order to retaliate against Maddox for having previously robbed her cousin. Bowen told Detective Styers that she, Defendant, and Raborn had all been present at Optimist Park earlier that day. She further stated that when she saw Defendant and Raborn approaching the bench where she and Maddox were sitting she immediately ran back to the house at 904 Hampton Street.

Bowen also told Detective Styers that by the time Defendant and Raborn returned to 904 Hampton Street from Optimist Park "the police were already circling the block." During his interview with Detective Styers, Defendant agreed to Bowen's account of the events, stating: "That's what happened. She said we did it for her cousin, so that's what happened."

Detective Lee Farris also investigated the incident. He examined the picnic shelter area and found a small amount of marijuana, a .45 caliber shell casing, and a damaged gold watch.

Detective Farris subsequently executed a search warrant on the house located at 904 Hampton Street. Inside the residence, he discovered a piece of a gold watchband matching the damaged watch he had found at Optimist Park.

Defendant was indicted by a grand jury on 12 January 2015 for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. A jury trial was held beginning on 16 February 2017 before the Honorable Robert C. Ervin in Cleveland County Superior Court. At the close of the State's evidence, Defendant moved to dismiss both charges, and the trial court denied the motion. He renewed his motion to dismiss at the close of all the evidence, which was also denied.

On 20 February 2017, the jury found Defendant guilty of both charges. The trial court sentenced Defendant to a term of 72 to 99 months imprisonment. Defendant gave oral notice of appeal.

Analysis

I. Sufficiency of Indictment

[1] In his first argument on appeal, Defendant contends that the trial court lacked jurisdiction to enter judgment against him because his indictment was fatally defective. He asserts that because the indictment misspelled his middle name and incorrectly identified his race and date of birth, it failed to "clearly and positively identify [Defendant] as the perpetrator of the charged offense."

Defendant did not challenge the sufficiency of the indictment at trial. However, it is well-established that "when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (citation omitted), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d. 548 (2001). We review the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (citation omitted), *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008).

This Court has held that "[a] valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony . . . ." *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002) (citation omitted). An indictment "is constitutionally sufficient if it apprises the

defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution of the same offense." *State v. Jones*, 188 N.C. App. 562, 564, 655 S.E.2d 915, 917 (2008) (citation and quotation marks omitted).

In the present case, Defendant's middle name was incorrectly spelled in the indictment as "Rashawn." His actual middle name is "Rashaun." Our Supreme Court has held that "[a]n indictment must clearly and positively identify the person charged with the commission of the offense." *State v. Simpson*, 302 N.C. 613, 616, 276 S.E.2d 361, 363 (1981) (citation omitted). "The name of the defendant, or a sufficient description if his name is unknown, must be alleged in the body of the indictment; and the omission of his name, or a sufficient description if his name is unknown, is a fatal and incurable defect." *Id.* (citation omitted).

In *State v. Higgs*, 270 N.C. 111, 153 S.E.2d 781 (1967), our Supreme Court held that minor mistakes in the spelling of a defendant's name in an indictment do not — without more — render the indictment defective. *Id.* at 113, 153 S.E.2d at 782. In that case, the defendant's given name was Burford Murril Higgs. However, the indictment listed his name as Beauford Merrill Higgs. *Id.* In ruling that the indictment was sufficient, the Supreme Court concluded as follows:

> On the trial, no point was made of the slight variance in the given names of *Beauford* and *Burford* and of the slight variance in the spelling of the middle name, and defendant will not now be heard to say that he is not the man named in the bill of indictment. Where defendant is tried without objection under one name, and there is no question of identity, he will not be allowed on appeal to contend that his real name was different.

Id. (citation and quotation marks omitted); *see also State v. Vincent*, 222 N.C. 543, 544, 23 S.E.2d 832, 833 (1943) ("Here, the two names, 'Vincent' and 'Vinson,' sound almost alike. . . . He was tried under the name of Vincent, without objection or challenge, and sentenced under the same name. There being no question as to his identity, he may retain the name for purposes of judgment." (citation omitted)).

In the present case, the misspelling of Defendant's middle name in the indictment differed by only one letter from the correct spelling. As shown above, our appellate courts have made clear that such minor spelling errors do not render an indictment defective absent a showing that the defendant was prejudiced by the error in preparing his defense.

See Higgs, 270 N.C. at 113, 153 S.E.2d at 782. Defendant has made no such showing here.

In addition to the misspelling of his middle name, the indictment also contained two other mistakes. First, it listed his race as white despite the fact that he is black. Second, his date of birth was set out in the indictment as 31 August 1991 when, in fact, his correct birth date is 2 October 1991. Neither of these mistakes, however, caused Defendant's indictment to be defective.

"Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). This Court has held that "a mistake in such information which is mere surplusage may be ignored if its inclusion has not prejudiced defendant." *State v. Sisk*, 123 N.C. App. 361, 366, 473 S.E.2d 348, 352 (1996) (citation omitted), *aff'd in part*, 345 N.C. 749, 483 S.E.2d 440 (1997).

In *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981), the defendant argued that his indictment was fatally defective because it "described him as being a resident of Robeson County when in fact he resided in Columbus County." *Id.* at 43, 274 S.E.2d at 193. Our Supreme Court held that the indictment was sufficient despite the error.

> Defendant's argument is, of course, frivolous. His residence is immaterial. General Statute 15A-924 requires a criminal pleading to contain the name or other identification of the defendant. The indictments contained defendant's name. The allegations as to his county of residence, if this is what was intended by the language in the indictment, is at most surplusage. Consequently any such error is not fatal.

Id. (internal citation, quotation marks, ellipsis, and brackets omitted).

Defendant concedes in his brief that no requirement exists that an indictment include the race or date of birth of a defendant. Instead, he argues, the "cumulative effect of these errors resulted in an indictment that was fatally defective for not clearly and positively identifying the person charged with the commission of the alleged offenses." We disagree.

As noted above, a valid indictment need only contain "[t]he name of the defendant, or a sufficient description if his name is unknown[.]" *Simpson*, 302 N.C. at 616, 276 S.E.2d at 363. Thus, the inaccuracies concerning his race and date of birth constitute "mere surplusage" that "may be ignored if its inclusion has not prejudiced defendant." *Sisk*, 123 N.C. App. at 366, 473 S.E.2d at 352 (citation omitted).

Defendant makes no contention in this appeal that he was prejudiced in his ability to defend himself against the charges contained in his indictment as a result of these errors. Therefore, although admittedly the indictment was not a model of precision, we are satisfied that it was not fatally defective.[1]

II. Denial of Motion to Dismiss Conspiracy Charge

[2] Defendant next argues that the trial court erred in failing to grant his motion to dismiss the charge of conspiracy to commit armed robbery with a dangerous weapon. He contends that the State presented insufficient evidence of the existence of an agreement between Defendant and another person to rob Maddox so as 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) (citation omitted). 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 (citation omitted).

> A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence

1. Defendant's alternative argument is that a fatal variance existed between his indictment and the evidence presented by the State at trial as a result of the inaccuracies discussed above. However, as the State notes, the Defendant did not raise this argument below. Therefore, he has waived appellate review of this issue pursuant to Rule 10(a) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

> tending to show a mutual, implied understanding will suffice. This evidence may be circumstantial or inferred from the defendant's behavior.

State v. Shelly, 176 N.C. App. 575, 586, 627 S.E.2d 287, 296 (2006) (internal citations and quotation marks omitted). This Court has recognized that "[d]irect proof of conspiracy is rarely available, so the crime must generally be proved by circumstantial evidence." *State v. Oliphant*, 228 N.C. App. 692, 703, 747 S.E.2d 117, 125 (2013) (citation and quotation marks omitted), *disc. review denied*, 367 N.C. 289, 753 S.E.2d 677 (2014).

In *Oliphant*, the defendants were convicted of conspiracy to commit robbery with a dangerous weapon. *Id.* at 694, 747 S.E.2d at 120. The evidence showed that they had approached the victim from behind as she walked alone late at night. *Id.* at 704, 747 S.E.2d at 125. One defendant held a gun while the other defendant took the victim's cell phone and pocketbook. In reviewing the sufficiency of the evidence to support the offense of conspiracy to commit armed robbery, we reasoned that the behavior of the defendants demonstrated "a mutual implied understanding that they would together approach the victim, and with the aid of a firearm, relieve her of her possessions[.]" *Id.* As a result, we held that sufficient evidence had been presented of a conspiracy to survive the defendant's motion to dismiss. *Id.*

State v. Young, __ N.C. App. __, 790 S.E.2d 182 (2016), involved two separate robberies committed in similar fashion that occurred in close geographic and temporal proximity to one another. *Id.* at __, 790 S.E.2d at 184-85. The evidence showed that the defendant — who was ultimately convicted of conspiracy to commit armed robbery — wore a blue bandana over his face and pointed a shotgun at the first victim while the defendant's accomplices took his car keys. *Id.* at __, 790 S.E.2d at 184. They then stole the victim's car and drove to a nearby apartment complex where the defendant robbed the second victim. *Id.* at __, 790 S.E.2d at 185. Both victims later identified the defendant from photo lineups as the person who had robbed them. *Id.* at __, 790 S.E.2d at 185. This Court held that the trial court did not err in denying the defendant's motion to dismiss the conspiracy charge, concluding that "[a]lthough the evidence is circumstantial, it does support the inference that defendant and [his accomplices] agreed to take [the first victim's] car and to go on to commit other unlawful acts, with defendant wielding the shotgun and another person driving the car." *Id.* at __, 790 S.E.2d at 187.

In the present case, Maddox identified Defendant, Raborn, and Bowen as the individuals who had robbed him. Furthermore, Defendant

confirmed to Detective Styers the accuracy of Bowen's pre-trial statement that the robbery at Optimist Park was in retaliation for Maddox having previously robbed Bowen's cousin.

Thus, sufficient evidence was offered at trial to establish Defendant's participation in a conspiracy to commit robbery with a dangerous weapon. Therefore, we hold that the trial court did not err in denying Defendant's motion to dismiss the conspiracy charge.

III. Due Process

[3] Finally, Defendant contends that Bowen's compelled appearance at trial as a witness for the State violated his "due process right to a fair trial under the Sixth and Fourteenth Amendments." Specifically, he argues that the prosecutor improperly coerced Bowen into testifying by threatening to charge her with obstruction of justice if she refused to do so and by the prosecutor also telling Bowen that she would make inquiries on Bowen's behalf regarding possible visitation with Bowen's son if she agreed to testify for the State.

It is well settled that constitutional issues "not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 415, 597 S.E.2d 724, 748 (2004) (citation and quotation marks omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). There is no indication in the record that Defendant asserted this argument in the trial court. Therefore, we deem the issue waived. *See State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 709-10 (1998) (holding that defendant's failure to raise constitutional issue at trial waived appellate review of that question), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999). However, even had Defendant properly preserved the issue, his argument lacks merit.

"A defendant's sixth amendment right to present his own witnesses to establish a defense is a fundamental element of due process of law, and is therefore applicable to the states through the due process clause of the fourteenth amendment." *State v. Melvin*, 326 N.C. 173, 184, 388 S.E.2d 72, 77 (1990) (citation omitted). Our Supreme Court has stated that "[w]hether judicial or prosecutorial admonitions to defense or prosecution witnesses violate a defendant's right to due process rests ultimately on the facts in each case." *Id.* at 187, 388 S.E.2d at 79. However, "[w]itnesses should not be discouraged from testifying freely nor intimidated into altering their testimony." *Id.*

The prosecutor in *Melvin* repeatedly threatened two witnesses for the State with perjury in the days leading up to trial if they changed

their testimony. *Id.* at 182-83, 388 S.E.2d at 76-77. He also engaged in a shouting match with the witnesses during which he grabbed one of them "by the arm, used profanity, and threatened [them] with jail if they changed their story." *Id.* at 183, 388 S.E.2d at 77. Our Supreme Court held that the defendant's due process rights had not been violated by the prosecutor's conduct for two reasons: (1) the prosecutor's actions did not prevent a witness "otherwise prepared to testify for a defendant, from doing so[;]" and (2) the prosecutor's conduct did not "result in any of the witnesses testifying more favorably for the State than they otherwise would have." *Id.* at 189-90, 388 S.E.2d at 81.

Conversely, this Court held in *State v. Mackey*, 58 N.C. App. 385, 293 S.E.2d 617, *appeal dismissed and disc. review denied*, 306 N.C. 748, 295 S.E.2d 761 (1982), that a new trial was required where a defense witness recanted his earlier testimony favoring the defendant after being threatened with perjury by a police detective and offered immunity by the District Attorney "if he would take the stand again and tell the truth." *Id.* at 387, 293 S.E.2d at 618. We concluded that the witness's "intimidation by a police detective and the offer of immunity by the District Attorney, who are symbols of the government's power to prosecute offenders, likewise deprived defendant of due process of law." *Id.* at 388, 293 S.E.2d at 619 (citation omitted).

Here, the following exchange took place between Bowen and the prosecutor at trial:

> [PROSECUTOR]: Abreanne, is it fair to say you don't want to be here?
>
> [BOWEN]: Yes, it is, 'cause I don't.
>
> [PROSECUTOR]: Did you and I have a conversation up in the jail?
>
> [BOWEN]: Um-hmm (affirmative), and you basically told me if I didn't get on the stand you was gonna criminally charge me with obstruction of justice.
>
> . . . .
>
> [PROSECUTOR]: Abreanne, did I tell you that I could get you a visit with your son, or did I tell you I would ask?
>
> [BOWEN]: You told me that you could get me a visit with my child and you would write the prison and ask them to get – you would write a report and ask them to give me game days.

> [PROSECUTOR]: I told you that I was in charge of visitation?
>
> [BOWEN]: No, but you told me that you could possibly get me a visit with my son, yes.

Throughout her direct examination, Bowen either remained silent in response to the prosecutor's questions concerning the 4 January 2015 incident or simply stated that she did not want to answer the question. Ultimately, the State requested permission from the trial court to treat Bowen as a hostile witness and ask her leading questions. After the court granted her request, the prosecutor asked Bowen about her pre-trial statement to Detective Styers.

> [PROSECUTOR]: And you told the officer that the three people in custody were the ones that did it, right?
>
> [BOWEN]: (No audible response)
>
> [PROSECUTOR]: Right, Abreanne?
>
> [BOWEN]: Yes, ma'am.
>
> [PROSECUTOR]: Okay, and [Defendant], even though he's the father of your baby, and you don't want to be here, he was one of the three, wasn't he?
>
> [BOWEN]: (No audible response)
>
> [PROSECUTOR]: He was one of the three, wasn't he?
>
> [BOWEN]: (No audible response)
>
> [PROSECUTOR]: Abreanne, can you tell the truth?
>
> [DEFENSE COUNSEL]: Objection.
>
> . . . .
>
> [PROSECUTOR]: Let me ask it this way. Did you tell the detective that interviewed you that [Defendant] was one of the three?
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Do you recall telling the detective that?
>
> [BOWEN]: No, ma'am.
>
> [PROSECUTOR]: Okay, you don't recall that?

[BOWEN]: (No audible response)

. . . .

[BOWEN]: I remember telling the detective that he didn't touch the guy's stuff or anything.

[PROSECUTOR]: You remember telling the detective that [Defendant] didn't touch the guy or his stuff?

[BOWEN]: Um-hmm (affirmative).

[PROSECUTOR]: How do you know that?

[BOWEN]: I remember telling him that.

[PROSECUTOR]: Okay. Is that true?

[BOWEN]: That I know of, yes, ma'am, because I took off running--

[PROSECUTOR]: Okay, that's right.

[BOWEN]: --as far as I know.

[PROSECUTOR]: So you don't know; is that right?

[BOWEN]: Yes, ma'am.

We reject Defendant's argument that Bowen's testimony resulted in a violation of his due process rights. Defendant does not assert that he intended to call Bowen as a defense witness but was prevented from doing so by the State. Furthermore, the circumstances surrounding Bowen's agreement to testify as the State's witness did not result in Bowen testifying more favorably for the State than she otherwise would have. *See Melvin*, 326 N.C. at 190, 388 S.E.2d at 81. To the contrary, as the above-quoted portion of her testimony makes clear, her testimony was largely unhelpful to the State. Accordingly, Defendant has failed to show a due process violation.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Chief Judge McGEE and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 1 May 2018)

ABDELJABAR v. KHALIL No. 17-667	Nash (13CVD1378)	Affirmed in Part, Reversed and Remanded in Part
AVERITT v. AVERITT No. 17-1206	Cumberland (16CVS379)	Affirmed
DYER v. ROTEN No. 17-671	Ashe (15CVD373)	Affirmed in part, vacated in part, and remanded
GRODENSKY v. McLENDON No. 17-1258	Durham (15CVS4722)	Affirmed
HOGUE v. CRUZ No. 17-122	Caswell (15CVS347)	Affirmed
HOLCOMBE v. OAK ISLAND AIRCRAFT HOUS., LLC No. 17-1081	Brunswick (15CVS2123)	Affirmed
HOPPER v. LAKESIDE MILLS, INC. No. 17-906	N.C. Industrial Commission (138346)	Affirmed
IN RE E.J.B. No. 17-1432	Onslow (16SP788)	Dismissed
IN RE I.G.M. No. 17-1065	New Hanover (15JT152)	Affirmed
IN RE S.W. No. 17-1297	Hoke (13JT56)	Vacated and Remanded
IN RE T.D.W. No. 17-1290	Cherokee (15JT1-3)	Vacated and remanded.
IN RE X.M.C. No. 17-1057	Davidson (15JT88-89)	Affirmed.
LEWIS v. LOWE'S HOME CTRS., LLC No. 17-1272	N.C. Industrial Commission (15-007878)	Affirmed
MADIGAN v. MADIGAN No. 17-468	Pitt (14CVD2596)	Affirmed

PRICE v. PASCHALL No. 17-1146	Durham (17CVS3591) (17CVS3592)	Affirmed
RADINGER v. ASHEVILLE SCH., INC. No. 17-1173	Buncombe (16CVS1102)	Affirmed
ROBERSON v. TR. SERVS. OF CAROLINA, LLC No. 17-1152	Wake (17CVS3620)	Affirmed
ROSS v. N.C. STATE BUREAU OF INVESTIGATION No. 17-794	N.C. Industrial Commission (TA-24836)	Affirmed
STATE v. BENNETT No. 17-986	Wake (15CRS1524) (15CRS207259)	NO ERROR AT TRIAL; REMANDED FOR NEW SENTENCING HEARING
STATE v. BROWN No. 17-1110	Mecklenburg (16CRS223504) (16CRS28102)	No Error
STATE v. LEWIS No. 17-1051	Johnston (14CRS55560) (14CRS55877)	Vacated and Remanded
STATE v. McALISTER No. 17-282	Yancey (16CRS181) (16CRS50269)	No Error
STATE v. MUHAMMAD No. 17-166	Wake (14CRS219793)	DISMISSED IN PART; NO ERROR IN PART
STATE v. PARKER No. 17-1067	Pitt (15CRS57593) (16CRS54467) (16CRS56962) (17CRS794)	Affirmed
STATE v. PEGUES No. 17-70	Guilford (15CRS23221) (15CRS76505)	No Error
STATE v. RAMIREZ No. 17-603	Durham (14CRS55312)	No Error
WILEY v. ARMSTRONG TRANSFER & STORAGE CO. No. 17-850	N.C. Industrial Commission (14-042875)	Affirmed

ABC SERVICES, LLC D/B/A TAYLOR'S QUICK LUBE & CAR WASH, PLAINTIFF
v.
WHEATLY BOYS, LLC D/B/A WHEATLY BOYS TIRE & AUTOMOTIVE, DEFENDANT

No. COA17-981

Filed 15 May 2018

1. Pretrial Proceedings—motions practice—local rules—trial judge's discretion to deviate

In a civil case involving littering, trespass to property, and negligence, the trial court did not abuse its discretion by hearing defendant's 12(b)(6) motion to dismiss on the day of trial despite defendant's failure to strictly adhere to local rules regarding motions, where plaintiff had sufficient advance notice of the motion, filed with defendant's answer over a year before the motion hearing.

2. Torts, Other—sufficiency of pleading—littering—definition of litter receptacle—car wash drain system

Plaintiff's claim for littering was properly dismissed by the trial court after it concluded that plaintiff's car wash drain system, into which defendant's employee dumped a large quantity of diesel fuel, constituted a litter receptacle pursuant to N.C.G.S. § 14-399 (deposits in which do not qualify as trespass).

3. Trespass—sufficiency of pleading—customer—conduct exceeding scope of invitation

Plaintiff properly pleaded a claim for trespass to property by alleging that defendant's employee exceeded the scope of his invitation to be a customer of plaintiff's car wash by dumping a large quantity of hazardous materials on the property.

4. Negligence—sufficiency of pleading—car wash—breach of duty of care—dumping of hazardous materials

Plaintiff properly pleaded a claim for negligence by alleging that defendant's employee owed a duty of care in the use of plaintiff's car wash, the employee breached that duty by dumping diesel fuel in the car wash drain system, and caused harm to plaintiff's property.

Appeal by Plaintiff from order entered 1 February 2017 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 20 February 2018.

Harvell and Collins, P.A., by Russell C. Alexander and Wesley A. Collins, for the Plaintiff.

Wheatly, Wheatly, Weeks, Lupton & Massie, P.A., by Claud R. Wheatly, III, for the Defendant.

DILLON, Judge.

ABC Services, LLC ("Plaintiff"), brought this action claiming that an employee of Wheatly Boys Tire & Automotive ("Defendant") damaged its car wash facility when the employee dumped a large quantity of diesel fuel into a drain at the facility during the process of washing Defendant's truck. The trial court dismissed Plaintiff's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiff appeals, contending that the trial court abused its discretion in reviewing Defendant's motion to dismiss *sua sponte* and without notice to Plaintiff, and thereafter erred by dismissing Plaintiff's claims despite the presence of a dispute over material facts. After reviewing the information before the trial court, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Background

In December 2014, an individual (the "Employee") employed by Defendant drove a company vehicle, a truck with an off-road diesel holding tank, into a washing bay at a car wash in Beaufort owned by Plaintiff. The Employee began washing the vehicle's holding tank, dumping the residue and its remaining contents into the car wash's drainage system. The Employee continued for 15-20 minutes before a car wash employee asked him to stop.

Following this incident, a smell of diesel wafted from the drain. Witnesses reported seeing a dark, greasy liquid inside the drain. Plaintiff ultimately hired an outside cleaning company to dispose of the drain's contents in an environmentally appropriate manner.

Ten months after the incident, in October 2015, Plaintiff filed a complaint against Defendant seeking recovery of its cleaning costs. Defendant filed an answer which contained a Rule 12(b)(6) motion to dismiss. Sometime later, before trial began, the parties stipulated to a Pre-Trial Order identifying motions in limine as the only motions pending before the court.

On 30 January 2017, the trial court heard the motions in limine and then empaneled a jury. The next day, immediately before trial was to

begin, the trial court elected to hear Defendant's Rule 12(b)(6) motion. The trial court granted Defendant's motion to dismiss as to all of Plaintiff's claims. Plaintiff appeals.

II. Analysis

A. Judicial Adherence to Local Rules

[1] Plaintiff argues the trial court improperly heard and subsequently granted Defendant's Rule 12(b)(6) motion to dismiss with respect to each of Plaintiff's claims. Specifically, Plaintiff views the trial court's *sua sponte* review of the motion as an abuse of discretion creating unfair surprise. Further, it is Plaintiff's view that its Complaint sufficiently pleaded each of its claims. We look first to the trial court's decision to consider the motion to dismiss on the day of trial.

Generally, a trial court is free to consider a motion to dismiss at any time before trial begins. N.C. R. Civ. P. 12(h)(2) ("A defense of failure to state a claim upon which relief can be granted . . . may be made . . . at the trial on the merits."). However, motions practice must adhere to the particular rules of the reviewing jurisdiction. *Forman & Zuckerman, P. A., v. Schupak*, 38 N.C. App. 17, 20, 247 S.E.2d 266, 269 (1978) (citing *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959)); N.C. Gen. Stat. § 7A-34 (2015) ("The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly.").

North Carolina District 3B, where the present matter was brought, requires in its local rules that dispositive motions must be noticed to all parties at least fifteen (15) days prior to trial. Local Calendaring Rules, Jud. Dist. 3B Superior Court Division Case Management Plan, Rule 2.1. Additionally, in District 3B, all Rule 12 dispositive motions must be accompanied by a supporting memorandum or else are deemed abandoned. Rule 6.8. Failure to provide appropriate notice may lead to unfair surprise to the nonmoving party, *see State v. Alston*, 307 N.C. 321, 331, 298 S.E.2d 631, 639 (1983); but pretrial orders may be modified as late as trial to prevent manifest injustice. N.C. R. Civ. P. 16; *see Harold Lang Jewelers, Inc. v. Johnson*, 156 N.C. App. 187, 189, 576 S.E.2d 360, 361 (2003).

A trial court does have the discretion to modify or avoid the application of a jurisdiction's local rules. N.C. Gen. R. Prac. Super. and Dist. Ct. 2(d); *Young v. Young*, 133 N.C. App. 332, 333, 515 S.E.2d 478, 479 (1999). In exercising this discretion, the trial court must be careful to give proper regard to the purpose of the applicable local rules. *Id.* We therefore

review a judge's discretionary decision to act outside the prescription of local rules for an abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.").

Here, the trial court issued a discovery scheduling order requiring each party to serve notice of its dispositive motions at least fifteen (15) days prior to trial. Defendant included its Rule 12(b)(6) motion to dismiss in its initial answer, but failed to serve any notice of or any memorandum supporting the motion fifteen (15) days before trial began. Rather, the trial court judge chose to exercise his discretion and hear Defendant's motion to dismiss on the day of trial.

Plaintiff acknowledges that this issue has been previously decided by our Court in *Harold Lang Jewelers, Inc., v. Johnson*, 156 N.C. App. 187, 576 S.E.2d 360 (2003), but contends that the case before us is distinguishable. In *Johnson*, the trial court issued a pretrial order stating that there were no motions pending before the court that needed to be addressed before trial. *Id.* at 189, 576 S.E.2d at 361. Still, the trial court elected to hear a dispositive motion on the day of trial. *Id.* This Court explained that the nonmoving party could not feign unfair surprise because the pending motion was "first presented in [the moving party's] answer." *Id.* Plaintiff contends that *Johnson* is distinguishable because in the present case, although Defendant presented its motion to dismiss in its answer, Plaintiff pleaded only that Defendant had failed to state a claim. The language of the motion was bare, unlike the detailed motion in *Johnson*. However, our Court in *Johnson* also held that the trial court's consideration of the pending motion was proper because Rule 16 of the Rules of Civil Procedure states that a pretrial order may be "modified at trial to prevent manifest injustice." *Id.*

We find *Johnson* instructive in this case. Here, Defendant placed Plaintiff on notice of the existence of its motion to dismiss when it filed an answer in December 2015, over a year before the motion was heard at trial. The trial court judge had the discretion to avoid the local rules concerning pretrial orders and to modify the terms of any pretrial orders at trial. The local rules serve to ensure that all parties are on notice of trial proceedings and that nothing new is raised at trial for the first time. We conclude that the trial court did not abuse its discretion in considering Defendant's Rule 12(b)(6) motion because Plaintiff had notice of the pending motion to dismiss.

B. Sufficiency of the Pleadings

In its complaint, Plaintiff brought three claims for relief: (1) intentional and/or reckless littering; (2) trespass to property; and (3) negligence and/or gross negligence. Generally, appellate review of a trial court's grant of a 12(b)(6) motion to dismiss is *de novo*. *Wray v. City of Greensbor*o, ___ N.C. ___, ___, 802 S.E.2d 894, 898 (2017). "[T]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015). A claim is rightfully dismissed when: "(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." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784-85, 618 S.E.2d 201, 204 (2005). The sufficiency of the pleadings setting forth each claim is considered below.

1. Littering

[2] Section 14-399 of the North Carolina General Statutes creates both criminal liability and a cause of action where a party disposes of litter in an improper location:

> No person, including any . . . organization, . . . 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 . . . 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); N.C. Gen. Stat. § 14-399(e) (defining a violation of section 14-399(a) in an amount

exceeding 500 pounds and/or for a commercial purpose as a felony); N.C. Gen. Stat. § 14-399(h) (authorizing a court to award damages to a party injured by a felonious violation of section 14-399(a)).

Under the statute, "litter" means "garbage, rubbish, trash, refuse, . . . or discarded material in any form resulting from . . . commercial . . . operations," N.C. Gen. Stat. § 14-399(i)(4). "Commercial purposes" refers to litter discarded by an entity, or its employees, "conducting business for economic gain." N.C. Gen. Stat. § 14-399(i)(2a).

The trial court dismissed Plaintiff's claim brought under this statute because it concluded, as a matter of law, that the car wash drain into which the Employee cleaned out his vehicle was "a litter receptacle of some sort." We agree.

Here, Plaintiff's complaint alleged that the Employee "dumped the contents of a one thousand gallon off-road diesel holding tank in Plaintiff's car wash drain system," that the amount dumped exceeded 500 pounds and was dumped for commercial purposes, and that Plaintiff sustained injuries as a result. While its claim thoroughly tracks the statutory scheme for pleading a claim under N.C. Gen. Stat. § 14-399 and presents all facts necessary for a claim thereunder, its claim also discloses facts that necessarily defeat it.

Specifically, we conclude that Plaintiff's car wash drain system qualifies as a "litter receptacle" as contemplated by N.C. Gen. Stat. § 14-399(a). We note that the term "litter receptacle" is not defined within Section 14-399, or another neighboring statute.[1] However, we have previously stated that our General Assembly intended to encompass a "broad range of containment vessels" by using the word "receptacle."[2]

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1. Littering statutes in other states codify "litter receptacle," e.g., (1) Virginia: " 'Litter receptacle' means containers acceptable to the Department for the depositing of litter." Va. Code Ann. § 10.1-1414 (2017); (2) Ohio: " 'Litter receptacle' means a dumpster, trash can, trash bin, garbage can, or similar container in which litter is deposited for removal." Ohio Rev. Code. Ann. § 3767.32.(D)(3) (2016); (3) Rhode Island: " 'Litter receptacle' means those containers adopted by the department of environmental management and which may be standardized as to size, shape, capacity, and . . . , as well as any other receptacles suitable for the depositing of litter." R.I. Gen. L. § 37-15-3(6) (2014). While these definitions are in no way binding on this Court, we find them persuasive here.

2. Our review of the case law reveals only two additional cases referencing the definition of "litter receptacle" under North Carolina law: *State v. Rankin*, ___ N.C. App. ___, ___, 809 S.E.2d 358 (2018) and *State v. Mather*, 221 N.C. App. 593, 728 S.E.2d 430 (2012). Each of these cases discusses *Hinkle*'s definition of "litter receptacle" only insofar as it is used to understand what language constitutes the definition of a crime, and offers no guidance on what is considered a "litter receptacle." *Rankin*, ___ N.C. App. at ___, 809 S.E.2d at 362-63; *Mather*, 221 N.C. App. at 601, 728 S.E.2d at 435.

State v. Hinkle, 189 N.C. App. 762, 767, 659 S.E.2d 34, 37 (2008). And, as a private dumpster holds litter in a contained location for some time until it can be removed, so too a car wash's drainage system collects and stores waste cleaned from its customers' vehicles until it can be removed at a later date. *See id.*

Plaintiff attempts to distinguish this case from *Hinkle* because the latter was decided in a criminal context.[3] However, we hold that the General Assembly intended for the term "receptacle" as used in N.C. Gen. Stat. § 14-399 to have the same meaning whether the statute was being applied in a criminal context or a civil context.[4]

2. Trespass

[3] We hold that Plaintiff's complaint does properly state a claim for trespass. A claim for trespass to property requires three elements: "(1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized entry by defendant; and (3) damage to plaintiff." *Fordham v. Eason*, 351 N.C. 151, 153, 521 S.E.2d 701, 703 (1999).

The design and use of a property can implicitly authorize an individual's presence as a lawful visitor, but an authorized presence may become unauthorized if the individual's conduct exceeds the scope of his or her invitation. *Smith v. VonCannon*, 283 N.C. 656, 660, 197 S.E.2d 524, 528 (1973) ("One who enters upon the land of another with the consent of the possessor may, by his subsequent wrongful act in

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3. Plaintiff appears to take issue with the possibility that the ultimate holding in *Hinkle* be applied to this case. The *Hinkle* Court found that the prosecution had failed to prove its case-in-chief because it did not present evidence showing that the private dumpster was not a litter receptacle, or otherwise a litter receptacle presenting a risk of overflow into property or waters. *Hinkle*, 189 N.C. App. at 769, 659 S.E.2d at 38. We do not hold here that it was necessary for Plaintiffs to plead that the car wash drain did not fall into a category described by N.C. Gen. Stat. § 14-399(a)(2), as this would improperly raise the notice pleading standard. Rather, we simply hold that the car wash drain is a "litter receptacle."

4. We note that Plaintiff's complaint alleges that Defendant's actions were "a violation of the Oil Pollution and Hazardous Substance Control Act." N.C. Gen. Stat. § 143-21A (2015). Plaintiff argues this point more thoroughly in its reply brief on appeal. However, Plaintiff's claims for relief and jury demand in its complaint refer only to N.C. Gen. Stat. § 14-399, trespass to property, and negligence. It may be that Defendant's actions constitute liability under N.C. Gen. Stat. § 143-21A, but that issue is not properly before us on appeal. *Parrish v. Bryant*, 237 N.C. 256, 260, 74 S.E.2d 726, 729 (1953) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount [on appeal][.]"); *see State v. Forte*, 360 N.C. 427, 438, 629 S.E.2d 137, 145 (2006).

excess or abuse of his authority to enter, become liable in damages as a trespasser.").

Plaintiff does not dispute that Defendant's entry onto Plaintiff's property was authorized. Indeed, Plaintiff operates a car wash business that is open to the public and invites the public to use its facilities. Plaintiff, however, contends that Defendant's presence became a trespass when the Employee allegedly intentionally dumped hundreds of pounds of diesel fuel, a hazardous material, into the car wash drain. Though Plaintiff's car wash drain is a litter receptacle designed to accept refuse and Defendant, (through the Employee) is a customer contemplated by Plaintiff's business, a jury could determine that Plaintiff's invitation to use its facilities to clean vehicles did not extend to an invitation to dump a large quantity of hazardous materials on its property. Therefore, we conclude that Plaintiff has stated a claim for trespass.

3. Negligence

[4] Plaintiff also pleads that Employee acted negligently in dumping the diesel fuel, resulting in damage to Plaintiff's property. Where an individual acts without the intent to cause harm to property, but actually and proximately causes harm by breaching his or her legal duty of care, the individual may be liable for negligence. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013).

Here, Plaintiff alleged essentially that the Employee had a duty of care in its use of Plaintiff's property and that the Employee caused damage to the car wash drain by failing to adhere to that duty. We conclude that the allegations in the Complaint are sufficient to state a claim for negligence.

III. Conclusion

We hold that Plaintiff's complaint failed to allege facts that constitute littering under N.C. Gen. Stat. § 14-399. We further hold that Plaintiff sufficiently pleaded facts to sustain its claims for trespass and for negligence. We, therefore, affirm the trial court's dismissal of Plaintiff's claim for damage under N.C. Gen. Stat. § 14-399, and reverse its dismissal of Plaintiff's claims for trespass and negligence. We remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge TYSON concur.

LARRY BROOKS, EMPLOYEE, PLAINTIFF
v.
CITY OF WINSTON-SALEM, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA17-1208

Filed 15 May 2018

Workers' Compensation—injuries—arising out of employment—idiopathic conditions

Where a city employee experienced uncontrollable coughing while smoking an e-cigarette in a city vehicle during his lunch break, exited the vehicle, and then passed out and injured his back falling on the cement curb, the Industrial Commission properly denied his workers' compensation claim. The employee's injury resulted solely from his own actions and idiopathic conditions (elevated blood sugar, elevated blood pressure, and coughing) rather than any condition of his employment.

Appeal by plaintiff from opinion and award entered 19 July 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 April 2018.

Oxner + Permar, PLLC, by Kathy Stewart, for plaintiff-appellant.

Spilman Thomas & Battle, PLLC, by Kevin B. Cartledge, for defendant- appellee.

DAVIS, Judge.

In this appeal, we revisit the issue of when an employee's injury is deemed to have arisen out of his employment under the North Carolina Workers' Compensation Act. Larry Brooks appeals from an opinion and award of the North Carolina Industrial Commission denying his claim for workers' compensation benefits. Because we conclude that Brooks' injury occurred solely as a result of his own idiopathic condition rather than due to conduct traceable to his employer, we affirm.

Factual and Procedural Background

In October 2015, Brooks was employed by the City of Winston-Salem (the "City") as a Senior Crew Coordinator in the Utilities Department. He supervised a team of four employees who were performing water and sewer line repairs throughout Winston-Salem. The City allowed Brooks

and the other employees on his team to take two 15-minute breaks and one 30-minute lunch break each day. As the supervisor of the group, Brooks was "responsible for deciding whether and when breaks would be taken, and [was] responsible for the crew during breaks."

On 22 October 2015, Brooks was with his crew working at a jobsite. At some point during the day, Brooks and the other employees decided to take a lunch break at a nearby Sheetz gas station. Brooks ate his lunch in the City's truck while the other employees sat at a table outside the gas station. After he finished eating his meal, Brooks briefly joined the group at the table and then entered the gas station for the purpose of purchasing cigarettes.

Inside the gas station, Brooks decided to buy an e-cigarette, a type of cigarette he had never previously smoked. He returned to the City's truck after making the purchase and began smoking the e-cigarette while sitting inside the vehicle. At all relevant times, the City maintained a "[t]obacco [f]ree" policy, which provided that "[s]moking cigarettes or e-cigarettes inside City vehicles or on City property [wa]s prohibited . . . ."

As Brooks "ignited and inhaled the e-cigarette," he began coughing "uncontrollably." In order to get some fresh air, he opened the vehicle's door and stepped out of the truck while continuing to cough. Brooks then "passed out and fell to the ground." He landed on the cement curb, causing injury to his right hip, back, and head.

Brooks was diagnosed by Dr. Dahari Brooks, a board-certified orthopedist, with "L3, L4 transverse process fractures." Due to these injuries, he was assigned light duty work restrictions, which prevented him from returning to work in his prior position.

The City filed a Form 19 (Employer's Report of Employee's Injury) on 29 October 2015 and a Form 61 (Denial of Workers' Compensation Claim) on 19 November 2015. On 28 December 2015, Brooks filed a Form 18 (Notice of Accident), alleging that "[w]hen [he] stepped out of his truck he passed out (from e-cig) causing him to fall to the ground injuring his back."

On 13 July 2016, a hearing was held before Deputy Commissioner Michael T. Silver. Brooks and Julie Carter, a risk manager working for the City, each provided testimony. Depositions were later taken of Dr. Brooks and Phillip Kelley, a physician's assistant who had treated Brooks following his injury.

On 21 November 2016, the deputy commissioner issued an opinion and award determining that "[Brooks'] injuries were not the result of an

injury by accident arising out of and in the course of employment . . . ." Brooks appealed to the Full Commission.

On 19 July 2017, the Full Commission issued an opinion and award affirming the deputy commissioner's decision and denying Brooks' claim for benefits. On 31 July 2017, Brooks filed a timely notice of appeal.

Analysis

Appellate review of an opinion and award of the Industrial Commission is typically "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed *de novo*." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680 (2013) (internal citations omitted), *aff'd per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015).

In its opinion and award in the present case, the Commission made the following pertinent findings of fact:

> 1. On October 22, 2015, [Brooks] was employed by [the City] as a Senior Crew Coordinator in the Utilities Department. In that capacity, [Brooks] was a working supervisor over a crew of five, including himself, which performed water and sewer line repairs throughout the city.
>
> 2. [Brooks'] work day started at 7:30 a.m. and was scheduled to end at 4:00 p.m., although he "worked over a lot." [Brooks] and his crew were entitled to take two 15-minute breaks and one 30-minute lunch break each day. While it is unclear from the record whether these were paid or unpaid breaks, [Brooks] was, as the supervisor, responsible for deciding whether and when breaks would be taken, and responsible for the crew during breaks.
>
> 3. On October 22, 2015, [Brooks] reported to work at 7:30 a.m., spoke to his supervisor to get his daily assignment, and then left out at approximately 8:00 a.m. with his crew in one of [the City]'s trucks to travel to that day's job site. Later that day, [Brooks] and his crew

decided to take their lunch break at a Sheetz gas station which was located in close proximity to where they were working. [Brooks] ate his lunch in the truck, while his co-workers sat at a table outside the gas station. [Brooks] testified that they probably took more than 30 minutes for lunch, but they had not taken their 15-minute break that morning. [Brooks] finished eating his meal in the truck, joined his crew briefly, and then went into the gas station to purchase cigarettes. [Brooks] purchased an electronic cigarette (or e-cigarette) which he usually does not smoke. [Brooks] then walked back to [the City]'s truck, got inside, and began to smoke the e-cigarette. Smoking cigarettes or e-cigarettes inside City vehicles or on City property is prohibited by [the City]'s Tobacco Free Policy. When [Brooks] ignited and inhaled the e-cigarette, "it just cut off [his]wind," and he began coughing uncontrollably. "Out of instinct," he opened the door and stepped out of the truck to get some air, all the while continuing to cough. After he had stepped out of the truck and while he was standing on the ground, coughing uncontrollably, [Brooks] passed out and fell to the ground. [Brooks] did not fall from the truck onto the ground.

4. EMS was called to the scene and [Brooks'] vital signs were taken. According to EMS records, [Brooks] had a blood pressure of 194/120 and a blood sugar level of 312, both of which are extremely elevated readings.

5. [Brooks] declined EMS transport to the emergency room and, instead, a co-worker took him to Novant Health Urgent Care & Occupational Medicine, where he was seen by Phillip Kelley, P.A. for injury to his right hip, back and head. [Brooks] informed Mr. Kelley that he had passed out after smoking an e-cigarette. [Brooks'] blood pressure remained elevated at 182/112, which Mr. Kelley testified is "very, very high" and constitutes "grade three hypertension," the highest grade there is. [Brooks] also informed Mr. Kelley that he was a known diabetic, but that he had been out of his medication since April. Mr. Kelley advised [Brooks] that he should be seen at the emergency room for further work-up regarding his syncope and extremely elevated blood pressure and blood sugar readings. [Brooks] refused,

telling Mr. Kelley that he thought he had been off his diabetes medication for too long and that he would be ok once he started taking them again. Mr. Kelley renewed [Brooks'] diabetes medication and discharged him against medical advice with the following diagnoses: "syncope, unspecified syncope type; contusion, back, right, initial encounter; diabetes type 2, uncontrolled; acute post-traumatic headache, not intractable; shortness of breath; glucosuria; elevated blood pressure reading without diagnosis of hypertension."

6. On October 22, 2015, [Brooks] completed a City of Winston-Salem Accident/Incident Report in which he described the accident as follows: "I developed a cough so hard I pass (sic) out standing. Free fell backwards onto a curb hurting backside back and head. More so my back cause it landed on curb." In his answers to interrogatories, [Brooks] described his injury as follows: "While sitting in the truck smoking an E-cig I started to choke. I got out to get air but I was coughing so much I passed out. I fell backwards on the cement curb causing my lower back and head to strike the ground."

7. On December 28, 2015, after [the City] had denied [Brooks'] claim, [Brooks] filed a Form 18 *Notice of Accident to Employer and Claim of Employee, Representative, or Dependent* in which he described the accident as follows: "When Employee stepped out of his truck he passed out (from e-cig) causing him to fall to the ground injuring his back."

8. [Brooks] was diagnosed with L3, L4 transverse process fractures and came under the care of Dr. Dahari Brooks, a board-certified orthopedist, who assigned light duty work restrictions which preclude [Brooks] from returning to work in the position he was performing on the date of the injury. As of the date of the hearing before the Deputy Commissioner, [Brooks] remained out of work but still employed by [the City].

9. Extremely elevated blood sugar levels and blood pressure readings, such as those exhibited by [Brooks] at the time of his injury, can cause someone to pass out. In addition, when someone coughs so much that they

become light-headed, they can pass out from a vasovagal response. Dr. Brooks testified that he thought it was a combination of these three things, and that "they probably all contributed to it."

10. [Brooks'] fall on October 22, 2015 was an unexpected and unforeseen occurrence. However, based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that [Brooks'] fall on October 22, 2015 was caused by idiopathic conditions, to wit: extremely elevated blood pressure and blood sugar levels and vasovagal response triggered by uncontrolled coughing, and that no risk attributable to his employment combined with the idiopathic conditions to cause [Brooks'] accident. [Brooks] did not fall from a height or hit his head on a piece of work equipment. There is no evidence that [Brooks'] working conditions contributed to his fall and injury. Moreover, there is nothing in the record to suggest that [Brooks] would not have fallen because of his idiopathic conditions had he been standing in his back yard or leaving a convenience store on the weekend. Therefore, while [Brooks'] accident occurred in the course of his employment, it did not arise out of his employment.

Based on these findings of fact, the Commission concluded that "because no risk or hazard incident to [Brooks'] employment duties combined with his idiopathic conditions to contribute to his injuries, his accident did not arise out of his employment and is therefore not compensable."

Brooks does not challenge the portions of the Commission's findings explaining how the 22 October 2015 accident occurred. Therefore, these findings are binding on appeal. *See Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) ("Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." (citation omitted)).

Brooks' primary argument is that the Commission erred as a matter of law by failing to conclude that his fall arose out of his employment. Under the Workers' Compensation Act, an injury is compensable if the claimant proves three elements: "(1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment." *Hedges*

v. Wake Cty. Pub. Sch. Sys., 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010) (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 77, 705 S.E.2d 746 (2011).

Our Supreme Court has held that "[a]n injury is said to arise out of the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment." *Taylor v. Twin City Club*, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963) (citation omitted). "Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, we are bound by those findings." *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988) (citation and quotation marks omitted).

"An idiopathic condition is one arising spontaneously from the mental or physical condition of the particular employee." *Philbeck*, 235 N.C. App. at 128, 761 S.E.2d at 672. We have consistently held that "[w]hen the employee's idiopathic condition is the sole cause of the injury, the injury does not arise out of the employment." *Mills v. City of New Bern*, 122 N.C. App. 283, 285, 468 S.E.2d 587, 589 (1996) (citation omitted). However, "[t]he injury does arise out of the employment if the idiopathic condition of the employee combines with risks attributable to the employment to cause the injury." *Billings v. Gen. Parts, Inc.*, 187 N.C. App. 580, 586, 654 S.E.2d 254, 259 (2007) (citation, quotation marks, brackets, and emphasis omitted), *disc. review denied*, 362 N.C. 233, 659 S.E.2d 435 (2008).

Brooks argues that this case is similar to those in which our courts have upheld an award of workers' compensation benefits to an employee who suffers an injury from an idiopathic condition while operating a vehicle for work-related purposes. *See, e.g.*, *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 556, 117 S.E.2d 476, 478 (1960) (plaintiff blacked out and crashed into pole while driving vehicle to run errand for employer); *Billings*, 187 N.C. App. at 587, 654 S.E.2d at 259 (plaintiff suffered "syncopal episode (i.e., blackout) while operating defendant-employer's truck, after which time the truck ran off the road, hit a light pole, and flipped over"); *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 373, 616 S.E.2d 403, 410 (2005) (plaintiff was traveling for job-related purposes and blacked out while driving vehicle), *appeal dismissed*, 360 N.C. 288, 627 S.E.2d 464 (2006). These cases, however, are materially distinguishable on their facts from the present case.

Where the relationship between a plaintiff's employment and his injury is too attenuated, our Supreme Court has held that the injury does not arise out of the plaintiff's employment. We find particularly instructive our Supreme Court's decision in *Vause v. Vause Farm Equipment Company*, 233 N.C. 88, 63 S.E.2d 173 (1951). In *Vause*, the plaintiff had previously suffered from epileptic convulsions for many years and could "feel one of these seizures when it was coming on." *Id.* at 93, 63 S.E.2d at 177. The plaintiff realized he was about to have a seizure "while driving a pick-up truck in the course of his employment to the home of a customer for the purpose of servicing a tractor . . . ." *Id.* at 89, 63 S.E.2d at 173.

Upon feeling "faint and ill[,]" the plaintiff "pulled the truck over to the side of the road and parked, then opened the door on his left, threw his feet outside, and lay down on the seat of the truck with his head on the side opposite from the steering wheel, and immediately suffered an epileptic seizure that caused him to lose consciousness." *Id.* When he regained consciousness, the plaintiff was "hanging to the steering wheel with his hands; his body was outside of the truck with one foot on the running board and the other dangling [to the] side of it." *Id.* at 89-90, 63 S.E.2d at 173. The plaintiff suffered various injuries as a result of the incident. *Id.* at 90, 63 S.E.2d at 173.

The plaintiff filed a workers' compensation claim, and the Commission determined that his injury had arisen out of his employment. *Id.* On appeal, our Supreme Court reversed the Commission's award of benefits, ruling that the injury was not caused by the plaintiff's employment. *Id.* at 98, 63 S.E.2d at 181. In so holding, the Court stated as follows:

> Conceding that, as found by the Commission, the plaintiff in being required to drive the truck to perform his work, was (thereby) subjected to a peculiar hazard, even so the evidence here discloses no causal connection between the operation of the truck and the injury. The evidence here shows that the plaintiff felt the epileptic seizure coming on. He pulled the truck off the road, parked it, and lay down on the seat in a place of apparent safety, with all of the ordinary dangers of his employment suspended and in repose. We perceive in this evidence no showing that any hazard of the employment contributed in any degree to the unfortunate occurrence. The evidence affirmatively shows that it was solely the force of his unfortunate seizure that moved him from his position of safety to his injury. The

> cause of the fall is not in doubt. It is not subject to dual inferences. All of the evidence shows that the cause of the plaintiff's fall was independent of, unrelated to, and apart from the employment. . . . The chain of cause and effect clearly leads in unbroken sequence from the plaintiff's unfortunate physical seizure, brought on by a pre-existing infirmity, to his injury. The award below can be sustained only by disregarding the epileptic seizure as a cause of the injury and by starting in the chain of causation at the point of the fall. To say that the injury was caused by the fall, and thus eliminate from consideration the epileptic seizure as the cause of the fall is not in accord with the fundamental principles by which the law fixes and determines the cause and effect of events. Any such process of reasoning, in effect, would strike out of the Workmen's Compensation Act the provision which requires that an injury to be compensable shall arise out of the employment.

Id. at 98, 63 S.E.2d at 180-81 (internal citation and quotation marks omitted).

We are further guided by the Supreme Court's decision in *Bartlett v. Duke University*, 284 N.C. 230, 200 S.E.2d 193 (1973), which involved a decedent who had been employed by Duke University as a construction administrator and was traveling to Washington, D.C. in order to recruit a maintenance engineer. *Id.* at 231, 200 S.E.2d at 194. During his trip, he had dinner with a friend at a restaurant in a nearby town. *Id.* While eating shish kebab at the restaurant, the decedent "aspirated a chunk of meat and immediately became unconscious." *Id.* He never regained consciousness and died two months later. *Id.* at 231, 200 S.E.2d at 194.

The decedent's widow filed for workers' compensation benefits. The Commission awarded benefits, concluding that the decedent's death "resulted from an injury by accident arising out of and in the course of his employment . . . ." *Id.* Our Supreme Court reversed the award, holding that the death did not arise out of the employment because "[t]here [wa]s no causal relationship between choking on a piece of steak and the employment of decedent, even though he was eating while he was on the job." *Id.* at 235, 200 S.E.2d at 196 (citation and quotation marks omitted). The Court held that

> the conditions of his employment had no bearing on the fact he choked to death. His injury resulted entirely from an unintentional but self-inflicted mishap. There is no

> evidence whatever that the choking was induced by any business activity.

Id. at 235, 200 S.E.2d at 196 (citations and quotation marks omitted).

These same principles apply to the present case. Brooks was on his lunch break at a gas station. After parking his employer's truck, he ate his meal in the truck and then went into the gas station to purchase cigarettes. When he returned to the truck, he inhaled an e-cigarette, began coughing, stepped out of his truck, passed out, and fell on the cement curb. While admittedly Brooks would not have been at the gas station but for his job, his fall was not traceable to the conditions of his employment. Rather, Brooks' own actions and his idiopathic condition were the sole forces causing his injuries. He chose to purchase an e-cigarette, return to the truck, smoke the cigarette, and ultimately step outside of the truck to get fresh air. None of these actions were required by his employment or served to benefit his employer.[1] Thus, no hazard related to Brooks' employment with the City contributed to his injury. *See Vause*, 233 N.C. at 98, 63 S.E.2d at 180.

In his final argument, Brooks contends that the Commission should have employed the "unexplained fall" doctrine based on these facts. "Unexplained falls . . . are differentiated in our case law from falls associated with an idiopathic condition of the employee." *Philbeck*, 235 N.C. App. at 128, 761 S.E.2d at 672. Brooks contends that it is unknown whether his injury was actually caused by his idiopathic condition or, alternatively, whether it was attributable to his employment. *See id.* ("When a fall is unexplained, and the Commission has made no finding that any force or condition independent of the employment caused the fall, then an inference arises that the fall arose out of the employment." (citation and quotation marks omitted)). Here, however, the Commission *did* expressly find that Brooks' idiopathic condition was the sole cause of his fall. Thus, the "unexplained fall" doctrine is inapplicable on these facts. *See id.* ("Unlike a fall with an unknown cause — where an inference that the fall had its origin in the employment is permitted — a fall connected to an idiopathic condition is not presumed to arise out of the employment." (citation and quotation marks omitted)).

Because Brooks' fall resulted from his own idiopathic condition and was not caused by a hazard of his employment, the Commission

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1. Indeed, as noted earlier, the City's policies prohibited its employees from smoking in a City vehicle.

properly concluded that the injury did not arise out of his employment. Thus, his injury was not compensable under the Workers' Compensation Act.

Conclusion

For the reasons stated above, we affirm the Commission's 19 July 2017 opinion and award.

AFFIRMED.

Judges INMAN and MURPHY concur.

GEA, INC., VALARIA DeVINE AND LESLIE FARKAS, PLAINTIFFS
v.
LUXURY AUCTIONS MARKETING, INC. AND JEREMY LeCLAIR, DEFENDANTS

No. COA17-1055

Filed 15 May 2018

1. Appeal and Error—interlocutory order—discovery sanctions—substantial right

In litigation arising from a business dispute, the trial court's interlocutory order imposing sanctions for discovery violations, dismissing all defenses, and entering default against defendants on each claim was immediately appealable because it affected a substantial right.

2. Discovery—inference—lesser sanctions considered

The Court of Appeals inferred from the record that the trial court considered lesser sanctions before striking defenses and entering default judgment since the trial court only entered more severe sanctions after reviewing plaintiffs' relatively conservative request. Further, the trial court is presumed to have acted correctly in the absence of evidence to the contrary, and defendant did not provide the Court of Appeals with a transcript of the hearing.

3. Discovery—scope of motion to compel—compliance

The trial court did not abuse its discretion in determining defendant failed to comply with a discovery order that required the production of all computers used in the business operations, which by its language included defendant's personal laptop. The discovery

order was also violated by defendant's failure to provide the login credentials to the server; the requirement that the server be available for inspection required more than the mere production of the server itself.

4. Discovery—abuse of discretion—compliance—credibility

The trial court did not abuse its discretion when it found defendant's representation not credible that neither he nor any other of his business's agents knew the login credentials to the server which was required to be produced under a discovery order. The trial court's determination was a necessary part of its review of the motion to show cause whether or not defendant was capable of complying with the order.

5. Discovery—compliance—personal laptop—privacy concern

The trial court did not abuse its discretion in imposing sanctions for defendant's failure to produce his personal laptop where sufficient evidence showed the laptop contained both personal and business information related to plaintiff's pending claims and would lead to the discovery of admissible evidence and where defendant testified at his deposition he would refuse to turn over his laptop even if ordered to do so, indicating his contempt for the discovery process. Privacy concerns were adequately addressed by the discovery order, which set bounds for the use of defendant's personal information. Nor did the trial court abuse its discretion in declining to conduct an in camera review of the laptop where the request was not timely sought and privacy protections were included in the order compelling discovery.

Appeal by defendants from order entered 10 July 2017 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 March 2018.

No brief filed for plaintiffs-appellees.

Law Offices of Paul Vancil, by Paul Vancil, for defendants-appellants.

ZACHARY, Judge.

Defendants Luxury Auctions Marketing, Inc. and Jeremy LeClair appeal from the trial court's order imposing sanctions against Luxury and LeClair (together, "Luxury") for failing to comply with a discovery order of the court. We affirm.

Background

The litigation at issue arose out of a business dispute between Luxury and plaintiffs GEA, Inc., Leslie Farkas, and Valaria DeVine (together, "GEA"). Ms. DeVine formed GEA and the company 4K&D roughly seventeen years ago as luxury residential auction companies. Ms. DeVine's companies were highly successful, in part due to (1) GEA's ownership of valuable trademarks, (2) GEA's ownership of 47 registered domain sites, and (3) a large customer database that GEA and Ms. DeVine had assembled over the years. In January 2016, Ms. DeVine hired Mr. LeClair as 4K&D's Director of Operations.

On 25 April 2016, Ms. Devine's husband, Leslie Farkas, formed Luxury. Luxury was formed "to generate new listings for auction and to market the properties that were placed under contract for auction." Five days after Luxury was formed, 4K&D sold all of its tangible assets—specifically, equipment, furniture, and office fixtures—to Luxury.

Shortly after his hire, Mr. LeClair became aware that Ms. DeVine and Mr. Farkas were interested in selling their businesses, and approached them about the possibility of purchasing the companies. The parties entered into a period of discussions and negotiations, culminating in the agreement of Ms. DeVine and Mr. Farkas to sell Luxury to Mr. LeClair. Ms. DeVine and Mr. Farkas retained ownership of GEA.

The parties executed Luxury's sale on 8 August 2016. The sale took the form of a Stock Purchase Agreement, by which Mr. Farkas sold all of his shares in Luxury to Mr. LeClair. GEA then issued revocable, non-exclusive, ten-year licenses to Luxury in certain trademarks, software, and intellectual property. Pursuant to the licenses, Luxury could transact business under GEA's trademark, could use GEA's registered domain site, and could access GEA's valuable customer database. Ms. DeVine and Mr. Farkas agreed to allow Mr. LeClair to defer the entire purchase price by making annual payments over the ten-year term of the agreement. Among other payment provisions, Luxury "agreed to pay 10% of each gross commission received by [Luxury] for the first ten years of the agreement, . . . for [the] revocable, non-exclusive license Agreement."

Conflict arose between the parties shortly after the purchase, which ultimately led to Luxury filing a complaint against GEA on 3 November 2016. GEA answered and asserted eleven counterclaims against Luxury. Luxury thereafter voluntarily dismissed its claims against GEA, leaving only GEA's counterclaims pending before the trial court.

GEA's counterclaims set forth an array of complicated factual allegations against Mr. LeClair and Luxury and asserted causes of action for,

inter alia, unpaid royalties and license fees, improper use and transfer of a software license and the customer database, conversion of computers and other GEA property, trademark infringement, conversion, and harassment.

Much of the information pertaining to GEA's counterclaims, and the proof thereof, was alleged to be stored in the various company computers and individual computers used by Luxury's employees[1]. However, after LeClair acquired Luxury, LeClair moved Luxury's offices and, according to GEA, "took all the computer equipment, hard drives, printers, copiers, related equipment and numerous files containing business and personal information having nothing to do with [Luxury]." Accordingly, GEA served Luxury with a discovery request on 1 March 2017 for inspection of the computers and equipment.

At Mr. LeClair's 8 May 2017 deposition, however, Luxury's counsel informed GEA that Mr. LeClair destroyed the computers after the litigation had commenced. Mr. LeClair testified to the following at his deposition:

> Q. Do you recall Mr. Farkas making a demand for the return of his personal computer?
>
> A. I do.
>
> . . .
>
> Q. Where is that computer today?
>
> A. That computer has been discarded.
>
> Q. Where was it discarded?
>
> A. I believe the Mecklenburg recycling, whatever it's called, recycling, trash dump.
>
> . . .
>
> Q. Did you discard the computer?
>
> A. I did.
>
> . . .
>
> Q. How many computers did you move from the [office]?

1. The parties dispute the ownership of these computers.

A. I don't have a specific number, but the majority of the computers, if not all.

Q. There was a server, correct?

A. Yes.

. . .

Q. What about the laptops used by [Luxury], where are those?

A. What about them? Those have been discarded as well.

. . .

Q. Have all of the computers transported from [the office] been discarded?

A. Yes.

Mr. LeClair also testified that he knew that GEA sought "return of these computers as part of [the] claims in the litigation":

Q. You knew that they--that my clients were seeking this--the return of these materials, correct?

MR. VANCIL: 'These materials' being what?

BY MR. LANDRUM:

Q. The return of these computers, correct?

A. *I know they were seeking them*; but whether they were--you know, they were owned by LAMI, so whether they were seeking them or not, that's just a . . . *These were our computers owned by us and we had the right to do with them as we pleased.*

Q. But you knew that these items were disputed in the litigation, correct?

A. Not by us. I mean, we--well, excuse me, I understand that--*I understand that there was a dispute based on what they had stated versus what we had stated*, yes, I agree with that, yes.

. . .

Q. . . . *You knew that Ms. DeVine was requesting the return of those computers, correct?*

> A. I also knew that Ms. DeVine was requesting millions of dollars in damages, so, you know, *whatever she was requesting or wanted, to me, at that point, you know, wasn't really a concern.*

In addition, Mr. LeClair repeatedly stated, "I am definitely 100 percent not agreeing to inspect my personal laptop, so you'll have to discuss that with my counsel."

GEA thereafter filed a motion to compel discovery, "specifically the inspection of computers pursuant to Rule 34" of the North Carolina Rules of Civil Procedure, dated 10 May 2017. GEA maintained that Luxury

> ha[s] refused to permit the inspection and, in fact, now claim[s] to have destroyed the computers subject to the Rule 34 request. [GEA] move[s] for an order compelling inspection of the computers or any copies or backups thereof or, in the alternative, [GEA] move[s] for an order compelling a sworn certification from [Luxury] that no such copies or backups exist and for sanctions for the destruction of the computers, or any copies or backups thereof.

Luxury responded that even though Mr. LeClair discarded the computers, he had "made copies of the files on the discarded computers, and those files are available for inspection on the hard drives in Mr. LeClair's possession." Mr. LeClair had also kept one computer (the "Accounting Computer") and a large Server, which Mr. LeClair averred were available for inspection by GEA.

On 12 June 2017, the trial court entered an order (the "12 June Order") regarding GEA's motion to compel[2]. The 12 June Order provided that

> [Luxury] shall make available for inspection the server, the accounting computer, any other computer hardware equipment which is the subject of this action, still existing, as well as all downloaded and stored contents and data from all computers which were destroyed or disposed of by [Luxury]. Unless otherwise agreed by the parties, this shall occur within twenty (20) days from May 18, 2017.

The parties met for the inspection on 7 June 2017. According to GEA,

> Based on deposition testimony, [GEA] expected [Luxury] to produce for inspection the following computers

2. The trial court orally rendered the same order on 15 May 2017.

> known to remain in existence: (1) [the] Server; (2) . . . the "Accounting Computer"; (3) two portable external hard drives created by former employees . . . (the "Employee Backups"); (4) backups of computers created by Jeremy LeClair (the "LeClair Backups"); and (5) a laptop used by Mr. LeClair to conduct [Luxury] business (the "LeClair Laptop").

Luxury produced for inspection the Accounting Computer, the Employee Backups, and the Server. However, Luxury did not produce the LeClair Backups or the LeClair Laptop, and the Server could not be inspected without certain login credentials. GEA requested the Server's login credentials, but Mr. LeClair maintained that he did not know the username or password and that the company's IT employee could not remember them. GEA has since been unable to access the Server. Nonetheless, Luxury has repeatedly requested the return of the reportedly inaccessible server.

On 23 June 2017, GEA filed a Motion to Show Cause to Avoid Contempt, claiming that Luxury had refused to comply with the 12 June Order in that Luxury had (1) failed to provide access to the Server, (2) failed to produce LeClair's backups, and (3) failed to produce LeClair's laptop. In its motion, GEA requested that Luxury "be sanctioned severely for their reprehensible conduct . . . , [and that] the Court should enter default as to [GEA's] conversion claim, permit [GEA] to keep the Server, and order [Luxury] to pay [GEA's] reasonable expenses, including attorney's fees[.]"

The trial court heard GEA's motion to show cause on 28 June 2017. The trial court orally granted GEA's motion and gave Luxury ten days within which to produce the Server's password, Mr. LeClair's laptop, and any other computers or backups in Luxury's possession. The trial court ordered that Luxury be sanctioned if it failed to make such production by 10 July 2017. On 3 July 2017, Luxury filed a Request for Approval to File Motion for Reconsideration and a "Time-Sensitive Motion for *In Camera* Review" of Mr. LeClair's laptop.

By 10 July 2017, Luxury had not provided the Server's login credentials or Mr. LeClair's laptop. Accordingly, the trial court reduced its 28 June bench ruling to writing (the "10 July Order"). The trial court's 10 July Order denied Luxury's request for reconsideration and *in camera* review, found Luxury to be in violation of the 12 June Order, and affirmed the sanctions. Per the 10 July Order, if by noon of that day Luxury had not complied with the production requirements, "as

a sanction for their noncompliance[,]" the trial court ordered that "all of [Luxury's] defenses in this action be stricken and that judgment by default enter in [GEA's] favor and against [Luxury] as to all of [GEA's] claims, with only the issues of injunctive relief and damages remaining for further hearing and/or trial."

Luxury filed a Notice of Inability to Comply with Court's Order on 11 July 2017. Luxury insisted that it was unable to comply with the 10 July Order because it did not have the login credentials to the Server. Luxury also maintained that it could not produce Mr. LeClair's personal laptop because of privacy concerns and the trial court's refusal to conduct an *in camera* review. Luxury filed a notice of appeal on 11 July 2017, and a motion to stay the 10 July Order on 13 July 2017. This Court granted a stay on 14 July 2017.

On appeal, Luxury argues that the trial court committed a variety of errors in its 10 July Order, including that it abused its discretion (1) by failing to consider less drastic sanctions than striking all of Luxury's defenses and entering default; (2) by failing to impose less drastic sanctions; (3) by ordering Luxury to produce the Server password, an impossibility; (4) by finding that Luxury violated the 12 June Order; (5) by ordering production of Mr. LeClair's personal laptop in violation of his right to privacy; (6) by denying the "Time-Sensitive Motion for *In Camera* Review"; (7) by making an erroneous finding as to Mr. LeClair's credibility and by making a finding as to his credibility in the first instance; and (8) by denying Luxury's Request for Approval to File Motion for Reconsideration. We consider each of Luxury's arguments as relevant to the discussion below.

Discussion

I. Grounds for Appellate Review

[1] The trial court's 10 July Order that imposed sanctions against Luxury is interlocutory. *Vick v. Davis*, 77 N.C. App. 359, 360, 335 S.E.2d 197, 198 (1985). However, the sanctions struck all defenses and entered default against Luxury on each of GEA's claims. "Orders of this type have been described as affecting a substantial right." *Essex Group, Inc. v. Express Wire Servs.*, 157 N.C. App. 360, 362, 578 S.E.2d 705, 707 (2003) (citing *Clark v. Penland*, 146 N.C. App. 288, 291, 552 S.E.2d 243, 245 (2001)). Accordingly, the trial court's order is immediately appealable. *Id.*; *see also Vick*, 77 N.C. App. at 360, 335 S.E.2d at 198 ("[A] party may appeal from an order imposing sanctions by striking his defense and entering judgment as to liability.") (citation omitted); N.C. Gen. Stat. § 1-277(a) (2017); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2017).

II. Rule 37(b)

Rule 37(b) of the North Carolina Rules of Civil Procedure grants trial judges the authority to impose sanctions on a party for failure to comply with a discovery order. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2017). Rule 37(b)(2) provides:

> **(2) Sanctions by Court in Which Action is Pending**—If a party . . . fails to obey an order to provide or permit discovery, . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;
>
> c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> d. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination[.]
>
> . . .

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2017).

It is axiomatic that "[o]ne of the primary purposes of the discovery rules is to facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit" so as to permit the receiving party to adequately prepare her case. *American Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888, *disc. review denied*, 297 N.C. 304, 254 S.E.2d 921 (1979) (citations omitted). This necessarily includes "the narrowing and sharpening of the basic issues and facts that will require trial." *Id.* (citations omitted). The objectives

of Rule 37(b) focus " 'not on gamesmanship, but on expeditious handling of factual information before trial so that the critical issues may be presented at trial unencumbered by unnecessary or specious issues[.]' " *F.E. Davis Plumbing Co. v. Ingleside West Associates*, 37 N.C. App. 149, 152, 245 S.E.2d 555, 557 (1978) (quoting *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976)). "Rule 37 contemplates that these objectives can be accomplished only if the court has the means and power to compel recalcitrant parties to abide by the rules of discovery." *F.E. Davis Plumbing Co.*, 37 N.C. App. at 153, 245 S.E.2d at 557. Accordingly, trial courts are vested with broad discretion in ordering sanctions under Rule 37(b). *American Tel. & Tel. Co.*, 39 N.C. App. at 727, 251 S.E.2d at 888 (citations omitted).

Not only is the decision to impose Rule 37(b) sanctions within the sound discretion of the trial court, but so too is the choice of Rule 37(b) sanctions to impose. *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239 (1992) (citing *Roane-Barker v. Southeastern Hospital Supply Corp.*, 99 N.C. App. 30, 36, 392 S.E.2d 663, 667 (1990), *disc. review denied*, 328 N.C. 93, 402 S.E.2d 418 (1991)). This Court will not overturn a trial court's imposition of sanctions under Rule 37(b) absent a showing of abuse of that discretion. *Id.* "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

A.

[2] First, Luxury argues that the trial court erred because it failed to make findings of fact and conclusions of law that it considered lesser sanctions than the striking of defenses and entry of default. We find no error.

Rule 37 does not limit a trial court's determination of the appropriateness of imposing a particular Rule 37(b) sanction. Nevertheless, our courts have held that "if the trial court chooses to exercise the option of striking a party's defenses or counterclaims, it must do so after considering lesser sanctions." *Clawser v. Campbell*, 184 N.C. App. 526, 531, 646 S.E.2d 779, 783 (2007) (citing *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 828 (2005) and *Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 159 (1993)). A failure to consider lesser sanctions may constitute an abuse of discretion. However, formal findings of fact and conclusions of law stating that the trial court considered lesser sanctions are not required in order to sustain an order's validity in every instance. "[T]his Court will affirm an order for sanctions

where 'it may be inferred from the record that the trial court considered all available sanctions' and 'the sanctions imposed were appropriate in light of the party's actions in the case.' " *In re Pedestrian Walkway Failure*, 173 N.C. App. at 251, 618 S.E.2d at 828 (quoting *Hursey*, 121 N.C. App. at 179, 464 S.E.2d at 507) (alteration omitted).

In the instant case, it can be inferred from the record that the trial court considered lesser sanctions and that the sanctions imposed were appropriate. In its Motion to Show Cause to Avoid Contempt, GEA explicitly requested the lesser sanction of entry of default solely as to GEA's conversion claim. This was a conservative request. While the various computers at issue and the information contained therein were the subject of GEA's conversion claim, the hardware also contained information that was highly material to, and necessary for, the prosecution of GEA's additional claims. In addition, the actions taken by Luxury's agents and the attitude evinced by LeClair, apparently in high dudgeon, make more severe sanctions suitable and fitting. Accordingly, while GEA requested lesser sanctions, the trial court clearly considered GEA's request and nevertheless determined that more severe sanctions were warranted under the circumstances. We also note that the trial court gave Luxury the opportunity to avoid the sanctions altogether by complying with the terms of the 12 June Order within ten days.

Moreover, "it is generally the appellant's duty and responsibility to see that the record is in proper form and complete and this Court will not presume error by the trial court when none appears on the record to this Court." *King v. King*, 146 N.C. App. 442, 445-46, 552 S.E.2d 262, 265 (2001) (quotation marks and citation omitted). Instead, "[w]here the record is silent on a particular point, we presume that the trial court acted correctly." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 488, 586 S.E.2d 791, 795 (2003) (citation omitted).

Here, Luxury has not provided this Court with a transcript of the hearing. Thus, not only may it be inferred from the record that the trial court considered lesser sanctions, but we may also "presume that the trial court acted correctly" where Luxury has failed to provide a transcript of the hearing. *E.g.*, *Clawser*, 184 N.C. App. at 531, 646 S.E.2d at 783 ("An examination of the transcript reveals that the trial court did not consider any lesser sanctions[.]).

B.

[3] We next address Luxury's argument that the trial court erred in its 10 July Order when it found Luxury and Mr. LeClair in violation of the 12 June Order.

The 10 July Order found that

> Defendant LeClair has not produced his personal laptop computer described in [GEA's] Motion to Show Cause and Defendants LeClair and [Luxury] have not produced all backups and other computers and devices, if any, in either of their possession, custody or control. Accordingly, Defendants LeClair and [Luxury] are found to be in violation of this Court's June 12, 2017 Order mandating that they "shall make available for inspection the server, the accounting computer, any other computer hardware equipment which is the subject of this action, still existing, as well as all downloaded and stored contents and data from all computers which were destroyed or disposed of by Defendants. Unless otherwise agreed by the parties, this shall occur within twenty (20) days from May 18, 2017."

Luxury maintains that Mr. LeClair's personal laptop was not subject to GEA's motion to compel or the subsequent 12 June Order. Accordingly, Luxury argues that the trial court erred when it found Luxury to be in violation of the 12 June Order on those grounds. Luxury further asserts that the trial court erred when it found Luxury to be in violation of the 12 June Order because Luxury *had* produced everything described in that order. We find no such error.

Our review of the record suggests that the 12 June Order did in fact mandate the production of Mr. LeClair's personal laptop. The 10 May 2017 deposition testimony reveals that the 12 June Order's reference to the "equipment which is the subject of this action" not only meant the "Luxury-owned" computers that were removed from the office and still in existence, but also the computers that had been used in relation to Luxury's operations overall. This included the personal laptops of various employees, including Mr. LeClair. Moreover, after referencing the "equipment which is the subject of this action," the 12 June Order explicitly addressed the handling and protection of Mr. LeClair's personal information, thus making it clear that the order included Mr. LeClair's laptop. Accordingly, we are not persuaded that the failure of the 12 June Order to specifically mention Mr. LeClair's laptop relieved Luxury of its production.

Nevertheless, Luxury unequivocally violated the provisions of the 12 June Order even assuming, *arguendo*, that Mr. LeClair's personal laptop was not subject to the Order. The trial court ordered that Luxury "shall make available for inspection the server[.]" Luxury insists that it

complied with the order because it "produced the server." However, the production of the Server was useless, as its access required login credentials that Luxury maintained it could not provide. We conclude that because the 12 June Order required not only that Luxury produce the Server, but that it make the Server "*available for inspection*," the trial court did not abuse its discretion when it concluded that Luxury violated the 12 June Order.

C.

Next, Luxury contends that the trial court erred "by failing to impose less drastic sanctions, all available and all more appropriate, than stricken defenses and entry of default judgment." The essence of Luxury's argument is that the trial court abused its discretion because it imposed the sanctions without regard to Luxury's inability to provide the Server's login credentials or to Mr. LeClair's privacy interests in his personal laptop. These arguments are not persuasive.

i. The Server

[4] Luxury first maintains that it "does not have the server password, as it repeatedly told the trial court, under oath, and demonstrated by its inability—not refusal—to provide it. The July 10 Order requires the impossible."

The trial court made the following finding pertaining to the Server in its 10 July Order:

> 1. The Court FINDS, pursuant to Defendant LeClair's deposition testimony and otherwise, that LeClair intentionally destroyed or physically disposed of computers and materials at issue in this case. On the basis of Defendant LeClair's destruction or physical disposal of certain computers and materials, the Court FINDS as not credible LeClair's assertion that he does not possess the password(s) and other credentials necessary to access [the Server]. Though the parties dispute ownership of the Server, the Server shall not be returned to [Luxury] unless provided for by further disposition of this Court.

The trial judge is the sole authority of the weight and credibility that should be given to the parties' testimony and evidence. *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994).

> "Issues of witness credibility are to be resolved by the trial judge. It is clear beyond the need for multiple citation

> that the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence." *Smithwick v. Frame*, 62 N.C. App. 387, 392, 303 S.E.2d 217, 221 (1983). "The 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).

Id. at 357, 446 S.E.2d at 25.

Despite Luxury's insistence, the trial court made clear that it did not find it credible that neither Mr. LeClair nor any other of Luxury's agents knew the login credentials to the Server. The trial court did not abuse its discretion simply because it declined to accept Luxury's allegations to the contrary. In that it was the province of the trial court to determine the credibility of Luxury's contentions on this point, we conclude that the trial court did not abuse its discretion when it ordered that Luxury be sanctioned if it did not provide the Server's login credentials.

Notwithstanding the trial court's discretion as to determinations of credibility, Luxury further argues that the trial court erred when it made any finding as to credibility. In support of this argument, Luxury cites *Lee v. Shor* for the proposition that "[i]t is well established that the court should not resolve an issue of credibility or conduct a 'trial by affidavits' at a hearing on a motion for summary judgment[.]" 10 N.C. App. 231, 235, 178 S.E.2d 101, 104 (1970). While the present case does not involve a motion for summary judgment, Luxury "submits that a ruling as to credibility in a dispositive context—either summary judgment or entry of default—is error[.]" We are not persuaded.

Not only has Luxury failed to provide this Court with authority to support the applicability of *Lee* to the present case, but we conclude that no such extension is warranted under the circumstances. The issue at hand in the 10 July Order was whether or not to impose *sanctions*. In ruling on GEA's motion to show cause, the trial court was required to determine whether Luxury was truly incapable of complying with the 12 June Order or whether Luxury personnel had in fact misrepresented their lack of knowledge of the password to the Server. Therefore, credibility was not only relevant, but was itself in issue. Moreover, in *Lee*, we reversed the trial court's summary judgment order on the basis of the affidavits provided because "[a] careful examination of defendants'

affidavits disclose[d] that . . . they do not cover all of the facts which would be material to a determination of the controversy and thus would not adequately support the motion." *Id.* at 236, 178 S.E.2d at 104. Here, however, Luxury personnel simply insisted that they did not know the Server's password. There was nothing further for the trial court to resolve other than whether that assertion was believable.

Accordingly, we find no error in the trial court's finding as to Mr. LeClair's credibility.

ii. LeClair Laptop

[5] Additionally, Luxury argues that the trial court erred when it ordered sanctions against Luxury if it did not produce Mr. LeClair's personal laptop. Luxury maintains that this requirement is "a violation of Mr. LeClair's right of privacy," and that such a violation could have been easily avoided by an *in camera* review of the laptop, which the trial court refused to conduct.

Despite the personal nature of certain information, "[u]nder the rules of discovery . . . , a party may obtain discovery concerning any unprivileged matter as long as it is relevant to the pending action and is reasonably calculated to lead to the discovery of admissible evidence." *Spangler v. Olchowski*, 187 N.C. App. 684, 693, 654 S.E.2d 507, 514 (2007) (citation omitted). Whether to conduct an *in camera* inspection is within the trial court's discretion. *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 736, 294 S.E.2d 386, 387 (1982) (citations omitted).

In the instant case, while Mr. LeClair's personal laptop may indeed include, as Luxury calls it, "needless" personal information, we find sufficient evidence in the record to suggest that Mr. LeClair's personal laptop also contained information related to GEA's pending claims and would lead to the discovery of admissible evidence.

The relevant information that could have been found on Mr. LeClair's laptop was not limited to Luxury's or GEA's business matters. For instance, GEA's harassment claim contained allegations concerning Mr. LeClair's personal Facebook postings and defamatory e-mails sent to the *Times* and *The Wall Street Journal*. Thus we are not persuaded by Luxury's claim that any personal information on the laptop would have been entirely irrelevant to GEA's pending actions. In any event, the possibility of unveiling "purely personal" information would have been outweighed by the potential for uncovering material that was relevant. Mr. LeClair testified that he used his personal laptop for Luxury's business matters. Additionally, largely at issue in GEA's claims—including

its accounting claim—was the housing of stolen intellectual property. There is no indication that the housing of any such stolen property would be limited solely to the business computers.

Furthermore, the extent of any harm caused by the revelation of personal information would have been circumscribed by the trial court's 12 June Order, which explicitly set the bounds for the use of Mr. LeClair's personal information. That order stated, in pertinent part, that

> [a]ny information, content or data obtained from the inspection [that] is Jeremy LeClair's personal information . . . shall be used solely for purposes of this case . . . and disclosed only (a) to the parties, their counsel, their experts or trial witnesses, (b) at trial as necessary, or (c) in response to any statute or court/governmental order. The [personal] [i]nformation will be returned to Jeremy LeClair within fourteen (14) days of final disposition . . . and not retained by the Plaintiffs.

(emphasis added).

This Court is also concerned by the attitude exhibited by Mr. LeClair. At his deposition, Mr. LeClair repeatedly stated that he would refuse to produce his personal laptop, and continued to so refuse even after the court ordered him to do so in its 10 July Order, thus showing his contempt for the discovery process overall.

Accordingly, we conclude that the trial court did not abuse its discretion when it ordered that Luxury be sanctioned unless Mr. LeClair produced his personal laptop for inspection.

We are also not convinced that the trial court abused its discretion when it declined to conduct an *in camera* review of the laptop. On 3 July 2017, Luxury filed a "Time-Sensitive Motion For *In Camera* Review And Request For Telephone Hearing." The motion requested that the *in camera* review be conducted prior to 10 July 2017, which was just seven days later. Luxury in essence asked the trial judge to clear his schedule and sort through the laptop's extensive supply of files in order to determine which information was and was not relevant to the pending claims. The trial court did not abuse its discretion when it refused to do so, particularly given the expedited nature of the request and the privacy protections that the trial court afforded to Mr. LeClair in its 12 June Order. Luxury's motion for *in camera* review should have been filed shortly after the *initial* discovery request, on 1 March 2017,

or at the latest, after the 12 June order, rather than on 3 July 2017, after the 23 June 2017 motion to show cause was filed by GEA.

Accordingly, we conclude that the trial court did not err when it ordered the production of Mr. LeClair's personal laptop and denied Luxury's motion for a time-sensitive *in camera* review.

* * *

In view of the above, we conclude that the trial court did not err when it struck Luxury's defenses to GEA's counterclaims, entered default against Luxury, and denied Luxury's Request for Reconsideration. As discussed in Section II *supra*, a determination of the appropriateness of particular sanctions is within the sound discretion of the trial judge. "Striking of defenses or counterclaims is an appropriate remedy, and is within the province of the trial court." *Clawser*, 184 N.C. App. at 531, 646 S.E.2d at 783 (citing *Jones v. GMRI, Inc.*, 144 N.C. App. 558, 565, 551 S.E.2d 867, 872 (2001)). Such sanctions "are well within the court's discretion in cases involving an abuse of discovery rules by one party." *Kewaunee Sci. Corp. v. Eastern Sci. Prods.*, 122 N.C. App. 734, 738, 471 S.E.2d 451, 453 (1996) (citing *Roane-Barker*, 99 N.C. App. at 36, 392 S.E.2d at 667). In the instant case, we find no such abuse of discretion.

Conclusion

For the reasons contained herein, the trial court's 10 July 2017 order is

AFFIRMED.

Judges HUNTER, JR. and DIETZ concur.

IN RE Foreclosure of Real Property under Deed of Trust from Jason V. Menendez and Ann C. Menendez, in the original amount of $244,980.00, dated May 13, 2016 and recorded on May 13, 2016 in Book R 7813 at Page 1531, Guilford County Registry
Current Owner(s): Jason V. Menendez and wife Ann C. Menendez Trustee
Services of Carolina, LLC, Substitute Trustee

No. COA17-1341

Filed 15 May 2018

Mortgages and Deeds of Trust—foreclosure sale—reinstatement of loan—third-party bidder—standing

A third-party bidder lacked standing to appeal an order setting aside a foreclosure sale where the mortgagors reinstated their loan and cured their default within the 10-day upset bid period and the substitute trustee returned the bidder's deposit. The bidder was not a real party in interest to the underlying property or deed of trust.

Appeal by Respondent from order entered 4 August 2017 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 17 April 2018.

Brown, Faucher, Peraldo & Benson, PLLC, by Drew Brown, for Respondent-Appellant Beach Capital Partners, LLC.

Hutchens Law Firm, by Claire L. Collins and Hilton T. Hutchens, Jr., for Petitioner-Appellee Quicken Loans.

Brock & Scott, PLLC, by Renner St. John, for Petitioner-Appellee Trustee Services of Carolina, LLC.

The Law Offices of Charles Winfree, by R. Robert El-Jaouhari, for Petitioner-Appellees Jason V. Menendez and Ann C. Menendez.

HUNTER, JR., Robert N., Judge.

Beach Capital Partners, LLC ("Respondent") appeals the trial court's order denying the appeal of the order to set aside foreclosure sale. Respondent contends its rights were "fixed" at the end of the 10-day upset bid period, and this Court should therefore order the trial court to instruct the clerk of court to confirm the sale and order Petitioner Trustee Services of Carolina, LLC ("Substitute Trustee") to convey property to Respondent. However, because Petitioners Jason C. Menendez

and Ann C. Menendez ("Petitioners Menendez") reinstated their loan and cured their default prior to the conclusion of the 10-day upset bid period, and because the Substitute Trustee returned Respondent's deposit, Respondent is left without any further remedy. We conclude Respondent is not a real party in interest to the contract between Petitioners Menendez and Petitioner Quicken Loans ("Petitioner Quicken") and the Substitute Trustee, and therefore Respondent does not have standing to pursue this action. Accordingly, we grant Petitioners' motion to dismiss Respondent's appeal.

I. Factual and Procedural Background

This action originates with a loan agreement for $244,980.00 entered into by Petitioners Menendez on 13 May 2016. Petitioners Menendez secured a loan through a deed of trust on property located at 5715 Bayleaf Lane, Greensboro, North Carolina. The trustee at this time was Petitioner Quicken.

On 28 November 2016, Petitioner Quicken appointed Substitute Trustee under the Deed of Trust. On 2 December 2016, the Substitute Trustee filed a Notice of Hearing Prior to Foreclosure of Deed of Trust. This initiated a power of sale foreclosure proceeding against Petitioners Menendez pursuant to N.C. Gen. Stat. § 45-21.16 *et seq*.

On 31 January 2017, the Guilford County Assistant Clerk of Court entered an order allowing the Substitute Trustee to proceed with the foreclosure sale. On 28 February 2017, the Substitute Trustee held a foreclosure sale where Respondent was the highest bidder, with a bid of $190,100.00.

Less than 10 days later, on 6 March 2017, and prior to the confirmation of the sale, Petitioners Menendez reinstated their loan by making a $20,000.00 payment to Petitioner Quicken. On 7 March 2017, Petitioner Quicken notified the Substitute Trustee the Petitioners Menendez had reinstated their loan, and requested the rescission and setting aside of the foreclosure sale. On 17 March 2017, the Substitute Trustee filed a Motion to Set Aside the Foreclosure Sale and Report of Sale with Guilford County Superior Court. On 20 March 2017, the Guilford County Assistant Clerk of Court entered an Order to Set Aside the Foreclosure Sale and Report of Sale.

On 16 March 2017, the Substitute Trustee returned Respondent's deposit made at the foreclosure sale by sending a refund check to Respondent via UPS. Respondent received the check on 17 March 2017. On 21 March 2017, the Substitute Trustee mailed a Withdrawal of Notice

of Hearing/Termination to the court and the Petitioners Menendez. The Substitute Trustee also filed the Withdrawal of Notice/Termination with the Guilford County Clerk of Court's Office on 24 March 2017.

On 1 June 2017, Respondent filed a Notice of Appeal of the Clerk's order setting aside the foreclosure sale. On 4 August 2017, the trial court entered an order denying the appeal of the order setting aside the foreclosure sale. On 31 August 2017, Respondent filed its notice of appeal to this Court.

II. Standard of Review

"Standing is a necessary prerequisite to the court's proper exercise of subject matter jurisdiction." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001). " 'If a party does not have standing to bring a claim, a court has no subject matter jurisdiction[.]' " *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006) (quoting *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005)). Whether a party has standing is a question of law which we review *de novo*. *Indian Rock Ass'n v. Ball*, 167 N.C. App. 648, 650, 606 S.E.2d 179, 180 (2004). The issue of standing may be raised for the first time on appeal and by this Court's own motion. *Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010).

III. Analysis

Respondent contends since its rights were "fixed" at the conclusion of the 10-day upset bid period, this Court should order the trial court to instruct the clerk of court to confirm the sale and order the Substitute Trustee to convey title and property to Respondent. We disagree.

"Every claim must be prosecuted in the name of the real party in interest[,] *Goodrich v. Rice*, 75 N.C. App. 530, 536, 331 S.E.2d 195, 199 (1985) (citation omitted), and, by extension, "[a] party has standing to initiate a lawsuit if he is a 'real party in interest.' " *Slaughter v. Swicegood*, 162 N.C. App. 457, 463, 591 S.E.2d 577, 582 (2004) (citations omitted). "A real party in interest is a party who is benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject-matter of the litigation." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (quoting *Parnell v. Nationwide Mut. Ins. Co.*, 263 N.C. 445, 448-49, 139 S.E.2d 723, 726 (1965)). "Thus, the real party in interest is the party who by substantive law has the legal right to enforce the claim in question." *Id.* at 337, 441 S.E.2d at 445.

In this case, Respondent is not the real party in interest. In a foreclosure pursuant to power-of-sale, a third party bidder has no interest in the underlying property or in the deed of trust pursuant to which that property is offered for sale. Therefore, the third party bidder has no legal right to force a forfeiture in satisfaction of the deed of trust. Foreclosure pursuant to power of sale is not a judicial proceeding, but rather a contractual proceeding with an overlay of judicial oversight. *See In re Lucks*, 369 N.C. 222, 225, 794 S.E.2d 501, 504 (2016) ("Non-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding."). Chapter 45 of our General Statutes provides this judicial oversight, and does not "alter the essentially contractual nature of the remedy." *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993) (citations omitted).

Foreclosure under Chapter 45 pursuant to power of sale does not create new rights in the underlying property or the deed of trust in third parties, including the third party bidder. Chapter 45 does create fixed rights of a third party bidder at the end of the 10-day statutory upset bid period. *See* N.C. Gen. Stat. § 45-21.27, 45-21.29A (2017). However, those rights are between the third party bidder and the trustee, and are not rights in the underlying property or the deed of trust. *Sprouse v. N. River Ins. Co.*, 81 N.C. App. 311, 316, 344 S.E.2d 555, 559 (1986). In *Sprouse*, this Court stated:

> The deed of trust results in legal title to the property being in the trustee. In a foreclosure title remains in the trustee until he conveys it to the high bidder. Title does not pass before the conveyance. . . . The high bidder is not entitled to an order of possession until payment of the purchase price. . . . This is consistent with the general rule: The sale is executed only by the delivery of the deed. The prior proceedings amount merely to a contract of sale. Therefore the only rights that are "fixed" upon expiration of the 10-day period are the contractual rights of the high bidder to delivery of the deed upon tender of the purchase price and of the trustee to hold the bidder liable for that price.

Id. at 316, 344 S.E.2d at 559 (internal citations and quotation marks omitted). Until the purchase price is paid in full by the high bidder, the only duty of the trustee is to return the deposit on the bid. In fact, there is no contract, and the high bidder has no contractual right for delivery of the subject property, until the high bidder tenders the full purchase price. *Id.* at 316, 344 S.E.2d at 560.

A deed of trust creates the trustee's rights and duties, and a trustee to a deed of trust only stands in a fiduciary relationship with the creditor and debtor. If there is a high bidder at a foreclosure proceeding, the trustee's only obligation to that bidder is to tender the deed upon payment of the purchase price. *Sprouse* at 316, 344 S.E.2d at 559. Respondent has not cited any language from the Deed of Trust or pointed to any case or statute which would create additional duties or obligations for the trustee to the high bidder.

In accordance with the terms of the Deed of Trust and pursuant to N.C. Gen. Stat. § 45-21.16, the notice of sale in this case provided the necessary details of the sale, and expressly stated the remedies and rights of the high bidder if the trustee was unable to convey title to the property. The contents of the notice of foreclosure sale in the instant proceeding expressly provide if the trustee is unable to convey the property, the third party bidder's sole remedy is the return of the deposit. The "Notice of Foreclosure Sale" provides:

> If the trustee is unable to convey title to this property for any reason, the sole remedy of the purchaser is the return of the deposit. Reasons of such inability to convey include, but are not limited to . . . reinstatement of the loan without the knowledge of the trustee. . . . The purchaser will have no further remedy.

This notice of foreclosure sale was mailed to all interested parties, published in local newspapers, and posted at the designated location in the courthouse to put the public on constructive notice of the terms of the sale. The Substitute Trustee was also required to cry the sale at the designated location and time, and required to read the contents of the notice of foreclosure sale out loud even if there were no potential bidders present.

In this case, Respondent was present at the foreclosure sale since the Report of Sale shows Respondent was the high bidder at the time of sale. Not only did Respondent have constructive notice of the contents of the "Notice of Foreclosure Sale" and the terms contained therein, but Respondent had actual notice of the rights of the purchaser because Respondent was present when the Substitute Trustee called for bids on 28 February 2017.

Respondent placed a bid and tendered a deposit of $9,505.00 at the sale, and proceeded to wait for the upset bid period to expire and for the sale to confirm. However, as expressly provided in the "Notice of Foreclosure Sale," and pursuant to the terms of the Deed of Trust and

Chapter 45, the Substitute Trustee was unable to convey title because Petitioners Menendez reinstated the loan. The "Notice of Foreclosure Sale" also provides the high bidder's sole remedy is the return of the deposit. Accordingly, Respondent received its deposit ten days after Petitioners Menendez cured the default. The Substitute Trustee owes no further duty to Respondent.

A third party bidder's rights, whether or not they are "fixed" pursuant to N.C. Gen. Stat. §§ 45-21.27 and 45-21.29A, cannot alter the rights of the parties to the Deed of Trust underlying a power-of-sale foreclosure. Those rights cannot be controlled by third party bidders in a power-of-sale foreclosure, and a third party bidder has no standing to force a forfeiture by prosecuting the rights of others. Because we conclude Respondent does not have standing to maintain this action, we grant Petitioners' motion to dismiss.

DISMISSED.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF THE WILL OF MARGUERITE TRAVERSE HENDRIX,
AMY HENDRIX WEBER AND MAUREEN TRAVERSE COLLINS, PETITIONERS
v.
JANET MARTIN TANTEMSAPYA, ET. AL., RESPONDENTS

No. COA17-281

Filed 15 May 2018

1. Civil Procedure—Rule 12(b)(6)—caveat—applicable

Although caveators argued that a caveat cannot be dismissed because N.C. courts have historically required that all caveat issues be tried by a jury, the Rules of Civil Procedure that have been applied to estate proceedings include those involving a disposition without a jury trial. Therefore, there is no absolute requirement for a jury trial in a will caveat.

2. Wills—caveat—holographic—modifications to typewritten will—Rule 12(b)(6)

A caveat claim based on a holographic codicil to a typewritten will did not state a valid clam where the handwritten notations had no meaning apart from the typewritten provisions of the earlier will.

IN RE WILL OF HENDRIX

[259 N.C. App. 465 (2018)]

Appeal by caveators from order entered 10 October 2016 by Judge Susan E. Bray in Superior Court, Forsyth County. Heard in the Court of Appeals 6 September 2017.

The Law Offices of Jason E. Taylor, by Gary W. Jackson and Lawrence B. Serbin, for petitioners-caveators-appellants.

Bell, Davis & Pitt, P.A., by William K. Davis, Alan M. Ruley, and Andrew A. Freeman, for respondent-appellees.

STROUD, Judge.

The Caveators appeal from the trial court's order dismissing their will caveat under North Carolina Rule of Civil Procedure 12(b)(6). Because the alleged codicil upon which the caveat was based is not a valid holographic codicil on its face, we affirm.

I. Background

On 26 July 2016, Amy Hendrix Weber and Maureen Traverse Collins, caveators, filed a caveat to the will of Marguerite Traverse Hendrix dated 1 September 2011 ("2011 Will"). The Caveators are two of about twelve named beneficiaries under the 2011 Will. Ms. Hendrix died on 7 June 2016, and her will entered probate on 24 June 2016. Ms. Weber and Ms. Collins alleged that portions of the 2011 Will should be set aside because the decedent had executed a holographic codicil to it on 13 November 2012. The Caveators alleged that the decedent had revoked some provisions of the 2011 Will and modified others, including removing Brenner Children's Hospital as a beneficiary. A copy of the alleged codicil was attached to the complaint.

The alleged codicil was a copy of the typewritten 2011 Will with some handwritten notations and markings through some portions of the typewritten text. At the top of the first page of the alleged codicil is a handwritten note "UPDATE Nov 13, 2012[,]" and under this a mark which could be the decedent's initials. After the date, the handwritten notations are nearly illegible, but we will assume for purposes of considering the motion to dismiss that they say what the Caveators alleged. The caveat does not include any allegation regarding when and where the alleged codicil was found.

Brenner Children's Hospital moved to dismiss under North Carolina Rule of Civil Procedure 12(b)(6).[1] On 10 October 2016, the trial court

1. Other named beneficiaries under the 2011 Will also filed responses, including

granted Brenner Children's Hospital's motion to dismiss the caveat with prejudice. The Caveators appeal.

II. Motion to Dismiss

On appeal, the Caveators argue that the trial court erred in dismissing their caveat under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The Caveators contend that Rule 12(b)(6) is not applicable to caveat proceedings, but even if it were, they contend the alleged codicil shows the decedent's intent and meets the statutory requirements for a holographic codicil, so they "are entitled to have a jury hear evidence that the requirements for a valid holographic instrument are satisfied."

A. Applicability of Rule 12(b)(6) to Caveat

[1] Caveators argue that a caveat cannot be dismissed because North Carolina courts have historically required that all caveat issues be tried by a jury. The Caveators cite several cases stating the general proposition that " 'on the issue raised by caveat, as provided by the statute, the issue must be tried by a jury and not by the judge.' *In re Hine's Will*, 228 N.C. 405, 410, 45 S.E.2d 526, 529 (1947)[.]" But the Rules of Civil Procedure still apply to caveat proceedings. *See generally In re Will of Durham*, 206 N.C. App. 67, 76, 698 S.E.2d 112, 120-21 (2010). In *Will of Durham*, this Court discussed the applicability of the Rules of Civil Procedure in estate proceedings at length, noting that the caveator's argument that the Rules of Civil Procedure did not apply "is understandable given certain language that appears in our prior decisions," but determined that North Carolina Rule of Civil Procedure 11 applied to estate proceedings:

> The North Carolina Rules of Civil Procedure govern the procedure in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute. The phrase all actions and proceedings of a civil nature is inclusive of, but not exclusive to, civil actions; the phrase is broad and encompasses different types of legal actions, not solely those initiated with a complaint. According to N.C. Gen. Stat. § 1–393, the Rules of Civil Procedure and the provisions of this Chapter on civil procedure are applicable to special proceedings, except as otherwise provided. A proceeding for the revocation of previously-issued letters testamentary initiated pursuant to N.C. Gen. Stat. § 28A–9–1 constitutes

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a motion to dismiss, but the trial court's order was based upon Brenner Children's Hospital's motion and only the Caveators and Brenner Children's Hospital have filed briefs on appeal.

> a special proceeding. As a result, an estate proceeding is a proceeding of a civil nature in which a Superior Court Judge has the authority to impose sanctions pursuant to N.C. Gen. Stat. § 1A–1, Rule 11.

206 N.C. App. at 76-77, 698 S.E.2d at 120–21 (citations, quotation marks, ellipses, and brackets omitted).

Although *Durham* specifically addressed Rule 11, *see id.*, and not Rule 12, other cases have applied other Rules of Civil Procedure to estate proceedings, including dismissal by summary judgment under Rule 56 and directed verdict under Rule 50. *See*, *e.g.*, *Matter of Will of Allen*, ___ N.C. App. ___, 801 S.E.2d 380 (2017), *disc. review allowed*, ___ N.C. ___, ___ S.E.2d ___ (2018) ; *see also In re Will of Mason*, 168 N.C. App. 160, 165-66, 606 S.E.2d 921, 924-25 (2005) (noting that a caveat may be addressed by summary judgment and directed verdict). Dismissal upon summary judgment or directed verdict is also a disposition without a jury trial, so there is no absolute requirement for a jury trial in a will caveat. *See generally id. Will of Allen*, explained, "A caveat is an in rem proceeding and operates as an attack upon the validity of the instrument purporting to be a will. Summary judgment may be entered in a caveat proceeding in factually appropriate cases." *Will of Allen*, ____ N.C. App. at ___, 801 S.E.2d at 383 (citations, quotation marks, and brackets omitted). We therefore conclude that Rule 12(b)(6) applies to caveat proceedings just as it does to other civil proceedings.

B. Sufficiency of Caveat

[2] > The standard of review of an order granting a 12(b)(6) motion is whether the [caveat] states a claim for which relief can be granted under some legal theory when the [caveat] is liberally construed and all the allegations included therein are taken as true. . . . On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428–29 (2007) (citations and quotation marks omitted).

The Caveators argue that they "expect that Appellees will contest the 2012 Codicil on the grounds that the instrument is not entirely in Decedent's handwriting and that those portions which are type-written are essential to discern the meaning of the handwritten words." And

appellee does make exactly this argument. The alleged holographic codicil is decedent's 2011 Will with some handwritten notations. The Caveators claim that the notations clearly show the decedent's intent so they should be given effect, even if they must be read in conjunction with the typewritten document to have any meaning, claiming that appellee's argument is based "upon a hyper-technical interpretation of the applicable statute." Perhaps appellee's argument is "hyper-technical[,]" but it is also the law as set forth by both this Court and our Supreme Court. *See Will of Allen*, ___ N.C. App. at ___, 801 S.E.2d at 383–85.

Will of Allen also addressed handwritten notations on a typewritten will which the decedent had previously executed, and this Court summarized the "Requirements for a Holographic Codicil to a Typewritten Will":

> A codicil is a supplement to a will, annexed for the purpose of expressing the testator's after-thought or amended intention. The mere making of a codicil gives rise to the inference of a change in the testator's intention, importing some addition, explanation, or alteration of a prior will.
>
> The statutory requirements for partial revocation or change to a will are found in N.C. Gen. Stat. § 31-5.1 (2015), which states in relevant part that a written will, or any part thereof, may be revoked only (1) by a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills. The manner provided for the execution of a holographic will is set out in N.C. Gen. Stat. § 31-3.4 (2015), which provides in pertinent part as follows:
>
> (a) A holographic will is a will
>
> (1) Written entirely in the handwriting of the testator but when all the words appearing on a paper in the handwriting of the testator are sufficient to constitute a valid holographic will, the fact that other words or printed matter appear thereon not in the handwriting of the testator, and not affecting the meaning of the words in such handwriting, shall not affect the validity of the will, and
>
> (2) Subscribed by the testator and
>
> (3) Found after the testator's death among the testator's valuable papers or effects.

Our Supreme Court has held that in some circumstances an addenda in the handwriting and over the signature of the testatrix written on the face of the typewritten attested will may be upheld as a holograph codicil thereto. However, our appellate jurisprudence has established specific requirements for a valid holographic codicil to a will. N.C. Gen. Stat. § 31-3.4(a)(1) states that the fact that other words or printed matter appear in a holographic will not in the handwriting of the testator, and not affecting the meaning of the words in such handwriting, shall not affect the validity of the will. *Goodman* applied this rule to a holographic codicil to a typewritten will:

> While the derivative and applied meaning of the word holograph indicates an instrument entirely written in the handwriting of the maker, this would not necessarily prevent the probate of a will where other words appear thereon not in such handwriting but not essential to the meaning of the words in such handwriting. But where words not in the handwriting of the testator are essential to give meaning to the words used, the instrument will not be upheld as a holograph will.

In *Goodman*, the testatrix added and signed the following handwritten words to her typewritten will: "To my nephew Burns Elkins 50 dollars" "Mrs. Stamey gets one-half of estate if she keeps me to the end"; and "My diamond ring to be sold if needed to carry out my will, if not, given to my granddaughter Mary Iris Goodman." Because the effect of these additions to the testatrix's will could be determined without reference to any other part of her will, our Supreme Court held that the handwritten notes on the testatrix's will constituted a valid holographic codicil:

> The additional words placed by her on this will written in her own handwriting and again signed by her are sufficient, standing alone, to constitute a valid holograph will; that is, the legacy of $ 50 to Burns Elkins, the devise of one-half of her estate to Mrs. Stamey, and the bequest of the diamond ring to Mary Iris Goodman are sufficiently expressed to constitute a valid disposition of property to take effect after death.

> However, where the meaning or effect of holographic notes on a will requires reference to another part of the will, the holographic notations are not a valid holographic codicil to the will. For example, in *In re Smith's Will*, 218 N.C. 161, 10 S.E.2d 676 (1940), the decedent's will was duly probated as a holographic will. Thereafter, the decedent's widow submitted for probate a purported codicil or supplemental will that included both typewritten and holographic elements. Our Supreme Court held that:
>
> > The paper writing presented 6 March, 1939, was improvidently admitted to probate in common form. An examination of the instrument leads us to the conclusion that it was not in form sufficient to be entitled to probate as a holographic will. Words not in the handwriting of the testator are essential to give meaning to the words used.

Id. (emphasis in original) (citations, quotation marks, ellipses, and brackets omitted). In *Will of Allen*, this Court ultimately determined,

> the words of the handwritten notation are not sufficient, standing alone, to establish their meaning. In order to understand the notation, it is necessary to incorporate or refer to the contents of Article IV to which the note refers. As discussed above, our appellate jurisprudence establishes that a holographic codicil is invalid if words not in the handwriting of the testator are essential to give meaning to the words used. We conclude that under binding precedent of our Supreme Court, the handwritten notation does not constitute a valid holographic codicil to the will.

Id. at ___, 801 S.E.2d at 385 (citation, quotation marks, and brackets omitted).

Here, the handwritten notations are almost entirely illegible, but for purposes of Rule 12(b)(6) review, we have assumed they say what the Caveators allege. *See Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428–29. But even if we make this assumption as to the content of the notations, the handwritten notations are still not sufficient, standing alone, to establish their meaning. The notations must be read along with the typewritten provisions of the 2011 Will to have any meaning. Accordingly,

> our appellate jurisprudence establishes that a holographic codicil is invalid if words not in the handwriting of the testator are essential to give meaning to the words used. We

> conclude that under binding precedent of our Supreme Court, the handwritten notation does not constitute a valid holographic codicil to the will.

Id.

Appellee alleges four other reasons the alleged caveat was properly dismissed, including the lack of any allegation of where the codicil was found and a lack of a subscription by the testator, both requirements under North Carolina General Statute § 31-3.4 (2015) for a valid holographic will, but we need not address those arguments since we have already determined that the caveat fails to state a valid claim because the handwritten notations have no meaning apart from the typewritten provisions of the 2011 Will. *See* N.C. Gen. Stat. § 31-3.4; *see also Will of Allen*, ___ N.C. App. at ___, 801 S.E.2d at 383-385. Because the handwritten notations on the alleged holographic codicil are not sufficient standing alone to "give meaning to the words used" *id.*, ___ N.C. App. at ___, 801 S.E.2d at 384, the caveat fails to state "a claim for which relief can be granted[,]" *Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428, and we affirm the trial court's order.

III. Conclusion

Because the alleged holographic codicil failed to meet the requirements of North Carolina General Statute § 31-3.4, the caveat was properly dismissed, and we affirm the trial court's order.

AFFIRMED.

Judges ELMORE and TYSON concur.

JEFFRIES v. CTY. OF HARNETT

[259 N.C. App. 473 (2018)]

KENT JEFFRIES, PETITIONER, AND LYNWOOD HARE, FRANCES L. HARE, BOBBIE LEWIS JEFFRIES, AND THOMAS GLENN FINCH, INTERVENING PETITIONERS
v.
COUNTY OF HARNETT, RESPONDENT, AND DRAKE LANDING, LLC, WILLIAM DAN ANDREWS, AND LINDA ANDREWS, INTERVENING RESPONDENTS

No. COA17-729

Filed 15 May 2018

1. Appeal and Error—preservation of issues—decision-making boards—petition for writ of certiorari

Petitioners challenging a determination that certain hunting and shooting activities constituted "agritourism" and thus were exempt from countywide zoning failed to perfect an appeal from one of several orders of the county board of adjustment by not filing any objections or otherwise complying with the petition filing requirements of N.C.G.S. § 160A-393(c) necessary to seek review of quasi-judicial decisions of decision-making boards. The trial court properly concluded that petitioners were procedurally barred from challenging the specified order for the first time at the certiorari review hearing and did not err in affirming that order.

2. Appeal and Error—preservation of issues—procedural posture

The Court of Appeals rejected petitioners' argument that a decision of the county board of adjustment they were procedurally barred from challenging should have been reviewed on the merits due to being in the same procedural posture as an earlier board decision that was reviewed by the trial court. The postures were procedurally different because petitioners unambiguously expressed their intent to appeal the earlier decision and lodged specific, written objections to that decision prior to the hearing in the trial court.

3. Zoning—farm exemption—definition of agriculture—shooting activities

The trial court properly concluded that various shooting activities did not constitute "agriculture" under N.C.G.S. § 106-581.1 or "bona fide farm purposes" under N.C.G.S. § 153A-340 and thus were not shielded from zoning under the statutory farm exemption. The legislature's 2017 amendment to section 153A-340 which added a definition of "agritourism" served to clarify existing law, not alter it, and proved instructive to the Court of Appeals in its evaluation of the type of activities exempt from zoning. The Court of Appeals determined that the specified commercial shooting activities at

issue, even when done on a bona fide farm and in preparation for the hunt, did not fit within traditional notions of hunting and thus did not constitute "agritourism" so as to be exempt from zoning.

4. Appeal and Error—record on appeal—failure to include ordinance—subject to dismissal—mootness

Intervening-respondents' arguments that the trial court misinterpreted a county unified development ordinance (UDO) to require a nexus between the farming activities and the shooting activities on their land were dismissed because the parties failed to include the UDO in the record on appeal and because the Court of Appeals' resolution of the appeals from two other orders rendered the arguments moot.

Judge MURPHY concurs in result only.

Appeal by petitioners from order entered 10 March 2017 by Judge C. Winston Gilchrist, and appeal by respondents from orders entered 17 March 2014 by Judge C. Winston Gilchrist and 24 July 2012 by Judge Tanya T. Wallace, in Harnett County Superior Court. Heard in the Court of Appeals 27 November 2017.

Troutman Sanders LLP, by Gavin B. Parsons, for petitioner-appellant and petitioner-appellee Kent Jeffries, and for intervening-petitioner-appellants and intervening-petitioner-appellees Lynwood Hare, Frances L. Hare, Bobbie Lewis Jefferies, and Thomas Glenn Finch.

No brief filed for respondent-appellee, Harnett County.

Bryant & Ivie, PLLC, by John Walter Bryant and Amber J. Ivie, for intervening-respondent-appellees and intervening-respondent-appellants Drake Landing, LLC, William Dan Andrews, and Linda Andrews.

ELMORE, Judge.

William Dan Andrews and Linda Andrews own and operate Drake Landing, LLC (collectively, "intervening-respondents"), a recreational hunting and shooting enterprise operating in Harnett County. William Dan Andrews is also the sole proprietor of Andrews Farms, a bona fide commercial crop farm. Drake Landing operates a controlled hunting

preserve and a variety of other commercial shooting activities on several acres of property it leases from Andrews Farms. Drake Landing has never obtained conditional-use permits to operate its hunting preserve or the other shooting activities on the basis that these activities constituted "agritourism" and were thus exempt from countywide zoning. Petitioner Kent Jeffries and intervening-petitioners Frances L. Hare, Bobbie Lewis Jeffries, and Thomas Glenn Finch (collectively, "petitioners") own residential property adjacent to or near Drake Landing. This case arose from Jeffries' request that the local zoning authority determine whether thirteen different shooting activities offered at Drake Landing constituted agritourism and were thus exempt from countywide zoning, including a conditional-use permitting requirement. After several hearings and hearings on remand before the Harnett County Board of Adjustment ("Board"), the superior court entered multiple orders on the matter, three of which are on appeal.

First, intervening-respondents appeal from a 2012 superior court order that remanded a 2011 Board decision with instructions to allow petitioners to present evidence to satisfy their burden of establishing that Drake Landing's shooting activities were unrelated to Andrews Farms' farming operations and were thus not shielded from zoning regulation under the statutory farm exemption. On appeal, intervening-respondents assert the superior court misinterpreted the zoning ordinance and our General Statutes by concluding that a nexus must exist between the shooting activities and the farming operations, because the shooting activities constitute agritourism and no such nexus is required for agritourism activities to be shielded by the farm exemption from countywide zoning.

Second, intervening-respondents appeal from a 2014 superior court order that reversed in part a 2013 Board decision, in which the court concluded under its *de novo* interpretation of the statutory farm exemption that shooting activities involving continental shooting towers, 3D archery courses and ranges, sporting clays, skeet and trap ranges, rifle ranges, and pistol pits were not as a matter of law activities intended by the legislature to be shielded from zoning regulation, even when performed on bona fide farm property, and even when done in preparation for the rural activity of hunting. The 2014 order also remanded the case to the Board with instructions for it to issue adequate findings and conclusions to support its determination that the remaining challenged activity—Drake Landing's operation of its controlled hunting preserve for domestically raised game birds—constituted a zoning-exempt agritourism activity. On appeal, intervening-respondents assert

the superior court misinterpreted our General Statutes by concluding these other shooting activities were not "agriculture" in the form of "agritourism" but, instead, were "nonfarm purposes" as a matter of law, and were thus subject to zoning regulation.

Third, petitioners appeal from a 2017 superior court order that affirmed a 2016 Board decision entered on remand from the 2014 order. In its 2016 decision, the Board determined that Drake Landing's operation of its hunting preserve was shielded from zoning under the statutory farm exemption. In its 2017 order, the superior court acknowledged that intervening-respondents filed the only petition for *certiorari* review of the 2016 Board decision, and that intervening-respondents conceded they raised no issue with that decision. The order also indicated the superior court judge refused to consider petitioners' challenges to the Board's 2016 decision because they failed to timely perfect an appeal from, or to raise any written objections to, the Board's decision as required under N.C. Gen. Stat. § 160A-393. The superior court thus affirmed the 2016 Board decision. On appeal, petitioners assert the superior court misinterpreted our General Statutes by not concluding that operating a controlled hunting preserve is excluded from the definition of "agritourism" because it amounts to a "nonfarm purpose" as a matter of law and is thus subject to countywide zoning. Petitioners contend, alternatively, that even if operating a controlled hunting preserve is not precluded as a matter of law from the definition of "agritourism," the Board's determination that Drake Landing's particular controlled hunting preserve operation is zoning-exempt was not supported by substantial, competent evidence in the whole record and was thus arbitrary and capricious. Petitioners also contend the superior court erred by failing to adequately review the merits of the Board's 2016 decision, since it refused to address their challenges to that decision.

After careful review, we affirm the 2014 and 2017 orders. We dismiss intervening-respondents' challenges to the 2012 order because they failed to include in the appellate record the Harnett County Unified Development Ordinance (UDO), upon which they primarily rely to challenge that order, and because our dispositions of petitioners' appeal from the 2017 order and of intervening-respondents' appeal from the 2014 order renders moot any remaining challenges to the 2012 order.

I. Background

William Dan Andrews is the sole proprietor of Andrews Farms, an undisputed bona fide farm. Andrews Farms owns over 2,000 acres of property and its agricultural operation currently consists of harvesting

and producing crops, including, *inter alia*, tobacco, pine straw, soybeans, timber, and grain sorghum. Since the 1990s, a tract of around 240 acres of Andrews Farms' property has been licensed as a controlled hunting preserve, and fowl such as pheasants and chukars have been domestically raised on the property for hunting purposes.

Around 2005, William Dan Andrews and his wife, Linda Andrews, established Drake Landing, a recreational hunting and shooting enterprise that operates on leased property from Andrews Farms. Drake Landing began its business by taking over the hunting preserve operation. Over time, however, Drake Landing added clay target throwers and other parts of the range to offer its patrons additional shooting activities beyond that of the early morning duck hunts and the afternoon pheasant, chukar, and quail hunts. According to the Board's unchallenged finding on the matter, Drake Landing uses over 2,000 acres of Andrews Farms' property to operate its hunting preserve but only about 100 to 120 acres to operate the other shooting activities.

In November 2010, petitioner Kent Jeffries, an adjacent property owner and the president of the North Harnett Property Rights Association, Inc. ("Property Rights Assoc."), wrote the Harnett County Planning Department to inquire as to whether the following shooting activities offered at Drake Landing constituted "agritourism" and were thus exempt from countywide zoning: (1) "hunting preserves"; (2) " 'continental tower shoots' for pheasant"; (3) "3-D archery courses and archery shooting ranges"; (4) "sporting clays and sporting clay courses"; (5) "skeet and trap ranges and other shotgun shooting stations"; (6) "pistol shooting pits and pistol shooting ranges"; (7) "rifle shooting ranges"; (8) "concealed carry handgun training"; (9) " 'Three Gun' firearms competitions"; (10) "IDPA (International Defensive Pistol Association) competitions, both sanctioned and non-sanctioned"; (11) "shotgun competitions, both sanctioned and non-sanctioned"; (12) "other forms of firearms competitions"; and (13) "corporate events hosted on an agritourism farm . . . ."

On 18 January 2011, the zoning authority responded by letter in which it concluded (1) hunting preserves constitute agritourism; (2) continental tower shoots and (3) 3D archery courses and ranges, as "activities related to . . . methods and weapons customarily used in the act of hunting in North Carolina," constituted agritourism; (4) sporting clays, (5) trap ranges, and (6) shotgun shooting stations constitute agritourism "when used 'in preparation for the hunt' "; (7) pistol pits and (8) rifle ranges, when "used to educate, enhance or assist in marksmanship skills for the purpose of hunting in a traditional manner . . . would be considered a related use to the agritourism activity" because those training activities

were "considered 'preparing for the hunt' "; and (9) corporate events involving these agritourism activities were similarly zoning-exempt. However, the zoning authority concluded, "concealed carry handgun courses, firearms competitions such as three gun and IDPA," and "tactical type training [were] not viewed as a form of agritourism."

Jeffries, individually and as president of the Property Rights Assoc., appealed the zoning authority's determinations to the Harnett County Board of Adjustment ("Board"). After a hearing, the Board entered an order on 9 May 2011 upholding the zoning authority's agritourism conclusions as to each activity on the basis that petitioners failed to show reversible error in the zoning authority's decision ("2011 Board Decision").

On 10 October 2011, Jeffries filed a petition in the superior court for *certiorari* review of the 2011 Board Decision. He argued in relevant part that he was prevented at the Board hearing from presenting evidence to establish that there was no nexus between Drake Landing's shooting activities and Andrews Farms' farming operations. Later, Drake Landing, William Dan Andrews, and Linda Andrews were allowed to intervene in the case. After the *certiorari* review hearing, the superior court entered an order on 24 July 2012 remanding the matter to the Board ("2012 Order"). In its 2012 Order, the superior court concluded that petitioners "were denied the opportunity to demonstrate facts consistent with their appeal to the Board of Adjustment" and thus remanded the 2011 Board Decision and instructed the Board "to determine for each activity from which Petitioners appealed whether Petitioners can demonstrate the requisite lack of connectivity between the shooting activities and farming activities on the premises of Drake Landing" and to allow petitioners "concerning each disputed activity, to offer evidence concerning the scope, size, hours of operation, number of persons involved, traffic, etc. and relation to shooting activities and farming activities as well as enterprise."

After the ordered remand hearing, the Board issued a decision on 11 March 2013, again upholding the zoning authority's agritourism conclusions ("2013 Board Decision"). In its 2013 Board Decision, the Board concluded that (1) "[h]unting preserves are agritourism" and concluded further that, "as used in preparation for the hunt," so were the following activities: (2) "Continental Tower shoots," (3) "3D Archery courses and ranges," (4) "Sporting Clays," (5) "Skeet and Trap shooting and ranges," (6) "Rifle Ranges," and (7) "Pistol Pits." The Board also concluded that (8) "Corporate Events" constituted agritourism "when used with hunting preserves or farming activities."

On 10 April 2013, Jeffries petitioned the superior court for *certiorari* review of the 2013 Board Decision. Later, adjacent residential property owners Bobbie Lewis Jeffries, Lynwood W. Hare, Frances L. Hare, and Thomas Glenn Finch were allowed to intervene in the case. After the *certiorari* review hearing, the superior court reversed in part and remanded in part the 2013 Board Decision by order entered 17 March 2014 ("2014 Order").

In its 2014 Order, the superior court remanded the Board's determination as to the (1) hunting preserve and reversed the Board's conclusions that (2) "continental shooting towers," (3) "3D archery courses and ranges," (4) "sporting clay," (5) "skeet and trap ranges," (6) "rifle ranges," (7) "pistol pits," and (8) corporate events involving these shooting activities were shielded from zoning regulation under the statutory farm exemption. Under a *de novo* review of the farming exemption statutes, the superior court concluded as a matter of law that those shooting activities were neither "agriculture" under N.C. Gen. Stat. § 106-581.1 nor "bona fide farm purposes" under N.C. Gen. Stat. § 153A-340. Rather, the superior court concluded, those activities were "non-farm purposes" under N.C. Gen. Stat. § 153A-340(b), "even when conducted on property which otherwise qualifies as a bona-fide farm or when conducted in connection with or 'in preparation for' hunting" and were thus subject to zoning. It also concluded, alternatively, that under the whole-record test, the Board's decision was not supported by "substantial competent evidence in the whole record" because "[a]ll of the competence evidence in the record establishes that the activities are in fact non-farm uses which are subject to county zoning." However, the superior court remanded the matter in part with instructions for the Board to issue "findings of fact and conclusions of law on [Drake Landing's] operation of [its] 'hunting preserve.' "

On 4 April 2014, intervening-respondents filed notices of appeal from the 2012 and 2014 Orders. This Court subsequently allowed petitioners' motion to dismiss those appeals on the basis that the orders were interlocutory. *See* Order, *Jeffries v. Hare*, No. 14-1022 (N.C. App. Jan. 30, 2015) (dismissing appeals).

After remand from the 2014 Order, the Board issued a decision on 12 October 2015 in which it concluded that, because Drake Landing possessed a valid controlled hunting preserve license from the North Carolina Wildlife Resources Commission, its property was thus categorically exempt from zoning ("2015 Board Decision").

On 13 November 2015, intervening-respondents, not petitioners, petitioned the superior court for *certiorari* review of the 2015 Board

Decision. In its petition, intervening-respondents conceded they raised no issue with the 2015 Board Decision and requested relief in the form affirming that decision so they could refile their appeals from the 2012 and 2014 Orders. After a hearing, the superior court reversed the 2015 Board Decision by order entered 2 June 2016 ("2016 Order"). In its 2016 Order, the superior court concluded that possessing a controlled hunting preserve license did not categorically exempt Drake Landing's property from countywide zoning regulation, and it again remanded the matter with instructions for the Board to issue findings and conclusions to "address the specific activities, if any, which the Board finds to constitute a 'hunting preserve' and whether, and why, such activities are 'agritourism' within the meaning of the applicable North Carolina General Statutes."

After the ordered remand hearing, the Board issued a decision on 3 August 2016 with detailed findings and conclusions supporting its determination that Drake Landing's particular controlled hunting preserve operation was exempt from zoning ("2016 Board Decision"). In its 2016 Board Decision, the Board concluded in relevant part that

> controlled hunting preserves for domestically raised game birds, like those at Drake Landing and Andrews Farms, are exempt from any and all Harnett County zoning ordinances[ ] . . . because hunting preserves like those at Drake Landing and Andrews Farms are operated on a bona fide farm, constitute a bona fide farm purpose under both N.C. Gen. Stat. § 153A-340(b)(2) and N.C. Gen. Stat. § 106-581.1, and are considered agritourism under N.C. Gen. Stat. § 99E-30.

On 1 September 2016, intervening-respondents, not petitioners, petitioned the superior court for *certiorari* review of the 2016 Board Decision. In its petition, intervening-respondents again conceded they raised no issue with the 2016 Board Decision and requested relief in the form of affirming that decision, and again explained that they "intend[ed] to refile their appeal[s from the 2012 and 2014 Orders], which was previously dismissed by the Court of Appeals as interlocutory, and file[d] this Petition for Writ of Certiorari out of an abundance of caution in order to preserve their right to appeal." Petitioners never filed a petition for *certiorari* review of the 2016 Board Decision, moved to intervene as "petitioners" to intervening-respondents' petition, nor filed any responsive pleading in which they lodged any objections or requested any relief from that decision; rather, the first objection petitioners raised to the 2016 Board Decision occurred at the *certiorari* review hearing initiated

by intervening-respondents' petition. After the hearing, the superior court affirmed the 2016 Board Decision by order entered 10 March 2017 ("2017 Order").

In its 2017 Order, the superior court indicated that it refused to address the merits of any challenge to the 2016 Board Decision raised by petitioners for the first time at the *certiorari* review hearing. The superior court concluded that petitioners failed to timely preserve their objection to that decision because they failed to comply with N.C. Gen. Stat. § 160A-393(c)'s requirement of filing a petition for *certiorari* review, in which petitioners were required to state the grounds upon which they contended the Board erred and to state the relief they sought from the 2016 Board Decision, and because petitioners failed to file any "form of written objection or request from relief" from that decision. The superior court also acknowledged that intervening-respondents stated in their petition they raised no issue with the 2016 Board Decision and sought relief in the form of affirming that decision "solely to preserve their appellate rights with respect to prior rulings of the Superior Court." Accordingly, the superior court concluded that intervening-respondents were entitled as a matter of law to prevail on the issues properly before it and thus affirmed the 2016 Board Decision.

Intervening-respondents appeal the 2012 and 2014 Orders; petitioners appeal the 2017 Order.

II. Review Standards

On *certiorari* review of a county zoning board of adjustment's quasi-judicial decision, "the superior court sits as an appellate court," *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 189, 689 S.E.2d 576, 585 (2010) (citation and quotation marks omitted), and is tasked with the following:

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

Cary Creek Ltd. P'ship v. Town of Cary, 207 N.C. App. 339, 341–42, 700 S.E.2d 80, 82–83 (2010) (citation omitted). The superior court should

apply *de novo* review to a petitioner's allegation of error implicating one of the first three enumerations and whole-record review to the last two. *See, e.g.*, *Four Seasons Mgmt. Servs., Inc. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 75, 695 S.E.2d 456, 462 (2010) ("If a petitioner contends the Board's decision was based on an error of law, '*de novo*' review is proper. However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the 'whole record' test." (citation and quotation marks omitted)).

"We review a superior court's *certiorari* review of a [county] zoning board's quasi-judicial decision to determine whether the superior court: (1) exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly." *NCJS, LLC v. City of Charlotte*, ___ N.C. App. ___, ___, 803 S.E.2d 684, 688 (2017) (citation and internal quotation marks omitted).

III. Petitioners' Appeal

[1] On appeal from the 2017 Order, petitioners contend the superior court erred by affirming the 2016 Board Decision because (1) as a matter of law, operating a controlled hunting preserve does not constitute the "bona fide farm purpose[ ]" of "agritourism" under the statutory farm exemption but instead constitutes a "nonfarm purpose" under N.C. Gen. Stat. § 153A-340(b)(1), that is thus subject to countywide zoning regulation; or, alternatively, (2) even if a hunting preserve is not excluded as a matter of law from the definition of agritourism, the Board's decision was not supported by sufficient evidence in the whole record because petitioners presented substantial, competent evidence that Drake Landing's hunting preserve is wholly unrelated to Andrews Farms' farming operations, and that the scale of Drake Landing's hunting preserve operation is such that it amounts to a "nonfarm purpose" subject to zoning regulation. Petitioners also argue (3) the superior court failed to adequately review the 2016 Board Decision because its 2017 Order affirming that decision was based not on the merits of the 2016 Board Decision but merely on procedural grounds.

As a threshold matter, intervening-respondents contend that petitioners failed to preserve any objection to the 2016 Board Decision because they never filed a petition for *certiorari* review of that decision, nor filed any responsive pleading in which they raised an issue with, or requested any relief from, the 2016 Board Decision. Thus, intervening-respondents argue, the superior court properly affirmed the 2016 Board Decision based upon the issues properly before it. We agree.

In its 2017 Order, the superior court made the following unchallenged, and thus binding, factual findings:

> 1. On September 1, 2016, Intervening Respondents . . . filed a "Petition for Writ of Certiorari" from the [2016 Board Decision] finding the "hunting preserve" . . . to be agritourism and exempt from county zoning.
>
> 2. In their petition, Intervening Respondents expressly stated that their petition was filed solely to preserve their appellate rights with respect to prior rulings of the Superior Court. Intervening Respondents further stated that they "did not appeal the most recent determination of the Board of Adjustment" regarding their hunting preserve.
>
> 3. Intervening Respondents' Petition did not in any way object to, or allege any error in, the [2016 Board Decision].
>
> 4. Neither Petitioner Kent Jeffries nor any Intervening Petitioners filed a petition for writ of certiorari from the [2016 Board Decision]. Jeffries and Intervening Petitioners have not filed any written objection or request for relief from the [2016 Board Decision], nor have they asserted in any writing filed with this court, by pleading or Correspondence, the grounds upon which they contend any error was made nor requested any relief from the most recent decision of the Board of Adjustment.
>
> 5. Mr. Jeffries and Intervening Petitioners did not file any Answer in response to the petition of [intervening-respondents] and did not request any alternative relief.
>
> 6. Intervening Respondents objected at the February 21, 2017 hearing to the court considering any contentions of error now made by Kent Jeffries or Intervening Petitioners because such parties did not file any form of written objection.
>
> 7. North Carolina General Statute 160A-393(c), made applicable to county boards of adjustment by N.C. General Statute 153A-349, provides:
>
> > An appeal in the nature of certiorari shall be initiated by filing with the superior court a petition for writ of certiorari.

> The petition shall:
>
> (2) Set forth the grounds upon which the petitioner contends that an error was made . . . .
>
> (4) Set forth the relief the petitioner seeks.
>
> (emphasis added)
>
> 8. Mr. Kent Jeffries and Intervening Petitioners have not complied with the requirements of N.C. General Statute 160A-393 for timely preserving their objection to the [2016 Board Decision] and for seeking relief from such order.
>
> 9. Drake Landing, LLC, William Dan Andrews and Linda Andrews are entitled, as a matter of law, to prevail on the issues now before the court.

N.C. Gen. Stat. § 153A-393 (2017) governs appeals in the nature of *certiorari*. Upon issuing a writ for *certiorari* review of a board decision, the superior court "shall hear and decide all issues raised by the *petition*[,]" *id.* § 160A-393(j) (emphasis added), and "shall ensure that the rights of *petitioners* have not been prejudiced[,]" *id.* § 160A-393(k)(1) (emphasis added). Following its review, the superior court "may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings." *Id.* § 160A-393(l).

Here, intervening-respondents filed the only petition for *certiorari* review of the 2016 Board Decision in which they contended the Board made no error in its decision and sought relief in the form of affirming that decision. Petitioners, contrarily, never filed a petition for *certiorari* review of that decision and, consequently, never set forth any grounds upon which they contended the Board erred, nor requested any relief from the 2016 Board Decision; petitioners never moved to intervene as a "petitioner" for the *certiorari* review hearing on the 2016 Board Decision, *see* N.C. Gen. Stat. § 160A-393(h); nor did petitioners file any responsive pleading in which they raised any objection to that decision, *see id.* § 160A-393(g) (permitting but not requiring a party to file a responsive pleading). Indeed, although the 2016 Board Decision was entered and mailed to petitioners on 3 August 2016, petitioners lodged no formal objection to that decision until the 21 February 2017 *certiorari* review hearing initiated solely by intervening-respondents' petition.

Accordingly, because the only petition for *certiorari* review of the 2016 Board Decision was filed by intervening-respondents, in which they

conceded they raised no issue with that decision and requested relief in the form of affirming that decision, and because petitioners neither lodged any written objections to the 2016 Board Decision, requested any alternative form of relief, nor moved to intervene as a "petitioner," the superior court properly determined that the 2016 Board Decision did not prejudice the petitioning party's rights, and it thus did not err by affirming the 2016 Board Decision based upon intervening-respondents' petition.

Further, although petitioners attempted to challenge the 2016 Board Decision for the first time at the *certiorari* review hearing, the superior court properly refused to address the merits of their arguments on procedural grounds.

"[A]n appeal is not a matter of absolute right, but the appellant must comply with the statutes and rules of Court as to the time and manner of taking and perfecting his appeal." *Hirschman v. Chatham Cty.*, ___ N.C. App. ___, ___, 792 S.E.2d 211, 216 (2016) (citations and quotation marks omitted); *see also id.* at ___, 792 S.E.2d at 213 (holding that the superior court properly dismissed a petition for *certiorari* review of a board decision where the petitioner failed to name the conditional-use permit applicant as a respondent as required under N.C. Gen. Stat. § 160A-393(e) and thus failed to perfect his appeal, reasoning that this noncompliance deprived the superior court of jurisdiction to review the merits of the board decision). Under N.C. Gen. Stat. § 160A-393, to perfect an appeal from a zoning board's decision, a party with standing must file a petition in the superior court for *certiorari* review of that decision, which "shall[ ] . . . [s]et forth the grounds upon which the petitioner contends that an error was made" and "[s]et forth the relief the petitioner seeks." *Id.* §§ 160A-393(c)(1), (c)(4). "Our appellate courts have consistently held that the use of the word 'shall' in a statute indicates what actions are required or mandatory." *Hirschman*, ___ N.C. App. at ___, 792 S.E.2d at 213; *see also id.* at ___, 792 S.E.2d at 213–16 (holding that a non-conditional-use-applicant seeking *certiorari* review of a board decision never perfected an appeal because he failed to comply with N.C. Gen. Stat. § 160A-393(e)'s requirement that such a petitioner "shall . . . name th[e] applicant as a respondent . . . .").

Here, petitioners failed to comply with subsection 160A-393(c)'s petition filing requirements and thus never perfected an appeal from the 2016 Board Decision. Further, petitioners never moved to intervene as a "petitioner" to intervening-respondents' petition for *certiorari* review of the 2016 Board Decision, nor did they file any responsive pleading, raise any written objection, or request any relief from that decision. *Cf. Durham Cty. v. Addison*, 262 N.C. 280, 283, 136 S.E.2d 600, 603 (1964)

("The decision of the Board of Adjustment is not subject to collateral attack." (citation omitted)); *Wil-Hol Corp. v. Marshall*, 71 N.C. App. 611, 614, 322 S.E.2d 655, 657 (1984) ("[T]he statutory procedure for challenging the validity of a zoning ordinance is to petition the Superior Court for certiorari to review the final decision of the Board of Adjustment. A zoning ordinance may not be collaterally attacked by a party that failed to avail herself of the judicial review that the ordinance and statutes authorize." (internal citation omitted)). Thus, the superior court properly concluded that petitioners were procedurally barred from challenging the 2016 Board Decision for the first time at the *certiorari* review hearing. Accordingly, we affirm the 2017 Order affirming the 2016 Board Decision based on these procedural grounds and thus do not reach the merits of petitioners' challenges to the 2016 Board Decision.

[2] As a secondary matter, petitioners contend the procedural posture underlying the superior court's *certiorari* merits-review of the 2015 Board Decision is identical to that of its *certiorari* review of the 2016 Board Decision and, thus, the superior court should have similarly reviewed the merits of that later decision. In both instances, petitioners argue, intervening-respondents filed the only *certiorari* petition in which they set forth no allegations of error in the Board's decisions and requested relief in the form of affirming those decisions for the purpose of preserving their right to refile their appeals from the 2012 and 2014 Orders. Although the 2016 Order is not on appeal, we reject petitioners' argument. The postures yielding both *certiorari* review hearings were procedurally different and, before the superior court's *certiorari* review of the 2015 Board Decision, petitioners unequivocally expressed their intent to appeal that decision and lodged specific, written objections to that decision.

The 2014 Order remanded the 2013 Board Decision, which yielded the 2015 Board Decision. On 19 October 2015, respondent Harnett County wrote a letter to Judge Gilchrist, who issued the 2014 Order, and enclosed a courtesy copy of the 2015 Board Decision. In its letter, Harnett County wrote: "It is the belief of counsel and the parties that procedurally, the appeal of the [2015 Board Decision] would lie in Harnett County Superior Court, but that Your Honor would be under no obligation to judicially review [that decision] unless appeal is affirmatively taken by any of the parties." On 26 October 2015, Jeffries responded by letter to Judge Gilchrist, writing that Hartnett County "is an adverse party in this case and does not speak for the petitioners" and that "[i]t is my position that an appeal is not necessary because this matter has already been appealed." Jeffries opined that this Court, in dismissing intervening-respondents' prior appeals, "labeled [the 2014 Order] as an

'interlocutory order' that 'did not decide all issues before the trial court' " and, thus, "[t]his case is now back in Your Honor's court . . . ." Jeffries then objected in writing to the Board's decision to "adopt[ ] wholesale the County's draft order" and not allow petitioners to discuss or explain their proposed order, and then set forth five separate grounds upon which he challenged the propriety of the 2015 Board Decision. Jeffries also requested that Judge Gilchrist "set dates for the submission of written arguments and for oral argument." Subsequently, on 13 November 2015, intervening-respondents filed their petition for *certiorari* review of the 2015 Board Decision.

As reflected, although the *certiorari* reviews of both the 2015 and 2016 Board Decisions were initiated solely by intervening-respondents' petition, unlike their failures to do so with the 2016 Board Decision, petitioners unambiguously expressed their intent to appeal the 2015 Board Decision and lodged specific, written objections to that decision before the hearing. Accordingly, we reject petitioners' argument.

IV. Intervening-Respondents' Appeals

A. 2014 Order

[3] On appeal from the 2014 Order, intervening-respondents assert the superior court erred by reversing the 2013 Board Decision with respect to its conclusions that Drake Landing's operation of commercial shooting activities involving "continental shooting towers, 3D archery courses and ranges, sporting clay, skeet and trap ranges, rifle ranges and pistol pits" constituted "agritourism" activities shielded by the statutory farm exemption from countywide zoning. Intervening-respondents argue that the superior court (1) misinterpreted our General Statutes by concluding as a matter of law that these shooting activities fall outside the farm exemption and were thus subject to zoning; and (2) erroneously concluded that, in the alternative, the 2013 Board Decision was not supported by substantial competent evidence in the whole record. Because we hold that the superior court properly concluded these shooting activities as a matter of law fall outside the statutory farm exemption, we affirm the 2014 Order on this basis. We thus need not address intervening-respondents' remaining challenge to the superior court's alternative rationale for reversing the 2013 Board Decision.

In its 2014 Order, the superior court concluded in relevant part:

> Issues of statutory interpretation are questions of law to be decided by application of a *de novo* standard of review. Applying the *de novo* standard, the court concludes that

> the General Assembly did not intend to include continental shooting towers, 3D archery courses and ranges, sporting clay, skeet and trap ranges, rifle ranges and pistol pits within the definition of "agriculture" in N.C. Gen. Stat. § 106-581.1 or of "bona fide farm purposes" under N.C. Gen. Stat. § 153A-340. These uses are instead non-farm purposes under N.C. Gen. Stat. § 153A-340(b) and are not exempt from county zoning laws, even when conducted on property which otherwise qualifies as a bona-fide farm or when conducted in connection with or 'in preparation for' hunting.

As reflected, the superior court properly identified *de novo* as the applicable review standard to address issues of statutory interpretation. Our review is whether it properly applied that standard by concluding these shooting activities do not as a matter of law constitute activities intended to be shielded from zoning under the statutory farm exemption.

1. Statutory Farm Exemption from Countywide Zoning

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Lanvale Properties, LLC v. Cty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809 (2012) (citation and quotation marks omitted). "[W]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. *Id.* at 154, 731 S.E.2d at 809–10 (citation and quotation marks omitted). Only where statutory language is unclear or ambiguous may courts resort to canons of judicial construction to interpret meaning.

Under the statutory farm exemption, "property used for bona fide farm purposes" is exempt from countywide zoning regulation but "the use of farm property for nonfarm purposes" is not. *See* N.C. Gen. Stat. § 153A-340(b)(1) (2013) (providing that countywide zoning "regulations may affect property used for bona fide farm purposes," with the exception of swine farms, but providing that "[t]his subsection does not limit regulation . . . with respect to the use of farm property for nonfarm purposes");[1] *see also Hampton v. Cumberland Cty.*, ___ N.C. App. ___, ___,

1. Effective 12 July 2017, our General Assembly eliminated county authority to regulate swine farms by amending N.C. Gen. Stat. § 153A-340(b)(1) to now provide that countywide zoning "regulations may not affect property used for bona fide farm purposes; provided, however, that this subsection does not limit regulation . . . with respect to the use of farm property for nonfarm purposes." *See* Act of July 12, 2017, ch. 108, sec. 9.(a), 2017 N.C. Sess. Laws ___, ___ (eliminating county authority to regulate swine farms).

808 S.E.2d 763, 775 (2017) (noting that "non-farm uses, even on bona fide farms, are not exempt from zoning regulation"). "[B]ona fide farm purposes include the production and *activities relating or incidental to the production of* crops, grains, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and *all other forms of agriculture*, as defined in G.S. 106-581.1." N.C. Gen. Stat. § 153A-340(b)(2) (2013) (emphasis added). "Agriculture" is defined in relevant part as follows:

> *When performed on the farm*, *'agriculture' . . . also include[s]* the marketing and selling of agricultural products, *agritourism*, the storage and use of materials for agricultural purposes, packing, treating, processing, sorting, storage, and other activities performed to add value to crops, livestock, and agricultural items produced on the farm, and similar activities incident to the operation of a farm.

Id. § 106-581.1(6) (2013) (emphasis added).

However, neither Chapter 153A, governing county authority, nor Chapter 106, governing agriculture, defined "agritourism." But Chapter 99E, governing special liability provisions, defined "[a]gritourism activity" in relevant part as

> [a]ny activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions.

Id. § 99E-30(1) (2013).

2. 2017 Act

While it was unclear when the Board and superior court decided the matter whether the legislature intended to shield from countywide zoning regulation the same "agritourism activities" it intended to shield from liability, after the case reached this Court, our General Assembly enacted "An Act to Amend Certain Laws Governing Agricultural Matters" ("2017 Act"). *See* Act of July 12, 2017, ch. 108, 2017 N.C. Sess. Laws ___, ___. Most pertinent here, the 2017 Act amended N.C. Gen. Stat. § 153A-340(b) by adding subdivision (2a), which in relevant parts incorporated N.C. Gen. Stat. § 99E-30(1)'s "agritourism activity" definition into section 153A-340 and described certain types of zoning-exempt

agritourism buildings and structures. Ch. 108, sec. 8.(a), 2017 N.C. Sess. Laws at ___ (clarifying activities incident to the farm and agritourism). As a result, the applicable statutory farm exemption provisions now provide in pertinent part:

> For purposes of this section, "agritourism" means any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions. A building or structure used for agritourism includes any building or structure used for public or private events, including, but not limited to, weddings, receptions, meetings, demonstrations of farm activities, meals, and other events that are taking place on the farm because of its farm or rural setting.

N.C. Gen. Stat. § 153A-340(b)(2a) (2017). A threshold question is whether N.C. Gen. Stat. § 153A-340(b)(2a) applies in this case to guide our interpretation of whether these shooting activities were intended by the legislature to constitute agritourism activities shielded by the statutory farm exemption.

An amendment that substantially alters the meaning of a law applies only prospectively. *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 682 (2012) ("[T]he default rule provides statutes with a prospective effective date[.]" (citation omitted)). But an amendment that merely clarifies the meaning of a law, rather than alters its substance, "will apply to all claims pending or brought before our State's courts after the amendment's passage." *Id.* We must therefore determine whether the addition of subdivision (2a) clarifies or alters subsection (b). *Id.* at 9, 727 S.E.2d at 681¬82 ("It is this Court's job to determine whether an amendment is clarifying or altering." (citation omitted)).

> "To determine whether the amendment clarifies the prior law or alters it requires a careful comparison of the original and amended statutes." If the statute initially "fails expressly to address a particular point" but addresses it after the amendment, "the amendment is more likely to be clarifying than altering."

Id. at 10, 727 S.E.2d at 682 (quoting *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 659, 435 S.E.2d 309, 315 (1993)).

In *Ferrell*, our Supreme Court was presented with an issue requiring it to interpret a statute governing the reconveyance of land taken by eminent domain but no longer needed, which was amended while the appeal was pending, and addressed whether that amendment was merely clarifying and thus applicable, or was substantially altering and thus inapplicable. 334 N.C. 650, 435 S.E.2d 309 (1993). There, when the Department of Transportation (DOT) offered its initial sell-back price offer to the original property owner, the relevant statute did not specify at what price the DOT was to sell back the property. *Id.* at 657, 435 S.E.2d at 314. But by the time the case reached our Supreme Court, the legislature had amended that statute by adding language that provided clear guidance on the sell-back price calculation. *Id.* at 658–59, 435 S.E.2d at 315. Our Supreme Court concluded that the amendment was clarifying, not altering, and thus relied on its calculative guidance in determining the propriety of the DOT's sell-back price offer. The *Ferrell* Court reasoned:

> Since here the statute before amendment provided no express guidance as to selling price, the amendment which addresses the selling price is best interpreted as clarifying the statute as it existed before the amendment. It is, therefore, strong evidence of what the legislature intended when it enacted the original statute.

Id. at 659, 435 S.E.2d at 315–16 (footnote omitted).

Here, when the Board and superior court issued their decisions, N.C. Gen. Stat. § 153A-340(b) exempted from zoning regulation property used for "bona fide farm purposes," which included "all . . . forms of agriculture" under N.C. Gen. Stat. § 106-581.1, such as "agritourism." But neither statute defined "agritourism." However, after this case reached our Court, the legislature amended N.C. Gen. Stat. § 153A-340(b) by adding subdivision (2a), which incorporated verbatim N.C. Gen. Stat. § 99E-30(1)'s "agritourism activity" definition into the section 153A-340 and provided guidance on what buildings or structures might constitute agritourism buildings or structures, providing "strong evidence" that the General Assembly intended to shield from zoning regulation the same agritourism activities it intended to shield from liability, and that the amendment intended to clarify what sorts of activities it contemplated might constitute agritourism.

Thus, we conclude that the addition of N.C. Gen. Stat. § 153A-340(b)(2a) served merely to clarify, rather than alter, the substance of the statutory farm exemption by providing further guidance on what constitutes

zoning-exempt agritourism activities. *See* ch. 108, sec. 8.(a), 2017 N.C. Sess. Laws at ___ (labeling the heading of section 8(a), which added N.C. Gen. Stat. § 153A-340(b)(2), as "Clarify activities incident to the farm and agritourism" (original in all caps)); *see also Taylor v. Crisp*, 286 N.C. 488, 497, 212 S.E.2d 381, 387 (1975) (" 'Whereas it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law, no such inference arises when the legislature amends an ambiguous provision.' In such case, the purpose of the variation may be 'to clarify that which was previously doubtful.' " (citation omitted)). We therefore rely on the clarifying language of subdivision (2a) to guide our interpretation of whether the legislature intended these shooting activities to constitute "agritourism" activities shielded from zoning regulation under the statutory farm exemption.

3. N.C. Gen. Stat. § 153A-340(b)(2a)

It is undisputed that Drake Landing operates its business on property it leases from Andrews Farms, a bona fide farm. At issue is whether using bona fide farm property to operate commercial shooting activities involving continental shooting towers, 3D archery courses and ranges, sporting clay, skeet and trap ranges, rifle ranges and pistol pits constitutes agritourism. As stated above, N.C. Gen. Stat. § 153A-340(b)(2a) defines "agritourism" in pertinent part as follows:

> "[A]gritourism" means any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy *rural activities*, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions.

Id. § 153A-340(b)(2a) (emphasis added).

Based on its plain language, it is unclear whether our legislature intended for these shooting activities, even when relating to or incidental to a rural activity such as hunting, to constitute zoning-exempt agritourism activities. Indeed, in the 2017 Act, the General Assembly requested a Legislative Research Commission study pertaining to what constitutes agritourism. *See* ch. 108, sec. 1.(a), 2017 N.C. Sess. Laws at ___ (ordering the Agriculture and Forestry Awareness Study Commission to study "[t]he type of activities that constitute agritourism when conducted on a bona fide farm and other relevant matters relating to agritourism activities"). Accordingly, we turn to the canons of judicial construction.

N.C. Gen. Stat. § 153A-340(b)(2a)'s use of "including" to introduce examples of acceptable "rural" agritourism activities indicates the list

is meant to be illustrative and not exhaustive. The statute does not define "rural."

> "[U]ndefined words are accorded their plain meaning so long as it is reasonable to do so." In determining the plain meaning of undefined terms, "this Court has used 'standard, nonlegal dictionaries' as a guide."

Midrex Techs., Inc. v. N.C. Dep't of Revenue, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (alteration in original) (citations omitted); *see also id.* at 259, 794 S.E.2d at 792 (relying on the New Oxford American Dictionary to define "building," "construction," and "contractor"). The dictionary definition of "rural" is "in, relating to, or characteristic of the countryside rather than the town." *New Oxford American Dictionary* 1531 (Angus Stevenson & Christine A. Lindberg eds. 3d ed. 2010). As petitioners concede in their brief, "hunting is a traditional rural activity." Under certain circumstances, activities incidental or relating to hunting that occur in, relate to, and are characteristic of the countryside, which retain the spirit of the traditional hunting, may reasonably fit within an example of a "rural" agritourism activity. Thus, for instance, operating a controlled hunting preserve for domestically raised game birds which supports a bona fide farm operation and allows the public "for recreational [or] entertainment purposes[ ] to . . . enjoy [the] rural activit[y]" of traditional hunting may constitute agritourism. But the other shooting activities at issue here do not fit so squarely into this interpretation.

Because N.C. Gen. Stat. § 153A-340(b)(2a) lists examples of rural activities, we turn to associative canons of construction. The interpretative canon of *noscitur a sociis* instructs that "associated words explain and limit each other" and an ambiguous or vague term "may be made clear and specific by considering the company in which it is found, and the meaning of the terms which are associated with it." *City of Winston v. Beeson*, 135 N.C. 192, 198, 47 S.E. 457, 460 (1904) (citations omitted); *see also State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) ("*Noscitur a sociis* is a rule of construction applicable to all written instruments." (citation omitted)). The interpretive canon of *expressio unius est exclusio alterius* instructs that the expression of one thing implies the exclusion of another. *See, e.g.*, *Fort v. Cty. of Cumberland*, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355 (2012) (citations omitted).

Applying the principle of *noscitur a sociis* to subdivision (2a)'s rural activity examples of "farming, ranching, historic, cultural, harvest-your-own activities, or other natural activities and attractions" imply that other contemplated rural agritourism activities should fit, in

a categorical sense, within this grouping. The listed examples associate in part because they allow members of the non-rural public to view or enjoy traditional rural activities or attractions relating to agriculture that typically occur in a rural setting. The activities listed also associate in part because they are "natural," in that their performance preserves the land and does not require its alteration other than by public consumption of natural items on the land. *Cf. Friends of Hatteras Island v. Coastal Res. Comm'n*, 117 N.C. App. 556, 575, 452 S.E.2d 337, 349 (1995) ("Hunting, fishing, navigation and recreation require only a temporary presence on the Reserve and do not necessitate alteration of the Reserve's undeveloped and natural state."). In applying the principle of *expressio unius est exclusio alterius*, however, that subdivision (2a) explicitly lists "farming" and "ranching" but not "hunting" implies that shooting activities, even when related to hunting, were not contemplated as "agritourism."

Moreover, N.C. Gen. Stat. § 153A-340(b)(2a) defines "[a] building or structure used for agritourism" in relevant part as

> any building or structure used for public or private events, including, but not limited to, weddings, receptions, meetings, demonstrations of farm activities, meals, and other events that are taking place on the farm because of its farm or rural setting.

Applying the principle of *noscitur a sociis*, the illustrative examples of agritourism buildings or structures include those used for "weddings, receptions, meetings, demonstrations of farm activities, [and] meals," events which share no commonality with hunting or shooting activities. Further, the inclusive phrase tying these examples together—"and other events that are taking place on the farm *because of its farm and rural setting*"—indicates the legislature did not contemplate buildings or structures used for shooting activities to be zoning-exempt agritourism buildings or structures. While shooting activities might require the land space that only a rural setting can provide, unlike the other event examples, they are not purposefully performed on a farm for the aesthetic value of the farm or its rural setting.

"Where legislative intent is not readily apparent from the act, it is appropriate to look at various related statutes *in pari materia* so as to determine and effectuate the legislative intent." *Craig v. Cty. of Chatham*, 356 N.C. 40, 46, 565 S.E.2d 172, 176–77 (2002) (citation omitted). Further, "words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize

with other statutory provisions and effectuate legislative intent, while avoiding absurd or illogical interpretations[.]" *Fort*, 218 N.C. App. at 407, 721 S.E.2d at 355 (citations and quotations marks omitted).

That N.C. Gen. Stat. § 99E-30(1)'s "agritourism activity" definition was incorporated into N.C. Gen. Stat. § 153A-340(b)(2a) indicates the legislature intended to shield the same agritourism activities from countywide zoning that it intended to shield from liability. Thus, we turn to N.C. Gen. Stat. § 99E-30(3)'s explanation of inherent risks of agritourism activity for further guidance, which provides in part:

> (3) Inherent risks of agritourism activity. – Those dangers or conditions that are an *integral part of an agritourism activity* including certain hazards, including surface and subsurface conditions, natural conditions of land, vegetation, and waters, the behavior of wild or domestic animals, *and ordinary dangers of structures or equipment ordinarily used in farming and ranching operations*.

Id. § 99E-30(3) (2017) (emphasis added). That this provision lists as examples of inherent risks of agritourism activity "surface and subsurface conditions, natural conditions of land, vegetation, and waters, [and] the behavior of wild or domestic animals," relatively minor and rarer risks than those associated with shooting guns that would be integral to the shooting activities at issue here, supports our interpretation that such activities were not contemplated as "agritourism." Further, that the statute lists "ordinary dangers of . . . equipment ordinarily used in farming and ranching operations" but not equipment such as guns used in hunting operations, buttresses an interpretation that shooting activities, even when done "in preparation for the hunt," were not contemplated as "agritourism."

In summary, commercial shooting activities involving continental shooting towers, 3D archery courses and ranges, sporting clays, skeet and trap ranges, rifle ranges, and pistol pits neither fit as squarely within traditional notions of hunting, the definition of a "rural" activity, nor the category of a "natural" activity. Applying the principle of *noscitur a sociis* to N.C. Gen. Stat. § 153A-340(b)(2a), shooting activities that require the construction and use of artificial structures and the alteration of natural land, such as clearing farm property to operate gun ranges, share little resemblance to the listed rural agritourism activity examples or the same spirit of preservation or traditionalism. Applying that same principle to subdivision (2a)'s examples of agritourism events yields the same interpretation. Under the principle of *expressio unius est exclusio*

alterius as applied to both N.C. Gen. Stat. § 153A-340(b)(2a) and N.C. Gen. Stat. § 99E-30(3), that these statutes list "farming" and "ranching" but not "hunting" implies that these shooting activities, even when done in preparation for a rural activity like traditional hunting, were not contemplated as "agritourism." Finally, N.C. Gen. Stat. § 99E-30(3)'s illustrative list of inherent risks of agritourism activities omits the typically greater risks of shooting guns that would be an integral danger to operating these commercial gun shooting activities.

Accordingly, after our *de novo* review of the statutory farm exemption provisions, we agree with the superior court that commercial shooting activities involving the operation of continental shooting towers, 3D archery courses and ranges, sporting clay, skeet and trap ranges, rifle ranges, and pistol pits, even when performed on a bona fide farm, and even when done in preparation for the hunt, were not contemplated by our legislature as types of "agritourism" activities intended to be shielded from countywide zoning under the statutory farm exemption. We thus hold that these shooting activities do not constitute "agritourism" as a matter of law and are subject to zoning. Accordingly, we affirm the 2014 Order on this basis. In light of our decision, we need not address intervening-respondents' remaining challenge to the 2014 Order. Intervening-respondents, of course, may freely apply for conditional-use permits to continue operating these activities, but we hold that they do not constitute "agritourism" as a matter of law under our General Statutes.

B. 2012 Order

[4] On appeal from the 2012 Order, intervening-respondents assert the superior court erred by remanding the 2011 Board Decision on the basis that (1) petitioners failed to meet their burden of presenting competent, substantial, and material evidence in support of their appeal to the Board of Adjustment; (2) the superior court erroneously concluded that petitioners had not been given an opportunity to be heard; and (3) the superior court misinterpreted the plain language of the Harnett County Unified Development Ordinance (UDO) and our General Statutes by concluding that there must be a nexus between agritourism activities offered on a bona fide farm and its farming operations in order to be shielded by the farm exemption.

The linchpin holding together each alleged error is the superior court's conclusion that petitioners burden to support their appeal from the 2011 Board Decision was to present evidence "to establish that there was no requisite nexus between the Respondents' farming activities[ ] and shooting activities." Intervening-respondents contend

that, because the shooting activities constitute "agritourism," no such nexus is required under the plain language of the UDO and our General Statutes. According to intervening-respondents, the UDO provides that "zoning provisions . . . shall not apply to bona fide farms, as defined herein" and that the "use of any bona fide farm property for any non-farm use purposes shall be subject to the regulations of the Ordinance, *with the exception of those uses determined to be agritourism*, as defined by this Ordinance." (Emphasis added.) Thus, intervening-respondents continue, the superior court erred by finding that Drake Landing operates "on real property of Andrews Farms" and that "Andrews Farms is a bona fide farm pursuant to N.C. Gen. Stat. § 153A-340" but nonetheless remanding the matter to the Board with instructions to allow petitioners to present evidence that there was no connectivity between Drake Landing's shooting activities and Andrews Farms' farming operations when no such nexus is required for agritourism activities.

However, because intervening-respondents failed to include the UDO in the appellate record, the authority upon which they primarily rely to support their main challenge to the 2012 Order, these issues are not properly before us. *See Town of Scotland Neck v. W. Sur. Co.*, 301 N.C. 331, 338, 271 S.E.2d 501, 505 (1980) ("No Town ordinance . . . was introduced, and we cannot take judicial notice of one if it exists." (citation omitted)); *Beau Rivage Homeowners Ass'n v. Billy Earl, L.L.C.*, 163 N.C. App. 325, 327, 593 S.E.2d 120, 122 (2004) ("When no ordinance is presented to the appellate court through the record on appeal, the appellate court is not permitted to take judicial notice of the ordinance if it exists." (citation omitted)); *see also Cty. of Durham v. Roberts*, 145 N.C. App. 665, 671, 551 S.E.2d 494, 498 (2001) (refusing to consider appellant's zoning-ordinance-interpretation argument where, although the ordinance was attached in an appendix to the appellate brief, it was not included in the appellate record: "[E]xternal documents included in the appendix to defendant's brief are not considered here.").

Further, the practical effect of the 2012 Order was to remand the matter to the Board, which yielded the 2013 Board Decision and, ultimately, the 2014 Order on appeal. Because we have already determined that the superior court in its 2014 Order properly concluded that the challenged shooting activities do not constitute "agritourism" as a matter of law, and because we have already determined that the superior court in its 2017 Order properly affirmed the 2016 Board Decision that concluded the only remaining activity—Drake Landing's operation of its controlled hunting preserve for domestically raised game birds—is exempt from countywide zoning, and that petitioners are procedurally

barred from objecting to that decision, no shooting activities remain to be challenged. Accordingly, we dismiss intervening-respondents' challenges to the 2012 Order on the grounds that they failed to include the UDO in the appellate record and on the grounds that, in light of our dispositions of the 2014 and 2017 Orders, their challenges to the 2012 Order are now moot.

V. Conclusion

Under N.C. Gen. Stat. §§ 160A-393(j) and (k)(1), the superior court was only required to address those issues raised by intervening-respondents' petition for *certiorari* review of the 2016 Board Decision and to ensure that intervening-respondents' rights were not prejudiced, as petitioners never raised any written objection to that decision, requested any alternative relief, or moved to intervene as a petitioner. The superior court also properly refused to consider petitioners' objections to the 2016 Board Decision for the first time at the *certiorari* hearing because petitioners were procedurally barred from challenging that decision by failing to comply with N.C. Gen. Stat. § 160A-393's requirements. Accordingly, based on intervening-respondents' petition for *certiorari* review, and on petitioners' failures to timely challenge that decision, the superior court did not err by affirming the 2016 Board Decision. We thus affirm the 2017 Order.

Additionally, based on our *de novo* interpretation of applicable provisions of the statutory farm exemption from countywide zoning, we hold that the particular outdoor shooting activities at issue here do not constitute "agritourism" as a matter of law and are thus subject to zoning. We therefore affirm the 2014 Order.

Finally, because intervening-respondents have failed to include in the appellate record the UDO upon which they primarily rely to support their appeal from the 2012 Order, and because our resolutions of petitioners' appeal from the 2017 Order and intervening-respondents' appeal from the 2014 Order renders moot the issues they raised with respect to the 2012 Order, we dismiss intervening-respondents challenges to the 2012 Order.

AFFIRMED IN PART; DISMISSED IN PART.

Chief Judge McGEE concurs.

Judge MURPHY concurs in result only.

KAISER v. KAISER

[259 N.C. App. 499 (2018)]

ROBERT DAVID KAISER, Plaintiff
v.
JILL ANN GERBER KAISER, Defendant

No. COA17-553

Filed 15 May 2018

1. Child Custody and Support—support—parties' gross income

While it is well established that child support obligations are determined by a party's actual income at the time the order is made, evidence of past income can assist the trial court in determining current income where income is seasonal or highly variable. What matters is why the trial court examines past income; the findings must show that past income was used to accurately assess current income.

2. Child Custody and Support—support—capital gains—findings

A child support order did not contain sufficient findings to justify the use of a parent's past capital gains to calculate current, regular capital gains income. Capital gains are a highly variable type of income and income from past capital gains generally is a poor predictor of current, regular income from capital gains. If the trial court relies on past capital gains to calculate current, regular capital gains income, the court must establish that the party still owns capital assets of like kind to continue generating similar gains as in the past and that the party can reasonably be expected to continue realizing similar gains.

3. Child Custody and Support—support—parties' income—dividend income

A child support order was remanded where the trial court's findings about dividend income were not specific about sources, so that the Court of Appeals was not able to determine whether the trial court's calculation included dividends from assets that had been sold earlier and thus would not generate future dividend income.

4. Child Custody and Support—support—parent's income—annual business income

The trial court's general findings were sufficient to support its calculation of a parent's business income despite defendant's argument that the trial court's calculation did not include the final months of the year. There was testimony that the prediction of income for the fourth quarter was speculative.

5. Child Custody and Support—support—income of parent—loan from parents

The trial court did not err in a child support case by not treating as income payments the father received from his parents. The father testified that these payments were loans he was obligated to repay. The trial court's general findings concerning the father's income, which impliedly rejected defendant's argument, were sufficient.

6. Child Custody and Support—support—income of parent—fiance's payments

The trial court's findings in a child support case regarding amounts paid by the mother's fiance, a cohabitant, were not sufficient to categorize the fiance's payments as part of the mother's gross income. The trial court needed to resolve the conflicting evidence as to whether the payments were to help the mother in paying her own household expenses (maintenance), a sublease rental payment, or the fiance's share of the household expenses. Maintenance and rental income would be income to the mother, but the fiance's payment of his share of expenses would not be.

7. Child Custody and Support—support—parent's income—income from stock account

The trial court did not err in a child support action by treating the income from a stock market account as part of the mother's gross income even though she argued that the parties had agreed in the equitable distribution agreement that the account belonged to the mother's father. At the time of the child support order, the account was in her name, she paid the taxes on the dividends, and there was no evidence that she was unable to use the income from the account if she wished to.

8. Child Custody and Support—support—child therapy expenses

The trial court did not abuse its discretion in a child support case by denying defendant's request to recover past and future expenses for child therapy as part of the father's child support obligations. There was at least some competent evidence to support the trial court's finding that the mother created the need for the therapy.

9. Child Custody and Support—support—car payments—credits—finding not sufficient

The trial court abused its discretion in a child support action by awarding the father a credit for payments toward the mother's car. The trial court would have been within its discretion in awarding the

credit had it made the required finding that an injustice would occur if the credit were not allowed, but it did not do so.

Appeal by defendant from order entered 14 November 2016 by Judge Jeffrey Evan Noecker in New Hanover County District Court. Heard in the Court of Appeals 14 November 2017.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for plaintiff-appellee.

Poyner Spruill LLP, by Steven B. Epstein and Andrew H. Erteschik, for defendant-appellant.

DIETZ, Judge.

Defendant Jill Ann Gerber Kaiser appeals from a child support order. She contends that the order lacks sufficient findings to support various determinations concerning the parties' gross income and applicable credits.

As explained below, we hold that the court's determination of Ms. Gerber's regular capital gains income, her dividend income, maintenance from Ms. Gerber's fiancé, and several other aspects of the order are unsupported by sufficient factual findings. We therefore vacate the order. On remand, the trial court, in its discretion, may enter a new child support order based on the existing record or may conduct any further proceedings that it deems necessary.

Facts and Procedural History

Defendant Jill Ann Gerber Kaiser and Plaintiff Robert David Kaiser are the parents of three minor children. Ms. Gerber and Mr. Kaiser married in June 2000, separated in June 2014, and divorced on 4 December 2015. Following the parties' separation, Ms. Gerber took custody of the three children, moved to Illinois, and later was awarded primary custody by consent order.

On 30 June 2014, Mr. Kaiser filed this action seeking a judicial determination of his child support obligation. While this action was pending, Mr. Kaiser paid $1,565 per month to Ms. Gerber, which he believed to be his child support obligation. These payments were a combination of cash payments and a $565 per month payment on Ms. Gerber's car debt. On 2 April 2015, Ms. Gerber filed a counterclaim for child support.

On 19 July 2016, Mr. Kaiser moved for an order to show cause for contempt and to modify child custody, alleging that Ms. Gerber was engaging in a "concerted effort to alienate the minor children" from him. Mr. Kaiser requested primary custody of the children. The trial court later entered an order transferring jurisdiction of any further child custody matters, including Mr. Kaiser's motion to modify, to Illinois where Ms. Gerber resides with the children.

At the hearing on the issue of child support, Ms. Gerber's testimony and the exhibits presented showed that she had significant capital gains each year from 2013 through 2015. In 2014 and 2015, Ms. Gerber sold mutual fund shares in a Wells Fargo account, realizing capital gains of $67,386 in 2014 and $73,143 in 2015. Ms. Gerber then sold the remaining assets in that account in early 2016, realizing $10,345 in capital gains from this final sale.

Ms. Gerber and her accountant both testified that Ms. Gerber received dividend income in 2014 and 2015 from three sources: $580 from the Wells Fargo account, $6,100 from a Vanguard account, and $1,541 from a Charles Schwab account. Ms. Gerber testified that, although the Charles Schwab account was in her name and she included the dividends on her tax returns, the account actually belonged to her father and she did not use the income generated from the account. The parties' post-nuptial agreement designated the account as "Wife's Father's Separate Property."

Ms. Gerber also testified that she and the children currently reside in a rental house that costs $3,500 per month. She testified that the lease is solely in her name, but that her fiancé lives with her and pays her $1,750 per month to cover his share of the rent and household expenses. Ms. Gerber explained the she and her fiancé "function financially like roommates."

Ms. Gerber also testified that, between the date of separation and trial, she incurred $15,048.88 in expenses for therapy for the children. The children were treated for PTSD and anxiety issues as "a result of the relationship with their father." Ms. Gerber testified that the intent of the therapy was "to try to repair the damage to the relationship between Mr. Kaiser and the children" because the children were afraid of their father, their fear got worse after they moved to Illinois, and the therapists were "trying to help them . . . be less afraid of him and—and relate to him better."

Mr. Kaiser testified that Ms. Gerber caused these issues for their children because she "creates this horrible situation for the girls where they feel like they've been abused and abandoned and then, uh, selects

these counselors and tells them all these lies about things that have happened and tells the kids and creates all these issues."

Mr. Kaiser testified regarding the income he receives from his 50% interest in a business called SAJ Media. He provided documentation of the business's revenues from the first eight months of 2016 but did not provide a projection for likely profits for the remainder of the year. Ms. Gerber asserted that the business typically earned its largest profit in the final three months of the year. Mr. Kaiser testified that the net profit for the year "depends on what happens the rest of the year" and there is no way "with certainty to know what's going to happen in the next three months." He testified that "there's so much uncertainty you really don't know" because "our year is made or broken in the fourth quarter."

Mr. Kaiser also testified that, in addition to his income from SAJ, he had received a total of $50,000 in financial support from his parents after he separated from Ms. Gerber. Mr. Kaiser testified that the $50,000 he received was a loan rather than a gift. He explained that there is a written promissory note for repayment of $30,000 and an informal verbal agreement to repay the remaining $20,000.

On 14 November 2016, the trial court entered its child support order. The trial court found that it was necessary "to deviate from the presumptive child support guidelines" due to the length of time that the matter had been pending and the significant changes in income for both parties. The trial court stated that its determination of the parties' incomes was based on "the parties['] 2014-2015 Tax Returns, their current paystubs, 2015 and 2016 YTD Profit and Loss Statements of SAJ Media, and the testimony of [Ms. Gerber's] CPA." The trial court found that Ms. Gerber's income is $15,239 per month, including $685 per month in regular dividends, $6,095 per month in regular capital gains, and $1,750 per month from her fiancé for maintenance. The court found that Mr. Kaiser's income is $9,615 per month, including his salary of $5,833 per month from SAJ Media and his profits of $3,620 per month from his 50% ownership share of SAJ Media. The trial court relied on the 2016 year-to-date profits from SAJ Media to determine Mr. Kaiser's expected yearly income from the company, without assuming an increase from expected fourth quarter profits. Ultimately, the trial court found that Mr. Kaiser's income represents 38.7% of the parties' combined incomes and Ms. Gerber's income represents 61.3%.

Based on its findings regarding the parties' incomes and expenses, the trial court ordered Mr. Kaiser to pay $1,922 per month in child support to Ms. Gerber. The trial court determined that Mr. Kaiser had paid

a total of $39,043 in child support from the date of separation through October 2016, resulting in a $1,304 overpayment. In making this determination, the court credited Mr. Kaiser for car payments of $565 per month on Ms. Gerber's car. The trial court denied Ms. Gerber's request for payment for the children's past and future therapy expenses, finding that the expenses for therapy were "unreasonable and unnecessary" and Mr. Kaiser was not obligated to pay Ms. Gerber for them because "the primary cause for any therapy was [Ms. Gerber's] active alienation of the minor children against their dad." Ms. Gerber timely appealed.

Analysis

Ms. Gerber challenges virtually every portion of the trial court's child support order in this case, but her arguments largely are tied together by a single thread: the lack of sufficient factual findings to support various legal determinations concerning the parties' respective child support obligations. As explained below, we agree that many of the decisions in the trial court's order lack sufficient factual findings. We therefore vacate the trial court's order and remand for further proceedings.

In North Carolina, the determination of parents' child support obligations is guided by the North Carolina Child Support Guidelines, which are designed to calculate the amount of financial support necessary 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." N.C. Gen. Stat. § 50-13.4(c); *see also* 2015 N.C. Child Support Guidelines, AOC-A-162, Rev. 8/15, at 2.

Ordinarily, "[c]hild support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). "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).

Over time, this Court has decided hundreds of cases involving the calculation of gross income and the deductions and credits applicable to parties' child support obligations under the Guidelines. In many of these cases, this Court has identified specific fact findings that are

necessary for this Court to review the judgment. The unfortunate result of this patchwork of precedent is that trial courts and parties preparing proposed orders must comb through decades of past cases to ensure that their orders contain the specific findings required by this Court. And, as this case demonstrates, despite the volume of past precedent, there are still some issues concerning the Guidelines that have yet to be addressed in an appellate decision.

Thus, we sympathize with the trial court in this case, which entered a detailed and well-reasoned order involving a number of complicated issues. Nevertheless, we hold that some of the court's determinations in the order lack specific findings required by our precedent or established in this opinion. We therefore vacate the order and remand for further proceedings.

I. Trial court's calculation of the parties' current gross income

[1] Ms. Gerber first challenges various aspects of the trial court's calculation of the parties' gross income. We address these challenges in turn below, but begin with the general principles that govern our review on this issue.

"It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997). Although this means the trial court must focus on the parties' current income, past income often is relevant in determining current income. Indeed, this Court has expressly held that "a trial court may permissibly utilize a parent's income from prior years to calculate the parent's gross monthly income for child support purposes." *Midgett v. Midgett*, 199 N.C. App. 202, 208, 680 S.E.2d 876, 880 (2009).

For example, in professions where income is seasonal or highly variable from month to month, evidence of income in past years can assist the trial court in determining current monthly gross income. *See*, *e.g.*, *Holland v. Holland*, 169 N.C. App. 564, 568, 610 S.E.2d 231, 235 (2005) (discussing use of prior years' income for a farmer whose "crops would have been harvested and sold in the late summer and fall"). Similarly, where the court finds that a party's most recent pay stubs or most recently filed tax return are unreliable, the court can use past years' income to fill in the gaps. *See*, *e.g.*, *Diehl v. Diehl*, 177 N.C. App. 642, 650, 630 S.E.2d 25, 30 (2006) (holding that a trial court may calculate current income by "averaging [the party's] income from his two prior tax returns" where the most recent tax return was unreliable).

What matters in these circumstances is the reason *why* the trial court examines past income; the court's findings must show that the court used this evidence to accurately assess current monthly gross income. *See Green v. Green*, __ N.C. App. __, __, 806 S.E.2d 45, 55 (2017).[1] With this precedent in mind, we turn to the trial court's findings in this case.

A. Regular capital gains income

[2] We begin by addressing the court's calculation of income from regular capital gains. The trial court found that Ms. Gerber had current, regular monthly income of $6,095 in capital gains at the time of the November 2016 order. The court appears to have calculated this monthly income by taking the total capital gains reported in Ms. Gerber's 2015 tax return and dividing that number by 12. The court also found that "while [Ms. Gerber] urged the Court to treat this income as irregular the Court finds that she regularly received capital gains in 2013, 2014, 2015 and will continue to receive capital gains in 2016." As explained below, we hold that these findings are insufficient and therefore remand for further proceedings.

Realized capital gains are treated as part of "gross income" under the North Carolina Child Support Guidelines. 2015 N.C. Child Support Guidelines, AOC-A-162, Rev. 8/15, at 3. But capital gains differ from more traditional sources of income and these differences mean more fact finding by the trial court often will be required. By their nature, capital gains are a highly variable type of income. To realize a capital gain, one must first own capital—whether stocks, bonds, real property, or any other form of capital—and then sell that capital for a profit. By doing so, one no longer owns that capital, and cannot expect to receive any further gains as that asset appreciates.

Likewise, particularly with respect to corporate stock, asset prices are volatile. Thus, even if one holds substantial assets in stock and regularly sells a fixed portion of those holdings each year, the capital gains could vary year to year (indeed, some years the sale could realize a capital loss). Thus, income from past capital gains generally is a poor predictor of current, regular income from capital gains.

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1. There are also circumstances in which the trial court can impute a higher current income based on earnings capacity where the court finds that "the party deliberately depressed its income." *Askew v. Askew*, 119 N.C. App. 242, 244–45, 458 S.E.2d 217, 219 (1995). This case does not involve any arguments concerning imputation based on earnings capacity.

This does not mean courts must ignore all past capital gains. But if the trial court relies on past capital gains to calculate current, regular capital gain income, the court must include sufficient findings to establish (1) that the party still owns additional capital assets of like kind sufficient to continue generating similar gains; and (2) that the party reasonably can be expected to continue realizing similar gains given past behavior and current market conditions.

Here, for example, the record indicates that Ms. Gerber's capital gains in 2014 and 2015—on which the trial court relied to determine Ms. Gerber's regular capital gains income in 2016—resulted from the sale of mutual fund holdings in a Wells Fargo account. In each of those years, Ms. Gerber realized approximately $70,000 in capital gains. But the record also shows that, by early 2016, Ms. Gerber sold the last remaining assets in that Wells Fargo account, realizing only $10,345 in capital gains.

Ms. Gerber also has capital assets in a Charles Schwab and a Vanguard account, but the trial court did not find that those accounts were similar to the Wells Fargo account, could be expected to generate similar capital gains, or were similarly suited for sale and realization of gains in current market conditions. Indeed, the record shows that the Vanguard account generates sizable dividend income, which may indicate that one would not reasonably expect Ms. Gerber to sell those assets but instead continue holding them to generate regular dividend income.

In sum, the trial court's order does not contain sufficient findings to justify the use of Ms. Gerber's past capital gains to calculate current, regular capital gains income. We therefore vacate and remand for further proceedings on this issue.[2]

B. Dividend income

[3] Ms. Gerber next challenges the trial court's findings concerning her regular dividend income. The trial court, based on evidence of Ms. Gerber's dividend income in 2014 and 2015, found that Ms. Gerber received $685 per month in regular dividend income. The court did not make specific findings about the sources of that dividend income. Mr. Kaiser concedes on appeal that the trial court's dividend calculation included income from three sources: the Wells Fargo account, the

2. Ms. Gerber also argues that her capital gains should be treated as irregular, nonrecurring income and prorated over the period of time in which the asset was held. She can raise this argument on remand should the trial court determine that the facts do not support treating her capital gains as regular income.

Charles Schwab account, and the Vanguard account. But, as explained above, Ms. Gerber sold her remaining assets in the Wells Fargo account in early 2016. From the record on appeal, we are unable to determine if the trial court's calculation of regular dividend income as of November 2016 included dividend income from assets Ms. Gerber sold months earlier and thus cannot generate future dividend income. We therefore vacate and remand for further proceedings on this issue.

C. Business income

[4] Ms. Gerber next challenges the trial court's calculation of Mr. Kaiser's profit from his 50% ownership in SAJ Media. She argues that the trial court's findings are insufficient to support its calculation because the court relied on the business's net income during the first eight months of 2016 without making findings concerning the final three months of the year, which Ms. Gerber asserts are SAJ Media's "biggest quarter."

We reject this argument. The trial court heard testimony indicating that any prediction of increased profits for the business during the fourth quarter of 2016 was too speculative to credit. Thus, the trial court's calculation of SAJ Media's income, using only the existing eight months of 2016 income, is supported by competent evidence. To be sure, the trial court made no specific fact finding that rejected Ms. Gerber's evidence concerning the anticipated increase in 2016 profits during the fourth quarter. But our precedent does not require a specific, express fact finding on this issue. Accordingly, we hold that the trial court's general findings are sufficient to support its calculation of this business income.

D. Support from Mr. Kaiser's parents

[5] Ms. Gerber next challenges the trial court's decision not to treat as income approximately $50,000 in payments that Mr. Kaiser received from his parents. She argues that the trial court failed to make a specific, express finding that these payments were something other than ordinary maintenance that qualifies as gross income under the Guidelines.

We reject this argument. Mr. Kaiser testified that these payments were loans he was obligated to repay, not gifts or maintenance. And, as with the business income issue, our precedent does not require the trial court to include a separate, express fact finding concerning this determination. Thus, the court's general findings concerning Mr. Kaiser's income, which did not include these payments and thus impliedly rejected Ms. Gerber's argument, are supported by competent evidence and are sufficient.

E. Support from Ms. Gerber's fiancé

[6] Ms. Gerber next argues that the trial court improperly treated her fiancé's payments to her as income. She contends that her fiancé is a cohabitant and those payments are simply his share of the cost of housing and household expenses. She asserts that roommates' and other cohabitants' payments for their share of household expenses cannot be treated as maintenance under the Guidelines.

We agree that the trial court's findings are insufficient to categorize the fiancé's payments as part of Ms. Gerber's gross income. The Child Support Guidelines define income to include both "rental of property" and "maintenance received from persons other than the parties to the instant action." 2015 N.C. Child Support Guidelines, AOC-A-162, Rev. 8/15, at 3. "Maintenance" in this context means financial support that one provides to someone else for that other person's benefit. *Spicer*, 168 N.C. App. at 288, 607 S.E.2d at 682.

Thus, if Ms. Gerber were subleasing a portion of her home to her fiancé, his sublease payments would be income under the Guidelines. Similarly, if the fiancé's payments were intended to assist Ms. Gerber in paying her own household expenses, those payments properly could be treated as maintenance. Here, however, there was at least some competing evidence in the record indicating that the fiancé's payments were neither of these things, but instead were payments of the fiancé's share of household expenses that he incurred. In its findings, the trial court stated that these payments were used for "rent and utility bills which are all in Jill's sole name" but did not find that the payments were for Jill's benefit, rather than for her fiancé's share of rent and utilities incurred for his own benefit.

To treat these payments as part of Ms. Gerber's gross income, the trial court first must resolve the competing evidence by finding that the payments indeed were maintenance under the Guidelines. From the existing findings, we cannot be sure that the trial court properly applied the legal definition of maintenance because the findings could be interpreted to include payments for the fiancé's share of expenses. *See Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682 (holding that the trial court must "make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law"). We therefore vacate and remand for further proceedings.

F. Income from the Charles Schwab account

[7] Finally, Ms. Gerber argues that the doctrine of judicial estoppel barred Mr. Kaiser from asserting that the Charles Schwab account was Ms. Gerber's property. She contends that in the equitable distribution consent order, the parties agreed that this account was "Wife's Father's Separate Property." Thus, Ms. Gerber argues, Mr. Kaiser is judicially estopped from now claiming the account is Ms. Gerber's property.

We reject this argument because the record supports the trial court's finding that the income from the Charles Schwab account either belongs to Ms. Gerber or was given to her to use for her benefit. At the time of the child support order, the Charles Schwab account was in Ms. Gerber's name, she paid the taxes on the dividend income from that account, and there was no evidence that she was unable to use the income from that account to pay her expenses if she chose to do so.

The purpose of a child support order is to accurately determine the parties' respective gross incomes to assess their ability to meet the needs of their children. *Holt v. Holt*, 29 N.C. App. 124, 126, 223 S.E.2d 542, 544 (1976). The trial court's findings, supported by competent evidence in the record, show that the court properly treated the income from the Charles Schwab account as part of Ms. Gerber's gross income.

II. Denial of Ms. Gerber's request to recover child therapy expenses

[8] Ms. Gerber next challenges the trial court's denial of her request to recover past and future expenses for child therapy for her children as part of Mr. Kaiser's child support obligations. The trial court found that these expenses—which were incurred to repair Mr. Kaiser's relationship with his children—resulted from Ms. Gerber's "active alienation of the minor children against their dad." As a result, the trial court determined that Mr. Kaiser did not need to share payment for any past therapy expenses and "is not obligated to pay [Ms. Gerber] for such therapy in the future to the extent it relates to issues associated with the minor children's relationship with [Mr. Kaiser]."

Ms. Gerber contends that the trial court's finding concerning her efforts to alienate her children from Mr. Kaiser is "utterly at odds with the trial court's decision" to transfer the child custody dispute to an Illinois court that is a more convenient location for most of the witnesses who can address this issue in the custody context.

We reject this argument. On appeal from the child support order, our review of the trial court's findings is limited to whether those findings are supported by competent evidence in the record. *Hodges v. Hodges*,

147 N.C. App. 478, 482, 556 S.E.2d 7, 10 (2001). That a separate proceeding in another state may yield more detailed evidence on this issue is irrelevant.

In the child support proceeding below, there was at least some competent evidence to support the trial court's finding that Ms. Gerber's conduct created the need for this child therapy. Accordingly, the trial court did not abuse its discretion in determining that Mr. Kaiser need not pay any portion of these child therapy expenses. *Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682.

III. Credit for Mr. Kaiser's car payments

[9] Finally, Ms. Gerber challenges the trial court's decision to credit Mr. Kaiser for 17 payments he made toward Ms. Gerber's monthly car financing. She contends that the trial court failed to expressly find that an injustice would exist if the court did not apply this credit.

"[T]here are no 'hard and fast rules' when dealing with the issue of child support credits. Instead, the controlling principle is that credit is appropriate only when an injustice would exist if credit were not given." *Brinkley v. Brinkley*, 135 N.C. App. 608, 612, 522 S.E.2d 90, 93 (1999). When a "trial court properly awards a credit against a child support award, it should conclude in its written order that, as a matter of law, an injustice would exist if the credit were not allowed and should support that conclusion by findings of fact based on competent evidence." *Id.*

Our review of the record indicates that the trial court would have been well within its sound discretion to credit these payments toward Mr. Kaiser's child support obligation had it made sufficient findings. But the court did not make that finding and we therefore vacate and remand for further proceedings.

Conclusion

As explained above, various portions of the trial court's child support order are unsupported by sufficient findings of fact. We therefore vacate the trial court's order. On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct further proceedings including a new evidentiary hearing if necessary. *See Hendricks v. Sanks*, 143 N.C. App. 544, 549, 545 S.E.2d 779, 782 (2001).

VACATED AND REMANDED.

Judges BRYANT and DILLON concur.

ELIZABETH E. LeTENDRE, Plaintiff
v.
CURRITUCK COUNTY, NORTH CAROLINA, Defendant

No. COA17-1108

Filed 15 May 2018

1. Appeal and Error—interlocutory appeals—preliminary injunction—enforcement of county unified development ordinance

The Court of Appeals had jurisdiction to consider defendant county's interlocutory appeal from a preliminary injunction preventing the county from enforcing its unified development ordinance.

2. Appeal and Error—mootness—enforcement of county's unified development ordinance—prior Court of Appeals opinion—completion of construction project

A county's appeal of a preliminary injunction preventing it from enforcing its unified development ordinance (UDO) was not rendered moot by the plaintiff's completion of her construction project. The preliminary injunction continued to prevent the county from enforcing its UDO as required by the Court of Appeals' prior opinion in the matter.

3. Zoning—unified development ordinance—definition of single family detached dwelling—validity

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner's claim that the UDO violated the zoning enabling statute was an improper basis for the preliminary injunction. Plaintiff's argument regarding structural dependency misconstrued the UDO, and the UDO's definition of a single family detached dwelling did not impose an arbitrary restriction on her ability to use her property.

4. Zoning—unified development ordinance—layout of interior rooms—validity

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner's claim that the UDO violated N.C.G.S. 153A-340(l) was an improper basis for the preliminary injunction. Plaintiff's argument that the UDO impermissibly attempted to regulate the interior layout of rooms was a misconstruction of the UDO.

5. Zoning—unified development ordinance—due process—arbitrary and capricious

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her claim that the UDO was unconstitutionally arbitrary or capricious as applied to her. The zoning ordinance was within the scope of the county's police power, and it protected the natural environment of a remote portion of the Outer Banks and the people who lived there. The limited interference with plaintiff's use of her property was reasonable, and plaintiff's trouble was created by her decision to build on a certain area of her lot that required a Coastal Area Management Act permit (in addition to compliance with the UDO).

6. Zoning—unified development ordinance—due process—vagueness

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her claim that the UDO was unconstitutionally vague to the extent it required the wings of her home to be structurally dependent. Plaintiff's argument incorrectly assumed that the UDO required structural dependency, and the UDO plainly prohibited more than one principal structure per lot, while allowing accessory structures.

7. Zoning—unified development ordinance—equal protection—building permit

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her equal protection claim because there was no forecast of evidence that defendant county applied its zoning ordinance in a manner that treated plaintiff differently from other property owners in the same district.

8. Zoning—unified development ordinance—preemption by building code—location and use of buildings and structures

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her claim that the UDO

impermissibly regulated construction practices and was preempted by the N.C. Building Code. The UDO dealt solely with the location and use of buildings and structures as expressly authorized by statute.

9. Injunctions—basis for—inverse condemnation—not claim to restrain

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals noted that plaintiff's complaint alleged that defendant county had taken her property by inverse condemnation but that the preliminary injunction was not and could not have been based upon this claim, because inverse condemnation is a claim for monetary compensation and not a claim to restrain defendant from taking some action.

10. Laches—enforcement of zoning ordinance—conduct of officials

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals noted that plaintiff homeowner's complaint alleged that defendant's enforcement of its UDO was barred by laches but that the preliminary injunction was not based upon this claim. Plaintiff would not have been entitled to a preliminary injunction on the basis of a likelihood of success on her laches claim because a municipality cannot be estopped from enforcing a zoning ordinance based on the conduct of its officials.

11. Zoning—common law vested right—construction during pendency of appeal—knowledge of risk

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff was not likely to succeed on her common law vested right claim. Plaintiff could not accrue a vested right to construct or occupy the house where she began construction on the house while a legal challenge to the project was pending at the Court of Appeals—particularly where she was warned of the risks of proceeding with construction.

Appeal by Defendant from order entered 9 June 2017 by Judge Walter H. Godwin, Jr. in Superior Court, Currituck County. Heard in the Court of Appeals 21 March 2018.

Parker Poe Adams & Bernstein LLP, by Jonathan E. Hall, Michael J. Crook, and Jamie Schwedler, for plaintiff-appellee.

Currituck County Attorney Donald I. McRee, Jr., for Defendant-appellant.

STROUD, Judge.

I. Introduction

This case arises from this Court's prior opinion issued on 21 June 2016 in *Long v. Currituck County*, ___ N.C. App. ___, 787 S.E.2d 835 (2016), which held that under Currituck County's Unified Development Ordinance § 10.51, Plaintiff's proposed "project does not fit within the plain language of the definition of Single Family Dwelling, and thus is not appropriate in the SF District." *Id.* at ___, 787 S.E.2d at 841. While *Long* was pending before this Court, Plaintiff was warned of the possible consequences of proceeding with construction of the project if the trial court's order in that case was reversed on appeal, but she decided to build the project anyway. After Defendant took action to comply with this Court's ruling in *Long*, issued on 21 June 2016, Plaintiff sought and obtained a preliminary injunction issued on 9 June 2017 which required Defendant to "deem the home approved by the County building permit issued in March 2015 to be a single-family detached dwelling for purposes of the Currituck County Unified Development Ordinance" and to allow her to complete construction and occupancy of the project. Defendant appealed the preliminary injunction. Although Plaintiff's complaint includes many claims in her attempt to prevent Defendant from enforcing the Unified Development Ordinance in accordance with this Court's opinion in *Long*, ___ N.C. App. ___, 787 S.E.2d 835, Plaintiff has not demonstrated that she is likely to prevail on any of her claims, and therefore the preliminary injunction must be reversed.

II. Background

On 27 March 2017, Plaintiff filed this action seeking a declaratory judgment, preliminary injunction, permanent injunction, monetary damages, and attorney fees. On 9 June 2017, the trial court entered a preliminary injunction ordering Defendant to "deem the home approved by the County Building permit issued in March 2015 to be a single-family detached dwelling for purposes of the Currituck County Unified Development Ordinance;" to rescind the Stop Work Order issued in September 2016 and the Notice of Violation issued in February 2017; and to permit Plaintiff to complete construction of her project and then allow occupancy.

Plaintiff sought the preliminary injunction and other relief to prevent Defendant from complying with this Court's ruling issued on 21 June

2016 in *Long*, ___ N.C. App. ___, 787 S.E.2d 835. Plaintiff was a party to *Long* and that case dealt with the same project and the same provisions of the Currituck County Unified Development Ordinance ("UDO") as this case. *See generally id.* In *Long*, the petitioner-plaintiffs appealed

> a Superior Court (1) DECISION AND ORDER affirming the Currituck County Board of Adjustment's decision that a structure proposed for construction on property owned by Respondent Elizabeth Letendre is a single family detached dwelling under the Currituck County Unified Development Ordinance and a permitted use in the Single Family Residential Outer Banks Remote Zoning District and dismissing petitioners' petition for writ of certiorari and (2) ORDER denying petitioners' petition for review of the Currituck County Board of Adjustment's decision and again affirming the Currituck County Board of Adjustment's decision.

Id. at ___, 787 S.E.2d at 836 (quotation marks omitted). In other words, the preliminary injunction on appeal ordered Defendant to "deem" Plaintiff's project which was under construction during the pendency of the appeal of *Long* "to be a single-family detached dwelling" under the Currituck County UDO, although this Court held in *Long* that her house is *not* a single-family detached dwelling as defined by the Currituck County UDO. *See id.*, ___ N.C. App. ___, 787 S.E.2d 835.

Plaintiff described her plan to build the house which is the subject of this case, and was the subject of *Long*, in her complaint as follows:

> 4. LeTendre bought the Lot on the open market in April 2012 for a purchase price of $530,000.00.
>
> 5. From the time that LeTendre bought the Lot in April 2012, through the present time, the Lot has had a Single Family Residential Outer Banks Remote ("SFR") zoning classification assigned to it by Currituck County.
>
> 6. Under Currituck County's Unified Development Ordinance ("UDO"), developments that are permitted on properties with a SFR zoning classification include single-family detached dwellings.
>
> 7. Section 10.51 of the UDO defines a "single-family detached dwelling" as a "residential building containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal

structure. For regulatory purposes, this term does not include manufactured homes, recreational vehicles, or other forms of temporary or portable housing. Manufactured buildings constructed for use as single-family dwelling units (manufactured home dwellings) are treated similar [sic] to single-family detached dwellings."

8. Neither Section 10.51 of the Currituck County UDO, nor any other provision of the Currituck County UDO, limits the square footage that a single family detached dwelling may have.

9. Neither Section 10.51 of the Currituck County UDO, nor any other provision of the Currituck County UDO, limits the number of bedrooms that a single-family detached dwelling may have.

10. Neither Section 10.51 of the Currituck County UDO, nor any other provision of the Currituck County UDO, limits the number of rooms that a single family detached dwelling may have.

11. After buying the Lot in April 2012, LeTendre engaged an architect to develop plans for a home to be built on the Lot. LeTendre's architect first developed plans for a home ("Disconnected Home") with one central wing and two side wings. The two side wings would not be connected to the central wing, and instead unenclosed decking would run between the central wing and each side wing, such that a person would have to step outside of the Disconnected Home in order to travel from wing to wing. The three wings would not have connected rooflines. On the plans for the Disconnected Home, because the three wings were not connected, the architect labeled each of the three wings as a separate "building." Those plans were never utilized, and the Disconnected Home was never built.

12. LeTendre's representatives later sought guidance from the County regarding what type of development on the Lot would qualify as a single-family detached dwelling under the Currituck County UDO. LeTendre's representatives met with the County Planning Director and the County Attorney in 2013. At that meeting, the County Planning Director advised LeTendre's representatives

that, if the three wings had a connected roof and were connected by air-conditioned hallways that allowed for the free flow of heating and air conditioning, the resulting home would qualify as a single-family detached dwelling under the UDO. The County Planning Director did not claim that the three wings would need to have a common foundation in order for the home to qualify as a single-family detached dwelling.

13. Based on this guidance from the County Planning Director, LeTendre's architect developed a new set of plans for a different home for the Lot. This home ("Home") would also have a central wing and two side wings. But unlike in the Disconnected Home, the Home's side wings would be connected with the central wing by two enclosed, air-conditioned hallways. These hallways would allow for the free flow of heating and air conditioning, and they also would allow a person to walk throughout the Home, including all three wings, without ever stepping outside. The three wings in the Home would have a common, integrated roofline.

14. Although the plans for the Home showed that the three wings would be interconnected and would have a connected roofline, through inadvertence these plans continued the practice from the Disconnected Home's plans of labeling each wing as a separate "building."

15. In October 2013, LeTendre submitted the plans ("Plans") for this Home to Currituck County for the County to formally confirm that the Home would be a permissible single-family detached dwelling that would be permitted on the Lot under the County's UDO.

16. The Plans showed that each wing would be slightly less than 5,000 square feet in size, and they showed that the Home would also have a detached pavilion as an accessory structure.

17. The Plans showed that the foundation of each enclosed, air-conditioned hallway would be connected to the foundation of the side wing to which that hallway was attached.

> 18. The Plans showed that the foundations for the enclosed, air-conditioned hallways would not be connected to the foundation of the Home's central wing.
>
> 19. The Plans showed that each of the three wings would have its own separate foundation and that the foundations for the three wings would not connect together.
>
> 20. The Plans showed that the Home would not have a single common foundation.
>
> 21. The Plans that were submitted to Currituck County in October 2013 disclosed the square footage of each of the three wings of the Home as well as the total square footage of the Home.

In November of 2013, the Currituck County Planning Director, Mr. Ben E. Woody, issued a Letter of Determination "confirming that the Home as proposed in the Plans would be a single-family detached dwelling and would be permitted on the Lot pursuant to the Currituck County UDO."

Besides approval by the Currituck County BOA, Plaintiff's house required a permit from the N.C. Department of Environment and Natural Resources ("DENR") allowing "[m]ajor [d]evelopment in an [a]rea of [e]nvironmental [c]oncern pursuant to NCGS 113-118[.]" Plaintiff planned to build close to the water, in a location "set back a minimum of 60 feet from the first line of stable natural vegetation[.]" Plaintiff had hired George Wood, of Environmental Professionals, as a consultant to "assist her in obtaining state and federal approvals for construction of a home on the oceanfront property she bought in April 2012." Plaintiff's representatives, including Mr. Wood, her architect, and her contractor, worked with the North Carolina Division of Coastal Management to develop a plan for the house which would meet Coastal Area Management Act ("CAMA") requirements. The requirement which has created most of this controversy was that no building could be larger than 5,000 square feet; Plaintiff planned for the project to be approximately 15,000 square feet.

The trial court's order made several findings of fact regarding the CAMA regulations:

> 3. Construction on LeTendre's lot would also have to satisfy regulation under North Carolina's Coastal Area Management Act ("CAMA"). CAMA regulations impose setbacks that developments must satisfy that are based

on the size of the developments proposed. LeTendre wanted her home to use a CAMA setback known as the "60 foot" setback, which requires a development to be set back from the waterfront a minimum of 60 feet or 30 times the property's shoreline erosion rate. That setback is for developments less than 5,000 square feet in size. However, CAMA regulations allow a larger development to use the 60-foot setback if that development is composed of separate components that are each less than 5,000 square feet and that are structurally independent of each other. LeTendre therefore intended to design her home so that each of the three wings would be less than 5,000 square feet and would be structurally independent from each other. Designing homes that are larger than 5,000 square feet so that they have structurally independent components and can use the 60-foot CAMA setback is permitted by the Division of Coastal Management and is common along the North Carolina Coast and in Currituck County. LeTendre's representatives explained to the Division of Coastal Management and to Currituck County her desire for the wings of her home to be structurally independent so that the 60-foot setback could be used.

4. After consultation with the North Carolina Division of Coastal Management, which administers CAMA regulations, and with the Currituck County Planning Department, LeTendre's architect prepared a set of plans that proposed to connect the three wings of her home using uncovered, unenclosed decking. Although this would satisfy CAMA's requirement for structural independence, the Currituck County Planning Director would not accept those plans. The Planning Director determined that connecting the wings with unenclosed decking would not make the wings a single structure in order for the home to qualify as a single-family detached dwelling under the County UDO.

5. During subsequent discussions between LeTendre's design professionals and the County Planning Department, the County Planning Director proposed that the wings be connected with enclosed, air conditioned hallways. The Planning Director determined that connecting the wings in this way would allow the home to qualify as a single-family detached dwelling because

> the wings would be sufficiently integrated to constitute a single structure. There was no language in the UDO that expressly contradicted this determination by the Planning Director.[1]
>
> 6. LeTendre's architect therefore prepared a set of plans that proposed to connect the three wings using enclosed, air conditioned hallways. After reviewing these plans, the County Planning Director issued a November 2013 Letter of Determination providing that the home proposed on those plans would qualify as a single-family detached dwelling under the UDO. The Division of Coastal Management also concluded that those plans satisfied CAMA's setback regulations so that the 60-foot setback could be used for LeTendre's home.

After these consultations and plan revisions seeking to comply with both CAMA regulations and the UDO, the CAMA permit was "issued on March 17th, 2014, four days after the hearing before the Currituck County Board of Adjustment on March 13, 2014" where Mr. Wood testified as Plaintiff's CAMA expert.

In December of 2013, landowners adjacent to Plaintiff's lot, Mr. and Mrs. Long, appealed the November 2013 Letter of Determination to the Currituck County BOA, which upheld the Letter of Determination in May of 2014. The Longs then sought review of the BOA's determination by the Superior Court, which upheld the BOA's ruling in December of 2014; on 31 December 2014, the Longs appealed.

In March of 2015, *after* the Longs filed their notice of appeal and before the record on appeal had even been submitted to this Court, Plaintiff sought a Building Permit "permitting construction of the Home on the Lot." Our record shows that both the Currituck County Planning Director, Mr. Woody, and counsel for the Longs warned Plaintiff about beginning construction before this Court had issued its opinion in *Long*. On 2 April 2015, counsel for the Longs sent a letter to Plaintiff's counsel warning:

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1. Section 10.51 of the UDO does not permit the principal structure to be "physically attached" to any other principal structure, so the last sentence of this finding is not entirely accurate; this Court interpreted the UDO in *Long* and determined otherwise. *Long*, __ N.C. App. at ___, 787 S.E.2d at 838.

> I want to emphasize that this litigation is not over and you and your client are on notice that construction of the project while the litigation is ongoing is done with the risk that the appellate court will reverse the Superior Court, and that such reversal would result in the revocation of the building permit. While it may be true that your client can begin construction (provided there is no other prohibition from the Department of Insurance) your client will nonetheless be required to tear down, dismantle or otherwise remove such construction if the Court of Appeals reverses the Superior Court and revokes the zoning approval and attendant building permit. I understand that your client has elected to proceed with construction despite knowledge of the aforementioned risks.

Despite these warnings, Plaintiff proceeded with construction. Plaintiff described her decision to proceed in her affidavit filed in this case:

> 14. In March 2015, Currituck County issued a building permit for my home to me and to my general contractor. Although the Longs' appeal wasn't over, after carefully considering all options, I decided to proceed with construction of the home. I made this decision for several reasons.
>
> 15. First, over the course of a year, three different authorities had considered the 2013 plans for my home and had agreed that the home would be permitted under the County UDO. The Currituck County Planning Director had made that determination, the Currituck County Board of Adjustment had made that determination, and then a superior court judge had made that determination. All of them had considered the Longs' arguments for why my home shouldn't be allowed, and all of them had rejected the Longs' arguments.
>
> 16. Additionally, the plans for my home had been reviewed and approved by a number of other agencies . . . . These agencies all had reviewed the plans because a CAMA Major Development was required for my home.
>
> 17. Meanwhile, the Longs hadn't filed any appeal to the Board of Adjustment from the building permit issued

> to me in March 2015. No challenge to that permit existed when I decided to begin construction. In fact, to date, no one has appealed the issuance of my building permit, and the County Building Inspector has never withdrawn that permit. The Longs also had not appealed the Division of Coastal Management's issuance of a CAMA permit for my home.

On 21 June 2016, this Court issued its opinion in *Long*, reversing the superior court's order and holding that Plaintiff's project as proposed was not a single family detached dwelling as defined by the Currituck County UDO, Section 10.51. *See Long*, ___ N.C. App. ___, 787 S.E.2d 835. Plaintiff alleges in her complaint in this action that construction on the project was about 95% complete at that point. Plaintiff's representatives met with county officials and they discussed various ways of bringing Plaintiff's house into compliance with the UDO in a manner within the CAMA permit but could not reach an agreement. In September 2016, Defendant issued a Stop Work Order. In January 2017, Plaintiff proposed an amendment to the UDO which would allow her project to be permitted as a single family detached dwelling, but the Currituck County Board of Commissioners rejected it. On 1 February 2017, the Currituck County Planning Director issued a Notice of Violation based upon the house's failure to qualify as a single family detached dwelling under the UDO, in accordance with *Long*. Plaintiff made no changes to the house but filed this action seeking injunctions and a declaratory judgment preventing Defendant from complying with this Court's ruling in *Long* and compensation for Defendant's attempts to enforce *Long*.

III. Preliminary Matters

Before addressing the substance of Defendant's appeal, we first address a few preliminary matters.

A. Plaintiff's Claims

Plaintiff's complaint presents many claims which she alleges support issuance of a preliminary injunction, permanent injunction, and ultimately a declaratory judgment preventing Defendant from enforcing its UDO in accord with this Court's opinion in *Long*. To avoid confusion, we will address Plaintiff's claims mostly in the order as presented in her complaint, although we will group the claims of constitutional violations together since the analysis is similar for each. Plaintiff labeled her claims as follows:

FIRST CAUSE OF ACTION

(Section 10.51 of the Currituck County UDO Violates North Carolina's Zoning Enabling Statutes)

(Section 10.51's Requirement That the Home Have a Single Common Foundation Does Not Promote Health, Safety, Morals, or the General Welfare)

(Section 10.51's Requirement That a Single-Family Detached Dwelling Be Contained Within a Single Building Does Not Promote Health, Safety, Morals, or the General Welfare)

(Section 10.51 Otherwise Imposes Pointless Restrictions)

SECOND CAUSE OF ACTION

(Section 10.51 of the Currituck County UDO Violates the United States and North Carolina Constitutions Because It Is Arbitrary and Capricious)

THIRD CAUSE OF ACTION

(Section 10.51 of the Currituck County UDO Attempts To Regulate "Building Design Elements" In Violation of North Carolina Law)

FOURTH CAUSE OF ACTION

(Section 10.51 of the Currituck County UDO Is Preempted By the North Carolina Building Code)

FIFTH CAUSE OF ACTION

(Section 10.51 of the Currituck County UDO Is Unconstitutionally Vague)

SIXTH CAUSE OF ACTION

(Currituck County Has Taken LeTendre's Property)

SEVENTH CAUSE OF ACTION

(Currituck County Has Violated LeTendre's Right to Equal Protection Under the North Carolina Constitution and the United States Constitution)

EIGHTH CAUSE OF ACTION

(Currituck County's Attempts to Enforce Section 10.51 of the UDO Against the Home are Barred by Laches)

NINTH CAUSE OF ACTION

(LeTendre Has Vested Rights To Complete the Home and To Use the Home)[2]

In this appeal, we will consider *only* whether the trial court erred in issuing the preliminary injunction. We will consider only whether the trial court erred in issuing the preliminary injunction based upon the conclusion that Plaintiff is likely to prevail on the merits of any of the other claims and will suffer irreparable harm without issuance of the injunction.

B. Interlocutory Appeal

[1] Because the preliminary injunction is not a final order, this appeal is interlocutory. *See Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, 230 N.C. App. 317, 318, 749 S.E.2d 469, 471 (2013) ("It is well-established that a preliminary injunction is an interlocutory order.") "There is no immediate right of appeal from an interlocutory order unless the order affects a substantial right." *Id.* Defendant alleges that it has a substantial right that will be impaired if review is delayed because it has a right to exercise its police power to enforce its ordinances. Defendant is correct as clarified by Judge, now Justice, Ervin's dissent, which was adopted by the Supreme Court in *Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty.*: "[T]his Court has recognized that the entry of a preliminary injunction precluding a state or local agency from enforcing the law affects a substantial right and is immediately appealable." 236 N.C. App. 340, 360, 762 S.E.2d 666, 680 (2014) (Ervin, J. dissenting), *rev'd and remanded*, 368 N.C. 91, 773 S.E.2d 55 (2015). Adoption and enforcement of zoning ordinances is an exercise of the police power. *See Raleigh v. Fisher*, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950) ("In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State.") This Court therefore "has jurisdiction over Defendant's appeal from the issuance of the preliminary injunction" and we will "proceed to address the validity of Defendant's challenge to . . . the trial court's order on the merits." *Sandhill*, 236 N.C. App. at 361, 762 S.E.2d at 681.

C. Plaintiff's Motion to Dismiss as Moot

[2] Plaintiff has moved to dismiss this appeal as moot because the preliminary injunction on appeal allowed her to complete the construction

2. Plaintiff's complaint has 69 pages with 372 paragraphs of allegations. The record includes 651 pages of exhibits. In comparison, this opinion is relatively short.

of the project and begin using it. Plaintiff argues that the "[c]onstruction cannot be undone, the County's determination that the Home was constructed in accordance with the building code cannot be unmade, and the [Certificate of Occupancy] cannot rightfully be rescinded." Defendant responds that even though the project is complete, the preliminary injunction continues to have effect because it "prevents the County from requiring Letendre to cease use of the multiple buildings on her property until she complies with the UDO and this Court's *Long* decision and the County's use of civil and criminal remedies to enforce the county's ordinance."

"A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (citation and quotation marks omitted). Plaintiff's assertions that "construction cannot be undone" and "the [Certificate of Occupancy] cannot rightfully be rescinded" are not supported by law and are incorrect. Construction can be undone and structures can be moved. Plaintiff's assertion regarding "the County's determination that the Home was constructed in accordance with the building code" is irrelevant. There has never been any contention in this case that Plaintiff's project was in violation of the building code; the dispute arises from the UDO. Because the preliminary injunction continues to keep Defendant from enforcing the UDO as required by this Court's opinion in *Long*, this appeal is not moot, *see generally id.*, and Plaintiff's motion to dismiss is denied.

IV. Analysis

Defendant appealed the trial court's ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION which orders Defendant to "deem the home approved by the building permit issued in March 2015 to be a single-family detached dwelling for purposes of the Currituck County Unified Development Ordinance" and to allow Plaintiff to complete construction of the home and to grant a certificate of occupancy when complete. The trial court determined Plaintiff was likely to succeed on the merits of several claims in her complaint, and Plaintiff argues on appeal that even if a legal basis found by the trial court was in error, the order must be affirmed if there is any legal basis to support the result. Therefore, if just one of Plaintiff's claims is likely to succeed on the merits, the injunction must be affirmed. *See generally Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the

judgment entered.") Because we have determined that Plaintiff is not likely to succeed on any of her claims, we must address each of them.

A. Standard of Review

In review of a trial court's ruling on a motion for a preliminary injunction, we begin with the "presumption that the lower court's decision was correct, and the burden is on the appellant to show error." *A.E.P. Industries v. McClure*, 308 N.C. 393, 414, 302 S.E.2d 754, 767 (1983). But "on appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *Id.* at 402, 302 S.E.2d at 760. "The scope of appellate review in the granting or denying of a preliminary injunction is essentially *de novo*." *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984).

A preliminary injunction is an extraordinary measure normally intended only to preserve the status quo during litigation,

> [i]t will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

A.E.P., 308 N.C. at 401, 302 S.E.2d at 759–60 (citations omitted).

In this action, there is no challenge to the trial court's underlying findings of fact. Also, the preliminary injunction was not intended "to preserve the status quo[,]" *see id.*, but to change it, by requiring Defendant to disregard the UDO's plain language as interpreted by *Long* and remove Defendant's ability to enforce the law. *See generally Long*, ___ N.C. App. ___, 787 S.E.2d 835. But in any event, the first question in determining whether a preliminary injunction should have been granted is the likelihood of success on the merits. *See id.* If the Plaintiff is unable to show likelihood of success on the merits of her legal claims, the Court need not reach the second question of whether the Plaintiff "is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Id.*

We will next consider whether Defendant has met its burden of showing that Plaintiff does not have a likelihood of success on the merits for each claim. Defendant's brief addresses why Plaintiff's claims will likely not succeed, and Plaintiff's brief addresses why they will.

Thus, while Defendant is the appellant, the focus of our analysis is on Plaintiff's claims and their "likelihood of success on the merits[.]" *Id.* We consider "essentially *de novo*[,]" *Robin*, 70 N.C. App. at 540, 320 S.E.2d at 696, whether the trial court erred in taking this "extraordinary measure" and determining "plaintiff is able to show likelihood of success on the merits[.]" *A.E.P.*, 308 N.C. at 401, 302 S.E.2d at 759. Because many of Plaintiff's claims are similar and her arguments tend to overlap, and because Plaintiff's brief does not address the issues in the same order as Defendant's brief, we will address the claims in the order as set forth in the complaint.

We also note that while Plaintiff has presented nine claims, including constitutional claims, Plaintiff is actually challenging a *definition* of a single family detached dwelling. Six out of Plaintiff's nine claim headings specifically reference Section 10.51 and the other three implicitly rely upon it. As noted by *Long*, Section 10.51 simply defines a single family detached dwelling as "[a] residential building containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal structure. UDO § 10.51." *Long*, __ N.C. App. at ___, 787 S.E.2d at 838. While it is easy to lose the forest for the trees amidst Plaintiff's many claims, Plaintiff is simply challenging the definition of a single family detached dwelling as interpreted by *Long* and as applied to her project. *See Id.* ___ N.C. App. ___, 787 S.E.2d 835.

B. Claim I: UDO Section 10.51 Violates North Carolina's Zoning Enabling Statutes

Plaintiff raises two claims under the Zoning Enabling Statutes.

1. North Carolina General Statute § 153A-340(a)

[3] Plaintiff alleges that Section 10.51 of the UDO violates North Carolina General Statute § 153A-340(a), which is the grant of power to counties to enact zoning ordinances:

> For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance or as a separate ordinance. A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and

> use of buildings, structures, and land for trade, industry, residence, or other purposes.

N.C. Gen. Stat. § 153A-340(a) (2017).

The trial court made this conclusion of law on the zoning enabling statute:

> 4. LeTendre is likely to prevail on her claim that the provisions of the UDO that are barring her home from being a single-family detached dwelling are unenforceable because *those provisions violate the zoning enabling statutes*. They constitute an arbitrary restriction on her ability to use her property in that they do not promote health, safety, morals, or the general welfare.

(Emphasis added.) Plaintiff contends that Section 10.51 of Currituck County's UDO violates North Carolina General Statute § 153A-340(a) because it does not promote "health, safety, morals, or the general welfare[.]" *Id.* Plaintiff argues that Section 10.51's "requirements" of "a Single Common Foundation" and "that a Single-Family Detached Dwelling Be Contained Within a Single Building" do not "Promote Health, Safety, Morals, or the General Welfare[.]"

"The presumption is that the zoning ordinance as a whole is a proper exercise of the police power[.] The burden to show otherwise rests upon a property owner who asserts its invalidity." *Durham County v. Addison*, 262 N.C. 280, 282, 136 S.E.2d 600, 602 (1964) (citations, quotation marks, and ellipses omitted). In asserting Section 10.51's "invalidity[,]" *see id.*, Plaintiff focuses on her alleged "requirements" of UDO Section 10.51 and the lack of a substantial relation between the regulation and the promotion of general welfare. Plaintiff argues,

> Our courts have confirmed that zoning regulations are valid only if they substantially promote one of the four stated goals. 'Zoning ordinances are upheld when, but only when, they bear a ***substantial relation*** to the public health, safety, morals, or general welfare.' *Schloss v. Jamison*, 262 N.C. 108, 114, 136 S.E.2d 691, 695 (1964) (emphasis added); *see also Covington v. Town of Apex*, 108 N.C. App. 231, 234-35, 423 S.E.2d 537, 539 (1992) (striking down a town's rezoning ordinance in part because the rezoning would create only aesthetic improvements, which were a minimal public benefit); *Wenco Mgmt. Co. Town of Carrboro*, 53 N.C. App. 480, 281 S.E.2d 74 (1981)

> (finding zoning ordinances that barred drive-thru restaurants but allowed other types of businesses to have drive-thru windows as not being reasonably related to any legitimate governmental objective).

(Emphasis in original.) Plaintiff claims, and the trial court found, that Section 10.51 of the UDO is an "arbitrary restriction on her ability to use her property" because it does "not promote health, safety, morals, or the general welfare" so it is in violation of the zoning enabling statutes. Plaintiff argues that "the UDO's requirement of structural dependence does not bear substantial relation to the zoning enabling statute because this statute does not authorize a County to regulate the design or function of structural elements."

The most basic problem with Plaintiff's argument is that UDO Section 10.51 does *not* require "a Single Common Foundation" or that "a Single-Family Detached Dwelling Be Contained Within a Single Building[,]" nor does it "regulate the design or function of structural elements." As explained in *Long*,

> The UDO defines "DWELLING, SINGLE-FAMILY DETACHED" as follows: "A residential building containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal structure." UDO § 10.51. Thus, the definition of a Single Family Dwelling has five elements: (1) A building, (2) for residential use, (3) containing not more than one dwelling unit, (4) to be occupied by one family, and (5) not physically attached to any other "principal structure." The definition of a Single Family Dwelling includes portions that address the physical structure of the proposed dwelling: "a building," "containing not more than one dwelling unit," and "not physically attached to any other principal structure." . . .
>
> . . . .
>
> Yet the definition of Single Family Dwelling clearly allows more than one "building" or "structure" to be constructed on the same lot, so the presence of three "buildings" alone does not disqualify the project.

___ N.C. App. at ___, 787 S.E.2d at 838-40 (citation and footnotes omitted).

Plaintiff argues because the UDO would allow a 15,000 square foot house on Plaintiff's lot there is no practical difference between her

project and a 15,000 square foot house of a more traditional configuration. Plaintiff's argument, and some of the trial court's findings, also focus on a "structural dependence" requirement allegedly imposed by Defendant. But the UDO does not address structural dependency nor does it require any particular type or design of foundation. The type or design of foundation was also not a factor in this Court's decision in *Long*. *See Long*, ___ N.C. App. ___, 787 S.E.2d 835. Section 10.51 addresses the types of structures allowed but says nothing about their construction or design. *See generally id.* at ___, 787 S.E.2d at 838. Section 10.51 is directly within the types of restrictions listed by North Carolina General Statute § 153A-340(a); Defendant

> may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

N.C. Gen. Stat. § 153A-340(a).

Plaintiff's focus on a requirement of "structural dependence" is simply misplaced.

The only specific requirements as to the design or size of the house or type of foundation are imposed by the CAMA permit which will not allow any single building to be over 5,000 square feet. As the trial court found, "CAMA regulations allow a larger development to use the 60-foot setback if that development is composed of *separate components that are each less than 5,000 square feet* and that are *structurally independent of each other*." (Emphasis added). And the need for a CAMA permit was created by Plaintiff's decision to build the house so close to the shore. Plaintiff's lot is approximately 3.5 acres, and the project could have been constructed in another location where a CAMA permit would not be needed. The unique characteristics of Plaintiff's lot and her desired project location do not mean that Defendant acted beyond the authority granted by North Carolina General Statute § 153A-340(a) to enact ordinances which in their legislative judgment "promote health, safety, morals, or the general welfare[.]" N.C. Gen. Stat. § 153A-340(a).

> In addition, *Long* also noted the substantial relation between Section 10.51 and the general welfare:

The UDO provides that the SF District

> is established to accommodate very low density residential development on the portion of the outer banks north of Currituck Milepost 13. The district is intended to accommodate limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events. The district accommodates single-family detached homes. Public safety and utility uses are allowed, while commercial, office, and industrial uses are prohibited.

Long, ___ N.C. App. at ___, 787 S.E.2d at 838 (citation, ellipses, and brackets omitted). "The UDO defines DWELLING, SINGLE–FAMILY DETACHED as follows: A residential building containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal structure. UDO § 10.51." *Id.* at ___, 787 S.E.2d at 838 (quotation marks omitted). Thus, allowing only residential buildings that do not contain "more than one dwelling unit to be occupied by one family" and are "not physically attached to any other principal structure" ensures there is "limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events[;]" *id.*, the UDO's goals would promote "the public health, safety, morals, or general welfare." N.C. Gen. Stat. § 153A-340(a). And while we find Plaintiff's argument to be without merit, even assuming *arguendo* there was weight to her contention that UDO Section 10.51 does not promote "public health, safety, morals, or general welfare[,]" Plaintiff's own cited case law states that

> [w]hen the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary

> duty and responsibility of determining whether its action is in the interest of the public health, safety, morals or general welfare.

Schloss v. Jamison, 262 N.C. 108, 115, 136 S.E.2d 691, 696 (1964) (citations and quotation marks omitted).

Plaintiff is asking this Court to conclude she is likely to prevail on a claim that a UDO *definition* of a single family detached dwelling is beyond the legislative authority granted by North Carolina General Statute § 153A-340(a). If we were to determine that Plaintiff is likely to prevail on such a claim, our ruling would cast serious doubt on nearly every common provision of all municipal ordinances in the State of North Carolina, including definitions of single family detached dwellings and other common uses. Plaintiff has presented no authority that Defendant's definition of a single family detached dwelling is beyond the County's statutory power. Plaintiff is unlikely to prevail on her claim that UDO Section 10.51 is not authorized by North Carolina General Statute § 153A-340(a), and thus that is not a proper basis for a preliminary injunction.

2. North Carolina General Statute § 153A-340(l)

[4] North Carolina General Statute § 153A-340(l) provides, in part,

> Any zoning and development regulation ordinance relating to building design elements adopted under this Part, under Part 2 of this Article, or under any recommendation made under G.S. 160A-452(6)c. may not be applied to any structures subject to regulation under the North Carolina Residential Code for One- and Two-Family Dwellings . . . .
>
> . . . .
>
> . . . For the purposes of this subsection, the phrase "building design elements" means exterior building color; type or style of exterior cladding material; style or materials of roof structures or porches; exterior nonstructural architectural ornamentation; location or architectural styling of windows and doors, including garage doors; the number and types of rooms; and the interior layout of rooms. The phrase "building design elements" does not include any of the following: (i) the height, bulk, orientation, or location of a structure on a zoning lot; (ii) the use of buffering or screening to minimize visual impacts, to mitigate the impacts of light and noise, or to protect the privacy of

> neighbors; or (iii) regulations adopted pursuant to this Article governing the permitted uses of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings.

N.C. Gen. Stat. § 153A-340(l) (2017).

Plaintiff also argues that "Section 10.51 of the Currituck County UDO [a]ttempts [t]o [r]egulate "[b]uilding [d]esign [e]lements" [i]n [v]iolation of North Carolina [l]aw[,]" specifically North Carolina General Statute § 153A-340(l). Plaintiff essentially alleges in her complaint that because multiple principal structures are not allowed on her lot, the UDO impermissibly attempts "to regulate the interior layout of rooms[.]" The trial court did not make a specific conclusion as to North Carolina General Statute § 153A-340(l) and its conclusion regarding the zoning enabling statute focuses on the "public welfare" portion of subsection (a). Plaintiff also does not make any arguments specifically regarding North Carolina General Statute § 153A-340(l) in her brief.

But just as we discussed above, Plaintiff's argument seeks to impose imaginary "requirements" upon Section 10.51. Section 10.51 does not address the "interior layout of rooms" any more than it addresses foundations or "structural dependence[.]" Plaintiff is unlikely to prevail on a claim that Defendant wrongfully regulated the interior layout of her rooms, and thus that could not be a proper basis for a preliminary injunction.

C. Constitutional Claims

Plaintiff's second, fifth, and seventh claims all raise constitutional issues. Each of the constitutional issues again focuses on Section 10.51. It is not entirely clear if Plaintiff's claims are facial or as-applied challenges to Section 10.51.

> [T]here is a difference between a challenge to the facial validity of an ordinance as opposed to a challenge to the ordinance as applied to a specific party. The basic distinction is that an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context. In an as-applied case, the plaintiff is contending that the defendant municipal agency violated his or her constitutional rights in the manner in which an ordinance was applied to his or her property. Only in as-applied

> challenges are facts surrounding the plaintiff's particular circumstances relevant.
>
> . . . And in the context of a zoning action involving property, it must be clear that the state's action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. Further, in making this determination we may consider, among other factors, whether: (1) the zoning decision is tainted with fundamental procedural irregularity; (2) the action is targeted at a single party; and (3) the action deviates from or is inconsistent with regular practice.

Town of Beech Mountain v. Genesis Wildlife, ___ N.C. App. ___, ___, 786 S.E.2d 335, 347 (2016) (citations, quotation marks, and brackets omitted), *aff'd per curiam*, 369 N.C. 722, 799 S.E.2d 611 (2017). The complaint uses the phrase "on its face" several times, but Plaintiff cites no authority and makes no real argument that the UDO is unconstitutional on its face. Because "a facial challenge represents a Plaintiff's contention that a statute is incapable of constitutional application *in any context*[,]" if we determine the ordinance is constitutional as-applied to Plaintiff, we have necessarily also determined it is facially constitutional as her case is the "context" where it is capable "of constitutional application[.]" *Id.* (emphasis added). Plaintiff's real argument is that UDO Section 10.5 is unconstitutional as applied to her project, so we will address her contentions accordingly.

Again, it is also important to remember the history of this case. Defendant initially approved Plaintiff's plans and the Longs challenged that approval in *Long*. *See generally Long*, ___ N.C. App. ___, 787 S.E.2d 835. Defendant did not *apply* UDO Section 10.51 to Plaintiff in the manner she claims to be unconstitutional in this case until after *Long* was issued and Defendant sought to comply with the ruling in *Long*. So Plaintiff's as-applied constitutional challenges are based upon Defendant's efforts to enforce the UDO as interpreted by *Long*.

While our standard of review remains "essentially *de novo*[,]" *Robin*, 70 N.C. App. at 540, 320 S.E.2d at 696, for purposes of whether the trial court should have issued a preliminary injunction, we also consider constitutional issues *de novo*:

> The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering

> the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act. In passing upon the constitutionality of a statute there is a presumption that it is constitutional, and it must be so held by the courts, unless it is in conflict with some constitutional provision.

State v. Fryou, 244 N.C. App. 112, 125, 780 S.E.2d 152, 161 (2015), *disc. review dismissed*, 368 N.C. 689, 781 S.E.2d 479, *disc. review denied*, 368 N.C. 689, 781 S.E.2d 483 (2016).

1. Arbitrary and Capricious

[5] Plaintiff argues that application of Section 10.51 violates the state and federal constitutions because it arbitrarily and capriciously distinguishes between building characteristics and her constitutional due process rights have been violated. To a large extent, Plaintiff's argument repeats her contentions from her arguments regarding North Carolina General Statute § 153A-340(a). The trial court's only conclusion which appears to address this claim is: "They constitute an arbitrary restriction on her ability to use her property in that they do not promote health, safety, morals, or the general welfare."[3]

Plaintiff contends

> Section 10.51 violates the federal and state constitutions because it is arbitrary and capricious in three respects: (1) its distinction of permissible buildings based on common, versus separate, foundations; (2) its requirement that a 'dwelling' be a single building; and (3) the County's interpretation that labeling within plans as opposed to actual building characteristics, is determinative.

Plaintiff only cites one case in this section of her brief: " 'Governmental action in the zoning or land use context violates due process principles if it is arbitrary or capricious, lacks a rational basis, or is undertaken with improper motives.' *Browning-Ferris Industs. Of South Atlantic, Inc. v. Wake Cty.*, 905 F. Supp. 312, 319 (E.D.N.C. 1995)."[4] Plaintiff uses *Browning-Ferris* only to support this general proposition, which is

3. It appears this conclusion was actually addressing the zoning enabling statutes since that is the only legal basis the trial court mentions along with the "health, safety, morals, or the general welfare" language, but it is the only conclusion which uses the word "arbitrary[.]"

4. As a federal district court case, *Browning-Ferris* is from a federal trial court, and is not binding upon this Court.

correct, but Plaintiff cites no cases to show how her enumerated three contentions would likely violate her rights to due process.

In *Responsible Citizens*, our Supreme Court set out the analysis to be used in "due process challenges to governmental regulations of private property claimed to be an invalid exercise of the police power." *See generally Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261, 302 S.E.2d 204, 208 (1983).

> Several principles must be borne in mind when considering a due process challenge to governmental regulation of private property on grounds that it is an invalid exercise of the police power. First, is the object of the legislation within the scope of the police power? Second, considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable?
>
> In short, then, the court is to engage in an ends-means analysis in deciding whether a particular exercise of the police power is legitimate. The court first determines whether the ends sought, *i.e.*, the object of the legislation, is within the scope of the power. The court then determines whether the means chosen to regulate are reasonable. Justice Brock stated that this second inquiry is really a two-pronged test. That is, in determining if the means chosen are reasonable the court must answer the following: (1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?

Id. at 255, 261–62, 302 S.E.2d at 208 (1983) (citations and quotation marks omitted).

As directed by our Supreme Court in *Responsible Citizens*, *see id.*, we must first consider whether "the object of the ordinance is within the scope of the police power[.]" *Id.* at 261, 302 S.E.2d at 208. It is well-established that zoning ordinances such as Section 10.51 are within Defendant's police power:

> In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. The police power is that

> inherent and plenary power in the state which enables it to govern, and to prohibit things hurtful to the health, morals, safety, and welfare of society.

Raleigh v. Fisher, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950). In addition, Section 10.51 is specifically within the authority granted by North Carolina General Statute § 153A-340(a). *See* N.C. Gen. Stat. § 153A-340(a).

Next, we must address whether "considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable?" *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208. This question includes a "two-pronged test": "(1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?" *Id.* at 261–62, 302 S.E.2d at 208.

The first question is whether Section 10.51 of the UDO is "in its application reasonably necessary to promote the accomplishment of a public good[.]" *Id.* Defendant has chosen to adopt a zoning ordinance which limits development in the Single Family Residential Outer Banks Remote District. *See generally Long*, ___ N.C. App. at ___, 787 S.E.2d at 838. The "public good" which the ordinance seeks to accomplish is provided by the ordinance itself:

> The UDO provides that the [Single Family Residential Outer Banks Remote] District
>
> > is established to accommodate very low density residential development on the portion of the outer banks north of Currituck Milepost 13. The district is intended to accommodate limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events. The district accommodates single-family detached homes. Public safety and utility uses are allowed, while commercial, office, and industrial uses are prohibited.

Id.

Part of the "surrounding circumstances[,]" *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208, is the natural environment of the

Single Family Residential Outer Banks Remote District. The location of Plaintiff's project is so environmentally sensitive that her house also required a CAMA permit and approval by other agencies. Plaintiff's project is in exactly the type of location which justifies limitations on development. The limitations are intended both to protect the natural environment *and* to protect the people who live in or visit the area. As the UDO notes, there is a "lack of infrastructure," making access by emergency personnel more difficult. *See generally Long*, ___ N.C. App. at ___, 787 S.E.2d at 838. In addition, the area is subject to "flooding and catastrophic weather events" so there is a greater risk of a need for emergency evacuation. *Id.*

The risk from flooding and erosion is also one of the stated reasons for the structural limitations of the CAMA permit: "Any structure authorized by this permit shall be relocated or dismantled when it becomes imminently threatened by changes in shoreline configuration." Plaintiff's environmental expert, Mr. Woody, described the reasons for the 5,000 square foot limitation in his affidavit:

> The goal in determining structure setbacks under CAMA is articulated in a January 17, 1992 memorandum to the Implementation & Standards Committee (CRAC) from Charles Jones of the DCM staff. That memorandum states that the "*objective [of determining the size of a structure] is to limit the total size of a structure so that it can be readily relocated if threatened by erosion." If a home is larger than 5,000 square feet but consists of structurally independent components that are each less than 5,000 square feet, that would facilitate relocation of the structure if it is threatened by erosion.*

(Emphasis added.)

Defendant's ordinances are "reasonably necessary to promote the accomplishment of a public good" and Defendant is applying them reasonably and consistently with that purpose. "[I]t is this Court's duty to apply the ordinance irrespective of any opinion we may have as to its wisdom, for it is our duty to declare what the law is not what the law ought to be." *Town of Pine Knoll Shores v. Evans*, 104 N.C. App. 79, 83, 407 S.E.2d 895, 897 (1991) (citation, quotation marks, and brackets omitted), *aff'd as modified*, 331 N.C. 361, 416 S.E.2d 4 (1992). Although there may be other ways to accomplish the UDO's purposes and it could be worded differently, we cannot substitute our judgment for that of the

Currituck County Board of Commissioners.[5] *See id.* The specific application of Section 10.51 of the UDO to Plaintiff's project which Plaintiff challenges is based upon Defendant's Notice of Violation and Stop Work order issued after, and based directly upon, this Court's opinion in *Long*. Plaintiff cannot show that Defendant has acted unreasonably or arbitrarily by seeking to comply with this Court's mandate. *See Battle v. City of Rocky Mount*, 156 N.C. 329, 337, 72 S.E. 354, 357 (1911) ("The law will not countenance or condone any attempt to defy its mandate. The private citizen must obey the law, and the public officer is not exempt from this duty by any special privilege appertaining to his office. He is not wiser than the law, nor is he above it.")

The second prong of the test "is [whether] the interference with the owner's right to use his property as he deems appropriate [is] reasonable in degree?" *Responsible Citizens*, 308 N.C. at 255, 262, 302 S.E.2d at 208. In *Wenco Management Co. v. Town of Carrboro*, this Court addressed whether a zoning ordinance was a reasonable interference with the landowner's right to use its property. 53 N.C. App. 480, 281 S.E.2d 74 (1981). Carrboro had adopted an amendment to its zoning ordinances which barred drive-through windows for restaurants in all of the business zoning districts in town except one, the B-4 district. *See id.* at 482, 281 S.E.2d at 75. But Carrboro designated no area in the town as B-4, so there was nowhere in town where Wenco could operate a restaurant with drive-through service. *See id.* In addition, Carrboro had adopted the amendment to its zoning ordinance "in direct response to plaintiffs' proposed construction of a restaurant with drive-in service after plaintiffs had obtained a valid conditional use permit." *Id.* at 483, 281 S.E.2d at 76. This Court determined the amendment was not reasonably related to any legitimate governmental interest because of the timing of the ordinance in response to plaintiff's permit and the fact that no area was designated as a B-4 district, holding that "[t]he B-4 district amendment was unlawful as an arbitrary and unduly discriminatory interference with plaintiffs' property rights which lacked any rational relation to valid police power objectives." *Id.* at 484, 281 S.E.2d at 76.

Here, there is no indication that Defendant has adopted or applied any zoning ordinance in a discriminatory, arbitrary, or retaliatory manner. Nor does the ordinance prevent Plaintiff from using her lot for its intended purpose, a single family detached dwelling. The UDO does not limit Plaintiff's right to build a house on her property; it does not limit

5. Again, Plaintiff proposed an amendment to the UDO which would allow her project to be permitted as a single family detached dwelling, but the Currituck County Board of Commissioners rejected it.

the square footage of the house, or as relevant for this case, where on the lot she may build. Once again, Plaintiff's issue is created by a combination of her decision to build in a certain location on her property, the CAMA permit based upon that location, and the requirements of the UDO. Any "interference with [Plaintiff's] right to use her property as [she] deems appropriate" imposed by the UDO is secondary to the other factors and is "reasonable in degree[.]" *Responsible Citizens*, 308 N.C. at 262, 302 S.E.2d at 208.

Plaintiff also argues that the UDO is arbitrary and capricious as applied to her because of (1) a distinction of permissible buildings based on common versus separate foundations; (2) a requirement that a dwelling be a single building; and (3) Defendant's interpretation that labeling within the plans, as opposed to actual building characteristics, is determinative.

Plaintiff's argument regarding the foundation of the project is based primarily upon the Letter of Determination from the Planning Director, of 27 March 2017. In that letter, Mr. Woody stated:

> In response to the Notice of Violation dated February 1, 2017, you have submitted for review construction plans dated January 20, 2017. The construction plans dated January 20, 2017 depict the same three structurally separate and independent buildings illustrated on construction plans dated November 22, 2013 that were the subject of the Letter of Determination reversed by the Court of Appeals. Other than modification of language on the construction plan sheets, there appears to be no material difference between the plans used to construct the three structurally separate and independent buildings and the construction plans dated January 20, 2017. It is also noteworthy that to acquire a permit from the North Carolina Division of Coastal Management it is represented to that agency that the buildings located on your property are structurally separate and independent buildings. In a January 27, 2017 North Carolina Division of Coastal Management memorandum from Doug Hugget, Major Permits Coordinator, to Ron Reinaldi, Field Representative, Mr. Hugget writes, "The original major permit authorized the construction of three single-family dwellings connected via a structurally detached roofed two story deck . . . ." Mr. Hugget's memorandum further shows that the only changes on construction plan sheets

> are (1) "[c]hanges nomenclature on the Title Sheet to refer to the dwelling as a 'Single-Family Dwelling' " and "depicts a smaller constructed size of the permitted gazebo building" and (2) "that a girder system that would connect the separate buildings is no longer being considered and is not incorporated into the submitted construction plans."
>
> The February 1, 2017 Notice of Violation requires compliance by structurally modifying separate and independent buildings on your property into one structurally dependent building. The construction plans dated January 20, 2017 do not show one structurally dependent building. It is therefore my determination that plans dated January 20, 2017 do not show a building that complies with the UDO definition for single-family detached dwelling and a modified zoning compliance permit is denied.

This letter was part of Defendant's efforts to comply with this Court's decision in *Long*. After *Long*, Plaintiff and Defendant sought to find an acceptable revision to the project to make it fit within the UDO requirements as set forth by *Long*. Several possible changes were discussed, such as moving the three buildings out of the CAMA setback area so they could be connected as one principal structure or reconfiguring the side buildings to be smaller accessory buildings, with the middle building as the principal structure. Plaintiff declined to make any changes, and ultimately Mr. Woody issued the 27 March 2017 letter. But Defendant was not requiring any particular revision to Plaintiff's project. Defendant has no duty to tell Plaintiff what she must do to comply with the UDO, although Defendant has worked extensively with Plaintiff and her representatives to consider alternatives. It is not the job of Defendant's Planning Department to direct the details of how to bring the project into compliance with the UDO; their job is to determine if Plaintiff's proposed plans comply with the UDO. Section 10.51 does not regulate Plaintiff's "foundation[.]" The fact that Defendant may have suggested changes to Plaintiff's foundation as *one* way to comply with both the UDO and CAMA, does not mean the UDO regulates foundations.

Nor does the UDO require that a single family detached dwelling be "a single building[.]" As explained by *Long*, the dwelling may include "accessory structures" which are

> "subordinate in use and square footage" to a principal structure. UDO § 10.34. Even assuming that the two side "buildings" or "structures" are subordinate in use to the center "building," it is uncontested that all of the buildings are approximately 5,000 square feet. No building is

> subordinate in square footage to another so none can meet the definition of an "accessory structure."

Id. at ___, 787 S.E.2d at 840 (citations and footnote omitted).

And if labeling on plans, instead of actual building characteristics, were controlling, there would be no dispute here. Plaintiff could simply re-label the structures on the plans as whatever she likes that would comply with the UDO. According to Mr. Woody's letter, that is what she attempted to do.[6] Although in *Long*, ___ N.C. App. ___, 787 S.E.2d 835, the parties were dealing with plans on paper, when Plaintiff filed her complaint, the buildings were nearly complete so Defendant is dealing with actual structures. Giving a structure a new name on paper changes nothing; it is what it is. *See*, *e.g.*, *Pine Knoll Shores*, 104 N.C. App. 79 at 80-81, 407 S.E.2d at 895-96. (The defendant landowners called their structure a "ground cover," not a "deck," where zoning ordinance forbade construction of "other separate structures" on single-family residential lot; Court determined name of structure was not controlling and landowner had violated the ordinance by construction of a structure of "precisely sized wooden boards connected to one another so as to form a level, continuous surface covering a substantial area of the lot between the canal and house."). Plaintiff has failed to show she is likely to prevail on her claim that Section 10.51 of the UDO is unconstitutionally arbitrary or capricious as applied to her, and thus that is not a proper basis for the issuance of a preliminary injunction.

2. Vagueness

[6] Plaintiff argues that "[t]he UDO is unconstitutionally vague to the extent it requires the wings of the home to be structurally dependent."

> [A] statute is unconstitutionally vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply the law. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Fryou, 244 N.C. App. at 125, 780 S.E.2d at 161 (citation omitted).

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6. Mr. Woody's letter provides, "Other than modification of language on the construction plan sheets, there appears to be no material difference between the plans used to construct the three structurally separate and independent buildings and the construction plans dated January 20, 2017."

The trial court determined that Plaintiff is likely to prevail on her claim that Section 10.51 is unconstitutionally vague:

> LeTendre is likely to prevail on her claim that those provisions in the UDO that are barring her home from being a single-family detached dwelling are unconstitutionally vague. The UDO as written does not provide reasonable notice that a home like LeTendre's, in which the wings connected by enclosed, air conditioned hallways and have connected rooflines, would not meet the definition of a single-family detached dwelling. Those UDO provisions therefore fail to reasonably apprise property owners concerning what conduct they prohibit.

Again, Plaintiff's argument is based upon an assumption that the UDO requires "structural dependency[,]" although it does not. In fact, even Plaintiff notes that "Section 10.51 of the UDO does not expressly include a requirement that the wings of a building be structurally dependent on one another in order for the building to be considered a dwelling." As explained in *Long*,

> The UDO defines "DWELLING, SINGLE-FAMILY DETACHED" as follows: "A residential building containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal structure." UDO § 10.51. Thus, the definition of a Single Family Dwelling has five elements: (1) A building, (2) for residential use, (3) containing not more than one dwelling unit, (4) to be occupied by one family, and (5) not physically attached to any other "principal structure." The definition of a Single Family Dwelling includes portions that address the physical structure of the proposed dwelling: "a building," "containing not more than one dwelling unit," and "not physically attached to any other principal structure." . . .
>
> . . . .
>
> Yet the definition of Single Family Dwelling clearly allows more than one "building" or "structure" to be constructed on the same lot, so the presence of three "buildings" alone does not disqualify the project. However, the remainder of the definition does disqualify the project. The last element in the definition of a Single Family Dwelling is "not physically attached to any other principal

> structure." UDO § 10.51. In other words, the Single Family Dwelling is "detached," which is part of the title. The UDO provides that "words used in the singular number include the plural number and the plural number includes the singular number, unless the context of the particular usage clearly indicates otherwise." UDO § 10.1.11. In the definition of Single Family Dwelling, the context does clearly indicate otherwise. We cannot substitute the word "buildings" for "a building" without rendering the last phrase of the definition, "not physically attached to any other principal structure" either useless or illogical. The Planning Director determined that the multiple buildings together function as a principal structure, but even if they are functionally used as one dwelling unit, each individual building is itself a "structure." *See* §§ 10.43, .83. Thus, each building is necessarily either an "accessory structure" or a principal structure. And respondents do not argue that the side buildings are "accessory structures;" they argue only that the entire project functions as one "principal structure." Although the ordinance does not define principal structure, it does define "accessory structures" as "subordinate in use and square footage" to a principal structure. UDO § 10.34. Even assuming that the two side "buildings" or "structures" are subordinate in use to the center "building," it is uncontested that all of the buildings are approximately 5,000 square feet. No building is subordinate in square footage to another so none can meet the definition of an "accessory structure." This would mean that each building is a principal structure, however a Single Family Dwelling only allows for one. In addition, the ordinary meaning of "principal" is in accord. *See* Webster's Seventh New Collegiate Dictionary 676 (1969). "Principal" is defined as "most important." *Id.* There can be only one "principal structure" on a lot in the SF District and that principal structure can be attached only to "accessory structures."

Long, ___ N.C. App. at ___, 787 S.E.2d at 838-40 (citations, brackets, and footnotes omitted).

The UDO defines a single family detached dwelling as "[a] residential building containing not more than one dwelling unit to be occupied by one family, *not physically attached* to any other principal structure.

UDO § 10.51." *Id.* at ___, 787 S.E.2d at 838 (emphasis added). Plaintiff is again arguing, as she did in *Long*, *see id.* at ___ 787 S.E.2d at 840, that if the structures are *connected*, they function as and should be deemed as one "building" under the UDO.[7] But "connection" does not make three building into one, despite the function. As explained in *Long*,

> Perhaps a more "absurd" result would be if we were to read the ordinances to focus only upon the "use" portion of Single Family Dwelling definition, as respondents argue, while ignoring the structural portion, since it would not matter how many "buildings" are connected by "conditioned hallways" if they are functioning as one dwelling for one family. Were we to adopt respondent Currituck County's interpretation, a project including ten 5,000 square foot buildings, all attached by conditioned hallways, which will be used as a residential dwelling for one family with a kitchen facility in only one of the buildings would qualify as a Single Family Dwelling. Respondents' interpretation would also be contrary to the stated purpose of the zoning, which calls for "very low density residential development" and "is intended to accommodate limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events."

Id. at ___, 787 S.E.2d at 840-41 (citation omitted).

The words "physically attached" are not vague or difficult to understand; they mean the same thing as "connected." *Id.* at ___, 787 S.E.2d at 838. However the structures are "physically attached" – whether by the foundation or by "air conditioned hallways" – Plaintiff's project includes three separate buildings which are *physically attached* to one another. The importance of the foundation of the structures comes only from the CAMA requirements, not the UDO. The CAMA permit will allow no building larger than 5,000 square feet and will not allow the three buildings to be structurally dependent upon one another. Plaintiff's

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7. For example, the affidavit from Plaintiff's architect states that "[o]n the October 10, 2013 plans, because the wings were connected with air conditioned hallways and their roof lines were connected, the wings were integrated and connected such that the entire home would be considered a single building and a single dwelling in the design and construction industry."

project included three separate buildings from the beginning; it was intentionally designed this way to comply with CAMA requirements.

The *Long* case answered the question of vagueness. *Id.* at ___, 787 S.E.2d at 840-41. Although the UDO provisions can be difficult to read, as many ordinances and statutes are, they are not unconstitutionally vague. Section 10.51 "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "provide[s] explicit standards for those who apply the law[,]" *Fryou*, 244 N.C. App. at 125, 780 S.E.2d at 161, by plainly prohibiting more than one principal structure per lot, although allowing accessory structures. *See Long*, ___ N.C. App. at ___, 787 S.E.2d at 838-40. Plaintiff understood this also; the negotiations and plan revisions have been caused by Plaintiff's insistence on fitting a square peg into a round hole. The problem was created by the CAMA regulations and Plaintiff's decision to build within the CAMA setback area; these factors do not make the ordinance vague. Plaintiff is unlikely to prevail on her claim of unconstitutional vagueness, and thus that is not a proper basis for the issuance of a preliminary injunction.

3. Equal Protection

[7] Plaintiff's final constitutional claim was regarding equal protection. The trial court's order did not address whether Plaintiff was likely to prevail on her equal protection claim. Neither Plaintiff nor Defendant have addressed equal protection in their briefs on appeal.[8]

An equal protection violation would require Plaintiff to show that Defendant treated her differently from other similarly situated property owners in its application of the UDO because in order

> [t]o establish an equal protection violation, [plaintiff] must identify a class of similarly situated persons who are treated dissimilarly. . . . Thus, in order to properly assert an equal protection violation, Petitioner was required to allege and demonstrate that she was treated differently than other similarly situated individuals in some relevant way.

Yan-Min Wang v. UNC-CH Sch. Of Med., 216 N.C. App. 185, 204–05, 716 S.E.2d 646, 658–59 (2011) (citation and quotation marks omitted). There has been no forecast of evidence that Defendant has applied its

8. Because a trial court's order must be affirmed if there is any legal basis for the order, even one other than stated in the order, *see generally Shore*, 324 N.C. at 428, 378 S.E.2d at 779, we are briefly addressing equal protection. In addition, Plaintiff was unwilling to concede at oral argument that any one of the nine claims may not support the preliminary injunction.

zoning ordinance in a manner that treats Plaintiff differently from other property owners in the SF District. Plaintiff is not likely to prevail on a claim for violation of her equal protection rights so it may not serve as the reason a preliminary injunction may issue.

D. Preemption by North Carolina Building Code

[8] Plaintiff's fourth cause of action is that "Section 10.51 of the Currituck County UDO [i]s [p]reempted [b]y the North Carolina Building Code[.]" The trial court's order agreed with Plaintiff and found:

> The provisions in the UDO that prevent LeTendre's home from qualifying as a single-family detached dwelling also attempt to regulate matters already regulated by the North Carolina Building Code. Ms. LeTendre's home is governed [by] the Building Code, and the Building Code contains detailed provisions governing such matters as how the foundations of her home should be constructed and whether the wings of her home should be structurally dependent. Nothing in the Building Code requires the foundations of LeTendre's home to be structurally integrated, and nothing in the Building Code requires the wings of her home to be structurally dependent. The UDO provisions that bar her home from being a single family detached dwelling therefore require her home to be constructed in a way that the Building Code does not require.

The trial court concluded:

> LeTendre is likely to prevail on her claim that the provisions of the UDO that are barring her home from being a single-family detached dwelling are preempted by the North Carolina Building Code because those provisions attempt to regulate matters of construction that are already comprehensively and exclusively regulated by the Building Code.

We first note that neither Plaintiff's brief nor the trial court's order identifies which provisions of the North Carolina Building Code preempt Defendant's zoning ordinance, but Plaintiff's complaint identified the statutory basis for her claim as North Carolina General Statute § 143-138(e), which provides:

> Effect upon Local Codes. – Except as otherwise provided in this section, the North Carolina State Building Code shall apply throughout the State, from the time of

its adoption. Approved rules shall become effective in accordance with G.S. 150B-21.3. However, any political subdivision of the State may adopt a fire prevention code and floodplain management regulations within its jurisdiction. The territorial jurisdiction of any municipality or county for this purpose, unless otherwise specified by the General Assembly, shall be as follows: Municipal jurisdiction shall include all areas within the corporate limits of the municipality and extraterritorial jurisdiction areas established as provided in G.S. 160A-360 or a local act; county jurisdiction shall include all other areas of the county. No such code or regulations, other than floodplain management regulations and those permitted by G.S. 160A-436, shall be effective until they have been officially approved by the Building Code Council as providing adequate minimum standards to preserve and protect health and safety, in accordance with the provisions of subsection (c) above. Local floodplain regulations may regulate all types and uses of buildings or structures located in flood hazard areas identified by local, State, and federal agencies, and include provisions governing substantial improvements, substantial damage, cumulative substantial improvements, lowest floor elevation, protection of mechanical and electrical systems, foundation construction, anchorage, acceptable flood resistant materials, and other measures the political subdivision deems necessary considering the characteristics of its flood hazards and vulnerability. In the absence of approval by the Building Code Council, or in the event that approval is withdrawn, local fire prevention codes and regulations shall have no force and effect. Provided any local regulations approved by the local governing body which are found by the Council to be more stringent than the adopted statewide fire prevention code and which are found to regulate only activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion or related hazards, and are not matters in conflict with the State Building Code, shall be approved. Local governments may enforce the fire prevention code of the State Building Code using civil remedies authorized under G.S. 143-139, 153A-123, and 160A-175. If the Commissioner of Insurance or other State official with responsibility for enforcement of the Code institutes a civil action pursuant to G.S. 143-139, a local

> government may not institute a civil action under G.S. 143-139, 153A-123, or 160A-175 based upon the same violation. Appeals from the assessment or imposition of such civil remedies shall be as provided in G.S. 160A-434.
>
> A local government may not adopt any ordinance in conflict with the exemption provided by subsection (c1) of this section. No local ordinance or regulation shall be construed to limit the exemption provided by subsection (c1) of this section.[9]

N.C. Gen. Stat. § 143-138(e) (2017). North Carolina General Statute § 143-138(e) merely sets forth the authority of the State to adopt building codes which apply throughout the state. Plaintiff's house is governed by the North Carolina Residential Code.

Plaintiff again focuses her argument on her contention that the UDO requires "structurally dependent foundations[.]" Plaintiff submitted the affidavit of her contractor, Mr. Mancuso, who averred:

> 80. The Building Code contains a chapter on foundations. I have reviewed and relied upon that chapter of the Building Code many times over the years and am personally familiar with it. An accurate copy of that chapter is attached as Exhibit 13. The Building Code's chapter on foundations applies to and governs the foundations in Ms. LeTendre's home. That chapter of the Building Code states that it "shall control the design and the construction of the foundation and foundation spaces for all buildings." That chapter comprehensively regulates the foundations of one and two family dwellings, and it has provisions governing matters like what materials must be used in a home's foundation, how the different components in a home's foundation must connect together and connect to other parts of the home, and what standards the components of a home's foundation must meet.
>
> 81. Neither the Building Code's chapter on foundations, nor any other provision in the Building Code, requires the foundations of the three wings in Ms. LeTendre's home

9. Subsection (c1) deals with elevators in private clubs and religious organizations, so it is not relevant to this case. *See* N.C. Gen. Stat. § 143-138(c1) (2017).

> to be connected or requires Ms. LeTendre's home to have a single common foundation.
>
> 82. Simply put, Ms. LeTendre's home is one building and one dwelling. It is one building for purposes of the Building Code, and it is considered one building as [that] term is understood and used in the local design and construction industry.

Plaintiff also relies upon a determination by the North Carolina Building Code Council issued in August 2015. Plaintiff's project came under consideration by the Building Code Council based upon Plaintiff's appeal from the North Carolina Department of Insurance ("NCDOI"). A staff member of NCDOI determined, after

> his review of the building plans, coupled with his review of the Coastal Area Management Agency ("CAMA") permit application for the project, led him to conclude that the proposed occupancy more closely resembles a "hotel" and should be constructed in compliance with R-l type occupancy as mandated in the North Carolina Building Code ("NCBC").

After discussion among Plaintiff's contractor, members of Defendant's staff, and NCDOI staff,

> an agreement was reached wherein Mr. Newns issued a residential building permit for the project with various modifications to construction standards and methods normally called for only in projects meeting R-3 occupancy standards found in the [North Carolina Building Code], but not in the [North Carolina Residential Code.] The additional requirements included sprinkler systems, handicap access, increased fire protection, emergency exits and the like.

Plaintiff's contractor agreed to these requirements with the "express understanding that . . . [Plaintiff] would solicit a formal interpretation from NCDOI regarding the occupancy classification and petition the County to remove all additional requirements not expressly mandated by the NCRC" if the NCDOI's determination that the building closely resembled a hotel" was reversed. On 28 May, 2015, a deputy commissioner of the NCDOI approved the determination that "if the property is 'used as a house,' it can be built according to NCRC standards, but if it were rented out as a "vacation rental,' as shown in the CAMA application, it most closely resembles a Group R-l Occupancy and must be constructed

in accordance with the NCBC." Plaintiff appealed this determination to the North Carolina Building Code Council, and the Council reversed the NCDOI ruling and concluded that "[t]his project meets the definition of a one family dwelling not more than three stories above grade plane in height with a separate means of egress, as required in NCRC section R101.2. Accordingly, the NCRC applies to this project."

Plaintiff argues that

> Currituck County's application of the UDO attempts to regulate a home's foundations in a manner different from that prescribed by the Building Code. (*See* Doc. Ex. 116 ¶¶80–81) The construction of a home's foundation(s) is regulated by the Building Code, and nowhere in the Code is there a requirement that various wings of a home must be structurally dependent or share a common foundation.

Plaintiff then footnotes that

> [t]hese conclusions are supported by the August 2015 ruling of the Building Code Council, which determined that the home depicted in the October 2013 plans is a "single-family dwelling." (Doc. Ex. 94-95, Ex. 11) Two building inspectors, including the County's Chief Building Inspector, have confirmed that the home is a single building for purposes of the Building Code. (Doc. Ex. 115 ¶78)

The first problem with Plaintiff's preemption argument is that the Currituck County UDO does not regulate the construction of foundations. Plaintiff is arguing only that the *definition* of a single family detached dwelling in the UDO somehow addresses the construction of foundations. The Planning Director's letter of 17 March 2017 also did not address any of the technical requirements of foundations. In addition, the determination by the North Carolina Building Code Council does not in any way control Defendant's application of its UDO.

In *Duggins v. Town of Walnut Cove*, this Court rejected a similar argument that the town ordinance's definitions of "mobile home," "modular home," and "site-built home" were an "impermissible attempt to regulate construction practices." 63 N.C. App. 684, 687, 306 S.E.2d 186, 188 (1983). The plaintiffs contended that they should be allowed to install a mobile home in an area which allowed only modular and site-built homes. *See id.* Prior to purchasing the mobile home, "the plaintiffs described to Defendant's town clerk/zoning administrator the type of manufactured home they intended to erect on their property and were

assured this home complied with local ordinances. Defendant issued a building permit to plaintiffs and accepted their payment of $200 as a water tap fee." *Id.* at 685, 306 S.E.2d at 187. But when the plaintiffs tried to install the mobile home on their lot, they were informed that it was not allowed in that zoning district. *Id.* One of the plaintiffs' arguments on appeal was that

> [d]efendant's attempt to "zone out" mobile homes as defined in the ordinance exceeds Defendant town's statutory authority both because the zoning enabling act does not authorize Defendant to regulate the types of structures used for single-family residential purposes and because Defendant's ordinance constitutes a back door attempt to intrude into a field preempted by state and federal law.

63 N.C. App. at 686, 306 S.E.2d at 188. Regarding building codes, the plaintiffs argued that because mobile homes and modular or site-built homes are governed by different building codes, "the zoning ordinance . . . [has] the effect of distinguishing between structures used for the same purpose--single-family residences--based solely on the construction methods and materials used." *Id.* at 687, 306 S.E.2d at 188. But this Court determined,

> We do not agree with plaintiffs' interpretation of the ordinance. It is obvious from the definitions in the ordinance that the different applicable building codes is not the only factor differentiating mobile homes from modular homes. Therefore, the ordinance does not have the effect suggested by plaintiffs. Defendant is clearly authorized by G.S. 160A-381 to regulate and restrict the location and use of any buildings or structures for residential and other purposes, and that is exactly what defendant has done in restricting the location of mobile homes.
>
> Similarly, plaintiffs attack the ordinance on the grounds it is an impermissible attempt to regulate construction practices. *Defendant's ordinance was not intended to and does not have the effect of regulating construction practices in any way. Rather, the ordinance deals solely with the location and use of buildings and structures as the statute expressly authorizes. Plaintiffs' attempt to read more into defendant's enactment of the ordinance is not warranted.* Accordingly, we hold both aspects of plaintiffs' first argument are meritless.

Id. at 687, 306 S.E.2d at 188–89 (emphasis added).

Defendant's UDO also "deals solely with the location and use of buildings and structures as the statute expressly authorizes. Plaintiff[']s[] attempt to read more into defendant's enactment of the ordinance is not warranted." *Id.* The trial court erred in concluding that Plaintiff is likely to prevail on her claim that UDO Section 10.51 impermissibly regulates construction practices and is preempted by the North Carolina Building Code. Plaintiff is unlikely to prevail on this claim so it is not a proper basis for a preliminary injunction.

E. Inverse Condemnation

[9] Plaintiff's sixth cause of action is that "Currituck County [h]as [t]aken LeTendre's [p]roperty[.]" The trial court did not conclude and Plaintiff does not argue that the preliminary injuction could be based upon her alternative claim for inverse condemnation. Plaintiff's complaint alleges that "Section 10.51 of the Currituck County UDO, by itself and in combination with those County actions, assurances, and representations . . . induced [her] to build" the project which now is deprived "of all economic value, market value, and utility." But since inverse condemnation is a claim for monetary compensation and not a claim to restrain the Defendant from taking some action, a preliminary injunction could not logically be based on inverse condemnation. We also note that under North Carolina General Statute § 40A-51, a Memorandum of Action must be filed for an inverse condemnation claim, and Plaintiff has failed to do so. *See* N.C. Gen. Stat. § 40A-51(b) (2017); *see also Cape Fear Pub. Util. Auth. v. Costa*, 205 N.C. App. 589, 596, 697 S.E.2d 338, 342 (2010) ("Defendant's counterclaim for inverse condemnation was thus subject to dismissal for its failure to comply with N.C. Gen. Stat. § 40A–51.") Since the preliminary injunction could not be based upon this claim, we will not speculate on it further, but we note Plaintiff would not be entitled to a preliminary injunction on this basis.

F. Laches

[10] Plaintiff's eighth cause of action is that "Currituck County's [a]ttempts to [e]nforce Section 10.51 of the UDO [a]gainst the Home are [b]arred by [l]aches[.]" This claim is based upon her allegation that Currituck County had notice "that the Home as described in the Plans might not comply with the UDO" in December of 2013 when the Longs appealed the BOA's determination. In other words, Defendant has taken too long to oppose Plaintiff's plans; Defendant should have known better than to approve her plans in November 2013 and should have changed

its position right away to join in the Longs' challenge.[10] The trial court did not rely upon laches in its issuance of the preliminary injunction, and Plaintiff has not addressed laches on appeal. But we do note that "a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past." *Fisher*, 232 N.C. at 635, 61 S.E.2d at 902. Therefore, Plaintiff is not entitled to a preliminary injunction on the basis of a likelihood of success of her claim of laches.

G. Common Law Vested Right

[11] Plaintiff's last claim is that even if she is not likely to prevail on any of her other claims, she still has a common law vested right to use the project. The trial court concluded that Plaintiff was likely to prevail on her vested right claim:

> LeTendre is likely to prevail on her claim that she has a vested right to complete and use her home as approved by the County in November 2013. At the time that LeTendre constructed her home, starting in the spring of 2015, she had valid approvals from Currituck County for that home's construction. This Court had ruled in December 2014 that the County's approval of her home was valid, and there was no stay in place to prevent this Court's order from taking effect. As a result, when LeTendre spent substantial sums in reliance on her approvals from the County to construct her home, she was relying on valid governmental approvals. Her reliance on those approvals was also reasonable and in good faith.

Plaintiff argues that

> [t]o establish a common law vested right, an owner must obtain an approval for the development and make substantial expenditures in good faith reliance on that approval. *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 112, 388 S.E.2d 538, 544–45 (1990). LeTendre received approval of her home's construction in the County's November 2013 Letter of Determination and March 2015 building permit. She then spent over $4 million building her home in

10. In *Long*, Plaintiff and Defendant were in agreement. *See Long*, ___ N.C. App. ___, 787 S.E.2d 835. Defendant is now carrying out this Court's mandate in *Long*, in opposition to Plaintiff.

> reliance on those approvals. (*See* Doc. Ex. 10 ¶32) Thus, she made substantial expenditures in good faith reliance on governmental approvals.

This Court described how a landowner may acquire a vested right to use her land in a certain way in *Browning-Ferris Industries v. Guilford County Bd. of Adj.*:

> The common law vested rights doctrine is rooted in the due process of law and the law of the land clauses of the federal and state constitutions and has evolved as a constitutional limitation on the state's exercise of its police powers. A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building; (2) the obligations and/or expenditures are incurred in good faith; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party; and (4) the amended ordinance is a detriment to the party. The burden is on the landowner to prove each of the above four elements.

126 N.C. App. 168, 171–72, 484 S.E.2d 411, 414 (1997) (citations, quotation marks, and brackets omitted).

As described in *Browning-Ferris*, the first element of a vested rights claim is that "the party has made, *prior to the amendment of a zoning ordinance*, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building[.]" *Id.* at 171, 484 S.E.2d at 414 (emphasis added). Here, the zoning ordinance has not been amended; the only question from the beginning has been whether Plaintiff's house is a "single-family detached dwelling" as defined by Section 10.51 of the UDO. *Long*, ___ N.C. App. at ___, 787 S.E.2d at 836 ("On appeal, there is no real factual issue presented but only an issue of the interpretation of the UDO. The parties have made many different arguments, with petitioners focusing upon the applicable definitions and provisions of the UDO, and respondents focusing upon the intended use and function of the project. This case ultimately turns

upon the definition of a single family detached dwelling." (citations, quotation marks, and brackets omitted)). Plaintiff is correct in noting that her project was initially approved by Defendant:

> The 22 November 2013, LETTER OF DETERMINATION from the Planning Director describes the project as follows: "The plans indicate a three-story main building that includes cooking, sleeping, and sanitary facilities; as well as two-story side buildings that include sleeping and sanitary facilities. The building plans also show two conditioned hallways connecting rooms within the proposed single family detached dwelling." This is an accurate and undisputed description of the project. The BOA affirmed the Planning Director's description, and the Superior Court affirmed the BOA's decision.

Id. at ___, 787 S.E.2d at 839.

But the Longs appealed and that case proceeded on appeal to this Court, where it was resolved by issuance of *Long* in favor of the petitioner-plaintiffs who argued against plaintiff LeTendre. *See id.*, ___ N.C. App. ___, 787 S.E.2d 835. Thus, as to Plaintiff's argument that she relied upon "the County's November 2013 Letter of Determination and March 2015 building permit[,]" Plaintiff knew the Letter of Determination as affirmed by the BOA and then the Superior Court was on appeal and was specifically warned that this Court may not find in her favor Plaintiff did not get her building permit and begin construction until *after* the appeal. *See generally id.* But Plaintiff argues that unless someone took *additional* legal action to stop her, she was still entitled to proceed to build: "With a valid building permit in hand, and without any injunction in place, proceeding with her home was a reasonable decision made in good faith." Thus, Plaintiff's vested rights theory is that she could acquire a common law vested right to build and occupy her house simply by proceeding with construction quickly, even while aware that her right to do so was on appeal and could be reversed.

Plaintiff's interpretation of vested rights is simply not supported by the law. *See generally Fisher*, 232 N.C. 629, 61 S.E.2d 897. First, Plaintiff's interpretation would deprive Defendant of its right and duty to exercise the police power if a landowner building a structure in violation of its zoning ordinance simply acts fast enough to complete the work before a legal challenge to the landowner's project can be completed. Although *Fisher* did not specifically address vested rights, the situation presented is very similar to this case. *See generally id.* In *Fisher*, the City of Raleigh

sued to enjoin the Defendant "landowners from carrying on business in a residential zoning district in violation of a zoning ordinance." *Id.* at 630, 61 S.E.2d at 898. The Defendants had been "operating a bakery and sandwich company" at an address within a residential zoning district. *Id.* at 631, 61 S.E.2d at 899 (quotation marks omitted). The property had been zoned as residential since 1923, and in 1936 the Defendants acquired the land and constructed the house in which the business operated. *See id.* at 632, 61 S.E.2d at 900. Defendants operated the business from this location "with the full approval and consent of the officials of the City of Raleigh" "for at least ten years." *Id.* The Defendants also "increased their facilities from the operation of the business" during this time, investing "at least $75,000.00, which [would] be lost in case they are precluded from continuing their commercial operations[.][11] *Id.* (quotation marks omitted). But in 1948, the City of Raleigh notified Defendants they must "discontinue their business operations within said residential district[;]" the Defendants refused to comply, leading to the lawsuit to enjoin them from continuing operation of the business. *Id.* at 631, 61 S.E.2d. at 899-900 (quotation marks omitted),

The Supreme Court determined that the City of Raleigh could not be estopped from enforcing "its zoning ordinance against the defendants" despite "the fact that its officials have encouraged or permitted them to violate it for at least ten years." *Id.* at 634, 61 S.E.2d at 900. While the Court recognized Defendants' good faith reliance upon the City's acquiescence, and even encouragement, of the operation of the business for many years *and* their substantial expenditures based upon that reliance, it determined that because enforcement of the zoning ordinances is within the police power of the City, the City could change its position and require the business to cease operation in that location:

> In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. The police power is that inherent and plenary power in the state which enables it to govern, and to prohibit things hurtful to the health, morals, safety, and welfare of society. In the very nature of things, the police power of the State cannot be bartered away by contract, or lost by any other mode.

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11. To put the investment of $75,000.00 in context, according to the United States Department of Labor, Bureau of Labor Statistics' Consumer Price Index calculator, this expenditure in 1940 would be equivalent to over $1,300,000.00 today. *See* United States Department of Labor, Bureau of Labor Statistics, Databases, Tables & Calculators by Subject, CPI Inflation Calculator - https://www.bls.gov/data/inflation_calculator.htm.

> This being true, a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past.
>
> Undoubtedly this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.

Id. at 635, 61 S.E.2d at 902 (citations omitted). The November 2013 Letter of Determination could not create a vested right for Plaintiff to build the project as planned, particularly since that letter was *immediately* challenged, and she did not even begin construction until much later. *See generally id.* We have no doubt that Defendant's Planning Director was acting in good faith in approving Plaintiff's plans, but Plaintiff could not in good faith rely upon the November 2013 letter to build the house, where a legal challenge to the project was pending.

Our Supreme Court has also recognized that a landowner cannot in good faith acquire a vested right if the landowner knows of a pending amendment to a zoning ordinance which would change the use of the land:

> The "good faith" which is requisite under the rule of *Warner v. W & O, Inc.*, *supra*, is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him.

Town of Hillsborough v. Smith, 276 N.C. 48, 56, 170 S.E.2d 904, 910 (1969).

In *Finch v. City of Durham*, the plaintiffs planned to build a hotel on a tract of land zoned as Office-Institutional, which would allow hotels. *See Finch*, 325 N.C. 352, 355-56, 384 S.E.2d 8, 10 (1989). The plaintiffs worked on planning the motel for several years and leased the property with an option to purchase it at the end of the lease. *See id.* at 356-60, 384 S.E.2d at 10-12. In 1984, the plaintiffs entered into an agreement with

Red Roof Inns providing for Red Roof Inns to construct the motel and lease the property from plaintiffs. *See id.* The plaintiffs had to exercise their option to purchase by giving notice by 1 May 1985; if they did not, the lease would end in June 1985. *See id.* The plaintiffs exercised the option, but a rezoning request for the property was under consideration during April 1985, and on 6 May 1985, the Durham City County adopted an amendment to the zoning, changing it back to R-10, residential. *See id.* at 355-60, 384 S.E.2d at 10-12. Therefore, when the plaintiffs exercised the option to purchase, they knew that a proposed change to the zoning was pending, although it had not yet been approved. *See generally id.* at 356-57, 384 S.E.2d at 10-11.

The plaintiffs brought a declaratory judgment and damages lawsuit against Durham with claims quite similar to this case which included

> six claims: (1) that the zoning ordinance be invalidated as arbitrary, capricious, discriminatory and unreasonable; (2) that the zoning ordinance be invalidated as a "taking" under the state and federal Constitutions; (3) that the City of Durham be found liable for inverse condemnation under N.C.G.S. § 40A-51, and pay damages of $700,000; (4) that the City of Durham be estopped from enforcing the zoning ordinance and the subsequent general ordinance requiring a use permit; (5) that should the zoning ordinance be invalidated, the City of Durham be found liable for a "temporary taking" and plaintiffs be compensated under N.C.G.S. § 40A-51 in the amount of $100,000; and (6) that the City of Durham be found liable under 42 U.S.C. § 1983 for a taking and compensate plaintiffs in the amount of $700,000 and costs and attorney's fees.

Id. at 358, 384 S.E.2d at 11.

Some of the plaintiffs' claims were dismissed by summary judgment but some proceeded to a jury trial. *See id.* at 358, 384 S.E.2d at 11-12. But on appeal of various issues and rulings, the Supreme Court ruled in favor of the City of Durham on all claims. *See id.*, 325 N.C. 352, 384 S.E.2d 8. Regarding the plaintiffs' decision to exercise their option to purchase despite knowledge of a pending proposal to change the zoning, the Court stated:

> [W]here an investor knows of a pending ordinance change proposed by a city planning board to the city council, the investor has no valid claim that he relied upon the prior ordinance in guiding his investment decision. An investor

> may speculate on regulatory changes, but the purchase price is irrelevant to the reasonableness of the current restriction. To hold otherwise would constitute a windfall to the investor at taxpayer expense.
>
> In analyzing the distinct investment-backed expectations of plaintiffs, we note the City Council enacted the zoning change on 6 May 1985, seven days after plaintiffs were under an equitable obligation to perform the purchase contract. However, the undisputed evidence shows that plaintiffs chose to exercise their option to purchase the property on 29 April 1985. *This was some twenty-seven days after plaintiffs knew of the recommendation by the Durham Planning and Zoning Commission to rezone the property to R-10. Plaintiffs' expectations of investment return were in fact based on a speculative risk that the Durham City Council would not rezone the property to prohibit the proposed Red Roof Inn project.*
>
> Plaintiffs argue that exercise of the option was necessary to protect prior financial investment in the property. It is axiomatic, however, that the purpose of an option contract is to minimize investment exposure to adverse changes in the business environment by postponing for an extended period the decision to accept or reject an offer. *When such changes threatened, plaintiffs chose to ignore the warning clouds. They cannot now say that they reasonably expected an investment return untroubled by zoning changes.*

Finch v. City of Durham, 325 N.C. 352, 366–67, 384 S.E.2d 8, 16–17 (1989) (emphasis added) (citations omitted).

As noted above, vested rights cases are normally based upon an actual or pending *amendment* to a zoning ordinance after a landowner has made substantial expenditures or entered into contractual obligations as part of developing the land. Here, there was no change in zoning and Defendant's action which Plaintiff seeks to permanently enjoin is its enforcement of this Court's mandate from litigation challenging Plaintiff's project which was pending before a building permit was issued or any construction occurred. Although we are not aware of a North Carolina case which has directly held that a landowner may not acquire a vested right to develop land in a certain way where there is pending litigation directly challenging the proposed development, we conclude that *actual* litigation challenging the plan is a far stronger

factor in eliminating the landowner's reasonable expectations than the landowner's knowledge of a pending rezoning proposal, as in *Finch*. *See generally id.*, 325 N.C. 352, 384 S.E.2d 8. In addition, although in dicta, our Supreme Court has cited with approval several cases from other states which do address whether vested rights may accrue when the landowner knows of a pending lawsuit which may affect use of the land:

> In *Omaha Fish & Wildlife Club, Inc. v. Community Refuse Disposal, Inc.*, 213 Neb. 234, 329 N.W.2d 335 (1983), the Nebraska Supreme Court refused to apply the doctrine of "vested rights" for the benefit of defendant landowner. That court found that expenditures made by defendant with knowledge that a lawsuit had been filed challenging his proposed use were not made in good faith.
>
> In an analogous situation, the Supreme Court of Hawaii held that a resort developer proceeded at his own risk where he made expenditures despite notice that a petition had been certified for a public referendum which would (and, when passed, did) prohibit the proposed use. The court refused to apply the "vested rights" or "equitable estoppel" doctrines to allow property rights to vest. *County of Kauai v. Pacific Std. Life Ins.*, 65 Haw. 318, 653 P.2d 766 (1982), *appeal dismissed*, 460 U.S. 1077, 103 S.Ct. 1762, 76 L.Ed.2d 338 (1983).
>
> In *Bosse v. City of Portsmouth*, 107 N.H. 523, 226 A.2d 99 (1967), the Pace Industrial Corporation had successfully persuaded the local administrative body to rezone its particular tract from residential to light industrial. Adjoining landowners had sought two injunctions to prevent the proposed use, and during the hearings, the trial court had twice warned Pace that it proceeded with construction at its own peril. The New Hampshire Supreme Court held that the designation change procured by Pace constituted unlawful "spot zoning" and stated that Pace had taken a "calculated risk" in proceeding with construction after plaintiffs had twice instituted legal proceedings seeking to enjoin the construction. Quoting from the Master's order below, the court went on to note:
>
> > " 'Under the circumstances, and considering the fact that the Pace Industrial Corporation was aware that this was a Residential Zone at the time the purchase was made, and was aware shortly

> after the passage of the ordinance that the validity of this particular zone would be attacked, the Master finds that no vested interest accrued to Pace Industrial Corporation.' "

Id. at 532, 226 A.2d at 107.

Finally, in an often-cited Florida Supreme Court case, *Sakolsky v. City of Coral Gables*, 151 So.2d 433 (Fla. 1963), that court held that knowledge by a developer that a political contest in which the success of certain candidates might alter the voting pattern of the municipal body did not prevent good faith reliance on an act of the current governing body. However, the court was careful to point out that

> "[t]he effect of pending litigation directly attacking the validity of a permit or zoning ordinance, or the effect of an eventual determination that such permit was invalid, may present a very different problem. The decision in the instant case was not rested on any showing that petitioner, at the time he acted in reliance on the permit granted him, was a party defendant in legal action directly attacking its validity, that he had any notice that his permit might have been invalid in its inception, or that its revocation was in fact required in the public interest."

Id. at 436 (footnote omitted). *See generally* Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urban L. Ann. 63, 80.

A trial court could conclude that application of the "vested rights" doctrine is inappropriate on the facts of this case and hold that when the landowner here incurred expenses with the knowledge that a lawsuit had been filed challenging the validity of the zoning ordinance amendment under which the landowner had obtained his building permit, he proceeded at his peril and thereby acquired no vested rights in the use of the property which is prohibited as a result of a judicial declaration that the ordinance amendment was invalid. In such a situation, it could not be said that the landowner had expended funds

> in good faith and in reasonable reliance upon a building permit issued pursuant to the challenged amendment.

Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 64 n.2, 344 S.E.2d 272, 280 n.2 (1986).

Here, Plaintiff also took a calculated risk to proceed with construction while litigation challenging her project's approval was pending. Plaintiff could not accrue a vested right to construct or occupy the project where she knew of the potential effect of pending litigation – particularly since the Plaintiff herself was a party to that litigation. The litigation in *Long* challenged Defendant's approval of Plaintiff's plans, but Plaintiff decided, upon consideration of many factors as described in her affidavit, she would proceed with construction. *See generally Long* ___ N.C. App. ___, 787 S.E.2d 835. Plaintiff believed she would prevail on the *Long* appeal because her plans had been approved by the BOA and by the Superior Court, so she demanded a building permit and sought to complete construction before the *Long* appeal was concluded. After issuance of the *Long* opinion, Plaintiff sought the preliminary injunction at issue here so she could continue to build and use the project. Plaintiff even moved to dismiss this appeal as moot because she had completed the project in spite of the issuance of the opinion in *Long*.

Plaintiff also argues that since no one stopped her, she could continue to build. Defendant issued the building permit, which it had a duty to do based upon the Superior Court's approval of the BOA's ruling. Plaintiff argues that either Defendant or the Longs should have sought injunctive relief against her to stop her construction. But in *Godfrey*, our Supreme Court rejected a similar argument:

> We disagree with the suggestion of the panel below that plaintiffs and others similarly situated must resort to obtaining or attempting to obtain injunctive relief in order to protect their property interests against unlawful actions of a zoning board. Plaintiffs were well within their rights in electing to challenge the 1980 amendment through a declaratory judgment action rather than attempting, possibly in vain, to raise sufficient bond in order to procure an injunction.
>
> A suit to determine the validity of a city zoning ordinance is a proper case for a declaratory judgment. The plaintiffs, owners of property in the adjoining area affected by the ordinance, are parties in interest entitled to maintain the action.

> *Jackson v. Board of Adjustmen*t, 275 N.C. 155, 166 S.E.2d 78; *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325.
>
> The adjoining property owners should not be called upon to suffer to protect the financial investment of one who acts at his own peril with forewarning of the possible consequences. If the law were otherwise, there would be no protection from a zoning board which, unlike the situation before us, might act from purely corrupt motives. If one, in a situation such as the one at bar, could be assured that a major investment would be protected regardless of the outcome of his gamble, a comprehensive zoning ordinance would offer little or no protection to those who have relied upon that ordinance.

Godrey, 317 N.C. at 67, 344 S.E.2d at 281 (citations omitted).

Just as in *Godfrey*, neither Defendant nor adjacent property owners were required to take *additional* legal action "to protect the financial investment of one who acts at his own peril with forewarning of the possible consequences." *Id.* Plaintiff knew of the potential consequences of her decision to construct the home as it is designed and in the location she chose. She did not even *begin* construction until after the Superior Court order in *Long* was on appeal, so if she did not know before then, she knew about the potential for reversal when that appeal was taken. Both the Long's counsel and Defendant specifically warned Plaintiff of the risks of proceeding with construction. Plaintiff knowingly chose to gamble that the order in *Long* would not be reversed, and she lost that gamble. The consequences of delaying construction may have also been harsh, and Plaintiff had to make a difficult choice, but the choice was hers to make:

> The ultimate result in cases such as this may indeed be harsh. As this Court said in *City of Raleigh v. Fisher*, 232 N.C. 629, 61 S.E.2d 879 (1950):
>
> > Undoubtedly this conclusion entails much hardship to the Defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.

Id. at 67, 344 S.E.2d at 281–82. Plaintiff is not likely to prevail on her vested rights claim, and thus it is not a proper basis for a preliminary injunction.

V. Conclusion

We have examined each of Plaintiff's causes of action and determined that none have a likelihood of success for the purposes of entering a preliminary injunction. Because the order below must be reversed, we need not address Defendant's other contentions of why Plaintiff's preliminary injunction should be reversed, including arguments that Plaintiff failed to properly appeal the March 2017 determination letter from Mr. Woody; that Plaintiff's claims are barred by the statute of limitations; that Plaintiff has unclean hands; and that Plaintiff has an adequate remedy at law.

On *de novo* review, Defendant has borne its burden of showing that the trial court's preliminary injunction was erroneous. Even if Plaintiff has demonstrated the potential for harm and substantial financial loss, she has not demonstrated a likelihood of success on any of her causes of action. The preliminary injunction is hereby reversed. "[T]he mandate of an appellate court is binding on the trial court, which must strictly adhere to its holdings." *Campbell v. Church*, 51 N.C. App. 393, 394, 276 S.E.2d 712, 713 (1981). This matter is remanded to the trial court for further proceedings consistent with this Court's opinion in *Long* and this opinion.

REVERSED and REMANDED.

Judges DAVIS and ARROWOOD concur.

MARSH v. MARSH

[259 N.C. App. 567 (2018)]

CRISTAL A. MARSH (NOW KURFEES), PLAINTIFF
v.
TIMOTHY B. MARSH, DEFENDANT

No. COA17-457

Filed 15 May 2018

Child Custody and Support—custody—modification—visitation—temporary order—substantial change of circumstances not needed

The trial court did not err by entering an order modifying visitation in a child custody case without making sufficient findings showing a substantial change in circumstances where the initial order was a temporary custody order. The trial court stated in the original order that its findings would not be binding on the parties in future hearings; the conclusions were consistent with a temporary order; the order stated at one point that it was temporary; and it was clear from the plain language of the parties that it was entered without loss or other prejudice to the rights of the parties.

Appeal by plaintiff from order entered 15 December 2016 by Judge Mark L. Killian in Iredell County District Court. Heard in the Court of Appeals 19 October 2017.

Homesley, Gaines & Dudley, LLP, by Christina Clodfelter, for plaintiff-appellant.

Bowling Law Firm, PLLC, by Kirk L. Bowling, for defendant-appellee.

BERGER, Judge.

Cristal A. Marsh ("Plaintiff") appeals from a child custody order entered on December 15, 2016 granting Timothy B. Marsh's ("Defendant") motion to modify child custody and denying Defendant's motion for attorney's fees. Plaintiff argues the trial court erred by entering the order without making sufficient findings of fact showing a substantial change in circumstances regarding the child's welfare since the entry of a child custody order on September 16, 2014. We disagree.

Factual and Procedural Background

Plaintiff and Defendant were married on August 5, 2000, and one minor child was born of the marriage. The parties separated on June 27, 2007, and executed a Separation and Property Settlement Agreement ("the Agreement") on March 3, 2009. On May 11, 2009, the trial court entered a divorce decree which incorporated the Agreement. The trial court's order set a visitation schedule between the parties that entitled Defendant to a "substantial and loving relationship with the child," with visitation to be mutually agreed upon by the parties. Defendant's initial visitation arrangement was every other weekend from Friday to Sunday.

On July 25, 2014, Defendant filed a motion to modify child custody, for psychological assessments, and attorney's fees alleging a substantial change in circumstances concerning the visitation schedule and lack of consistent application of the Agreement in the May 2009 Order. Defendant's motion specifically alleged that Plaintiff had deprived Defendant of visitation with the minor child for extended periods of time in 2010 through mid-2011, and cut short pre-planned visits based on Plaintiff's schedule. In 2012, Defendant was only able to see the minor child on average once a month, and eventually not at all due to Plaintiff's refusal to respond to Defendant's emails, letters, and phone calls. In March 2014, Defendant attempted to visit the minor child, but Plaintiff refused to communicate with Defendant or honor the May 2009 Order and Agreement. In April 2014, Defendant contacted the minor child's doctor's office to review her medical records, and Plaintiff delayed giving medical information to Defendant. Defendant attempted to specifically contact the minor child on her birthday and holidays, including Christmas 2012 and 2013, but was never able to reach her. Defendant further requested psychological assistance with the minor child to help her develop a loving relationship with him after such a prolonged separation from her father.

On August 19, 2014, the trial court denied Defendant's motion for a psychological assessment of both Plaintiff and the minor child for lack of evidence of a mental health disorder requiring an assessment. In the same order, the trial court mandated that both Plaintiff and Defendant attend mediation and a parenting class.

On September 16, 2014, the trial court entered a "Temporary Child Custody Order" that granted primary custody to Plaintiff and visitation to Defendant. The September 2014 Order found that Defendant had been deprived of seeing the minor child for extended periods of time, and that the minor child was excited about seeing Defendant again regularly. Further, the trial court found that both parents were fit and proper to exercise temporary custody of the minor child. The September 2014 Order

further set out a temporary visitation schedule for Defendant to exercise until further notice, and found that it was in the best interests of the minor child to have a relationship with both parents. The parties performed under the schedules outlined in the September 2014 Order until 2016.

Defendant filed a second notice of hearing on his motion for modification of child custody and attorney's fees on August 31, 2015. The trial court conducted a hearing on Defendant's motions for modification of child custody and attorney's fees in September 2016. A permanent child custody order was entered on December 15, 2016 granting Defendant primary custody of the minor child and visitation to Plaintiff. Plaintiff timely appeals from the December 2016 Order.

Standard of Review

"[W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582, *disc. review denied*, 363 N.C. 375, 678 S.E.2d 670 (2009) (citation omitted); see also *File v. File*, 195 N.C. App. 562, 567, 673 S.E.2d 405, 409 (2009).

Analysis

Plaintiff argues that, although the September 2014 Order was labeled a temporary order, it was a permanent order because more than a "reasonably brief" amount of time had passed since the temporary order was entered, the order failed to set forth a specific reconvening date, and the order determined all issues relating to custody of the minor child. Plaintiff further contends the trial court erred by modifying the September 2014 Order without finding a substantial change in circumstances. We disagree.

"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." *Peters v. Pennington*, 210 N.C. App. 1, 13-14, 707 S.E.2d 724, 734 (2011) (citations, quotation marks, and brackets omitted). "In its elementary sense the word 'or' . . . is a disjunctive particle indicating that the various members of the sentence are to be taken separately." *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citation and internal quotation marks omitted). For the reasons discussed below, the September 2014 Order was entered without prejudice to either party, and was a temporary custody order. Accordingly, we do not need to address the remaining disjunctive elements of the permanency test.

An order is "without prejudice" if it is entered "[w]ithout loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party." *Without Prejudice*, Black's Law Dictionary (8th ed. 2004); *see also Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (holding the custody order was entered "without prejudice" because it contained express language stating as such); *File*, 195 N.C. App. at 568, 673 S.E.2d at 410. A temporary custody order is not determinative of all material issues, and leaves open the possibility of a hearing on the merits for permanency. *See Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677; *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000); *Lamond v. Mahoney*, 159 N.C. App. 400, 404, 583 S.E.2d 656, 659 (2003). "If a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change of circumstances." *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002).

Here, the trial court stated at the outset of the September 2014 Order, "[s]ince the [c]ourt placed time limits on the parties, the Findings of Fact *will not be binding on the parties in future hearings*." (Emphasis added). In addition, Finding of Fact #9 indicates the court and the parties contemplated the September 2014 Order to be temporary:

> After the hearing last week, the parties were able to agree on some visitation. It was not as much as the Defendant would have desired. It was consistent with the Plaintiff's desire to have a gradual process. It began with 4 hours one Saturday, 24 hours the next weekend.

The trial court made conclusions of law consistent with a temporary order:

> 1. The mother is a fit and proper person to have temporary primary custody of the minor child . . . *pending further orders of the Court.*
>
> 2. The father is a fit and proper person to have *temporary* reasonable visitation with the minor child.
>
> 3. It is in the best interest of the minor child that *temporary* primary custody remains with the mother[,] with the father having joint custody in the form of reasonable visitation.

(Emphasis added).

The September 2014 Order also recognized that "Defendant is still driving more, but in case the Plaintiff has trouble getting off work, the exchange is closer to her house and *this is a temporary order*." (Emphasis added). Litigation continued between the parties after the entry of the temporary order regarding child custody, indicating the intent of the parties and trial court regarding the status of the case as ongoing. *See Miller v. Miller*, 201 N.C. App. 577, 580, 686 S.E.2d 909, 912 (2009). Even though the trial court did not include express language in the order stating it was entered "without prejudice," it is clear from the plain language of the order that it was entered without the loss of rights, or otherwise prejudicial to the legal rights of either party. Consequently, we hold the September 2014 Order was a temporary custody order.

The trial court was not required to find a substantial change in circumstances between the temporary September 2014 Order and the permanent December 2016 Order. *See LaValley*, 151 N.C. App. at 292, 564 S.E.2d at 915. The plain language of the September 2014 Order shows that it was both entered without prejudice to either party and did not fully adjudicate the facts concerning the best interests of the child. The custody arrangements were tailored to be an intermediate solution, not a permanent determination of custody and visitation, until the facts of the case could be fully adjudicated. Accordingly, the trial court did not err when entering the December 2016 Order and made the necessary findings of fact and conclusions of law considering the child's best interests.

Conclusion

The September 2014 Order was a temporary custody order as it was entered without prejudice to the parties in a way that does not harm or cancel their legal rights or privileges. Accordingly, the trial court did not err when entering the December 2016 Order.

AFFIRMED.

Judges DAVIS and ZACHARY concur.

MASTNY v. MASTNY

[259 N.C. App. 572 (2018)]

JAMIE LUNSFORD MASTNY, PLAINTIFF
v.
CHAD JOSEPH MASTNY, DEFENDANT

No. COA17-1171

Filed 15 May 2018

Child Custody and Support—change of circumstances—nexus between change and child's welfare—findings

The trial court in a child custody case failed to follow the mandate of the Court of Appeals to reconsider whether a significant change of circumstances affecting the child's welfare had occurred and, if so, whether modification of the custody provisions of the prior consent order would be in the child's best interest—and to demonstrate these through sufficient additional findings of fact. The trial court merely rearranged and reworded its previous order.

Appeal by defendant from order entered 17 May 2017 by Judge Christine M. Walczyk in Wake County District Court. Heard in the Court of Appeals 18 April 2018.

Laura C. Brennan for plaintiff-appellee.

Tharrington Smith, LLP, by Steve Mansbery and Jeffrey R. Russell, for defendant-appellant.

TYSON, Judge.

Defendant appeals from an order modifying custody of his minor child. We reverse the order and remand.

I. Background

This appeal is before this Court a second time. *Mastny v. Mastny*, __ N.C. App. __, 796 S.E.2d 402, 2017 N.C. App. LEXIS 101 (2017) (unpublished) (hereinafter "*Mastny I*"). Jamie Lunsford Mastny ("Plaintiff") and Chad Joseph Mastny ("Defendant") originally settled the custody arrangements for their minor child, Tyler, by entering into a consent order in 2012.

This order entitled Defendant to "alternating weekend visitation from Thursday at the recess of school until Monday morning" when Tyler would return to school. On the weeks Defendant did not have weekend visitation, he was entitled to overnight visitation on Thursdays.

Additionally, Defendant was granted two "floating days" per month for visitation. Each party was guaranteed one week of vacation with Tyler in the summer.

Between 2013 and 2015, both Defendant and Plaintiff sought to modify the custody arrangement. The use and scheduling of the "floating days" was at issue in each motion for modification. The trial court first mandated make-up visitation days for Defendant in 2013, since Plaintiff had allegedly denied his exercise of these floating visitation days seven times without reason.

In the 2015 order modifying custody, the trial court eliminated these "floating days" from the custody schedule. During the school year, Defendant was entitled to an alternating weekend visitation spanning from the end of the school day on Friday to the beginning of school on Monday. Summer visitation was to follow an alternating week schedule.

Defendant appealed the 2015 order to this Court. In *Mastny I*, this Court reversed the portions of the 2015 order that had modified the custody schedule from the prior consent order, and remanded to the trial court. *Mastny*, 2017 N.C. App. LEXIS 101 at *26. Upon remand, the trial court was ordered to

> revisit the question of whether there has been a significant change of circumstances affecting Tyler's welfare and, if so, whether modification of the custody provisions of the prior consent order would be in Tyler's best interest. *If* the trial court decides that modification of the custody provisions of the prior consent order are warranted, it *shall* demonstrate through sufficient additional relevant findings of fact that there is a nexus between any change in circumstances and Tyler's welfare, and that any particular modifications of the custody portions of the prior consent order are in Tyler's best interest.

Id. (emphasis supplied).

Upon remand, the trial court did not receive or hear any additional evidence. On 17 May 2017, the trial court entered an order modifying child custody that contained additional findings of fact and conclusions of law, but retained the identical custody schedule from 2015. Defendant timely appealed.

II. Jurisdiction

An appeal of right lies to this Court from a child custody order entered in a district court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2017).

III. Issues

Defendant argues the trial court erred by failing to follow the mandates of *Mastny I* by: (1) making certain findings of fact; (2) failing to make sufficient findings of fact to support conclusion of law #4; (3) failing to show modification was in the best interests of Tyler and in response to the substantial changes; (4) reducing Defendant's physical custody time; and, (5) failing to promote the policy of the State articulated in N.C. Gen. Stat. § 50-13.01.

IV. Analysis

A. Standard of Review

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted). "[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." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011). Conclusions of law must be supported by the findings of fact. *Id.* "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006) (citation omitted).

B. Findings of Fact

Defendant argues insufficient evidence supports Findings of Fact 24(j), 24(g), 15A(a), 15A(b), 15A(c), 15A(e), 16A, 17A, and 27. Plaintiff only addresses Finding of Fact 24(j) in her brief.

> Finding of Fact 24 states, in relevant part:
>
> 24. Since the entry of this Order, there has been a substantial change of circumstances justifying this court to assume jurisdiction to modify the August 13, 2012 Order as it relates to the custodial schedule in that:
>
> . . . .
>
> (g) Plaintiff sometimes requires Tyler to facetime with his father outside;
>
> . . . .
>
> (j) Defendant has inappropriate boundaries concerning Plaintiff. Following the first day of trial and

> after learning Plaintiff's salary at Trinity Academy, Defendant called Plaintiff's boss to ask him to give her a raise. Defendant had previously asked Plaintiff's employer for information on the tuition discount Plaintiff was entitled to as a result of her employment at Trinity. This behavior undoubtedly put the Plaintiff's employment at Tyler's school, and the family's financial security, at risk[.]

Finding of Fact 24(j) was partially included in the 2015 modification order, with the final sentence being added upon remand. We previously found "Defendant's having 'inappropriate' boundaries concerning Plaintiff could theoretically affect Tyler's welfare, but there are no findings of fact supporting any conclusion that this has happened." *Mastny I*, 2017 N.C. App. LEXIS 101 at *23.

Plaintiff argues the effects of Defendant's actions are "self-evident" requiring no "evidence directly linking the change to the effect on the child." *In re A.C.*, __ N.C. App. __, __, 786 S.E.2d 728, 743 (2016) (citation and internal quotation marks omitted). Whether or not Defendant's actions contacting Tyler's school were inappropriate, it cannot be presumed, and is hardly "self-evident," that Defendant's contacting Plaintiff's employer "undoubtedly" jeopardized Plaintiff's position at the school or placed the "family's financial security [] at risk." No new evidence was offered at the hearing upon remand. This finding is unsupported by any substantial evidence. *See Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

Finding of Fact 24(g) is also not supported by competent evidence. Finding 24(g) was slightly modified from the 2015 order, where it was labeled 15(g) and read: "Plaintiff does not allow [Tyler] to facetime with Defendant in her residence; rather, she makes the minor child go outside to facetime with Defendant." This Court previous found "substantial record evidence" to support the 2015 finding. *Mastny*, 2017 N.C. App. LEXIS 101 at *12. As no new evidence was taken or received upon remand, no evidence supports the change of Plaintiff "making" Tyler go outside to facetime with his father to "sometimes requir[ing]" Tyler to go outside. It is unclear why the trial court altered this Finding of Fact.

A similar change in the Findings of Fact from the 2015 order can be seen in Finding 17A, which reads:

> 17[A]. As stated previously, there have been disagreements about the floating days which have prevented the Defendant from having the children for specific events such as the family wedding and NC State football games.

> Plaintiff has sometimes been inflexible on these matters. She has also made the child talk with his father outside the house on occasion. Despite these things, Plaintiff is less likely, based on the evidence presented, to involve the children directly in the parties' conflict.

This finding not only reiterates the new, occasional nature of Plaintiff requiring Tyler to speak to his father outside, but also modified the related finding from the 2015 order, which read:

> 16. Plaintiff has unreasonably denied Defendant extra custodial time with the children for specific events and refused to modify the schedule that would have provided the children with experiences with Defendant such as the family wedding and NC State football games.

Upon remand, and without additional evidence to support the change, the trial court now finds Defendant was "prevented . . . from having the children for specific events" because the Plaintiff "has sometimes been inflexible," whereas previously the trial court had found Plaintiff's denial of these requests unreasonable. There is no substantial evidence to support the changes in Finding of Fact 17A. We will consider in greater detail below the trial court's conclusion that the Plaintiff is less likely to involve the children in the parties' conflict.

Finding of Fact 15A reads in relevant part:

> 15[A]. These changes have affected Tyler negatively in the following ways:
>
> > (a) Because the parties communicate ineffectively and cannot agree on floating days, Tyler has missed certain sporting, cultural and family events such as NC State Football games and an out-of-state wedding[.]
> >
> > (b) There are no consistent rules or expectations between homes concerning the use of phones, online gaming, and television and movie viewing. This makes it difficult for Tyler, an eight year old boy [now ten years old], who is going back and forth between homes regularly[.]
> >
> > (c) Tyler is aware of his parent's conflict.
>
> . . . .

> (e) Because the parties do not communicate effectively and there are multiple exchanges during the school week, Tyler has not had things for school such as uniforms and supplies for classroom projects and/or activities.

Substantial record evidence supports Findings 15A(a), (c), and (e). There is evidence to support the lack of consistent rules as indicated in Finding 15A(b). We return to these Findings as they relate to the nexus between the substantial change and Tyler's welfare and best interests, below.

No substantial evidence supports Finding of Fact 16A:

> 16[A]. The changes have affected Tyler positively in the following ways:
>
> > (a) Due to Plaintiff's new work schedule at the child's school, Plaintiff is able to be involved with the children's educational pursuits on a daily basis. This has proved beneficial to Tyler to have a parent employed at his school as evidenced by his good grades.

No evidence or prior findings tends to show Tyler was doing poorly in school prior to Plaintiff's employment therewith, nor is there evidence that his good grades are related to his mother's employment at the school.

Finding of Fact 27 is most appropriately considered as a conclusion of law, and is discussed below.

C. Nexus Between Changed Circumstances; Effect on Welfare and Best Interests

Defendant argues the trial court failed to find facts showing the required nexus between the changed circumstances and Tyler's welfare, and erred by concluding:

> 4. Modification of the child custody provisions set forth in the Consent Order is in Tyler's best interest, promotes his best interest, and directly addresses needs indicated by the substantial changes in circumstances affecting Tyler's best interest.

"The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child." *Shipman*, 357 N.C. at 474, 586 S.E.2d

at 253. The trial court can only modify an existing order after it determines the change affected the child's welfare and modification is in the child's best interests. *Id.*

"[Be]fore a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection." *Id.* at 478, 586 S.E.2d at 255 (citation omitted). Upon remand, the trial court attempted to meet this requirement through modifying the wording of the findings it had previously made in 2015, but failed to follow the mandate we prescribed in *Mastny I*.

The modification in Finding 17A, "Plaintiff is less likely, based on the evidence presented, to involve the children directly in the parties' conflict," is unsupported by the evidence. The trial court attempted to soften its findings concerning Plaintiff's behavior in order to "shoehorn" this finding and tie the changed circumstances to Tyler's welfare. The 2015 and 2017 modifications removed the conflict over the "floating days," but it appears Plaintiff would be less likely to involve the children in the conflict only because she would not be provided an opportunity to unreasonably deny Defendant access to the children, as she had in the past.

We previously discussed how Finding of Fact 15A, related to the 2015 modification:

> Finding[] 15A(a) . . . involve[s] Plaintiff's unwillingness to allow Defendant access to Tyler for specific events. To the extent Plaintiff's unwillingness in this regard constituted a substantial change that affected Tyler's welfare, it was a change of Plaintiff's making, and the 21 December 2015 modification order does not address this situation. The concerns implicit in findings 15A(c) and (d) are likewise not addressed by the 21 December 2015 order. Rearranging the custody schedule will not serve to make rules between the two homes more consistent, nor remove Tyler from the "middle" of any conflicts between Plaintiff and Defendant, with the possible exception that removal of the "floating" days dispenses with one source of prior conflict.
>
> . . . .
>
> In finding 15A(e) the trial court found that "[t]he children have not had things for school such as uniforms and supplies for classroom projects and/or activities." By reducing the number of times Tyler changes custody during

> the school year to once every two weeks instead of once every week, the trial court has reduced the chances that Tyler might not have access to certain items he needs for school because they have been left at the other parent's home. However, we do not find that this benefit is enough to support a conclusion that modifying the consent order in the manner done in the 21 December 2015 order was in Tyler's best interest. While it may well be correct . . . that "[a] specific and detailed custody order will reduce the conflict between the parties[,]" we hold there are insufficient findings of fact concerning how the trial court's modifications will reduce conflict between Plaintiff and Defendant to such an extent that the modifications made were in Tyler's best interest.

Mastny, 2017 N.C. App. LEXIS 101 at *22-24. This reasoning from *Mastny I* equally applies to the current appeal.

Finding of Fact 27 appears to have been drafted by the trial court as a way to remedy the errors in the 2015 order. Finding 27 states:

> 27. It is in the best interest of the minor child that the number of back and forth exchanges during the school year be reduced and that Tyler has a more consistent "home base" during the school year. This will enable Tyler to have more consistent rules and expectations at home during the school year, and reduce the number of times he is missing equipment or school supplies. It is [i]n Tyler's best interest that the "home base" be Plaintiff's home for the following reasons:
>
> > a. Plaintiff is employed at the children's school and has more time to spend with the [sic] Tyler during the work/school week;
> >
> > b. Plaintiff is able to transport Tyler to and from school daily;
> >
> > c. Tyler's time in the care of Defendant's employees and at Defendant's office will be reduced;
> >
> > d. Tyler will have regular and consistent time with Reagan; and
> >
> > e. Plaintiff is less likely to involve the children in the conflict between the parties.

Again, no finding shows how changing custody would make the rules between the homes more consistent, nor does the reduction of the number of times he may be missing something for school justify a change in custody. *See id.*

Plaintiff's employment at the children's school does not have any bearing on Tyler's custody, nor does it support a conclusion that Plaintiff's home is a more appropriate "home base." No evidence suggests Defendant has had any issue with taking the children to or from school. The fact that Defendant employs a caretaker for the children while he finishes his workday does not support a conclusion that his home is not appropriate for weekday visitation. In fact, the record shows the children attend after-school care or activities while Plaintiff also finishes her workday at the school.

"There are no findings, and there is no evidence, that Tyler will be afforded more opportunities to spend time with Reagan as a result of the modification[.]" *Id.* at *23. As stated above, the evidence does not support the conclusion that Plaintiff is less likely to involve the children in the parties' conflict. "In short, these findings of fact do not support a conclusion that the modification of the existing custody consent order, in the manner ordered by the trial court, served to promote Tyler's best interests." *Id.*

The trial court failed to follow and apply the mandate set forth in *Mastny I*. As before,

> the trial court's findings of fact are not sufficient to demonstrate the nexus between the change of circumstances and any effect on Tyler's welfare. Further, the 21 December 2015 order [and the 2017 order on remand] fails to demonstrate that the particular remedy chosen – a significant reduction in Defendant's custodial time for nine months with an increase in Defendant's custodial time for three months – addresses the concerns raised in light of any change in circumstances.

Id. at *25.

We reverse the 2017 order and remand. In light of our holding, we do not address Defendant's argument concerning the policy of N.C. Gen. Stat. § 50-13.01 (2017).

V. Conclusion

The holding in *Mastny I* was clear: the trial court had failed to find a nexus between the changed circumstances and Tyler's welfare, and

failed to support its conclusion that the specified modification addressed the changes and was in Tyler's best interest. *See Mastny*, 2017 N.C. App. LEXIS 101 at *25-26. This Court also provided detailed guidance based upon *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. Instead of making findings upon remand to demonstrate the nexus between the substantial changes and Tyler's welfare, the trial court merely rearranged and reworded its previous order, bringing the same failures to this Court for a second time.

It appears the trial court did not reconsider its conclusion there had been a substantial change. It may still do so upon this remand. If the court still concludes a substantial change has occurred, the trial court must make the required findings of fact to demonstrate how the substantial change affects Tyler's welfare. If a substantial change did not occur, or if it did occur, but it did not affect the child's welfare, "the court's examination ends, and no modification can be ordered." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

If the trial court finds a substantial change occurred that affected Tyler's welfare, the trial court must then determine if the proposed modification is in Tyler's best interest and is in response to the identified substantial changes. All of these findings must be supported by substantial evidence in the record. As several years have passed since a full evidentiary hearing was conducted in this matter, new and additional evidence may be presented upon remand.

This Court previously reversed portions of the 2015 order and remanded. The trial court subsequently entered the 2017 order, presently before us, which is indistinguishable in substance from the 2015 order. We reverse the 2017 order, effectively putting the parties back under the initial 2012 consent order.

We again remand to the trial court for additional findings and conclusions consistent with this opinion and the prior mandate set forth in *Mastny I*. Any visitation due to Defendant under the 2012 consent order, but missed due to Plaintiff's actions and the trial court's 2015 and 2017 orders, must be credited and provided to Defendant upon remand. *It is so ordered.*

REVERSED AND REMANDED.

Judges ELMORE and ZACHARY concur.

MAGGIE B. McDONALD, Plaintiff
v.
THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION fka The Bank of New York Mellon Trust Company N.A., as successor to JPMorgan Chase Bank, N.A., as successor in interest to Bank One, National Association, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates Series 2001-RS3, SPECIALIZED LOAN SERVICING, LLC, and SUBSTITUTE TRUSTEE SERVICES, INC., in its capacity as Substitute Trustee, Defendants

No. COA17-1310

Filed 15 May 2018

1. Mortgages and Deeds of Trust—permanent loan modification agreement—preconditions—time-is-of-the-essence payment

In an action to enjoin a foreclosure sale, plaintiff mortgagor failed to allege sufficient facts to show that a permanent loan modification agreement was binding upon defendant mortgagee parties, so the trial court properly dismissed her contractual claims pursuant to Rule of Civil Procedure 12(b)(6). Plaintiff's complaint showed that she failed to make a time-is-of-the-essence payment that was required to make the permanent loan modification agreement become effective.

2. Mortgages and Deeds of Trust—permanent loan modification agreement—preconditions—foreclosure—unfair or deceptive trade practices

Where plaintiff mortgagor failed to remit a time-is-of-the-essence payment to make a permanent loan modification agreement become effective, defendant mortgagee parties had no obligation to accept her subsequent payments under the terms of that agreement and were within their rights to initiate foreclosure proceedings against her. Plaintiff thus failed to state a claim for unfair or deceptive trade practices against defendants.

Appeal by plaintiff from order entered 1 September 2017 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 18 April 2018.

Legal Aid of North Carolina, Inc., by Celia Pistolis, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough, L.L.P., by Donald R. Pocock, for defendant-appellees.

TYSON, Judge.

Maggie B. McDonald ("Plaintiff") appeals the trial court's 1 September 2017 order granting The Bank of New York Mellon Trust Company, National Association's f/k/a The Bank of New York Mellon Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as successor-in-interest to Bank One, National Association, as Trustee For Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates Series 2001-RS3 ("Bank of New York Mellon") and Specialized Loan Servicing, LLC's ("SLS") (collectively, "Defendants") motion to dismiss. We affirm.

I. Background

Plaintiff and her husband, Turnal D. McDonald, have lived at the same house situated in Fayetteville, North Carolina for over sixteen years. On 12 June 2001, Plaintiff obtained a fifteen-year mortgage loan from Decision One Mortgage Company, LLC, which is secured by a deed of trust on her home. The principal amount of the mortgage was $185,491.25 and carried a 9.60% annual interest rate, with monthly payments of $1,573.27. Plaintiff agreed to pay off the mortgage loan in full by 18 June 2016. The deed of trust securing the loan was properly recorded in the Cumberland County Registry at deed book 5499, page 278.

At an unspecified time after the mortgage loan was made, Decision One Mortgage Company, LLC transferred the ownership and servicing of the loan to GMAC Mortgage, LLC ("GMAC"). Plaintiff made the required monthly loan payments until January 2010, when she defaulted on those payments to GMAC. On 1 February 2011, Plaintiff petitioned for Chapter 13 bankruptcy. Plaintiff's bankruptcy petition was dismissed without discharge on 2 March 2012.

After the bankruptcy dismissal, Plaintiff allegedly submitted a loan modification application to GMAC. In June 2012, GMAC approved Plaintiff for a trial loan modification under the Home Affordable Modification Program. GMAC temporarily reduced Plaintiff's required monthly payments from $1,573.27 to $1,117.82 and required three timely consecutive payments of that amount.

After Plaintiff allegedly made the three monthly payments under the trial loan modification, GMAC allegedly offered her a permanent loan modification agreement in September 2012. Plaintiff agreed to the permanent loan modification agreement on 26 September 2012. The monthly payments under the permanent loan modification agreement

were to be paid by the first of each month, with the first payment due on 1 October 2012.

At some unspecified time after Plaintiff had entered the permanent loan modification agreement, GMAC transferred the ownership and servicing rights of Plaintiff's mortgage loan to Defendants, SLS and Bank of New York Mellon. On 15 October 2012, Plaintiff allegedly tendered a $1,441.92 mortgage payment to SLS under the permanent loan modification agreement. Sometime in November 2012, Plaintiff's niece, Sobriena Medley, telephoned SLS on Plaintiff's behalf to make a second mortgage payment. SLS allegedly refused to accept Plaintiff's modified loan payment upon the grounds that Plaintiff's loan had not been modified.

In December 2012, Ms. Medley again allegedly called SLS on Plaintiff's behalf to make the third mortgage payment under the permanent loan modification agreement. SLS also allegedly refused to accept that payment because the loan had not been modified.

Over three years later on 6 February 2016, Substitute Trustee Services, Inc. ("the Substitute Trustee"), initiated a power of sale foreclosure proceeding with the Cumberland County Clerk of Superior Court against Plaintiff on behalf of Bank of New York Mellon. On 23 May 2016, the clerk of superior court issued an order pursuant to N.C. Gen. Stat. § 45-21.16(d), which included all of the statutorily required findings to permit a foreclosure sale. The clerk's order included, in part, the finding that "said note is now in default . . . ." The clerk's order authorized the Substitute Trustee to proceed with a foreclosure by power of sale on Plaintiff's home. Plaintiff did not appeal from the clerk's order.

Plaintiff subsequently filed another Chapter 13 bankruptcy to attempt to stay the foreclosure sale on 10 June 2016. As part of the bankruptcy proceeding, SLS filed a proof of claim on 30 September 2016, asserting Plaintiff owed approximately $276,470.58 to Bank of New York Mellon, and that the debt was secured by the deed of trust on Plaintiff's home. SLS attached a copy of the permanent loan modification agreement signed by Plaintiff to its proof of claim. SLS alleged that Plaintiff was past due on the November 2012 payment required under the agreement, which Plaintiff alleges her niece attempted to pay on her behalf.

On 25 October 2016, Plaintiff objected to SLS's proof of claim. Plaintiff later withdrew the objection and the debt identified in the proof of claim was included in Plaintiff's bankruptcy plan. On 12 May 2017, the United States Bankruptcy Court for the Eastern District of North Carolina dismissed Plaintiff's bankruptcy case as a result of her inability to make payments in accordance with her bankruptcy plan.

On 23 May 2017, the Substitute Trustee filed an *ex parte* motion to reactivate foreclosure. The clerk of superior entered an order allowing the foreclosure sale of Plaintiff's home to proceed. A foreclosure sale was conducted on 17 July 2017. Plaintiff's home was sold to Bank of New York Mellon as the highest bidder.

On 27 July 2017, Plaintiff filed a motion for preliminary injunction and verified complaint pursuant to N.C. Gen. Stat. § 45-21.34 to enjoin the foreclosure sale. In her motion and complaint, Plaintiff asserts several legal and equitable claims, including: a claim for specific performance requesting the trial court to order Defendants to comply with the terms of the permanent loan modification agreement, a breach of contract claim, a breach of the duty of good faith and fair dealing claim, and an unfair or deceptive trade practices claim pursuant to N.C. Gen. Stat. § 75-1.1.

On 16 August 2017, Defendants filed a motion to dismiss pursuant to Rule of Civil Procedure 12(b)(6), asserting Plaintiff's verified complaint failed to state a claim for relief and that the doctrines of *res judicata* and collateral estoppel barred Plaintiff from asserting claims premised upon Plaintiff not being in default. Plaintiff was expressly found to be in default on payments due on the note in the clerk of superior court's 23 May 2016 order. Defendant's motion to dismiss also asserted Plaintiff should be estopped from asserting a breach of the permanent loan modification agreement, because Plaintiff had previously alleged the agreement was forged before the bankruptcy court.

On 1 September 2017, the trial court granted Defendant's motion to dismiss and dismissed Plaintiff's verified complaint with prejudice. Plaintiff filed timely notice of appeal of the trial court's order.

II. Jurisdiction

Appeal lies of right in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 1-277 (2017).

III. Issue

Plaintiff argues the trial court erred in granting Defendants' motion to dismiss and asserts she adequately stated claims for which relief can be granted. She asserts the clerk of court's determination of her being in default did not collaterally estop her from asserting contract and unfair or deceptive trade practice claims against Defendants.

IV. Standard of Review

In reviewing an order granting a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), this Court is to analyze:

> whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true.

Bissette v. Harrod, 226 N.C. App. 1, 7, 738 S.E.2d 792, 797 (2013) (citations omitted), *disc. review denied*, 367 N.C. 219, 747 S.E.2d 251 (2013). A motion to dismiss should be granted when: "(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." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

"[W]hen ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers[.]" *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001). We review the trial court's dismissal of an action *de novo*. *Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013).

V. Analysis

Plaintiff contends the trial court improperly dismissed her verified complaint because: (1) her legal and equitable claims are supported by sufficient allegations; and (2) any determinations made in a non-judicial foreclosure proceeding before a clerk of court do not implicate *res judicat*a or collateral estoppel in a subsequent judicial action.

A. Contractual Claims

[1] In her verified complaint, Plaintiff asserts claims for: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; and (3) specific performance to enforce the permanent loan modification agreement.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of [the] contract." *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005) (citation omitted), *disc. review denied*, 360 N.C. 290, 627 S.E.2d 621 (2006). "To state a valid claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must plead that the party charged took action

'which injure[d] the right of the other to receive the benefits of the agreement,' thus 'depriv[ing] the other of the fruits of [the] bargain.' " C*onleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc.*, __ N.C. App. __, __, 805 S.E.2d 147, 158 (2017) (alterations in original) (quoting *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228-29, 333 S.E.2d 299, 305 (1985)), *disc. review denied*, __ N.C. __, 811 S.E.2d 596 (2018). A defendant cannot breach a covenant of good faith and fair dealing when a claimant fails to establish the defendant breached the underlying contract. *See Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 (2012).

"The party claiming the right to specific performance must show *the existence of a valid contract*, its terms, and either *full performance on his part* or that he is ready, willing and able to perform." *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981) (emphasis supplied and citation omitted).

The permanent loan modification agreement, attached as an exhibit to Plaintiff's verified complaint, states payments were due on the first day of each month. Plaintiff does not allege she made all required payments by the first of each month as provided by the permanent loan modification agreement.

Attached as an exhibit to Plaintiff's complaint is a transactional history showing her payment due 1 October 2012 was made on 15 October 2012. The permanent loan modification agreement specifically states, "This Agreement will not take effect unless the preconditions set forth in Section 2 have been satisfied." The first subsection under Section 2 states that "TIME IS OF THE ESSENCE[.]" The permanent loan modification agreement specifically states and expressly requires "the first modified payment will be due on October 01, 2012." The agreement does not contain a grace or forbearance period for this requirement.

Plaintiff asserts no equitable defense to foreclosure in her complaint, asserting Defendants had waived the right to prompt payment by purportedly accepting a late payment on 15 October 2012. *See In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 859 (1993) ("Equitable defenses to foreclosure, such as waiver of the right to prompt payment through acceptance of late payments, may not be raised in a hearing pursuant to N.C.G.S. § 45-21.16 or on appeal therefrom but must be asserted in an action to enjoin the foreclosure sale under N.C.G.S. § 45-21.34.").

Viewing the allegations in Plaintiff's complaint as true, and in light of the exhibits attached to it and referenced therein, the permanent loan

modification agreement did not become effective, due to her failure to make a timely first payment by 1 October 2012. *See Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004) ("Since the exhibits to the complaint were expressly incorporated by reference in the complaint, they were properly considered in connection with the motion to dismiss as part of the pleadings."), *aff'd per curiam*, 360 N.C. 167, 622 S.E.2d 495 (2005).

Plaintiff premises all her claims upon the validity of the permanent loan modification. Plaintiff asserts no equitable defense to foreclosure in her complaint, asserting Defendants waived or should be estopped from requiring prompt payment, by purportedly accepting a late payment on 15 October 2012. *See Goforth*, 334 N.C. at 374, 432 S.E.2d at 859.

Presuming Plaintiff's complaint to be true, the permanent loan modification agreement Plaintiff alleges Defendants breached had not commenced and was not in effect, when Defendants allegedly refused to accept the payments tendered on her behalf in November and December 2012. *Schlieper v. Johnson*, 195 N.C. App. 257, 265, 672 S.E.2d 548, 553 (2009) ("The trial court may reject allegations that are contradicted by documents attached to the complaint [on a Rule 12(b)(6) motion.]" (citation omitted)).

Plaintiff cannot meet her burden of proof on her claims for breach of contract, specific performance, and breach of the covenant of good faith and fair dealing. She has failed to allege sufficient facts to show the permanent home modification agreement was binding upon Defendants, or that she had timely performed according to the terms of the permanent home modification agreement.

Upon review of the face and exhibits of Plaintiff's complaint, the trial court correctly held Plaintiff cannot prevail on her contractual claims. Her complaint shows the permanent loan modification agreement she alleges Defendants breached did not commence and was in effect, because she failed to make a time-is-of-the-essence payment as due by 1 October 2012. Plaintiff's arguments are overruled.

B. Unfair or Deceptive Trade Practices

[2] Plaintiff's unfair or deceptive trade practices claim alleges Defendants (1) refused to honor the terms of the permanent loan modification agreement by rejecting payments from Plaintiff; (2) initiated foreclosure proceedings against Plaintiff's property; and (3) forced Plaintiff to file Chapter 13 bankruptcy and incur additional expenses, costs and attorney's fees in an effort to stay the foreclosure proceedings.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013) (citation omitted). "[A]ctions for unfair or deceptive trade practices are distinct from actions for breach of contract, and 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." *Suntrust Bank*, 222 N.C. App. at 826, 732 S.E.2d at 599.

Plaintiff alleges Defendants committed unfair or deceptive trade practices by allegedly refusing to accept her November and December 2012 mortgage payments without reason, which proximately caused injury to her due to her default on the permanent loan modification agreement. Because the permanent loan modification agreement did not commence and go into effect due to Plaintiff's failure to make a timely payment by 1 October 2012, Defendants could not have committed unfair or deceptive trade practices by refusing to honor an agreement that was not in effect. Plaintiff has failed to state an unfair or deceptive trade practices claim for which relief can be granted. Plaintiff's arguments are overruled.

C. Collateral Estoppel and Res Judicata

Based on our determination that Plaintiff has failed to state any claim for which relief can be granted, it is not necessary to address the parties' remaining arguments regarding the doctrines of *res judicata* and collateral estoppel.

VI. Conclusion

Plaintiff has failed to plead claims for which relief can be granted. Construing Plaintiff's complaint as true and in conjunction with the permanent loan modification agreement attached thereto, Plaintiff did not make a timely payment on 1 October 2012 to validate and initiate the permanent loan modification agreement. Defendants could not be in breach of the defaulted permanent loan modification agreement for refusing to accept payments in November and December 2012. Because of Plaintiff's late payment, Defendants cannot breach an agreement not in effect. Plaintiff cannot succeed on her claims for breach of contract, specific performance, and breach of the covenant of good faith and fair dealing as a matter of law.

Plaintiff has also failed to assert a viable claim for unfair or deceptive trade practices. Defendants were under no obligation to accept payments in November and December 2012, after Plaintiff failed to submit a timely payment on 1 October 2012. The order of the trial court dismissing Plaintiff's complaint with prejudice is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and ZACHARY concur.

CAROL D. MOORE, PLAINTIFF
v.
WILLIAM W. JORDAN AND HILL EVANS JORDAN & BEATTY,
A PROFESSIONAL LIMITED LIABILITY COMPANY, DEFENDANTS

No. COA17-577

Filed 15 May 2018

Attorneys—legal malpractice—proximate cause—equitable distribution—evidentiary decisions

Summary judgment was properly granted to defendant attorneys in a legal malpractice action where plaintiff client failed to forecast sufficient evidence that her attorney's decision not to present certain evidence regarding alleged hidden marital assets, which the attorney determined was speculative and unfounded, proximately caused damage to her in the prior equitable distribution action.

Appeal by plaintiff from order entered 7 February 2017 by Judge James K. Roberson in Orange County Superior Court. Heard in the Court of Appeals 29 November 2017.

Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellant.

Sharpless & Stavola, P.A., by Frederick K. Sharpless, for defendant-appellees.

CALABRIA, Judge.

Carol D. Moore ("plaintiff") appeals from the trial court's order granting defendants' motion for summary judgment on plaintiff's claim

for legal malpractice. After careful review, we conclude that plaintiff failed to forecast any evidence to prove that, but for defendants' alleged negligence, plaintiff would have received a more favorable judgment in her prior equitable distribution action. Accordingly, we affirm the trial court's order.

I. Background

Plaintiff and James B. Moore, III ("Dr. Moore") were married on 22 September 1984 and separated on 29 March 2009. On 23 July 2009, plaintiff filed *Moore v. Moore*, 09 CVD 1183, in Orange County District Court seeking, *inter alia*, spousal support and an equitable distribution of marital property. On 21 June 2010, plaintiff retained William W. Jordan ("Jordan") and Hill Evans Jordan & Beatty, PLLC, (collectively, "defendants") to represent her in the pending action. Plaintiff hired defendants due to their experience tracing marital assets in complex equitable distribution proceedings. Defendants were aware that plaintiff believed that Dr. Moore had hidden assets in anticipation of the parties' divorce. In addition to defendants, plaintiff also retained certified public accountant Heather Linton and certified fraud examiner Carl Allen ("Allen") to help locate the alleged missing assets.

During discovery, defendants conducted depositions; subpoenaed financial institutions; and reviewed tax returns and other documents for evidence of undisclosed earnings or accounts, including potential off-shore transactions. However, neither defendants nor plaintiff's experts ever located any undisclosed assets. Jordan ultimately concluded that the Moores' once-substantial marital estate had been depleted as a result of market factors and the parties' extravagant lifestyle choices. Although Allen had "theories" that Dr. Moore might have mismanaged marital funds, Jordan determined that the evidence was speculative, unsubstantiated, and likely inadmissible. Therefore, when the trial commenced on 3 January 2011, Jordan notified Allen that he would not call him to testify. At trial, defendants did not present any expert witness evidence to support plaintiff's theory that Dr. Moore hid marital assets prior to the parties' divorce.

On 20 June 2012, the trial court entered an Equitable Distribution Judgment and Alimony Order awarding plaintiff alimony and an unequal distribution of the parties' net, non-retirement marital and divisible estate. The trial court found, in relevant part, that:

> 26. Plaintiff believed that [Dr. Moore] was moving and hiding the parties' money. The Court finds Plaintiff's belief to be unfounded.

. . .

> 40. The parties lived well above their means during their marriage. The parties frequently incurred charges on their credit cards of $12,000 - $15,000 per month. They hired private tennis coaches for the children. Their children attended private and/or out-of-state schools. The parties used savings and investment accounts during the latter part of their marriage to meet their lifestyle expenses; in so doing and with the help of negative market forces, the parties dwindled their non-retirement cash and investment accounts from approximately $3,000,000 to under $200,000 by the time the parties separated.
>
> . . .
>
> 83. Plaintiff's claim for attorney's fees should be denied. . . . The parties' respective estates, after the entry of this Judgment, shall be substantially similar. Many fees were incurred by the parties due to Plaintiff's unfounded suspicion that [Dr. Moore] was hiding money, and the Court cannot find any statutory basis and justification to support an award of attorney's fees from [Dr. Moore] to Plaintiff.

Plaintiff did not appeal the Equitable Distribution Judgment and Alimony Order. However, on 18 June 2015, plaintiff filed a complaint against defendants in Orange County Superior Court, alleging legal malpractice in their representation of plaintiff's equitable distribution action. Following some discovery, on 14 October 2016, defendants filed a motion for summary judgment. On 7 February 2017, the trial court entered an order granting defendants' motion for summary judgment. Plaintiff appeals.

II. Analysis

On appeal, plaintiff argues that defendants' failure to present certain evidence to the district court proximately caused her to receive a less-favorable judgment at equitable distribution. We disagree.

As an initial matter, since this is a legal malpractice action, "the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, . . . and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985) (internal citation omitted). "In a negligence action, summary judgment for defendant is proper where the evidence fails to establish negligence on the

part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury." *Id.* (citation and quotation marks omitted). We review the trial court's summary judgment order *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

A legal malpractice action is considered "a case within a case." *Young v. Gum*, 185 N.C. App. 642, 647, 649 S.E.2d 469, 473 (2007), *disc. review denied*, 362 N.C. 374, 662 S.E.2d 552 (2008). In order to hold an attorney liable for harm arising from the attorney's negligence in another action, the plaintiff must establish causation by proving that "(1) the original claim was valid; (2) the claim would have resulted in a judgment in the plaintiff's favor; and (3) the judgment would have been collectible." *Id.* at 646, 649 S.E.2d at 473 (citation and quotation marks omitted). We look to the substantive law defining the plaintiff's underlying claim in order to determine which facts the plaintiff must forecast to support the legal malpractice claim. *Id.* at 647, 649 S.E.2d at 473-74.

In an equitable distribution action,

> the burden of proof is upon the party claiming that property is marital property to show by a preponderance of the evidence that the property: (1) was acquired by either spouse or both spouses; (2) during the marriage; (3) before the date of the separation of the parties; and (4) is presently owned.

Id. at 647, 649 S.E.2d at 474 (citation and quotation marks omitted). "The party claiming that property is marital property must also provide evidence by which that property is to be valued by the trial court." *Id.* at 647-48, 649 S.E.2d at 474. Accordingly, in order to succeed on her legal malpractice claim against defendants, "plaintiff was required to forecast evidence that would be sufficient to demonstrate not only that defendants were negligent in advising her, but also evidence which would support plaintiff's underlying equitable distribution claim and her allegation that an equitable distribution judgment in her favor would have exceeded" the amount she actually received. *Id.* at 648-49, 649 S.E.2d at 474.

On appeal, plaintiff asserts that there are several assets that *would have been* classified as marital property, but for defendants' failure to present expert financial evidence at equitable distribution. For example, plaintiff contends that a projected income spreadsheet prepared by the Moores' financial planner, Kyle Elliott, along with Elliott's deposition testimony, establishes that on 1 December 2008, "the Moores owned a 20% interest in a Texas business valued at 1.8 million dollars."

Assuming, *arguendo*, that this bare assertion and evidence would suffice at equitable distribution, plaintiff's belief that the Moores' business interest would be classified as marital property might be correct, because the spreadsheet was drafted 118 days prior to the parties' separation. *See generally* N.C. Gen. Stat. § 50-20 (2017) ("Distribution by court of marital and divisible property."). However, N.C. Gen. Stat. § 50-21(b) provides, in pertinent part:

> For purposes of equitable distribution, *marital property shall be valued as of the date of the separation of the parties*, and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties.

N.C. Gen. Stat. § 50-21(b) (emphasis added). Accordingly, at best, Elliott's spreadsheet and testimony would have been competent as corroborative evidence of the value of the Moores' business interest.

In any event, this alleged asset was never presented to the district court because there was *not* sufficient supporting evidence for equitable distribution purposes. Jordan questioned Elliott about the spreadsheet and business interest during his deposition prior to equitable distribution:

> [JORDAN:] All right. Now over to the right I see that you've got some accounts listed and you have Carol IRA, Carol taxable, Jim IRA, Jim taxable, 20 percent of business and rental house equity.
>
> [ELLIOTT:] Yes, sir.
>
> Q. Okay. Can you explain what those accounts are and numbers represent?
>
> A. The IRA and taxable are the accounts that are managed by my firm. Twenty percent of business references what I was – I guess what I was told was his interest in his new business. And that is the estimate of the value of that stock.
>
> Q. And is that based on what he told you?
>
> A. Yes, sir.
>
> Q. And what was that new business?
>
> A. I've gone blank on the name. It's where he's currently employed.

. . .

Q. . . . [E]arlier you were talking about a business that [Dr. Moore] had 20 percent interest in.

A. Okay; right.

Q. And you couldn't remember the name of it. And I'm – I want to know if it was Highline FI. Or was it Mentis Analytics or some other business?

A. I believe Highline was his old company.

Q. Uh-huh.

A. And . . . The 20 percent was in the new business that I believe is located in Texas.

Q. Okay. But you don't remember the name of it?

A. I've gone totally blank; and that doesn't sound familiar.

Elliott's spreadsheet includes the specific disclosure that "Wilbanks, Smith and Thomas Asset Management LLC *does not guarantee the accuracy of the data* or future performance returns." (emphasis added). And although plaintiff argues that this "asset should have been disclosed, valued, and distributed as marital property" during the equitable distribution trial, she presents no evidence of its existence beyond Elliott's spreadsheet and testimony. Indeed, plaintiff fails to provide even *the name* of any business in which she and Dr. Moore claimed a 20% ownership interest. In short, "plaintiff has not forecast any evidence which would permit the court to identify, value or classify" any alleged asset not considered by the equitable distribution court, "and in the absence of this evidence, the court could not value or classify the property." *Young*, 185 N.C. App. at 649, 649 S.E.2d at 474.

Plaintiff also contends that defendants breached the community's standard of care by failing to present expert financial testimony to support her theory that Dr. Moore hid marital assets. Plaintiff supports this contention by relying upon the report and deposition testimony of Buddy Herring, her own expert witness in the instant case.

An attorney must "represent his client with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. The standard is that of members of the profession in the same or similar locality under similar circumstances." *Rorrer*, 313 N.C. at 356, 329 S.E.2d at 366. However, "[t]he mere fact that one attorney-witness testifies that

he would have acted contrarily to or differently from the action taken by defendant is not sufficient to establish a prima facie case of defendant's negligence. . . . Differences in opinion are consistent with the exercise of due care." *Id.* at 357, 329 S.E.2d at 367.

During his deposition in the instant case, Jordan explained why he decided not to present plaintiff's expert evidence to the equitable distribution court:

> [Allen] had lots of questions. He had theories. But there were no – there was nothing that could be substantiated to his various theories about the money. And, therefore, I deemed it speculative.
>
> It was unsupported. . . . I did express concern about the quality of the work of Carl Allen on multiple occasions. And I don't believe that Heather Linton did work that would be usable.
>
> . . . I discussed with Ms. Moore on many occasions leading up to the trial the – the concern that I had with regard to what evidence we had of the so-called missing money.
>
> It was non-existent. And as a lawyer, you have an obligation to not offer evidence that you know is not going to be allowed in and doesn't – doesn't represent probative evidence.
>
> . . .
>
> I've also found that in my 40-some years of trial practice that you weaken a case when you're trying a case to the bench by offering evidence that's basically fluff or speculative and subject to multiple attacks by the opposition.
>
> So if you don't have something that is really probative, you're better off leaving it alone, instead of setting up a dummy for the other side to knock down and make you look bad with.

"The law is not an exact science but is, rather, a profession which involves the exercise of individual judgment." *Id.* Contrary to plaintiff's arguments, Jordan's failure to present evidence that he, in his professional judgment, deemed "speculative" and "unsupported" is consistent

both with the exercise of due care in representing plaintiff's action, and with his duty of candor to the court.

III. Conclusion

Plaintiff failed to forecast sufficient evidence for the trial court to consider regarding any alleged marital asset. Without such evidence, the trial court could not determine whether plaintiff might have obtained a judgment in excess of the one that she actually received at equitable distribution. Furthermore, contrary to plaintiff's arguments, there is no evidence that defendants failed to exercise due care and diligence in representing plaintiff's action. Since plaintiff failed to establish that any alleged negligence on the part of defendants proximately caused damage to her, we affirm the trial court's order granting defendants' motion for summary judgment.

AFFIRMED.

Judges DAVIS and TYSON concur.

N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY,
DIVISION OF WASTE MANAGEMENT, PETITIONER
v.
TRK DEVELOPMENT, LLC, RESPONDENT

No. COA17-882

Filed 15 May 2018

1. Estoppel—equitable—against government agency

An administrative law judge and superior court judge erred by holding that the Department of Environmental Quality (DEQ) was estopped from enforcing the Solid Waste Management Act against a developer based on a prior permit. A State agency's power to enforce its government powers cannot be impaired by estoppel and enforcing the Solid Waste Management Act and its regulations falls within DEQ's core governmental powers.

2. Estoppel—equitable—elements—erosion control permit

Equitable estoppel did not apply on the facts where the Department of Environmental Quality (DEQ) had issued an erosion and sediment control permit to a developer, the developer discovered trash below the surface of the ground, and the developer began

disposing of the trash on an adjacent parcel instead of in a landfill. The developer had no basis for believing that anything other than its erosion and sedimentation control plan had been approved, and DEQ was not estopped for its failure to foresee a future violation.

Appeal by petitioner from order entered 26 January 2017 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 21 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for petitioner.

Hartsell & Williams, PA, by Andrew T. Cornelius and Austin "Dutch" Entwistle III, for respondent.

DAVIS, Judge.

This case requires us to determine whether the North Carolina Department of Environmental Quality ("DEQ") was properly estopped from enforcing the Solid Waste Management Act against a developer based on the developer's prior receipt of an erosion and sedimentation control permit from DEQ. Because we conclude that both the administrative law judge and the trial court erred in their application of the equitable estoppel doctrine in favor of the developer on these facts, we reverse.

Factual and Procedural Background

At all times relevant to this appeal, TRK Development, LLC ("TRK") owned three adjoining parcels of land in Concord, North Carolina. In April 2014, TRK sought to make a structural addition to a warehouse located on the first parcel. The planned addition required that a substantial amount of soil be excavated from the second parcel. Prior to beginning construction, TRK hired surveyors, an architect, and a civil engineer to prepare an erosion and sedimentation control plan to be submitted to DEQ for approval.[1]

On 18 June 2014, Dale Fink, the civil engineer hired by TRK, submitted the completed erosion and sedimentation control plan to Tamara Eplin, an assistant regional engineer in the Land Quality Section of

1. At the time the erosion and sedimentation control plan was submitted, DEQ was known by its former name, the Department of Environment and Natural Resources.

DEQ.[2] Included in the plans were topographic maps containing the results of soil boring testing conducted by TRK at the proposed construction site. The borings indicated the presence of trash in multiple locations beneath the surface of the soil TRK intended to excavate.

The Land Quality Section approved TRK's erosion and sedimentation control plan by issuing a Letter of Approval and Certificate of Plan Approval on 26 June 2014. The Letter of Approval contained the following language:

> If, following the commencement of this project, the erosion and sedimentation control plan is inadequate to meet the requirements of the Sedimentation Pollution Control Act of 1973 . . . this office may require revisions to the plan and implementation of the revisions to insure compliance with the Act.
>
> Acceptance and approval of this plan is conditioned upon your compliance with Federal and State water quality laws, regulations, and rules. In addition, local city or county ordinances or rules may also apply to this land-disturbing activity. *This approval does not supersede any other permit or approval.*

(Emphasis added.)

On 18 August 2014, Fink submitted an amended erosion and sedimentation control plan to Eplin that was specifically for the "spoils area" where excavated soil would be placed. DEQ approved TRK's second erosion and sedimentation control plan on 26 August 2014 by issuing another Letter of Approval and Certificate of Plan Approval. The 26 August Letter of Approval contained the same above-quoted language as the 26 June Letter of Approval.

After receiving these approvals, TRK began construction on the warehouse addition in September 2014. On 18 September 2014, an inspector with the Land Quality Section conducted an inspection of the construction site and determined that it was in compliance with the Sedimentation Pollution Control Act of 1973.[3]

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2. DEQ is comprised of eleven divisions, which are in turn subdivided into sections. The departments within DEQ relevant to this appeal are: (1) the Division of Energy, Land, and Mining Resources, which contains the Land Quality Section; and (2) the Division of Waste Management, which encompasses the Solid Waste Section.

3. N.C. Gen. Stat. § 113A-50, *et seq.* (2017).

On 23 November 2014, DEQ received an anonymous letter stating, in pertinent part, as follows:

> In the area of Ramdin Court and Cascade Drive in Concord, NC there seems to be some activity taking place that basically is leaving the area looking like a landfill. . . . There is some sort of grading taking place that is uncovering what appears to be a massive area of buried trash and garbage. There is all kind of trash and also rank odors. It has been spread across a large area near a creek and near power lines. . . . We would appreciate it if you can help look into this matter. If this is not a matter you are responsible for, please forward it [to] the appropriate department. You are the only place I could think of that handles this sort of thing.

In response to the letter, Teresa Bradford, an environmental senior specialist working in the Solid Waste Section of DEQ's Division of Waste Management, conducted a site inspection of the construction area on 3 December 2014. During the inspection, she observed "waste being moved from one area to the next[.]" Bradford spoke with TRK's main contractor, Brandon Cornelius, who told her that TRK possessed the necessary permits for its construction project. Cornelius showed Bradford one of the Certificates of Plan Approval that TRK had received from the Land Quality Section of DEQ. Bradford explained that this approval had been given "for erosion and sediment control measures only" and not "to dispose [of] solid waste on the [third] parcel." While at the site, Bradford also spoke by phone with Rishi Kapadia, a member manager of TRK. She advised Kapadia that TRK's permit "was approval for erosion control measures only" and that she "wasn't aware of any solid waste permit that would allow for the disposal."

On the following day, Bradford informed Kapadia that TRK had not been issued a permit allowing it to dispose of solid waste on its property. She further told Kapadia that — for this reason — the waste that had already been excavated would have to be taken to a permitted landfill and that, similarly, "any waste continuing to be removed from the original location would have to be disposed of at [a permitted] landfill." Kapadia responded that doing so would cost "millions of dollars."

Bradford conducted a second site inspection on 16 December 2014 and saw that waste was continuing to be disposed of on the third parcel. She further observed that the waste area had increased in size since her first inspection from one acre to approximately 1.7 acres and from ten feet in height to between twenty and thirty feet.

On 29 December 2014, DEQ issued a Notice of Violation to TRK, which stated that TRK was "operating a non-conforming solid waste disposal site/open dump" in violation of four separate North Carolina Administrative Code regulations related to the disposal of solid waste.[4] The Notice of Violation also provided that TRK had sixty days in which to come into compliance with these regulations by taking certain specified actions, including that it refrain from disposing of any additional waste on TRK's third parcel and that it remove "all solid waste from the site including any that may be buried and properly dispose of it in a facility permitted by the Division of Waste Management."

DEQ received no response from TRK, and Bradford conducted another site inspection on 29 January 2015. During this inspection, she "observed that the [waste] area had increased in height and also that there was an additional area to the east of the disposal area that had been excavated and waste was being placed into the excavated area."

Following this inspection, a meeting was scheduled at the DEQ Mooresville Regional Office between Kapadia, Bradford, and Charles Gerstell, another environmental senior specialist in the Solid Waste Section. At the meeting, Kapadia reiterated his view that TRK had already obtained the necessary permits for its construction project. Bradford informed Kapadia that "the only solution was removal of the waste, but [that] the section would work with him on technical assistance for removal and disposal options and . . . a time line for a cleanup for the site."

On 27 February 2015, TRK sent a letter to DEQ responding to the Notice of Violation. The letter stated, in pertinent part, as follows:

> In response to your notice sent December 29, 2014, TRK Development respectfully disagrees with [DEQ's]

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4. The specific regulations listed in the Notice of Violation as having been violated by TRK were 15A N.C.A.C. 13B .0106(a) and (b), and 15A N.C.A.C. 13B .0201(a) and (b). Rule 13B .0106(a) provides that "[a] solid waste generator shall be responsible for the satisfactory storage, collection and disposal of solid waste." 15A N.C.A.C. 13B .0106(a) (2017). Rule 13B .0106(b) states that "[t]he solid waste generator shall ensure that his waste is disposed of at a site or facility which is permitted to receive the waste." 15A N.C.A.C. 13B .0106(b). Rule 13B .0201(a) provides that "[n]o person shall treat, process, store, or dispose of solid waste . . . except at a solid waste management facility permitted by the Division for such activity[.]" 15A N.C.A.C. 13B .0201(a) (2017). Rule 13B .0201(b) states that "[n]o person shall cause, suffer, allow, or permit the treatment, storage, or processing of solid waste upon any real or personal property owned, operated, leased, or in any way controlled by that person without first obtaining a permit for a solid waste management facility from the Division authorizing such activity[.]" 15A N.C.A.C. 13B .0201(b). Each of these regulations was promulgated pursuant to North Carolina's Solid Waste Management Act.

> assessment that site work . . . involves the excavation, transportation and/or disposal of solid waste. We believe that that material being transported consists of mostly soil/dirt and is in line with the definition of spoils as stated in the approved plans and Certificate of Plan Approval issued by [DEQ]. . . .
>
> We propose that we will leave the spoils in place as is, seed and mulch the area and add additional security measures such as a gate to secure the site.

DEQ issued a Notice of Continuing Violation to TRK on 17 March 2015 along with an accompanying letter informing TRK that it had thirty days in which to come into compliance with the applicable regulations. After the thirty-day deadline passed, Bradford returned to the site on 12 May 2015 with four other DEQ employees to conduct soil sampling. The laboratory results of this sampling indicated the presence of both semi-volatile organic compounds and metals (including arsenic and aluminum) in the soil at levels hazardous to human health.

On 23 July 2015, DEQ issued a Compliance Order With Administrative Penalty to TRK "because of certain violations of the North Carolina Solid Waste Management Act (N.C. General Statute 130A, Article 9) and of the North Carolina Solid Waste Management Rules (15A N.C. Administrative Code 13B) which implements [sic] the Act." The compliance order alleged violations of the same four regulations that had been listed in the Notice of Violation and Notice of Continuing Violation previously issued to TRK by DEQ. It also assessed an administrative penalty of $14,287.13.

TRK filed a petition for a contested case hearing with the Office of Administrative Hearings on 8 September 2015. Following a hearing, Administrative Law Judge ("ALJ") David F. Sutton issued a final decision on 11 July 2016 that "overruled and reversed" the 23 July 2015 compliance order issued by DEQ. In his decision, the ALJ determined, *inter alia*, that TRK was, in fact, a solid waste generator and did not come within the exception set out in the Solid Waste Management Act for "the management of solid waste that is generated by an individual . . . on the individual's property and is disposed of on the individual's property." However, the ALJ further concluded that DEQ was estopped from issuing a compliance order against TRK based on its prior issuance of approvals for the erosion and sedimentation control plans submitted by TRK.

On 8 August 2016, DEQ filed a petition for judicial review of the ALJ's final decision in Cabarrus County Superior Court. The Honorable Julia Lynn Gullett entered an order on 26 January 2017 affirming the

ALJ's final decision. DEQ filed a notice of appeal to this Court on 23 February 2017.

Analysis

Judicial review of an administrative decision is governed by Chapter 150B of the North Carolina General Statutes, which provides, in pertinent part, as follows:

> (b) The Court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2017).

It is well settled that "in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (citation, quotation marks, and brackets omitted). "The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Fehrenbacher v. City of Durham*, 239 N.C. App. 141, 146, 768 S.E.2d 186, 191 (2015) (citation and quotation marks omitted).

Our Supreme Court has stated that "where only one inference can reasonably be drawn from undisputed facts, the question of estoppel is one of law for the court to determine." *Hawkins v. M & J Fin. Corp.*, 238 N.C. 174, 185, 77 S.E.2d 669, 677 (1953) (citation omitted). However,

where "the evidence bearing on the issue of estoppel [is] conflicting and susceptible of diverse inferences[,]" the issue is a mixed question of fact and law. *Bowling v. Combs*, 60 N.C. App. 234, 241, 298 S.E.2d 754, 758 (citation omitted), *disc. review denied*, 307 N.C. 696, 301 S.E.2d 389 (1983).

On appeal, DEQ contends that the trial court erred in affirming the final decision of the ALJ for two reasons: (1) the doctrine of equitable estoppel cannot operate so as to impair the State's exercise of its governmental powers; and (2) the elements of equitable estoppel were not met in this case. We agree with both of DEQ's arguments.

I. Equitable Estoppel as a Limit on the Exercise of Governmental Powers

[1] DEQ first contends that the trial court erred in affirming the final decision of the ALJ because a State agency's ability to exercise its governmental powers cannot be impaired by the operation of estoppel. DEQ asserts that its duty to enforce the Solid Waste Management Act constitutes a police power as to which ordinary principles of estoppel do not apply.

It is well established that an administrative agency of the State "is not subject to an estoppel to the same extent as a private individual or a private corporation." *Meachan v. Montgomery Cty. Bd. of Educ.*, 47 N.C. App. 271, 279, 267 S.E.2d 349, 354 (1980) (citation omitted). Our appellate courts have made clear that estoppel "may not arise against a governmental entity if such estoppel will impair the exercise of the governmental powers of the entity." *Wallace v. Bd. of Tr.*, 145 N.C. App. 264, 277, 550 S.E.2d, 552, 560 (citation omitted), *disc. review denied*, 354 N.C. 580, 559 S.E.2d 553 (2001).

The Solid Waste Management Act states, in pertinent part, as follows:

> (a) For the purpose of promoting and preserving an environment that is conducive to public health and welfare, and preventing the creation of nuisances and the depletion of our natural resources, the Department shall maintain a Division of Waste Management to promote sanitary processing, treatment, disposal, and statewide management of solid waste and the greatest possible recycling and recovery of resources, and the Department shall employ and retain qualified personnel as may be necessary to effect such purposes. . . .
>
> (b) In furtherance of this purpose and intent, it is hereby determined and declared that it is necessary for the health and welfare of the inhabitants of the State that

> solid waste management facilities permitted hereunder and serving a specified geographic area shall be used by public or private owners or occupants of all lands, buildings, and premises within the geographic area. Actions taken pursuant to this Article shall be deemed to be acts of the sovereign power of the State of North Carolina[.]

N.C. Gen. Stat. § 130A-291 (2017). It is clear that DEQ's responsibility for enforcing the Act — along with the provisions of the North Carolina Administrative Code promulgated thereunder — directly invokes its core governmental powers.

Our Supreme Court recognized the inability of a city to be estopped from exercising its governmental authority in *City of Raleigh v. Fisher*, 232 N.C. 629, 61 S.E.2d 897 (1950). In that case, the defendants were allowed to operate a bakery within an area zoned for residential use with the knowledge of city officials for over ten years. *Id.* at 632, 61 S.E.2d at 900. During that time period, the defendants both increased their business operations and invested substantial amounts of money into the bakery. When the city later sought to enforce its zoning regulations against them, the defendants argued that the city was estopped from doing so "because its officials ha[d] encouraged and permitted such conduct for at least ten years." *Id.* In rejecting the defendants' argument, the Supreme Court stated the following:

> In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. The police power is that inherent and plenary power in the State which enables it to govern, and to prohibit things hurtful to the health, morals, safety, and welfare of society. In the very nature of things, the police power of the State cannot be bartered away by contract, or lost by any other mode.

Id. at 635, 61 S.E.2d at 902 (internal citations omitted). As a result, the Court held that the city could not be estopped from enforcing its zoning ordinances against the defendants despite the longstanding acquiescence of city officials to the defendants' zoning violations prior to beginning enforcement efforts. *Id.*[5]

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5. TRK argues that *Fisher* was later distinguished by this Court's decision in *City of Winston-Salem v. Hoots Concrete Company, Inc.*, 37 N.C. App. 186, 245 S.E.2d 536, *disc. review denied*, 295 N.C. 645, 248 S.E.2d 249 (1978). However, *Hoots* dealt with the question of whether or not a zoning officer had issued a building permit in accordance with applicable zoning regulations. *Id.* at 189, 245 S.E.2d at 538. In our opinion, we expressly stated

This principle was also applied in *Mecklenburg County v. Westbery*, 32 N.C. App. 630, 233 S.E.2d 658 (1977), which involved a mistakenly issued zoning permit that was later revoked by the county after the defendants had "incurred a substantial expense in good faith reliance upon [the] permit before it was revoked[.]" *Id.* at 635, 233 S.E.2d at 661. Citing *Fisher*, this Court held that the county could not be estopped from revoking the permit because "the planned usage was illegal from its inception" and "a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it." *Id.* (citation and quotation marks omitted). *See also Kings Mountain Bd. of Educ. v. N.C. State Bd. of Educ.*, 159 N.C. App. 568, 578, 583 S.E.2d 629, 636 (2003) (holding that State Board of Education could not be estopped from approving school merger where "application of the estoppel doctrine would impede the State Board from exercising its legislative power to approve or deny school mergers").

In arguing that the application of estoppel in the present case would not impair the exercise of DEQ's governmental powers, TRK attempts to rely upon *County of Wake v. North Carolina Department of Environment & Natural Resources*, 155 N.C. App. 225, 573 S.E.2d 572 (2002), *disc. review denied*, 357 N.C. 62, 579 S.E.2d 387 (2003), and *Fike v. Board of Trustees*, 53 N.C. App. 78, 279 S.E.2d 910, *disc. review denied*, 304 N.C. 194, 285 S.E.2d 98 (1981). Both cases, however, are inapposite.

County of Wake concerned a dispute between the Town of Holly Springs and Wake County over the siting of a landfill. Holly Springs initially approved the proposed landfill site and accepted compensation from Wake County before revoking its approval years later. *Cty. of Wake*, 155 N.C. App. at 230, 573 S.E.2d at 577. We held that Holly Springs was estopped from reneging on its agreement with Wake County because "[t]o allow the Town to withdraw its approval . . . would be inequitable under the circumstances." *Id.* at 241, 573 S.E.2d at 584. The dispute in that case, however, was purely contractual as no evidence was presented showing that any statute or regulation was violated by the siting of the landfill.

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that our decision was not in conflict with "the principle of law set out in . . . *Fisher*" and that if the zoning permit had, in fact, been issued in error "the city cannot be estopped to enforce its zoning ordinance under an appropriate interpretation of the ordinance." *Id.* at 190, 245 S.E.2d at 538.

In *Fike*, a state employee sought to compel the State Employees' Retirement System to provide him with disability retirement benefits. *Fike*, 53 N.C. App. at 79, 279 S.E.2d at 912. This Court ruled that the Retirement System was estopped from denying benefits to the employee where the Retirement System made representations that the employee's personnel officer would assist him with the proper execution of the correct forms for obtaining benefits, but the personnel officer failed to do so. *Id.* at 81, 279 S.E.2d at 913. Like *County of Wake*, the dispute in *Fike* did not concern the exercise of a police power by a governmental entity. Indeed, we expressly noted that "application of principles of estoppel in the present case would not impair the exercise of [the Retirement System's] governmental powers." *Id.* at 82, 279 S.E.2d at 913.

Here, the ALJ's findings established that TRK was in violation of the Solid Waste Management Act. It is beyond dispute that the Act serves important interests in terms of regulating "in the most economically feasible, cost-effective, and environmentally safe manner the storage . . . and disposal of solid waste in order to protect the public health, safety, and welfare; enhanc[ing] the environment for the people of this State; and recover[ing] resources which have the potential for further usefulness." N.C. Gen. Stat. § 130A-309.03(b)(1) (2017). Moreover, as noted earlier, the Act specifically provides that "[a]ctions taken pursuant to this Article shall be deemed to be acts of the sovereign power of the State of North Carolina[.]" N.C. Gen. Stat. § 130A-291.

Thus, DEQ's duty to enforce the Solid Waste Management Act and its accompanying regulations epitomizes the type of core police power possessed by a government agency that cannot be impaired by estoppel. Accordingly, on this ground alone, the trial court erred in affirming the final decision of the ALJ.

II. Elements of Equitable Estoppel

[2] The ALJ and the trial court also erred in their application of the elements of equitable estoppel to these facts. Therefore, we deem it appropriate to address this issue as well.

It is helpful at the outset to review basic principles regarding equitable estoppel.

> [T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than,

> and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Hawkins, 238 N.C. at 177-78, 77 S.E.2d at 672 (citation omitted).

This Court has held that "mere silence will not operate to create an estoppel. In order to work an estoppel the silence must be under such circumstances that there are both a specific opportunity, and a real or apparent duty, to speak." *Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 164, 356 S.E.2d 912, 916 (internal citations, quotation marks, and brackets omitted), *disc. review denied*, 320 N.C. 794, 361 S.E.2d 80 (1987). Furthermore, "[w]hen a party is misled through his own lack of diligence and reasonable care, he may not then avail himself of the doctrine of equitable estoppel." *N.C. Fed. Sav. & Loan Ass'n v. Ray*, 95 N.C. App. 317, 323, 382 S.E.2d 851, 855 (1989) (citation omitted). Finally, it is a well-established principle that "everyone is equally capable of determining the law, is presumed to know the law and . . . cannot be deceived by representations concerning the law or [be] permitted to say he or she has been misled." *Dalton v. Dalton*, 164 N.C. App. 584, 586, 596 S.E.2d 331, 333 (2004) (citation omitted).

In the present case, TRK submitted plans on 18 June 2014 to the Land Quality Section for the sole purpose of seeking approval for an erosion and sedimentation control plan. Based upon these submissions, the Land Quality Section issued documentation containing the limited and specific approval TRK had sought.[6] The Letter of Approval explicitly stated that "[t]his approval does not supersede any other permit or approval."

Despite the fact that the approval documents did not in any way mention the issue of solid waste disposal, TRK nevertheless contends that DEQ's approval of the erosion and sedimentation control plan should be deemed to be a representation by DEQ that TRK's project was

6. We note that TRK does not allege that DEQ has ever attempted to revoke its prior approval of the erosion and sedimentation control plan submitted by TRK.

— and would continue to be — in full compliance with the Solid Waste Management Act. This argument lacks merit.

The Letters of Approval and Certificates of Plan Approval issued by the Land Quality Section were, by their express terms, limited to the erosion and sedimentation control plan submitted by TRK and merely signified the compliance of the plan with the Sedimentation Pollution Control Act. None of the language appearing in these documents can be read as amounting to a declaration by DEQ that its approval of the erosion and sedimentation control plan also constituted approval of *other* aspects of TRK's construction project.

TRK also argues that the soil boring markers on the plans it submitted to the Land Quality Section indicated the presence of trash beneath the surface of the proposed excavation site and therefore (1) provided DEQ with knowledge of the necessity for TRK to obtain a solid waste permit; and (2) triggered an obligation on the part of the Land Quality Section to refer the application to the Division of Waste Management. This argument fails for several reasons.

First, to the extent that the soil boring markers provided DEQ with any indication of the eventual necessity for TRK to obtain a solid waste permit, such knowledge could be equally imputed to TRK, which was the entity ultimately responsible for ensuring that its project complied in all respects with North Carolina law. Second, while coordination among different sections of a state agency in appropriate circumstances is desirable, TRK has cited no legal authority suggesting that the Land Quality Section was somehow *required* as a matter of law to refer TRK's erosion and sedimentation control plan to the Solid Waste Section.

Finally, it is clear that TRK was not actually in violation of the Solid Waste Management Act at the time DEQ gave its approval for TRK's erosion and sedimentation control plan. Instead, TRK only began violating the Solid Waste Management Act once it actually started excavating and disposing of solid waste on its property. Thus, in essence, TRK is making the novel argument that DEQ should be estopped based on its failure to foresee a *future* violation of the statute by TRK. TRK has failed to explain why DEQ was legally required to assume that as the project moved forward TRK would proceed to dispose of this trash in a manner that was unlawful under the Solid Waste Management Act.

In sum, at no point was there any valid basis for TRK to believe that the documentation it had previously received from the Land Quality Section meant anything more than that its erosion and sedimentation control plan had been approved. Consequently, TRK's claimed reliance

upon this limited approval as a basis for believing it could lawfully proceed to excavate and dispose of 1.7 acres of solid waste without a solid waste permit in violation of the Solid Waste Management Act was manifestly unreasonable. In actuality, TRK was misled only by its "own want of reasonable care and circumspection." *Peek v. Wachovia Bank & Tr. Co.*, 242 N.C. 1, 12, 86 S.E.2d 745, 753 (1955) (citation omitted).

Conclusion

For the reasons stated above, we reverse the trial court's 26 January 2017 order and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges STROUD and ARROWOOD concur.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, PLAINTIFF
v.
LAXMI HOTELS OF SPRING LAKE, INC.; CIENA CAPITAL FUNDING, LLC; AND AMERICAN BUSINESS LENDING, INC., DEFENDANTS

No. COA17-951

Filed 15 May 2018

1. Appeal and Error—interlocutory order—appellate jurisdiction—collateral estoppel not applicable—consent judgment—petition for certiorari

The Court of Appeals had jurisdiction where the Department of Transportation (DOT) appealed from a Rule 60(b) order in a condemnation case arising from a consent judgment in a highway improvement project. The order was interlocutory because it clearly contemplated further proceedings at trial on just compensation and collateral estoppel did not apply because this was not relitigation of the same issue. However, DOT's petition for certiorari was granted.

2. Civil Procedure—Rule 60—consent judgment—timeliness of motion

The trial court did not abuse its discretion by setting aside a consent judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6) in a condemnation case arising from a highway improvement project.

Although the Department of Transportation (DOT) contended that the motion to set aside was not timely filed because the consent judgment could only be set aside based on fraud, mutual mistake, duress, or undue influence pursuant to Rule 60(b)(3), which has a one-year time limitation, facts illustrative of fraud and misrepresentation do not mean that the trial court is limited to apply only those facts as grounds for relief. Relief may be appropriate pursuant to Rule 60(b) if those facts are accompanied by circumstances that justify relief from the judgment. The motion must then be brought within a reasonable time, which was done here.

3. Judgments—consent—condemnation of land—motion to set aside—just compensation

The trial court did not abuse its discretion by setting aside a consent judgment under N.C.G.S. § 1A-1, Rule 60(b)(6) in an action arising from a condemnation for a highway improvement project. Extraordinary circumstances existed to support, and justice demanded, the setting aside of the judgment; the record was replete with evidence to support the trial court's conclusion that the Department of Transportation did not adequately inform the landowner of the extent of the taking. These were not two entities negotiating at arm's length and just compensation was constitutionally required.

Appeal by plaintiff from order entered 18 April 2017 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 22 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Alvin W. Keller, Jr. and Assistant Attorney General James Aldean Webster, III, for plaintiff-appellant.

McCoy Wiggins Cleveland & McLean PLLC, by Richard M. Wiggins, for defendants-appellees.

ZACHARY, Judge.

The North Carolina Department of Transportation ("DOT") appeals from the trial court's order granting defendant Laxmi Hotels of Spring Lake's ("Laxmi") 60(b) motion to set aside the parties' Consent Judgment. After careful review, we affirm.

I. Background

Laxmi owns real property abutting South Main Street in Spring Lake, upon which it operates a Super 8 Motel franchise ("the Hotel"). DOT intended to acquire a portion of the Hotel's property in order to widen and improve South Main Street. On 8 February 2012, DOT right of way agent Greg Kolat met with Laxmi's president Dev Rajababoo and informed him that DOT would be exercising its power of eminent domain to take a portion of the Hotel's property in order to execute DOT's South Main Street project. Kolat informed Rajababoo that DOT was going to acquire a small portion of the property fronting South Main Street in addition to taking a permanent utility easement along the frontage of the property. According to Kolat's testimony and the DOT Negotiating Diary admitted into evidence, Kolat explained the DOT "acquisition procedure and why it is fair" to Rajababoo.

DOT maintains that Kolat informed Rajababoo that DOT would also build a retaining wall to run adjacent to South Main Street along the Hotel property; Rajababoo testified that no one from DOT told him about the retaining wall. The appraisal that DOT provided to Rajababoo showed a retaining wall along the property's frontage, but did not indicate the height of the prospective wall. Rajababoo also testified that DOT assured him that the Hotel would not lose any parking spaces as a result of the taking, and the appraisal did not indicate a loss of parking spaces.

Based on these plans, DOT's initial appraisal reflected a $25,700 "offer of just compensation" for the taking. On 6 June 2012, Laxmi made a counteroffer of $35,000. DOT accepted Laxmi's counteroffer; however, Laxmi was unable to obtain the consent of one of its lenders, so the parties did not complete the settlement at that time.

At some point after accepting Laxmi's counteroffer, DOT made various changes to its South Main Street project plans. These changes were reflected in a modified appraisal summary. The modified appraisal indicated that the right of way would be enlarged, and added a temporary construction easement and a slope easement. DOT provided Laxmi with a copy of the revised offer and appraisal summary, but Laxmi maintains that it was never orally informed by DOT of the change in construction plans. The revised appraisal reflected a settlement offer to Laxmi of $35,000 as just compensation for the taking, which Laxmi accepted. According to Laxmi, it believed that the increase of DOT's offer to $35,000 was in response to Laxmi's counteroffer rather than in response to an increase in the scope of the taking. On 23 July 2014, the parties entered into a Consent Judgment in which the parties agreed to settle

for $35,000 as just compensation for the taking. DOT prepared the Consent Judgment.

Laxmi contends that it did not realize that DOT had changed its project plans until after construction began. The DOT project eliminated several of Laxmi's parking spaces, which caused the Hotel's parking lot to be in violation of local codes. In addition, when the Department completed construction of the retaining wall, the wall was roughly fifteen feet tall, completely blocking the Hotel's visibility from the street. The Hotel, which prior to the taking was fully visible from the main thoroughfares in the area, was, according to Rajababoo, now in a "dungeon." The pictures taken after the construction show the Hotel to be invisible from the main roadways because of the retaining wall.

DOT maintains that it informed Laxmi of the plan changes by providing Laxmi with copies of the modified appraisal and increased settlement offer. In support of this contention, DOT points to the Consent Judgment, which incorporated by reference the revised project plans. However, the Consent Judgment "states there is a slope easement under a heading entitled 'TEMPORARY CONSTRUCTION EASEMENT,' but does not mention the height of the retaining wall or the loss of parking spaces."

In contrast, Rajababoo testified that he was never informed of the changes to the plans regarding the loss of parking spaces or the increased height of the retaining wall. At trial, no one from DOT testified that he or she told Laxmi or Rajababoo that DOT's plans had changed. While the documents that DOT provided to Laxmi mentioned a "retaining wall," no document, including the modified appraisal summary, referenced a loss of parking spaces. Moreover, while the retaining wall was mentioned, none of the documents indicated how tall that wall would be.

Rajababoo testified that he first discovered that the Hotel was going to lose parking spaces "[w]hen they were already gone. . . . They just started the work. And one fine day I come to work and all the land is bulldozed, and there's—they are putting in dirt to make a ramp to come in. . . . Nobody had ever approached me for that." Laxmi maintains that "the construction of the wall in front of [the] hotel has severely impacted the value of the hotel . . . and that the taking of the additional parking space from the available usable parking spaces has also severely impacted the value of the hotel." When asked whether Laxmi would have entered into the Consent Judgment if it had been told about the wall or the loss of parking spaces, Rajababoo responded, "Absolutely no way."

On 15 February 2017, Laxmi filed a motion to set aside the Consent Judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. Laxmi's motion alleged that in persuading Laxmi to enter into the Consent Judgment, DOT misrepresented (1) the nature and extent of Laxmi's property that DOT intended to take, and (2) the effect that the taking would ultimately have on "the ability of [Laxmi] to operate or work on the site after the taking."

A hearing on Laxmi's motion was conducted before the Honorable Mary Ann Tally in Cumberland County Superior Court. Judge Tally determined that Laxmi "reasonably relied upon the representations made by [DOT]" and that Laxmi "was never informed of the loss of parking spaces or the change in the height of the retaining wall placed in front of the Hotel." Based on these facts, Judge Tally concluded that DOT "did not adequately inform [Laxmi] of the extent of the taking of the Hotel property, and did not provide just compensation to the Hotel." Judge Tally concluded that these facts warranted the setting aside of the Consent Judgment pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. Accordingly, Judge Tally granted Laxmi's motion and ordered that the case proceed to trial in order to determine the appropriate amount of compensation for the taking. DOT timely appealed.

On appeal, DOT argues that the trial court erred in setting aside the Consent Judgment (1) because Laxmi's motion was not timely, and (2) because there was no substantive basis to justify overturning the judgment.

II. Grounds for Appellate Review

[1] We initially consider whether this Court has jurisdiction to review the trial court's order granting Laxmi's Rule 60(b) motion.

DOT maintains that this Court has jurisdiction over the trial court's order setting aside the Consent Judgment because the trial court's order "affects a final judgment" pursuant to N.C. Gen. Stat. § 7A-27(b)(1). However, even if we deem DOT's appeal to be interlocutory, DOT asserts that the trial court's order is immediately appealable because it affects a substantial right. Finally, in the event that this Court determines that the trial court's order does not affect a substantial right, DOT has filed a petition for writ of certiorari asking this Court to assert jurisdiction and address the merits of its arguments.

A. Interlocutory Appeals

This Court customarily entertains appeals only from final judgments. *See* N.C. Gen. Stat. § 7A-27(b) (2017). A judgment is final if it "leaves

nothing further to be done in the trial court." *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014) (citing *Steele v. Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963)). In contrast, "[a]n order is interlocutory 'if it does not determine the issues but directs some further proceeding preliminary to final decree.' " *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (quoting *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961)). Because an interlocutory order is not yet final, with few exceptions, "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]" *Consumers Power v. Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

DOT first argues that even though the order setting aside the parties' Consent Judgment was interlocutory, this Court nevertheless "has jurisdiction to review the trial court's order because it set aside a final judgment." This argument is not persuasive. Judge Tally's order set aside the Consent Judgment in order for the parties "to put on evidence at trial . . . to determine the amount of damages to which [Laxmi] is entitled pursuant to the General Statutes of North Carolina." Clearly, as it contemplates further proceedings at the trial level on the issue of just compensation—the crux of the Consent Judgment—Judge Tally's order is interlocutory. *See Campbell*, 237 N.C. App. at 3, 764 S.E.2d at 632.

However, notwithstanding its lack of finality, an interlocutory order may be immediately appealed if "the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal," *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation omitted), or if the "order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Consumers Power*, 285 N.C. at 437, 206 S.E.2d at 181 (citation omitted); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2017). "A substantial right is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right.' " *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976)). "We consider whether a right is substantial on a case-by-case basis." *Id.*

In the instant case, the trial court did not certify the order setting aside the Consent Judgment for immediate appellate review. Nevertheless, DOT argues that "the trial court's setting aside the consent judgment deprived the Department of a substantial right, *i.e.*, the benefit of its bargain in the court-sanctioned settlement of the case."

In support of its argument, DOT turns our attention to *Turner v. Hammocks Beach Corp.* We do not find *Turner* persuasive in the case at bar.

In *Turner*, the defendant had previously "filed a declaratory judgment action seeking to quiet title" to a tract of property which was the subject of a charitable trust. *Turner*, 363 N.C. at 557, 681 S.E.2d at 773. The plaintiffs contested the quiet title action and the case was set for trial. *Id.* However, "[p]rior to trial . . . , the parties reached a settlement and signed a consent judgment, which was entered by the trial court[.]" *Id.* Nearly twenty years later, the plaintiffs brought an action seeking termination of the trust "alleging that fulfillment of the trust terms has become impossible or impracticable[.]" *Id.* The defendant filed a motion to dismiss the plaintiffs' action on the grounds that the "plaintiffs' rights to the property now in question . . . had already been determined by [a prior] consent judgment and that relitigation is barred by collateral estoppel." *Id.* The trial court denied the defendant's motion to dismiss, which the defendant argued was immediately appealable because "the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel." *Id.* at 558, 681 S.E.2d at 773. Our Supreme Court agreed with the defendant, and explained that "[u]nder the collateral estoppel doctrine, 'parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.' " *Id.* (quoting *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973)) (internal citations omitted) (alteration omitted). Thus, because the doctrine of collateral estoppel "is designed to prevent repetitious lawsuits," our Supreme Court concluded that the defendant had "a substantial right to avoid litigating issues that have already been determined by a final judgment." *Id.* at 558, 681 S.E.2d at 773.

Here, DOT cites the language from *Turner* and maintains that the trial court's order is immediately appealable because "parties have a substantial right to avoid litigating issues that have already been determined by a final judgment[,]" that is, the parties' Consent Judgment. *Id.* However, DOT overlooks "*why* our appellate courts hold that . . . collateral estoppel" triggers a substantial right: it "ensures that parties . . . are not forced to re-litigate issues that were *fully litigated* and *actually determined* in previous legal actions." *Campbell*, 237 N.C. App. at 5, 764 S.E.2d at 633 (citing *Turner*, 363 N.C. at 558, 681 S.E.2d at 773) (emphasis added). In this instance, the trial court's order setting aside the parties' Consent Judgment "will not force [DOT] to re-litigate [just compensation] issues that already were determined by a court in an

earlier proceeding[,]" *Campbell*, 237 N.C. App. at 5, 764 S.E.2d at 633, nor would the denial of an immediate appeal require DOT to endure "repetitious lawsuits." *Turner*, 363 N.C. at 558, 681 S.E.2d at 773. In fact, the issue of just compensation was never "fully litigated"; rather, the Consent Judgment prevented the need for litigation, as it was designed to do. *Id.* "Indeed, in the only similar proceeding between the parties," Laxmi agreed to accept a settlement of $35,000 as just compensation for DOT's taking, thereby "preventing the trial court from determining that issue on the merits." *Id.* In effect, DOT

> argues not that [it] is compelled to re-litigate an issue previously determined by a court, but instead that [it] must fully litigate—for the first time—an issue that [it] thought was precluded by the [consent] judgment [it] obtained. But that argument can be made in virtually every Rule 60(b) case and our appellate courts have long rejected it as a basis for immediate appeal.

Campbell, 237 N.C. App. at 5, 764 S.E.2d at 633 (citing *Waters*, 294 N.C. at 208, 240 S.E.2d at 344 (1978) and *Robinson v. Gardner*, 167 N.C. App. 763, 768, 606 S.E.2d 449, 452 (2005)). Collateral estoppel is thus no bar in the instant case. *See Turner*, 363 N.C. at 558-59, 681 S.E.2d at 773-74 ("To successfully assert collateral estoppel . . . , defendant would need to show that [an] earlier suit resulted in a final judgment on the merits [and] that the issue in question was identical to an issue *actually litigated* and necessary to the judgment[.]") (citation and quotation marks omitted) (emphasis added).

In that "no court has yet adjudicated" the just compensation issue in the instant case, DOT "cannot rely on our collateral estoppel precedent to immediately appeal the trial court's Rule 60(b) order." *Id.* Moreover, while DOT points out that the ultimate jury verdict in the instant case "may not be as favorable as the" Consent Judgment and that DOT would be liable for court costs and "interest on a jury verdict[,]" it has not offered an explanation as to why a verdict that demonstrates that the Consent Judgment failed to provide Laxmi with just compensation would deprive *DOT* of a substantial right. *See e.g.*, *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right[.]"). Accordingly, we conclude that the trial court's order setting aside the parties' Consent Judgment does not affect a substantial right and is therefore not immediately appealable.

B. Petition for Writ of Certiorari

DOT has filed a petition for writ of certiorari asking this Court to invoke its powers under Rule 21 of the North Carolina Rules of Appellate Procedure in order to address the merits of the instant appeal, notwithstanding its interlocutory nature.

"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 no right of appeal from an interlocutory order exists[.]" N.C. R. App. P. Art. V, Rule 21(a) (2017). Such "appropriate circumstances" exist when " 'review will serve the expeditious administration of justice or some other exigent purpose.' " *Amey v. Amey*, 71 N.C. App. 76, 79, 321 S.E.2d 458, 460 (1984) (quoting *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975)).

In its petition for writ of certiorari, DOT explains that its "power to acquire rights of way and other interests by . . . condemnation" is crucial to its mission as a state department. According to DOT, it "has more than 1750 condemnation cases pending . . . across the State," approximately ninety-five percent of which are settled by consent judgment. We choose to exercise our discretion to grant certiorari so that this Court can address the merits of this matter.

III. Rule 60(b)

Because we choose to grant DOT's petition for writ of certiorari, we must determine whether the trial court erred when it granted Laxmi's Rule 60(b) motion to set aside the Consent Judgment.

Where a final judgment or order has been entered in a particular case, Rule 60(b) will nevertheless allow for a party to obtain relief from that judgment or order "[o]n motion and upon such terms as are just[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017). "Rule 60(b) has been described as 'a grand reservoir of equitable power to do justice in a particular case.' " *Sloan v. Sloan*, 151 N.C. App. 399, 404, 566 S.E.2d 97, 101 (2002) (quoting *Branch Banking & Trust Co. v. Tucker*, 131 N.C. App. 132, 137, 505 S.E.2d 179, 182 (1998)). Pursuant to Rule 60(b), a trial court may relieve a party from operation of a final judgment 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;
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017).

This Court reviews a trial court's order granting a Rule 60(b) motion for abuse of discretion. *State ex rel. Davis v. Adams*, 153 N.C. App. 512, 515, 571 S.E.2d 238, 240 (2002) (citations omitted). "Our Supreme Court has stated that this Court should not disturb a discretionary ruling of a trial court unless it 'probably amounted to a substantial miscarriage of justice[.]' " *Sloan v. Sloan*, 151 N.C. App. at 404, 566 S.E.2d at 101 (quoting *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982)). Otherwise, "[a] judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted).

A. Timeliness of Laxmi's Rule 60(b) Motion

[2] DOT first argues that the trial court erred in granting Laxmi's Rule 60(b) motion because Laxmi's motion was not timely filed.

"One of the conditions precedent that must be proven before a court will consider a Rule 60(b) motion is timeliness." *Bruton v. Sea Captain Properties, Inc.*, 96 N.C. App. 485, 488, 386 S.E.2d 58, 59 (1989). A Rule 60(b) motion for relief made pursuant to subsections (b)(1), (2), or (3), *supra*, must be made "not more than one year after the judgment, order, or proceeding was entered or taken." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017). Conversely, a motion made pursuant to Rule 60 (b)(6) (on the grounds of any other reason justifying relief), must only be brought forward "within a reasonable time[.]" *Id.* "What constitutes a reasonable time depends on the circumstances of the individual case." *McGinnis v. Robinson*, 43 N.C. App. 1, 8, 258 S.E.2d 84, 88 (1979) (citation omitted).

In the instant case, the trial court set aside the parties' Consent Judgment pursuant to Rule 60(b)(6). In order for the trial court to have properly granted Laxmi's Rule 60(b) motion pursuant to Rule 60(b)(6), Laxmi must have made its motion "within a reasonable time." DOT, however, maintains that the Consent Judgment could have been set aside *only* "on the limited grounds of fraud, mutual mistake, duress, or

undue influence" pursuant to Rule 60(b)(3), rather than Rule 60(b)(6). DOT argues that Laxmi cannot circumvent the one year time limitation imposed under Rule 60(b)(3) "simply by failing to identify its arguments as falling within [that] section[]." Therefore, DOT contends that the trial court erred in granting Laxmi's Rule 60(b) motion because the motion was not brought within the requisite one year period under Rule 60(b)(3).

DOT correctly notes that "Rule 60(b)(6) cannot be the basis for a motion to set aside judgment if the facts supporting it are facts which more appropriately would support one of the five preceding clauses." *Bruton*, 96 N.C. App. at 488, 386 S.E.2d at 59-60. "We have repeatedly held that a movant may not be allowed to circumvent the requirements for clauses (b)(1) through (b)([3]) by 'designating [the] motion as one made under Rule 60(b)(6)[.]' " *Id.* at 488, 386 S.E.2d at 60 (quoting *Akzona, Inc. v. American Credit Indem. Co.*, 71 N.C. App. 498, 505, 322 S.E.2d 623, 629 (1984)).

That facts illustrative of fraud and misrepresentation exist, however, does not mean that the trial court is limited to applying those facts as grounds for relief under Rule 60(b)(3). A trial court will err in couching a Rule 60(b) order in terms of Rule 60(b)(6) only to the extent that "the facts supporting [the motion] are facts which *more appropriately* would support" judgment under Rule 60(b)(3) rather than under Rule 60(b)(6). *Bruton*, 96 N.C. App. at 488, 386 S.E.2d at 59-60 (emphasis added). Even where a case involves various indicia of fraud or misrepresentation, relief may be appropriate pursuant to Rule 60(b)(6) if those facts are accompanied by circumstances that "justify[] relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2017).

We conclude that the trial court did not abuse its discretion in concluding that the facts of the instant case more appropriately supported relief pursuant to Rule 60(b)(6), as explained in subsection *B* below. Accordingly, in order for Laxmi to be entitled to relief from the judgment pursuant to Rule 60(b)(6), Laxmi must have made its Rule 60(b) motion "within a reasonable time." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017).

In the instant case, we find no abuse of discretion on the part of the trial court in concluding that, under the particular circumstances of the case, Laxmi brought its Rule 60(b) motion within a reasonable period of time. While the Consent Judgment was filed on 23 July 2014, construction on the retaining wall did not begin until almost one year later, on 19 May 2015. The retaining wall was not completed until 22 October 2015. As the trial court noted, Laxmi "could not have sought relief from the judgment less than one (1) year after entry of the consent

judgment because construction on the wall and the slope easement resulting in the loss of parking spaces was not completed until more than one (1) year after the entry of the consent judgment." Laxmi then filed its motion to set aside the Consent Judgment less than a year and a half after construction of the wall had completed. This, according to DOT, was an unreasonable delay. We do not find a year and a half delay to be so inherently unreasonable as to constitute an abuse of discretion. Rather, given the complexities of this case, we conclude that the trial court did not abuse its discretion when it determined that Laxmi's "motion to set aside the judgment was brought within a reasonable time pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure."

B. Substantive Grounds for Laxmi's Rule 60(b) Motion

[3] Lastly, the Department argues that the trial court erred in setting aside the Consent Judgment because there was no substantive basis to justify the trial court's order. We disagree.

As explained *supra*, Rule 60(b)(6) "authorizes relief from final judgments for 'any other reason justifying relief from the operation of the judgment.' " *Lumsden v. Lawing*, 117 N.C. App. 514, 517, 451 SE.2d 659, 661 (1995). "Relief is appropriate under Rule 60(b)(6) if 'extraordinary circumstances exist' and 'justice demands relief.' " *Id.* at 518, 451 S.E.2d at 662 (quoting *Thacker v. Thacker*, 107 N.C. App. 479, 481, 420 S.E.2d 479, 480 (1992)). While not technically a "catch-all" provision, Rule 60(b)(6) provides trial courts with a "vast reservoir of equitable power." *Lumsden*, 117 N.C. App. at 517, 451 S.E.2d at 661 (citation and quotation marks omitted). "The broad language of clause (6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice." *Brady v. Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971) (citation and quotation marks omitted). Exercise of this equitable power is within the full discretion of the trial judge. *Thacker*, 107 N.C. App. at 482, 420 S.E.2d at 480 (citation omitted).

Initially, we note that DOT has not argued before this Court that the trial court abused its discretion when it concluded that the facts of the present case were sufficient to support the trial court's grant of relief to Laxmi pursuant to Rule 60(b)(6). Rather, DOT directs our attention to the conflicting evidence presented at the hearing to support its argument that there was not a sufficient showing of *fraud* to justify relief pursuant to Rule 60(b)(3). As explained *supra*, a trial court is not prevented from granting relief pursuant to Rule 60(b)(6) merely because the "extraordinary circumstances" involved contain aspects of fraud or misrepresentation.

In the instant case, we agree with Laxmi that extraordinary circumstances existed to support, and that justice so demanded, the trial court's setting aside of the Consent Judgment pursuant to Rule 60(b)(6).

The record is replete with evidence to support the trial court's conclusion that DOT "did not adequately inform [Laxmi] of the extent of the taking of the Hotel property." For instance, DOT maintains that its second offer of $35,000 provided notice to Laxmi that DOT had changed its project plans since the initial offer of $25,700. However, DOT's modified offer of $35,000—which DOT contends reflected the amended calculation of just compensation in light of the plan revisions—was the exact amount of Laxmi's counteroffer to DOT's initial offer of $25,700. Rajababoo testified that DOT "didn't tell me [the updated $35,000 offer] was for the change. That's what we had asked for. There was no change mentioned to me. It was the amount we had countered with[.]" DOT, on the other hand, maintains that its "right of way agent explained the plan changes to Laxmi[.]" As the sole judge of credibility, the trial judge acted well within her discretion when she accepted Laxmi's version of events. *See e.g.*, *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) ("We note that 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."). The same principle applies to the remaining conflicting testimony that DOT urges us to consider on appeal.

Additionally, in attacking the substantive grounds on which the Consent Judgment was set aside, DOT maintains that "Laxmi, through reasonable diligence, could have requested additional information regarding the retaining wall and slope easement effects." Thus, according to DOT, it "had no duty to disclose additional information absent a request for it and violated no such duty." This contention is surprising, however, considering the representations made by the DOT Right of Way agent and the fact that Laxmi had no option but to enter into a transaction with DOT.

The present case does not involve two entities that were conducting arm's-length negotiations, in which it was clear that neither party had any incentive to act against its best interest. In fact, Kolat represented to Rajababoo that this was not a regular arm's-length transaction. Kolat's testimony was unambiguous: he explained to Rajababoo that "the State's . . . looking out for . . . [the landowner's] best interest . . . ."

> Q. . . . Line Item No. 2, it says, "Did you explain acquisition procedure and why it is fair," and a box mark is checked, what does that indicate? Can you just describe for us what

you mean by explaining the acquisition procedure and why it's fair?

A. The process --

Q. Yeah.

A. -- of the appraisal and explaining to them what's going to take place on their property, explain the process of fair market value, just compensation to the property owner, and I guess that's the way, you know, that *the State's*, *you know*, *looking out for*, *you know*, *their best interest*, *too*.

Q. So the State is looking out for the landowner's best interest?

A. Yes.

Q. Did you tell them that --

THE COURT: Wait a minute. What did you just say?

THE WITNESS: I said the State would be--you know, they're concerned about the--you know, the property owner --

THE COURT: Uh-huh. Uh-huh.

THE WITNESS:

--and how it affects what they're doing.

***

Q. (By Mr. Dantinne) And what do you mean by why it is fair?

A. I can't answer that. I don't know.

Q. Did you check the box saying that you explained why it was fair?

A. Well, yes, I explained it. *It's fair. It's the process. It's the DOT's policies and procedures*.

Q. Did you explain to him--

A. I followed the rules.

Q. *Did you explain to him that the appraisal conducted on the property is fair?*

A. *Yes*, *it would be fair*. And he has the opportunity to get one himself, also.

> Q. Did you give him the appraisal that you told him was fair?
>
> A. Yes.

In contrast to DOT's assertion that it "had no duty to disclose additional information," DOT was obligated to deal in a fair manner with Laxmi. The transaction was a *condemnation* proceeding—that is, a forced sale of Laxmi's private property for public use. As such, DOT was *required* to provide Laxmi with just compensation. *Eller v. Bd. of Educ.*, 242 N.C. 584, 586, 89 S.E.2d 144, 146 (1955) ("When private property is taken for public use, just compensation must be paid."); *Dep't of Transp. v. Rowe*, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001) ("Just compensation is clearly a fundamental right under both the United States and North Carolina Constitution.").

Such constitutional protections do not exist in ordinary arm's-length transactions, which is precisely why the facts at hand are not compatible with, and would not "more appropriately" support, the traditional elements of fraud and misrepresentation. *Bruton*, 96 N.C. App. at 488, 386 S.E.2d at 59-60. However, we find no abuse of discretion on the part of the trial court in concluding that the various *indicia* of fraud and misrepresentation, at the very least, established that DOT "did not adequately inform [Laxmi] of the extent of the taking of the Hotel property." Moreover, in light of the constitutional protections at hand, we are satisfied that the fact that DOT inadequately informed Laxmi of the extent of its taking was sufficient to establish "(1) that extraordinary circumstances exist, and (2) that justice demands relief." *Sloan*, 151 N.C. App. at 405, 566 S.E.2d at 101 (citing *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987)). Accordingly, we are not convinced that the trial court abused its discretion when it concluded that relief was appropriate pursuant to Rule 60(b)(6) in light of such inadequate information.

In addition to its determination that DOT did not adequately inform Laxmi of the extent of the taking of the Hotel property, the trial court also determined that DOT did not provide just compensation to Laxmi. This finding is fully supported by the evidence.

Just compensation is measured by "the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking[.]" N.C. Gen. Stat. § 136-112(1) (2017); *Dep't of Transp. v. Mahaffey*, 137 N.C. App. 511, 517, 528 S.E.2d 381, 385 (2000) ("The measure of

compensation provided by section 136-112 . . . provides 'just compensation' within the scope of both the federal and state constitutions.").

It is undisputed that the amount reflected in DOT's second appraisal did not account for the loss in parking spaces. The DOT right of way agent who modified the appraisal testified that normally, "the taking of parking spaces would be considered" in an appraisal. The appraisal also did not account for the height of the retaining wall or the loss of visibility suffered by the Hotel. Moreover, DOT agreed to pay Laxmi the sum of $35,000 as just compensation for the taking, which was the same amount that the parties had agreed upon as just compensation two weeks *prior to* the revision of DOT's plans. If the sum of $35,000 was just compensation in May 2012 for a lesser taking, then it could not be just compensation in July 2014 after DOT substantially increased the scope of the taking. This evidence supports the trial court's finding that the Consent Judgment did not provide just compensation to Laxmi, and the trial court did not abuse its discretion in concluding that, in light of such constitutional deficiency, justice demanded relief pursuant to Rule 60(b)(6).

Accordingly, we conclude that the evidence supports the trial court's determination that Laxmi was not adequately informed of the extent of DOT's taking of the Hotel property, and that the Consent Judgment did not provide just compensation for DOT's taking. In light of the constitutional protections involved, the trial court did not abuse its discretion when it concluded that these facts warranted the setting aside of the Consent Judgment pursuant to Rule 60(b)(6).

IV. Conclusion

For the reasons expressed herein, the trial court's order setting aside the parties' Consent Judgment is

AFFIRMED.

Judges HUNTER, JR. and DIETZ concur.

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA, PLAINTIFF
v.
LE BEI, ADMINISTRATOR OF THE ESTATE OF TEI PAW, THLA AYE, ADMINISTRATOR OF THE ESTATE OF KHAI HNE, KHAI TLO, NU CING AND TIN AUNG, DEFENDANTS

No. COA17-1086

Filed 15 May 2018

Insurance—motor vehicle accident—UIM coverage—stacking—multiple claimant exception

Where estates of decedent car accident victims, who were passengers in the tortfeasor driver's vehicle and also had their own UIM policies, sought a declaratory judgment that they were entitled to underinsured motorist (UIM) coverage under the tortfeasor driver's policy, the trial court properly permitted them to recover UIM coverage under their own policies *and* the tortfeasor driver's policy. The purpose of the Financial Responsibility Act was to provide the innocent victim with the fullest possible protection, and the multiple claimant exception in the Act did not preclude the stacking of the UIM policies.

Judge DIETZ concurring in a separate opinion.

Appeal by Plaintiff from order entered 17 July 2017 by Judge A. Graham Shirley, II in Wake County Superior Court. Heard in the Court of Appeals 8 March 2018.

Simpson Law Firm PLLC, by George L. Simpson, IV, for plaintiff-appellant.

Arnold & Smith, PLLC, by Paul A. Tharp, for defendant-appellees.

HUNTER, JR., Robert N., Judge.

Nationwide Affinity Insurance Company of America ("Plaintiff") appeals from an order granting Le Bei, Administrator of the Estate of Tei Paw, and Thla Aye's, Administrator of the Estate of Khai Hne, (collectively "Defendants") motion for summary judgment and denying Plaintiff's motion for summary judgment. On appeal, Plaintiff argues the trial court improperly allowed Defendants to recover underinsured motorist coverage ("UIM"). We affirm.

I. Factual and Procedural Background

On 3 May 2016, Plaintiff filed a complaint for declaratory judgment, seeking a declaration regarding automobile insurance issued by Plaintiff to Sa Hietha. The complaint alleged the following narrative.

On 26 September 2014, around 11:00 p.m., Hietha drove his Honda Pilot on I-77, near Fort Mill, South Carolina. Hietha traveled northbound, in the far, right lane. Tei Paw, Khia Hne, Khia Tlo, Tin Aung, and Nu Cing rode as passengers in Hietha's vehicle. David Hope drove an American Red Cross bus ahead of Hietha, in the same lane. Mabel Gutierrez drove a Honda Accord in the neighboring lane, also northbound.

Hietha traveled too quickly for the conditions.[1] Consequently, he collided with the rear of the American Red Cross bus. Hietha's vehicle then "spun into the adjacent lane in front of" and collided with Gutierrez's Honda Accord. Tin Aung and Nu Cing suffered personal injuries from the accident. Tei Paw, Khai Hne, and Khai Tlo died as a result from injuries sustained from the accident.

From 28 May 2014 to 28 November 2014, Plaintiff insured Hietha's vehicle through a personal automobile insurance policy ("Hietha policy"). The Hietha policy provided liability insurance coverage with limits of $50,000 per person and $100,000 per accident. The policy also provided UIM coverage with limits of $50,000 per person and $100,000 per accident.

Plaintiff distributed the following amounts under the maximum per accident limit of liability coverage: $26,000 to Tei Paw; $26,000 to Khai Hne; $26,000 to Khai Tlo; $13,000 to Tin Aung; $5,000 to Mabel Gutierrez; $2,500 to David Hope; and $1,500 to Nu Cing. The parties disagreed on whether the passengers were entitled to recover under Hietha's UIM coverage for the difference between the amounts received under the liability coverage and the per person limits of UIM coverage. Thus, Plaintiff requested the trial court declare UIM under Hietha's policy "[wa]s not triggered for any of the Defendants under the Policy."

On 25 July 2016, Defendants filed their answer. Defendants asserted they were entitled to UIM coverage under the Hietha policy. At the time

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1. The complaint provides no other details for Hietha's driving beyond that he "traveled too fast for the conditions[.]" Pursuant to Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure, the record includes a narrative form of matters presented at the summary judgment hearing. N.C. R. App. P. 9(c)(1) (2017). The narrative includes the following, additional details. Hope, driving the American Red Cross bus, slowed down in the right lane, to exit I-77. Hietha "travell[ed] too fast for conditions (inattention) [and] ran into the rear of" the bus.

of the accident, Hne had a separate insurance policy with Plaintiff. This separate policy provided UIM coverage with limits of $50,000 per person and $100,000 per accident. Paw also had a separate insurance policy with Plaintiff. Paw's policy provided coverage with UIM limits of $100,000 per person and $300,000 per accident. Defendants contended the UIM coverage under their separate policies should be "stacked" with the UIM coverage under the Hietha policy.

On 30 January 2017, the trial court held a hearing for approval of proposed settlements. In orders entered 31 January 2017, the trial court approved of settlements of $30,800 of liability-policy funds to Defendant Aye and $1,000 of liability-policy funds to Defendant Bei. In both orders, the trial court specifically stated the settlements "shall not affect any rights of [Defendants] to pursue any underinsured motorist claims against any party, including . . . Sa Hietha[.]"

On 13 February 2017, Defendants filed a joint motion for summary judgment. Defendants requested the trial court "declare that they are entitled to UIM coverage under Sa Hietha's policy, in amounts sufficient to exhaust said UIM coverage[.]" On 1 May 2017, Plaintiff filed its own motion for summary judgment. Plaintiff contended the multiple claimant exception in the Financial Responsibility Act precluded Defendants from recovering UIM coverage under the Hietha policy.

On 24 May 2017, the trial court held a hearing on the parties' motions. In an order entered 17 July 2017, the trial court granted Defendants' motion for summary judgment and denied Plaintiff's motion for summary judgment. The trial court ordered "the movant-Defendants are entitled to payment under at-fault Sa Hietha's per-person underinsured motorist coverage provided by Plaintiff, subject to any applicable credits." On 15 August 2017, Plaintiff filed timely notice of appeal.

II. 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) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "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) (internal quotation marks and citation omitted).

III. Analysis

On appeal, Plaintiff contends the trial court erred by granting summary judgment in favor of Defendants. Specifically, Plaintiff argues the multiple claimant exception in N.C. Gen. Stat. § 20-279.21(b)(4) (2017) applies to the matters at hand. Accordingly, Plaintiff contends the trial court erred in allowing Defendants to recover UIM coverage under Hietha's policy. We disagree.

"Statutory interpretation begins with 'the cardinal principle of statutory construction . . . that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish.' " *Benton v. Hanford*, 195 N.C. App. 88, 92, 671 S.E.2d 31, 34 (2009) (brackets omitted) (ellipses in original) (quoting *State ex rel. Util. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443-44 (1983)). Moreover, "[l]egislative intent can be ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (citations omitted), *superseded by statute on other grounds*, *N.C. Farm Bureau Mut. Ins. Co. v. Stamper*, 112 N.C. App. 254, 257-58, 468 S.E.2d 584, 585-86 (1996). "The Court will not adopt an interpretation which results in injustice when the statute may reasonably be otherwise consistently construed with the intent of the act." *Nationwide Mut. Ins. Co. v. Chanto*s, 293 N.C. 431, 440, 238 S.E.2d 597, 603 (1977) (citation omitted).

At the outset, our analysis is guided by the "avowed purpose" of the Financial Responsibility Act, which is:

> to compensate the innocent victims of financially irresponsible motorists. The Act is remedial in nature and is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. The purpose of the Act, we have said, is best served when every provision of the Act is interpreted to provide the innocent victim with the fullest possible protection.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573-74, 573 S.E.2d 118, 120 (2002) (citations, quotation marks, ellipses, and brackets omitted).

The Financial Responsibility Act permits interpolicy stacking of UIM coverage to calculate the "applicable limits of underinsured motorist coverage for the vehicle involved in the accident." *N.C. Farm Bureau*

Mut. Ins. Co. v. Bost, 126 N.C. App. 42, 50-51, 483 S.E.2d 452, 458 (1997). After stacking, the parties use the stacked amount to determine if the tortfeasor's vehicle is an underinsured highway vehicle, under N.C. Gen. Stat. § 20-279.21(b)(4). *Id.* at 51, 483 S.E.2d at 458.

Our case law and a statutory amendment in 2004 shaped the relevant definition of an underinsured highway vehicle under N.C. Gen. Stat. § 20-279.21(b)(4). First, our Court decided *Ray v. Atlantic Casualty Insurance Co.*, 112 N.C. App. 259, 435 S.E.2d 80 (1993). In *Ray*, another vehicle crossed the centerline and struck one plaintiff's vehicle. *Id.* at 260, 435 S.E.2d at 80. One plaintiff, and the two passengers in her vehicle, all suffered injuries. *See id.* at 260, 435 S.E.2d at 80. Aetna Insurance Company insured the tortfeasor under a vehicle insurance policy. *Id.* at 260, 435 S.E.2d at 80. The policy provided for coverage with a liability limit of $100,000 per person and $300,000 per accident. *Id.* at 260, 435 S.E.2d at 80. The defendant insurer insured the plaintiff. *Id.* at 260, 435 S.E.2d at 80. Defendant's policy provided for coverage with a UIM limit of $100,000 per person and $300,000 per accident. *Id.* at 260-61, 435 S.E.2d at 80.

Aetna paid an occupant in the tortfeasor's car $98,000, pursuant to the liability coverage under the policy. *Id.* at 261, 435 S.E.2d at 80-81. Thus, $202,000 remained in liability coverage, to be split amongst the three plaintiffs—the driver and her two passengers. *Id.* at 260-61, 435 S.E.2d at 81. Plaintiffs sought a judgment declaring defendant insurer's policy provided for UIM coverage. *Id.* at 261, 435 S.E.2d at 81. Defendant insurer filed a motion for summary judgment, which the trial court granted. *Id.* at 261, 435 S.E.2d at 81. Plaintiffs appealed. *Id.* at 260, 435 S.E.2d at 80.

This Court analyzed whether an underinsured vehicle, as defined in N.C. Gen. Stat. § 20-279.21(b)(4), included "a tortfeasor's vehicle whose available liability insurance is less than the relevant UIM coverage." *Id.* at 261, 435 S.E.2d at 81. At the time our Court decided *Ray*, N.C. Gen. Stat. § 20-279.21(b)(4) provided UIM coverage applies when "all liability bonds or insurance policies providing coverage for bodily injured caused by . . . the underinsured highway vehicle have been exhausted." *Id.* at 261, 435 S.E.2d at 81 (emphasis omitted) (ellipses in original). Thus, the language of the statute "required this Court to base this determination on a comparison of the tortfeasor's overall liability *coverage* (not the actual liability *payment*) to the victim's UIM coverage." *Integon Nat'l Ins. Co. v. Maurizzio*, 240 N.C. App. 38, 42, 769 S.E.2d 415, 419 (2015) (analyzing *Ray*'s holding and the subsequent amendment of N.C. Gen. Stat. § 20-279.21(b)(4)).

Accordingly, this Court held plaintiffs were not entitled to UIM coverage under defendant insurer's policy, because the liability coverage and the UIM coverage provided were the same. *Ray*, 112 N.C. App. at 262, 435 S.E.2d at 81. Thus, the tortfeasor's vehicle did not meet the definition of an underinsured highway vehicle. *Id.* at 262, 435 S.E.2d at 81.

In 2004, in response to *Ray*, the General Assembly amended N.C. Gen. Stat. § 20-279.21(b)(4). The General Assembly added two sentences, and the statute now reads, *inter alia*:

> An "uninsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. *For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle unless the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits.*

N.C. Gen. Stat. § 20-279.21 (b)(4) (emphasis added).

Following the amendment, our Court twice examined the added two sentences and their effect on claimants' right to recover UIM. First, in *Benton*, plaintiff suffered injuries as a result of a single car accident.[2]

2. In *Benton*, there were actually two plaintiffs, the other plaintiff being the driver of the vehicle.

195 N.C. App. at 89, 671 S.E.2d at 32. Nationwide insured plaintiff under a vehicle insurance policy. *Id.* at 89-90, 671 S.E.2d at 32. The policy provided for coverage with a liability limit of $50,000 per person and a UIM limit of $50,000 per person. *Id.* at 90, 671 S.E.2d at 32. Defendant insurer, Progressive Southeastern Insurance Company, also insured plaintiff, under a household resident policy. *Id.* at 90, 671 S.E.2d at 32. This policy provided UIM coverage of $100,000 per person. *Id.* at 90, 671 S.E.2d at 32.

Nationwide paid plaintiff $50,000, pursuant to the liability limit. *Id.* at 90, 671 S.E.2d at 32. Defendant insurer contended the vehicle did not meet the definition of an "underinsured highway vehicle" because the Nationwide policy provided UIM coverage with limits equal to that of the policy's liability limits. *Id.* at 91, 671 S.E.2d at 33.

Our Court disagreed with defendant insurer. The Court, while specifically highlighting it "must interpret the provisions of the Act liberally in order to provide the innocent victim with the fullest possible protection," held the second sentence of the amendment did not apply. *Id.* at 93-94, 671 S.E.2d at 34-35 (brackets omitted). The Court titled the second sentence of the amendment the "multiple claimant exception" and concluded the sentence only applies to accidents with multiple claimants. *Id.* at 94, 671 S.E.2d at 34-35. Since the accident involved only one claimant, the Court used the general definition of an underinsured highway vehicle and concluded the vehicle met said definition. *Id.* at 94, 671 S.E.2d at 35.

Next, in *Maurizzio*, three family members, Destany, Daijah, and Desiree', were involved in a single car accident. 240 N.C. App. at 39, 769 S.E.2d at 417. Destany drove the vehicle owned by Suzanne Maurizzio, and Daijah and Desiree' rode as passengers. *Id.* at 39, 769 S.E.2d at 417. Desiree' and Daijah suffered injuries. *Id.* at 39, 769 S.E.2d at 417.

At the time of the accident, Suzanne insured the vehicle through a policy with plaintiff insurer. *Id.* at 39, 769 S.E.2d at 417. The policy provided both liability and UIM coverage with limits of $50,000 per person and $100,000 per accident. *Id.* at 39, 769 S.E.2d at 417. The parties settled Desiree's claim within the liability coverage limits of the policy. *Id.* at 39, 769 S.E.2d at 417.

Daijah's injuries resulted in an excess of $200,000 of expenses. *Id.* at 39, 769 S.E.2d at 417. Plaintiff insurer tendered the $50,000 per person liability limit. *Id.* at 39, 769 S.E.2d at 417. Daijah's parents also had an insurance policy with plaintiff insurer. *Id.* at 39, 769 S.E.2d at 417. This policy provided UIM coverage with limits of $50,000 per person and $100,000 per accident. *Id.* at 39, 769 S.E.2d at 417-18.

Plaintiff insurer sought a declaratory judgment, declaring Daijah's parents' policy did not provide UIM coverage for Daijah's injuries from the accident. *Id.* at 39, 769 S.E.2d at 418. Defendants moved for summary judgment and contended the UIM coverage under the parents' policy could be stacked with the UIM coverage under Suzanne's policy. *Id.* at 39, 769 S.E.2d at 418. Plaintiff insurer filed its own motion for summary judgment, asserting the multiple claimant exception applied, and, thus, the claimants could not stack the UIM coverage from Suzanne's policy with any other UIM coverage. *Id.* at 40, 769 S.E.2d at 418. The trial court denied plaintiff's motion for summary judgment and granted defendants' motion for summary judgment. *Id.* at 40, 769 S.E.2d at 418. The trial court declared plaintiff insurer's policies, to Suzanne and Daijah's parents, provided $100,000 in UIM coverage. *Id.* at 40, 769 S.E.2d at 418.

Plaintiff insurer appealed. *Id.* at 40, 769 S.E.2d at 418. Plaintiff insurer argued the multiple claimant exception applied because two people were injured in the accident. *Id.* at 40, 769 S.E.2d at 418. Our Court summarized the effect of amendment as providing "an additional definition of 'underinsured highway vehicle' for situations where multiple claimants seek liability funds." *Id.* at 42, 769 S.E.2d at 419. The Court explained:

> [t]he multiple claimant exception prevents an increase in liability or UIM exposure of the carrier providing coverage for the tortfeasor's vehicle. The exception states a vehicle is not an "underinsured motor vehicle" if the owner's policy provides UIM coverage with limits, which are less than or equal to that policy's bodily injury liability limits.

Id. at 43, 769 S.E.2d at 420 (citing N.C. Gen. Stat. § 20-279.21(b)(4)).

The Court held the multiple claimant exception was not triggered "simply because there were two injuries in an accident." *Id.* at 44, 769 S.E.2d at 420. The Court limited the exception's applicability to "when the amount paid to an individual claimant is less than the claimant's limits of UIM coverage after liability payments to multiple claimants." *Id.* at 44, 769 S.E.2d at 420-21 (citation omitted).

Plaintiff insurer and Desiree' settled her claim in the per person liability coverage. *Id.* at 44, 769 S.E.2d at 421. Thus, the liability payment did not reduce the liability coverage available for Daijah's claim. *Id.* at 44, 769 S.E.2d at 421. Accordingly, the multiple claimant exception did not apply. *Id.* at 44-45, 769 S.E.2d at 421.

Turning to the case at bar, the parties disagree on the issue before our Court. Plaintiff contends the case is an issue of first impression and

is not question of stacking insurance policies. Additionally, Plaintiff asserts the General Assembly sought "to broaden UIM coverage only for occupants of an innocent operator's vehicle . . . and expressly excludes occupants of a tortfeasor's vehicle from the expanded UIM coverage[.]"

Defendants disagree and argue the issue is not one of first impression. Instead, Defendants assert the issue only requires this Court to apply settled law permitting stacking of insurance policies. Defendants further contend Plaintiff's interpretation would "pervert the statute by adding a restrictive distinction that would punish innocent victims of a tortfeasor's negligence by exempting the latter's underinsured motorist coverage from his own passenger's claims."

We agree with Defendants' framing of the issue and conclude the multiple claimant exception does not apply to the case *sub judice*. The General Assembly added the multiple claimant exception post-*Ray* in an effort to further protect innocent victims of financially irresponsible motorists. To construe the multiple claimant exception to limit UIM recovery to innocent occupants of a tortfeasor's vehicle, while allowing recovery by innocent occupants of an innocent operator's vehicle, would be "an interpretation which results in injustice[.]" *Chantos*, 293 N.C. at 440, 238 S.E.2d at 603 (citation omitted).

Keeping in mind we are required to liberally construe the Act, we decline to apply the multiple claimant exception in a way which would reduce compensation to innocent victims and conflict with the avowed purpose of the Act. *Pennington*, 356 N.C. at 573, 573 S.E.2d at 120 (citation omitted). Moreover, this holding comports with the intent of the legislature, and we considered the "nature and purpose of the act and the consequences which would follow its construction one way or the other" and "the language of the statute, the spirit of the statute, and what it seeks to accomplish." *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763 (citations omitted); *Benton*, 195 N.C. App. at 92, 671 S.E.2d at 34 (quotation marks and citation omitted).

Because we hold the multiple claimant exception does not apply, the trial court properly permitted Defendants to recover UIM coverage under their own policies *and* the UIM coverage under Hietha's policy with Plaintiff. Accordingly, the trial court properly granted Defendants' motion for summary judgment and properly denied Plaintiff's motion for summary judgment.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judge ZACHARY concurs.

Judge DIETZ concurs in a separate opinion.

DIETZ, Judge, concurring.

I concur in the majority opinion but write separately to emphasize that "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. *Wilkie v. City of Boiling Spring Lakes*, __ N.C. __, __, 809 S.E.2d 853, 858 (2018). In other words, "[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Id.* We address the General Assembly's intent and the potential for injustice in this case only because N.C. Gen. Stat. § 20-279.21(b)(4), read in its entirety, is open to more than one reasonable interpretation and is therefore ambiguous.

STATE OF NORTH CAROLINA
v.
JAMES HAROLD COURTNEY, III

No. COA17-1095

Filed 15 May 2018

1. Appeal and Error—preservation of issues—double jeopardy—motion to dismiss

Where defendant argued on appeal that the State's voluntary dismissal of a murder charge after a mistrial terminated the jeopardy that attached at his first murder trial, he preserved the issue for appeal by raising his double jeopardy defense in a written motion to dismiss before the second trial.

2. Constitutional Law—double jeopardy—after mistrial for hung jury—voluntary dismissal by State—reprosecution

Where defendant's murder trial was declared a mistrial due to jury deadlock and the State subsequently filed a section 15A-931 voluntary dismissal of the murder charge, the State's reprosecution

of defendant for the same offense four years later violated the constitutional prohibition against double jeopardy. While the hung-jury mistrial did not terminate the initial jeopardy, the State's voluntary dismissal did terminate the jeopardy and was functionally tantamount to an acquittal.

Appeal by defendant from judgment entered 9 November 2016 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 18 April 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jess D. Mekeel, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.

ELMORE, Judge.

In 2009, the State charged James Harold Courtney, III (defendant) with first-degree murder for the shooting death of James Deberry. At trial the jury hung, and the trial court declared a mistrial on the ground of jury deadlock. Four months later, the prosecutor filed a N.C. Gen. Stat. § 15A-931 voluntary dismissal of the murder charge with the trial court, acknowledging on the form that its dismissal was being entered after defendant had already faced jeopardy for the charge and explaining the following reason for its dismissal: "Hung jury, State has elected not to re-try case."

In 2015, however, after acquiring new evidence it believed strengthened its case, the State recharged defendant with first-degree murder for Deberry's homicide. Before his second trial, defendant moved to dismiss the new murder indictment, claiming a double jeopardy bar, which the trial court summarily denied. The second jury found defendant guilty of second-degree murder, and the trial court entered a judgment sentencing him to approximately eighteen to twenty-two years in prison.

On appeal, defendant concedes that the State was permitted to retry him on the mistried murder charge without violating his double jeopardy rights because the hung-jury mistrial did not terminate the initial jeopardy that attached when the first jury was empaneled and sworn. He argues, however, that the prosecutor's post-mistrial voluntary dismissal of the mistried charge terminated that initial continuing jeopardy and, therefore, the State was barred from reprosecuting him four years later for the same offense. After careful consideration, we agree.

The Double Jeopardy Clause bars successive prosecutions for the same offense after acquittal. This protection "serves a constitutional policy of finality for the defendant's benefit[,]" *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977) (citation and quotation marks omitted), and "guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Blueford v. Arkansas*, 566 U.S. 599, 605, 132 S. Ct. 2044, 2050, 182 L. Ed. 2d 937 (2012) (citation and quotation marks omitted).

In North Carolina, a prosecutor may take "a simple and final dismissal which terminates the criminal proceedings under that indictment" at any time. *State v. Lamb*, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988) (citing N.C. Gen. Stat. § 15A-931). While "[s]ection 15A-931 does not bar the bringing of the same charges upon a new indictment," *id.* (citing N.C. Gen. Stat. § 15A-931 official cmt.), in this case defendant's constitutional right to be free from double jeopardy did, *see* N.C. Gen. Stat. § 15A-931 official cmt. (opining that reprosecution would be barred "if jeopardy had attached when the . . . charge[ ] w[as] dismissed").

We hold that when a prosecutor takes a section 15A-931 voluntary dismissal of a criminal charge after jeopardy had attached to it, such a post-jeopardy dismissal is accorded the same constitutional finality and conclusiveness as an acquittal for double jeopardy purposes. Further, while the State has the undisputed right to retry a hung charge, we hold that a prosecutor's election instead to dismiss that charge is binding on the State and tantamount to an acquittal.

We thus hold that here, by virtue of the prosecutor's post-jeopardy dismissal of the murder charge, regardless of whether it was entered after a valid hung-jury mistrial but before a permissible second trial, the State was barred under double jeopardy principles from retrying defendant four years later for the same charge. Accordingly, we vacate the judgment entered against defendant in 15 CRS 213392.

I. Background

On Halloween 2009, James Deberry was fatally shot outside his apartment in Raleigh. The State's evidence tended to show that when responding officers arrived, Deberry was still conscious and told a detective that "a friend upstairs" had shot him. Monica Bustamante, Deberry's fiancé, was with him and explained to the detective that "what he meant was Jar, a friend that lived upstairs, or one of Jar's friends."

Police determined that "Jar" was David Moses. The State's evidence also indicated that Moses and defendant had grown up together in New York; that defendant met Deberry at Moses' apartment; that Deberry sold a few pounds of low-grade marijuana to defendant, and likely others, for lower-level distribution; and that Deberry's homicide may have been drug-related.

The State charged defendant and Moses with first-degree murder. But in return for agreeing to testify at defendant's trial, the State dropped the charge against Moses and granted him immunity. After the jury hung at defendant's first trial, the trial court declared a mistrial, and defendant was released on bail.

On 16 December 2010 and 10 February 2011, the trial court issued "homicide status hearing" (original in all caps) orders containing handwritten notes from the judge indicating that the matter was set to be reviewed at a later status hearing to determine whether the State was going to retry the case. On 14 April 2011, the prosecutor filed a "Dismissal/Notice of Reinstatement" with the trial court, indicating that it was voluntarily dismissing the murder charge. The form, Form AOC-CR-307, is separated into three sections: (1) "Dismissal," (2) "Dismissal with leave," and (3) "Reinstatement." The prosecutor filled in the "Dismissal" section, checking the following boxes: (1) "The undersigned prosecutor enters a dismissal to the above charge(s) and assigns the following reasons:" and (2) "4. Other: (*specify*)." Next to box 4, the prosecutor wrote: "hung jury, State has elected not to re-try case." Under box 4 the form contains a typewritten sentence concerning whether a jury had been impaneled and whether evidence had been presented, with instructions to edit the sentence to reflect whether the voluntary dismissal was being entered before or after jeopardy had attached to the charge. With the handwritten edits, that sentence reads as follows (omissions are stricken; additions are underlined): "A jury has ~~not~~ been impaneled ~~nor~~ and has [sic] evidence been introduced."

In 2013 and 2014, the State acquired new evidence putting Ivan McFarland, a friend of both defendant and Moses from New York, at the scene of Deberry's shooting, and obtained cellphone records indicating that five calls were made between defendant's and McFarland's cellphones during the day of the shooting. In 2015, the State charged McFarland and recharged defendant with Deberry's murder.[1] On 6 July 2015, a grand jury reindicted defendant for first-degree murder.

1. A pretrial hearing transcript reveals that another judge had previously denied the State's motion to join McFarland's and defendant's murder trials, and that the State

Before his second trial, defendant moved to dismiss the 2015 murder indictment on double jeopardy grounds. Defendant conceded that the State was permitted to retry him for Deberry's homicide following the December 2010 hung-jury mistrial. But he argued that since the prosecutor four months later in April 2011 instead elected under N.C. Gen. Stat. § 15A-931 to voluntarily dismiss the 2009 murder indictment, after he had already faced jeopardy for that charge at the first trial, the Double Jeopardy Clause barred the State from retrying him for the same offense. The trial court summarily denied the motion.

Additionally, the following events occurred which we briefly address only to provide context for defendant's other non-dispositive alleged errors. Before his second trial, defendant also moved to dismiss the 2015 murder indictment on speedy trial grounds, which the trial court denied; and he objected to not having been formally arraigned at least a week before he was tried and requested a continuance, which the trial court denied, immediately arraigned him, and began trial the same day. At trial, the trial court admitted cellphone record evidence under Rule 802(6)'s business-records exception to the rule against hearsay, over defendant's objection that the records were not properly authenticated under Rule 902.

After the State rested its case, defendant presented no evidence. The jury convicted defendant of second-degree murder, and the trial court entered a judgment sentencing him to 220 to 273 months in prison. Defendant appeals.

II. Alleged Errors

On appeal, defendant asserts the trial court erred by denying his motions to dismiss the second murder charge on both double jeopardy and speedy trial grounds. First, he argues his double jeopardy dismissal motion was improperly denied because the prosecutor's post-mistrial section 15A-931 voluntary dismissal of the murder charge terminated its jeopardy that attached at the first trial and continued after the hung-jury mistrial and, thus, the State was barred under the Double Jeopardy Clause from retrying him for Deberry's murder. Second, and alternatively, defendant argues that if the voluntary dismissal did not terminate the continuing original jeopardy that attached at the first trial, his speedy trial rights were violated by the State's seven-year delay from his first arrest to the second trial; or, defendant argues, the case

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intended to try McFarland after it tried defendant. The record is silent as to the outcome of the murder charge against McFarland.

should be remanded for a new speedy trial hearing, because the trial court failed to account for the four years between the dismissal entry and his reindictment when the court balanced *Barker*'s length-of-delay factor in its speedy trial analysis.

Third, defendant argues the trial court erred by admitting the phone records into evidence under Rules 803(6)'s public-records hearsay exception over his Rule 902(a)(2) authentication objection. And fourth, he asserts the trial court violated his statutory right under N.C. Gen. Stat. § 15A-943(b) not to be tried within seven days of his arraignment because he was formally arraigned and tried the same day.

Because we conclude that defendant's first argument is dispositive and warrants vacating the judgment entered against him, we analyze only the double jeopardy issue presented and decline to address his remaining arguments.

III. Double Jeopardy

Defendant asserts his double jeopardy rights were violated when he was reprosecuted for first-degree murder. He argues the prosecutor's voluntary dismissal of the 2009 murder charge terminated the jeopardy that attached at the first trial and continued following the hung-jury mistrial. Thus, defendant contends, the trial court improperly denied his pretrial motion to dismiss the 2015 murder charge before his second trial, and he unconstitutionally faced jeopardy twice for the same offense.

A. Issue Preservation

[1] As a threshold matter, the State asserts that defendant failed to preserve his double jeopardy claim because he failed to object to the hung-jury mistrial. The State's preservation argument is meritless.

The State cites to *State v. Lachat*, 317 N.C. 73, 343 S.E.2d 872 (1986), for support. In *Lachat*, our Supreme Court interpreted its decision in *State v. Odom*, 316 N.C. 306, 341 S.E.2d 332 (1986), as holding that, in "a noncapital case, . . . a defendant is not entitled by reason of former jeopardy to dismissal of the charge against him, where he failed to object to the trial court's termination of his first trial by a declaration of mistrial." *Id.* at 85, 343 S.E.2d at 878 (citing *Odom*, 316 N.C. at 309, 341 S.E.2d at 334)). The *Lachat* Court, however, after declining to extend *Odom*'s objection requirement to capital cases, clarified that its decision in *Odom* was limited to situations where a defendant is given notice and opportunity to object before a mistrial is declared but fails to do so. Thus, the *Lachat* Court explained, it was declining to apply *Odom*'s objection requirement in part because "both declarations of mistrial by

the trial court were entered on the trial court's own motion and without prior notice or warning to the defendant." *Id.* at 86, 343 S.E.2d at 879. The *Lachat* Court determined that "requir[ing] [the defendant] to go through the formality of objecting after a mistrial had already been declared or lose her protection against double jeopardy would be a triumph of form over substance[,]" *id.* at 86, 343 S.E.2d at 879, "particularly [where] the defendant properly raised the issue of former jeopardy before the commencement of the second trial by filing her written motion to dismiss the charge against her," *id.* at 87, 343 S.E.2d at 879. Indeed, the *Lachat* Court reasoned, "it was the trial court's denial of that motion which preserved this issue for appeal." *Id.* at 87, 343 S.E.2d at 879. This authority, however, is simply inapplicable here.

The former jeopardy defenses raised by both defendants in *Odom* and *Lachat* before their second trials were grounded in their assertion that the prior mistrial was improperly declared, implicating their double jeopardy right to have their guilt or innocence determined by the first jury. Here, defendant neither disputed the validity of the hung-jury mistrial nor used it to support his former jeopardy defense; rather, his double jeopardy claim was grounded in his assertion that the State's voluntary dismissal of the murder charge terminated the jeopardy that attached at the first trial. Additionally, the constitutional protection at issue here is not defendant's right to have his guilt or innocence decided by a particular tribunal, but his right to avoid successive prosecutions for the same offense. Further, defendant here, like the defendant in *Lachat*, properly raised his former jeopardy defense before the second trial by filing a written motion to dismiss the murder charge on double jeopardy grounds, and it was the trial court's denial of that motion that preserved this issue for appeal. Accordingly, despite defendant's failure to object to the hung-jury mistrial, his former jeopardy argument is preserved.

B. Discussion

[2] As we review alleged double jeopardy violations *de novo*, *see*, *e.g.*, *State v. Schalow*, ___ N.C. App. ___, ___, 795 S.E.2d 567, 571 (2016) (citation omitted), *disc. rev. allowed*, 369 N.C. 521, 796 S.E.2d 791 (2017), *and disc. rev. improvidently allowed*, ___ N.C. ___, 809 S.E.2d 579 (2018), it follows that we review *de novo* a trial court's denial of a motion to dismiss an indictment on double jeopardy grounds.

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. The Clause " 'guarantees that the State shall not be permitted to make repeated attempts to

convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' " *Blueford v. Arkansas*, 566 U.S. 599, 605, 132 S. Ct. 2044, 2050, 182 L. Ed. 2d 937 (2012) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S. Ct. 1349, 1353, 51 L. Ed. 2d 642 (1977)).

Under the Double Jeopardy Clause, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may [not] be tried . . . a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S. Ct. 732, 736–37, 154 L. Ed. 2d 588 (2003) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)). "Where successive prosecutions are at stake, the guarantee serves 'a constitutional policy of finality for the defendant's benefit.' " *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977) (quoting *United States v. Jorn*, 400 U.S. 470, 479, 91 S. Ct. 547, 554, 27 L. Ed. 2d 543 (1971) (plurality opinion)). "The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' " *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 829, 54 L. Ed. 2d 717 (1978) (quoting *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S. Ct. 671, 672, 7 L. Ed. 2d 629 (1962)). The federal protection against successive prosecutions for the same offense is also guaranteed by the Law of the Land Clause of the North Carolina Constitution. *See State v. Brunson*, 327 N.C. 244, 247, 393 S.E.2d 860, 863 (1990) (citing N.C. Const. art. I, § 19; other citations omitted); *see also State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977) ("It is a fundamental principle of the common law, guaranteed by our Federal and State Constitutions, that no person may be twice put in jeopardy of life or limb for the same offense." (citations omitted)).

Defendant concedes that the hung-jury mistrial was a "nonevent" that did not terminate the initial jeopardy attached to the murder charge when the first jury was empaneled and sworn, and thus the State was permitted to retry him on that mistried charge without unlawfully twice subjecting him to jeopardy. He argues the State's post-mistrial section 15A-931 voluntary dismissal of that mistried charge was a jeopardy-terminating event functionally equivalent to an acquittal of that charge, thereby barring the second trial.

In its brief, the State does not address the jeopardy-terminating effect on the murder charge of the prosecutor's voluntary dismissal;

rather, it argues that where, as here, a proper hung-jury mistrial was declared, " 'in legal contemplation there has been no trial.' " *Lachat*, 317 N.C. at 82, 343 S.E.2d at 877 (quoting *State v. Tyson*, 138 N.C. 627, 629, 50 S.E. 456 (1905)). According to the State, because the "hung jury mistrial rendered the original trial 'a nullity' such that there was 'no trial' at all," the "clock was effectively rewound to before the impaneling of a jury and corresponding attachment of jeopardy." Thus, the State continues, "jeopardy cannot be terminated when it never attached in the first place."

"There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.' " *Martinez v. Illinois*, 134 S. Ct. 2070, 2074, 188 L. Ed. 2d 1112 (2014) (citations omitted); *see also Crist v. Bretz*, 437 U.S. 28, 35 n.10, 98 S. Ct. 2156, 2160 n.10, 57 L. Ed. 2d 24 (1978) ("[J]eopardy does attach even in a trial that does not culminate in a jury verdict[.] . . ." (citation omitted)). Here, jeopardy attached when the first jury was empaneled and sworn, and despite the State's theoretical argument, there can be no doubt that defendant faced the direct peril of being convicted and punished for first-degree murder at that trial. Jeopardy does not "unattach" when the jury hangs. *See Yeager v. United States*, 557 U.S. 110, 118, 129 S. Ct. 2360, 2366, 174 L. Ed. 2d 78 (2009) ("*[A] jury's inability to reach a decision* is the kind of 'manifest necessity' that *permits* the declaration of a mistrial and *the continuation of the initial jeopardy that commenced when the jury was first impaneled*." (emphasis added) (citations omitted)).

" '[T]he conclusion that jeopardy has attached,' however, 'begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.' " *Martinez*, 134 S. Ct. at 2075 (quoting *Serfass v. United States*, 420 U.S. 377, 390, 95 S. Ct. 1055, 1064, 43 L. Ed. 2d 265 (1975)). "The remaining question is whether the jeopardy ended in such a manner that the defendant may not be retried." *Id.* (citation omitted).

The Double Jeopardy Clause does not bar retrial of a hung charge because a hung-jury mistrial is "not an event that terminates the original jeopardy . . . ." *Richardson v. United States*, 468 U.S. 317, 326, 104 S. Ct. 3081, 3086, 82 L. Ed. 2d 242 (1984). But the Clause bars retrial after a jeopardy-terminating event, such as (1) a jury acquittal, *see, e.g.*, *Evans v. Michigan*, 568 U.S. 313, 328, 133 S. Ct. 1069, 1080, 185 L. Ed. 2d 124 (2013) ("There is no question that a jury verdict of acquittal precludes retrial . . . ." (citation omitted)); (2) a judicial acquittal, *see id.* at 319, 133 S. Ct. at 1075 (explaining that a judicial " 'acquittal' includes 'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding that necessarily establishes the criminal defendant's lack of criminal

culpability,' and any other 'ruling which relate[s] to the ultimate question of guilt or innocence' " (citation and brackets omitted)); or (3) certain non-defense-requested terminations of criminal proceedings, such as non-procedural dismissals or improperly declared mistrials, that for double jeopardy purposes are functionally equivalent to acquittals. *See, e.g.*, *Lee v. United States*, 432 U.S. 23, 30, 97 S. Ct. 2141, 2145, 53 L. Ed. 2d 80 (1977) ("A mistrial ruling invariably rests on grounds consistent with reprosecution, while a dismissal may or may not do so." (internal citation omitted)); *see also United States v. Scott*, 437 U.S. 82, 99–100, 98 S. Ct. 2187, 2198, 57 L. Ed. 2d 65 (1978) (holding that there is no jeopardy bar to a second trial where the trial court grants a defendant-requested motion to dismiss a charge on a basis unrelated to factual guilt or innocence on the ground that the Double Jeopardy Clause "does not relieve a defendant from the consequences of his voluntary choice").

In determining whether a judicial ruling, whether labeled a dismissal or mistrial, amounts to an acquittal barring retrial, "[t]he critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged." *Lee*, 432 U.S. at 30, 97 S. Ct. at 2145; *see also Evans*, 568 U.S. at 319, 133 S. Ct. at 1075 (explaining that "substantive rulings" of true judicial acquittals "stand apart from procedural rulings that may also terminate a case midtrial," such as "rulings on questions that 'are unrelated to factual guilt or innocence,' " including, for instance, "some problem like an error with the indictment" (citation omitted)). At issue here is whether the non-defense-requested section 15A-931 voluntary dismissal of the murder charge was a jeopardy-terminating event tantamount to an acquittal. We conclude that it was.

1. Post-jeopardy Section 15A-931 Voluntary Dismissal Amounts to an Acquittal

Under N.C. Gen. Stat. § 15A-931, entitled "Voluntary dismissal of criminal charges by the State":

> (a) . . . *[T]he prosecutor may dismiss any charges stated in a criminal pleading including those deferred for prosecution* by entering an oral dismissal in open court before or during the trial, or *by filing a written dismissal with the clerk at any time. The clerk must* record the dismissal entered by the prosecutor and *note in the case file whether a jury has been impaneled or evidence has been introduced.*

Id. § 15A-931(a) (2017) (emphasis added). In the context of addressing a speedy trial claim, our Supreme Court has interpreted a section 15A-931

dismissal as "a simple and final dismissal which terminates the criminal proceedings under that indictment[,]" *State v. Lamb*, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988) (interpreting N.C. Gen. Stat. § 15A-931), and explained that "[s]ection 15A-931 does not bar the bringing of the same charges upon a new indictment." *Id.* (citing N.C. Gen. Stat. § 15A-931 official cmt.). But the plain language of section 15A-931 explicitly requires that voluntary dismissals acknowledge whether a defendant has faced jeopardy for the charge, indicating that the legislature contemplated jeopardy attachment to a dismissed charge to be significant, and that the double jeopardy consequences of pre- and post-jeopardy dismissals would differ. *See State v. Williams*, 286 N.C. 422, 431, 212 S.E.2d 113, 119 (1975) ("[A] statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage." (citations omitted)).

Thus, in the jeopardy context, we have held that a defendant is not twice unlawfully subjected to jeopardy if the State recharges him or her with the same charge a prosecutor had previously dismissed under section 15A-931 before a jury was empaneled and sworn, because a defendant must face jeopardy before he can suffer double jeopardy. *See*, *e.g.*, *State v. Jacobs*, 128 N.C. App. 559, 569, 495 S.E.2d 757, 764 (1998) (rejecting a double jeopardy claim because "[t]he former prosecution was voluntarily dismissed by the State *before a jury had been empaneled and before jeopardy had attached*" (emphasis added) (citation omitted)); *State v. Strickland*, 98 N.C. App. 693, 694–95, 391 S.E.2d 829, 830–31 (1990) (same); *State v. Hice*, 34 N.C. App. 468, 471–72, 238 S.E.2d 619, 621–22 (1977) (same); *see also State v. Muncy*, 79 N.C. App. 356, 360, 339 S.E.2d 466, 469 (1986) ("A voluntary dismissal taken by the State, pursuant to G.S. 15A-931, does not preclude the State from instituting a subsequent prosecution for the same offense *if jeopardy has not attached*." (emphasis added) (citation omitted)).

But where, as here, the State voluntarily dismisses a criminal charge after a jury had been empaneled and sworn, we interpret section 15A-931 as according that dismissal the same constitutional finality and conclusiveness as an acquittal for double jeopardy purposes. We hold that if a prosecutor enters a post-jeopardy section 15A-931 dismissal of a charge, a defendant cannot again face jeopardy for that same charge. Accordingly, we conclude that defendant here was unlawfully placed twice in jeopardy when the prosecutor voluntarily dismissed the murder charge after jeopardy had attached to it, and the State years later retried him for that same offense. *Cf. Midgett v. McClelland*, 547 F.2d 1194, 1196 (4th Cir. 1977) ("Putting [the defendant] to trial on the assault charge

after he had been put to trial on that charge once, the prosecution dropping the charge only after the testimony was in, was clearly a violation of [his] right not to be put in jeopardy twice.").

Our conclusion—that a prosecutor's post-jeopardy dismissal of a criminal charge is functionally equivalent to an acquittal barring the State under double jeopardy principles from later reprosecuting that same charge—is buttressed by the official commentary to section 15A-931. "Although the official commentary was not drafted by the General Assembly," and it is thus not binding but merely persuasive, "its inclusion in The Criminal Procedure Act is some indication that the legislature expected and intended for the courts to turn to it for guidance when construing the Act." *State v. Williams*, 315 N.C. 310, 327, 338 S.E.2d 75, 85 (1986) (finding "the logic of the official commentary [to N.C. Gen. Stat. § 15A-1235] to be persuasive" and adopting the opinion of the Criminal Code Commission in reaching its holding). Section 15A-931's official commentary provides:

> [T]he Commission here provide for *a simple and final dismissal by the solicitor. No approval by the court is required*, on the basis that it is the responsibility of the solicitor, as an elected official, to determine how to proceed with regard to pending charges. *This section does not itself bar the bringing of new charges. That would be prevented* if there were a statute of limitations which had run, or *if jeopardy had attached when the first charges were dismissed.*

N.C. Gen. Stat. § 15A-931 official cmt. (emphasis added). The Criminal Code Commission clearly contemplated that the State would be barred from reprosecuting a section 15A-931 voluntarily dismissed charge "if jeopardy had attached when the . . . charge[ ] w[as] dismissed," and we find that logic persuasive.

Based on our understanding that the Double Jeopardy Clause's protection against reprosecution of an acquitted charge "serves a constitutional policy of finality for the defendant's benefit[,]" *Brown*, 432 U.S. at 165, 97 S. Ct. at 2225 (citation and quotation marks omitted), and "guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty[,]" *Blueford*, 566 U.S. at 605, 132 S. Ct. at 2050 (citation and quotation marks

omitted), and based on our interpretation of the contemplated finality of a post-jeopardy section 15A-931 dismissal, we explicitly hold what we have concluded in *Muncy*, *Strickland*, *Hice*, and *Jacobs*: if a prosecutor voluntarily dismisses a criminal charge after jeopardy has attached, it is functionally equivalent to an acquittal for double jeopardy purposes, and a defendant cannot be reprosecuted for that same offense.

2. Section 15A-931 Dismissal of a Hung Charge

In this case, however, it is the timing of the prosecutor's voluntary dismissal—after a hung-jury mistrial that afforded the State the right to a second trial without violating defendant's double jeopardy rights—which both parties concede presents an issue of first impression in our state. To this end, aside from relying on the basic double jeopardy principles above to compel our further holding that the timing of a post-jeopardy voluntary dismissal should not undermine its constitutional finality, we find further guidance from our Supreme Court's explanation and application of the "State's election" rule. The rule instructs that a prosecutor's pre-jeopardy silence of an intent to prosecute a potential charge in an indictment constitutes a "binding election . . . tantamount to an acquittal" of that potential charge, barring the State from later attempting to prosecute that potential charge for the first time after jeopardy had already attached to the indictment. *State v. Jones*, 317 N.C. 487, 494, 346 S.E.2d 657, 661 (1986).

In *Jones*, the indictment charging the defendant with rape arguably supported counts of both first- and second-degree rape, but the State only announced its intent to pursue a conviction for second-degree rape before the jury was empaneled and sworn. *Id.* After jeopardy had attached to the indictment, however, the State successfully prosecuted for first-degree rape. *Id.* at 491–92, 346 S.E.2d at 659–60.

On appeal, our Supreme Court vacated the judgment entered on the first-degree rape conviction and remanded for entry of a judgment on second-degree rape. *Id.* at 501, 346 S.E.2d at 665. The *Jones* Court reasoned that

> by unequivocally arraigning the defendant on second-degree rape and by failing thereafter to give *any notice whatsoever*, prior to the jury being impaneled and jeopardy attaching, of an intent instead to pursue a conviction for first-degree rape arguably supported by the short-form indictment, the State made a binding election not to pursue the greater degree of the offense, and such election was tantamount to an acquittal of first-degree rape.

Id. at 494, 346 S.E.2d at 661; *see also State v. Hickey*, 317 N.C. 457, 466, 346 S.E.2d 646, 652–53 (1986) ("[A]n announced election by the district attorney [to seek conviction for only some charges in an indictment] *becomes binding on the State and tantamount to acquittal of charges* contained in the indictment but not prosecuted at trial *only* when *jeopardy has attached* as the result of a jury being impaneled and sworn to try the defendant." (first emphasis added) (citations omitted)).

While *Jones* and *Hickey* applied the "State's election" rule in the context of its election not to seek conviction for some charges supported by an indictment until after jeopardy attached, we find the principle announced—that the event of jeopardy attachment renders such a decision binding and tantamount to an acquittal—applicable to the State's action here. In this case, jeopardy attached to the murder charge when the first jury was empaneled and sworn. The State had the right to retry defendant for that charge following the hung-jury mistrial. But after what the record indicates was at least one homicide status hearing with the trial court to determine whether the State was going to exercise its right to retry the hung charge, the prosecutor instead elected to file a section 15A-931 voluntary dismissal of that charge, explicitly acknowledging in its dismissal entry that a jury had been empaneled and evidence had been introduced, and reasoning in part that "State has elected not to re-try case." The record in this case leaves little doubt that both the trial court and the prosecutor contemplated his election to dismiss the hung charge, rather than announce the State's intent to retry it, amounted to a decision conclusively ending the prosecution, as would any reasonable defendant.

A logical extension of the State's election rule applied in *Jones* and *Hickey* buttresses our conclusion here: Because the prosecutor, after acknowledging that jeopardy had attached to the murder charge, elected to dismiss the hung charge in part because the "State has elected not to re-try case," rather than announce the State's intent to exercise its right to retry it, that decision was "binding on the State and tantamount to acquittal" of the murder charge. *Hickey*, 317 N.C. at 446, 346 S.E.2d at 652. *Cf. State v. Phillips*, 127 N.C. App. 391, 392–94, 489 S.E.2d 890, 891–92 (1997) (arresting judgment on a speeding conviction at superior court "because the State took a voluntary dismissal at the district court on the speeding charge" and, "[t]hus, the superior court did not have jurisdiction over the speeding offense" (citation omitted)); *State v. Reeves*, 218 N.C. App. 570, 574, 721 S.E.2d 317, 321 (2012) (vacating judgment on a convicted charge at superior court where the State previously voluntarily dismissed that charge in district court).

We have already rejected the State's main argument in its appellate brief: In essence, that the hung-jury mistrial "unattached" the jeopardy from the first trial. But at oral argument the State asserted that since its dismissal was entered after the hung-jury mistrial but before the second trial, the case was back in "pretrial" status, and thus its dismissal was equivalent to a pre-jeopardy dismissal. We disagree.

The State cited to *United States v. Sanford*, 429 U.S. 14, 97 S. Ct. 20, 50 L. Ed. 2d 17 (1976) (per curiam), for support. In *Sanford*, the defendant's first trial ended in a hung-jury mistrial and, four months later, the trial court granted the defendant's motion to dismiss the indictment before the second trial began. *Id.* at 14, 97 S. Ct. at 20. The *Sanford* Court concluded that, based on the timing of the dismissal—"several months after the first trial had ended in a mistrial, but before retrial . . . had begun[,]"—the case was "governed by *Serfass v. United States*, [420 U.S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975)], in which we held that a pretrial order of the District Court dismissing an indictment . . . was appealable[.] . . ." *Id.* at 16, 97 S. Ct. at 21. The Court reasoned: "The dismissal in this case, like that in *Serfass*, was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend." *Id.* at 16, 97 S. Ct. at 21–22. Thus, the *Sanford* Court held, the Double Jeopardy Clause did not bar the Government's appeal from that dismissal.

We recognize that the sequence of events are similar—a charge was dismissed following a hung-jury mistrial but before retrial began—but the similarity ends there. The *Sanford* dismissal was requested by the defendant, and the hung charge was dismissed at a time when the Government intended to retry it. Here, contrarily, the State entered a non-defense-requested dismissal, and the charge was dismissed at a time when the dismissal entry itself announced the State did not intend to retry the case, effectively terminating any right the State had to reprosecute the hung charge. Accordingly, the *Sanford* Court's conclusion that the parties there were back in "pretrial" status for double jeopardy purposes is simply inapplicable here.

III. Conclusion

Defendant faced the direct peril of being convicted and punished for murder at his first trial. "He was forced to run the gauntlet once on that charge and the jury refused to convict him." *Green v. United States*, 355 U.S. 184, 190, 78 S. Ct. 221, 225, 2 L. Ed. 2d 199 (1957). The initial jeopardy that attached to the murder charge during the first trial remained intact following the hung-jury mistrial, but it terminated when the prosecutor voluntarily dismissed that charge four months later.

We hold that a post-jeopardy section 15A-931 voluntary dismissal is to be accorded the same constitutional finality and conclusiveness as an acquittal of that charge. Further, while the State had the right to retry the hung charge without violating defendant's double jeopardy rights, in applying the State's election rule to the prosecutorial action in this case, we hold that the prosecutor's election instead to voluntarily dismiss the charge, rather than announce the State's intent to retry it, was binding on the State and tantamount to an acquittal. After defendant faced jeopardy for the murder charge at his first trial, and the prosecutor later dismissed that hung charge, the Double Jeopardy Clause's protection against successive prosecutions for the same offense barred the State from reprosecuting defendant for Deberry's murder four years later. The trial court thus erred by denying defendant's motion to dismiss the 2015 murder indictment on double jeopardy grounds. Accordingly, we vacate the judgment entered against defendant in 15 CRS 213392. In light of our disposition, we decline to address defendant's remaining arguments.

VACATED.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
LESLIE JUNIOR COX

No. COA17-862

Filed 15 May 2018

Search and Seizure—traffic stop—extended—reasonable suspicion

In a case arising from a traffic stop and drug charges, the trial court's findings supported its conclusion that the officer observed a sufficient number of "red flags" *before* issuing a warning citation to support a reasonable suspicion of criminal activity and therefore justify extending the stop.

Appeal by Defendant from order entered 29 July 2016 by Judge William H. Coward and from judgments entered 4 November 2016 by Judge Robert G. Horne in Superior Court, Macon County. Heard in the Court of Appeals 2 April 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.

Guy J. Loranger for Defendant.

McGEE, Chief Judge.

Leslie Junior Cox ("Defendant") appeals from an order denying his motion to suppress evidence recovered during a traffic stop from a vehicle in which Defendant was a passenger. For the reasons discussed below, we affirm.

I. Factual and Procedural Background

First Sergeant Clay Bryson ("Sergeant Bryson") and Deputy Sheriff Josh Stewart ("Deputy Stewart") of the Macon County Sheriff's Department ("MCSD") were patrolling U.S. Route 441 in separate patrol cars in Macon County, North Carolina, on 10 December 2015. Sergeant Bryson had been employed by the MCSD for over sixteen years, had extensive training in the area of drug interdiction, and had investigated more than one hundred drug cases for the MCSD. According to the trial court's unchallenged findings, U.S. Route 441 is a major thoroughfare for traffic from Atlanta, and Atlanta is "a major source of controlled substances for western North Carolina." Sergeant Bryson testified there was "a lot of drug activity on [U.S. Route] 441." While on patrol on 10 December 2015, Sergeant Bryson had with him a police dog trained to detect controlled substances.

Sergeant Bryson was parked in his patrol car on the east side of U.S. Route 441, perpendicular to the road, when he noticed a gold Pontiac ("the vehicle") traveling northbound around 3:00 p.m. Sergeant Bryson testified that, as the vehicle approached, he "noticed the female driver . . . was slumped back and over toward the center console [and] the male passenger . . . [who was wearing] . . . a cowboy type of hat[,] . . . tilted his head slightly, almost to block his face." Sergeant Bryson testified this behavior by the driver, later identified as Melanie Pursley ("Pursley"), and the passenger, later identified as Defendant, suggested "nervousness" and "aroused [Sergeant Bryson's] suspicion somewhat [based on] some of the [drug interdiction] training [he had] been through." Sergeant Bryson pulled his patrol car onto the road and into the far left lane, behind the vehicle. When Pursley did not voluntarily switch lanes, Sergeant Bryson moved over into the right-hand lane and pulled up alongside the vehicle. Sergeant Bryson testified that, as he pulled up

beside the vehicle, Pursley "swerved over into [Sergeant Bryson's] lane with the two right[-]side tires of [Pursley's] vehicle crossing the dotted white line in the center of the roadway into [Sergeant Bryson's] lane." This caused Sergeant Bryson to pull his patrol car to the right "over the fog line in order to keep from having a [] collision with the vehicle and [to] abruptly hit[] [his] brakes." After hitting his brakes, Sergeant Bryson pulled back into the passing lane, behind the vehicle. Using a radar device, Sergeant Bryson clocked the vehicle's speed at sixty-two miles per hour in a fifty-five mile per hour speed limit zone. Sergeant Bryson initiated a traffic stop for Pursley's unsafe movement and the speeding violation, and Pursley pulled off the road into a vacant parking lot.

Sergeant Bryson approached the driver's side of the vehicle and asked Pursley for her driver's license and vehicle registration. Pursley produced a registration card and began "fumbling all through the vehicle . . . searching for a driver's license." Sergeant Bryson testified that, as Pursley was searching for her license, he "was watching her behavior" and "note[d] a lot of [] nervousness[.]" Pursley's "hands were shaking" when she handed Sergeant Bryson her registration card, and he could "see her heartbeat[.]" Pursley eventually stopped searching for her driver's license and told Sergeant Bryson she believed she had left it at a gas station in Georgia.

Because Pursley had no driver's license or other form of personal identification, Sergeant Bryson asked her to exit the vehicle. While standing behind the vehicle, Sergeant Bryson "engaged [Pursley] in general conversation[,] . . . ask[ing] . . . where [she was] coming from, [and] where [she was] going[.]" Pursley gave Defendant's name and indicated Defendant was her boyfriend. She stated they were traveling from Georgia, "headed to Kentucky . . . [for Pursley] to meet [Defendant's] parents for the first time." Pursley indicated that was "the reason for her nervousness[.]" Sergeant Bryson wrote Pursley's name and date of birth on the back of her registration card.

Sergeant Bryson asked Pursley "if [Defendant] had an ID on him because [Pursley did] not . . . and asked if [he] could . . . speak to [Defendant]." According to Sergeant Bryson, Pursley responded, "of course." Sergeant Bryson approached the passenger side of the vehicle and tapped on the window "to get [Defendant] to roll it down." Sergeant Bryson testified:

> I asked [Defendant] just a couple of general questions after asking for his ID. He [told] me [he and Pursley were] headed to his camper on Big Cove in Cherokee[.] [I] asked

> him if he was going to do any gambling over there, just ask[ed] him some general questions. He said they were going over there to work on his camper for the week. . . . As I first walked up to the vehicle – I've been working dope for an extended period of time now. When I walked up to the vehicle I noticed [] [Defendant] had a sore, [an] open sore on the side of his face . . . [that] looked to me [like] that of a meth[amphetamine] sore.

Sergeant Bryson indicated one of his purposes in speaking with Defendant was to see if Defendant could "vouch" for Pursley. According to Sergeant Bryson, when asked to verify Pursley's name, Defendant replied: "I guess that's her name." Sergeant Bryson testified that when, at the end of their initial conversation, he again asked Defendant for Pursley's name, Defendant stated "he [did not] remember." Sergeant Bryson testified he "didn't see a great deal of nervousness with [Defendant]."

Sergeant Bryson returned to his patrol car to enter Pursley's name and date of birth into his mobile data terminal. Sergeant Bryson testified it took longer to run a data search using a name and date of birth rather than a driver's license number. Sergeant Bryson also testified he had to search "in the correct [S]tate that [Pursley] was out of, Georgia[,]" and that "[a] lot of times Georgia is slow to respond and . . . I have no control over that." The search revealed Pursley's driver's license expired the previous day. Sergeant Bryson prepared a written warning citation. He testified that an out-of-state citation takes longer to prepare because the information must be entered manually rather than by automatically accessing a database of the North Carolina DMV.

While preparing Pursley's warning citation, Sergeant Bryson asked Deputy Stewart to run Defendant's driver's license "to see if [Defendant's license] was valid [such that Defendant would] be able to drive [Pursley's vehicle] off from that location." Sergeant Bryson issued the printed citation to Pursley and returned Defendant's license. Sergeant Bryson testified that, "[i]n the process of getting the [license] back [to Defendant][,] I asked him if there was anything illegal in the vehicle, anything I needed to know of[.]" Defendant responded: "Not that I'm aware of." Sergeant Bryson testified this was a "red flag[,]" based on his drug interdiction training, because it was "a yes or no question." Pursley continued to engage Sergeant Bryson in unsolicited conversation about her expired license. As they continued speaking, Sergeant Bryson asked Pursley whether she was "responsible for everything in the vehicle." Pursley "hesitated and [said], my stuff." Pursley stated Defendant "ha[d] his own stuff." Sergeant Bryson testified this response from Pursley was another "red

flag," because "[a] typical response in a situation like that[] [would be][,] I know what's in my vehicle. . . . [M]ost people will give you a straight up yes or no answer." Sergeant Bryson asked Pursley "if [the drug-sniffing] dog was going to . . . alert on her vehicle, and [Pursley] said, 'I don't reckon.' " This equivocal response from Pursley was "another red flag."

Sergeant Bryson told Pursley he would ask Defendant to exit the vehicle and he would then conduct a dog sniff around the exterior perimeter of the vehicle. Sergeant Bryson testified Pursley's "level of nervousness was elevated" and Pursley continued "engaging [him] in conversation at that point." Pursley indicated Defendant might be in possession of some "personal use" marijuana and that there might be a hunting knife in the vehicle. Sergeant Bryson's dog "[s]howed [] indicators that he smelled illegal controlled substances there inside [Pursley's] vehicle." Sergeant Bryson returned the dog to his patrol vehicle and called for assistance to begin searching the vehicle. Inside the vehicle, officers found "[a] large amount of illegal contraband including methamphetamine, some marijuana, [and] some paraphernalia, including baggies, scales, . . . [and] pipes."

Defendant was arrested and subsequently indicted on charges of trafficking in methamphetamine by possession, possession of marijuana, possession of drug paraphernalia, trafficking in methamphetamine by transportation, and possession of methamphetamine with intent to manufacture, sell, or deliver. Defendant filed a motion on 23 March 2016 seeking "to suppress the use as evidence of any and all items seized from the vehicle of the co-defendant [] Pursley." Defendant contended Sergeant Bryson unlawfully extended the 10 December 2015 traffic stop without reasonable suspicion of criminal activity by either Pursley or Defendant. The trial court held a hearing on Defendant's motion to suppress on 26 July 2016 and denied the motion by order entered 29 July 2016. A jury convicted Defendant on all charges on 4 November 2016. The trial court consolidated Defendant's convictions for sentencing and sentenced Defendant to two separate terms of 225 to 282 months' imprisonment. Defendant appeals.

II. Motion to Suppress

Defendant contends the trial court erred by denying his motion to suppress because Sergeant Bryson unlawfully extended an otherwise-completed traffic stop without reasonable suspicion of criminal activity. Following our Supreme Court's recent holding in *State v. Bullock*, ___ N.C. ___, 805 S.E.2d 671 (2017), we disagree.

A. *Standard of Review*

"This Court's review of an appeal from the denial of a defendant's motion to suppress is limited to determining 'whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the [trial court's] conclusions of law.' " *State v. Granger*, 235 N.C. App. 157, 161, 761 S.E.2d 923, 926 (2014) (quoting *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011)). "[W]e examine the evidence . . . in the light most favorable to the State[.]" *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010).

On appeal, "[t]he trial court's findings of fact regarding a motion to suppress are conclusive . . . if supported by competent evidence." *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007). "[U]nchallenged findings of fact are presumed to be supported by competent evidence and [are] binding on appeal." *Cape Fear River Watch v. N.C. Envtl. Mgmt. Comm'n*, 368 N.C. 92, 99, 772 S.E.2d 445, 450 (2015) (citation and quotation marks omitted) (first alteration added). "Our review of a trial court's conclusions of law on a motion to suppress is *de novo*." *Edwards*, 185 N.C. App. at 702, 649 S.E.2d at 648 (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. Ward*, 226 N.C. App. 386, 388, 742 S.E.2d 550, 552 (2013) (citation and internal quotation marks omitted) (alteration in original).

B. *Analysis*

According to Defendant, the 10 December 2015 traffic stop concluded when Sergeant Bryson issued the warning citation to Pursley and, at that time, Sergeant Bryson lacked necessary reasonable suspicion to justify extending the stop to conduct the dog sniff that ultimately led to the discovery of contraband inside Pursley's vehicle.

The Fourth Amendment to the United States Constitution secures the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008) (citation and internal quotation marks omitted). During a traffic stop, both the driver *and* any passengers are "seized" within the meaning of the Fourth Amendment, and a passenger "may challenge the constitutionality of the stop[,] . . . including any improper prolongation of that investigatory detention." *State v. Hernandez*, 208 N.C. App. 591, 597, 704 S.E.2d 55, 59 (2010) (citations and internal quotation marks omitted). While "it is not unreasonable under the Fourth Amendment . . . to detain a passenger when a vehicle

has been stopped due to a traffic violation committed by the driver of the car[,]" this Court has held that "a passenger may not be detained indefinitely. Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." *State v. Brewington*, 170 N.C. App. 264, 272, 612 S.E.2d 648, 653 (2005) (citations and internal quotation marks omitted).

The "tolerable duration" of a routine traffic stop "is determined by the seizure's 'mission,' which is to address the traffic violation that warranted the stop, and attend to related safety concerns." *Rodriguez v. U.S.*, 575 U.S. ___, ___, 191 L. Ed. 2d 492, ___ (2015) (internal citation omitted). In *Rodriguez*, the United States Supreme Court held that a seizure for a traffic violation "ends when tasks tied to the traffic infraction are – or reasonably should have been – completed[,]" and an otherwise-completed traffic stop may not be prolonged "absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at ___, 191 L. Ed. 2d at ___; *see also State v. Downey*, ___ N.C. App. ___, ___, 796 S.E.2d 517, 519 (2017) ("When a law enforcement official initiates a valid traffic stop, . . . the officer may not extend the duration of that stop beyond the time necessary to issue the traffic citation unless the officer has reasonable, articulable suspicion of some other crime." (citation omitted)).

"Traffic stops have been historically reviewed under the investigatory detention framework first articulated [by the United States Supreme Court] in *Terry v. Ohio*, 392 U.S. 1, [] 20 L. Ed. 2d 889 (1968). Therefore, reasonable suspicion is the necessary standard for traffic stops." *State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012) (citation and quotation marks omitted). "If [an] investigatory seizure is invalid [due to a lack of reasonable suspicion], evidence resulting from the warrantless stop is inadmissible under the exclusionary rule in both our federal and state constitutions." *State v. Fields*, 195 N.C. App. 740, 743, 673 S.E.2d 765, 767 (2009) (citation omitted). "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required." *State v. Salinas*, 214 N.C. App. 408, 409, 715 S.E.2d 262, 264 (2011) (citation and quotation marks omitted). Our Supreme Court

> has determined that the reasonable suspicion standard requires that the stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious

> officer, guided by his experience and training. Moreover, [a] court must consider "the totality of the circumstances – the whole picture" in determining whether a reasonable suspicion exists.

Id. at 409-10, 715 S.E.2d at 264 (citation and quotation marks omitted) (alterations in original); *see also State v. Johnson*, ___ N.C. ___, ___, 803 S.E.2d 137, 139 (2017) ("To determine whether reasonable suspicion exists, courts must look at 'the totality of the circumstances,' as viewed from the standpoint of an *objectively* reasonable police officer[.]" (citations and internal quotation marks omitted) (emphasis added)).

In the present case, Defendant contends that (1) the traffic stop concluded when Sergeant Bryson gave the warning citation to Pursley,[1] and (2) "[a]t that point in the stop, [Sergeant] Bryson could not have formed reasonable suspicion [of criminal activity] from his interactions with Pursley and [Defendant][.]" Defendant has not challenged any of the trial court's findings of fact, and we therefore "accept the findings of fact as true." *State v. Gerard*, ___ N.C. App. ___, ___, 790 S.E.2d 592, 595 (2016). Defendant also does not appear to argue that Sergeant Bryson unlawfully prolonged the traffic stop up to the point of issuing the warning citation to Pursley. Indeed, Defendant states in his brief that the printing of the warning citation was "the end of what had been *a 'necessary and unavoidable' process*." (emphasis added). Thus, the only question for our consideration is whether, as Defendant argues, the trial court erroneously concluded Sergeant Bryson observed a sufficient number of "red flags" prior to issuing the warning citation to support a reasonable suspicion of criminal activity and justify further detaining Defendant and Pursley. Applying *Bullock*, as further discussed below, we do not find the trial court's conclusion erroneous.

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1. The trial court similarly determined that "[t]he 'traffic stop' mission was concluded when [Sergeant] Bryson handed the warning citation to Pursley." We note this Court has held that "an initial traffic stop concludes . . . *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) (emphasis added); *see also State v. Velasquez-Perez*, 233 N.C. App. 585, 595, 756 S.E.2d 869, 876 (2014) (discussing *Jackson*, and holding traffic stop did not conclude when officer handed defendant written warning citation, because officer "had not completed his checks related to the licenses, registration, insurance, travel logs, and invoices of [the defendant's] commercial vehicle."). Thus, contrary to Defendant's argument, the mere issuance of the printed citation to Pursley did not itself conclude the traffic stop. However, the distinction is inapposite in this case, because the trial court's findings indicate Sergeant Bryson returned Pursley's registration at the same time he handed her the printed citation, thus concluding the initial traffic stop.

The trial court stated the following in Conclusion of Law Number Three:

> The [c]ourt's findings of fact show that up to the point of the delivery of the citation [to Pursley], the "red flags" that [Sergeant] Bryson [observed] were as follows:
>
> a. [Pursley's and Defendant's] evasiveness [by] hiding their faces as they passed [Sergeant] Bryson;
>
> b. [The fact that Pursley and Defendant were] travelling on a road known to [Sergeant] Bryson as a major route for drug traffic into western North Carolina;
>
> c. The swerving of [Pursley's] car upon the sudden appearance of [Sergeant Bryson's patrol vehicle];
>
> d. Pursley's extreme and continued nervousness;
>
> e. The clear inconsistencies in [Pursley's and Defendant's] descriptions of their travel plans and their relationship;
>
> f. The open sore on [Defendant's] face, which [Sergeant] Bryson believed to be related to [the] use of methamphetamine; [and]
>
> g. Pursley's equivocal answer to [Sergeant Bryson's] question, "Is there anything in the vehicle that I need to know about?"

The court later concluded in Conclusion of Law Number Thirteen that "[g]iven the 'red flags' observed by [Sergeant] Bryson before he delivered the warning citation to Pursley, . . . based on the totality of [the] circumstances, reasonable suspicion existed to support [Sergeant] Bryson . . . in his determination that criminal activity may have been afoot." (emphasis in original). Defendant does not dispute that Sergeant Bryson in fact observed the "red flags" enumerated in Conclusion of Law Number Three. Defendant instead argues that the first six "red flags" relied upon by the trial court involved noncriminal behavior "consistent with innocent travel." *See Fields*, 195 N.C. App. at 745, 673 S.E.2d at 768. Defendant further asserts that the final "red flag" identified in Conclusion of Law Number Three – Pursley's equivocal response to Sergeant Bryson's question about the contents of the vehicle – actually occurred *after* Sergeant Bryson issued the citation and returned Pursley's registration.

Defendant cites *State v. Reed*, ___ N.C. App. ___, 791 S.E.2d 486 (2016), in which this Court held a law enforcement officer lacked reasonable suspicion of criminal activity to extend a traffic stop after issuing a speeding ticket. In *Reed*, a state trooper pulled the defendant over for speeding and, in the course of the stop, asked the defendant to sit in the trooper's patrol vehicle while he ran checks on the defendant's license and criminal background; asked the defendant questions about his travel plans and criminal history; and separately questioned the defendant's passenger. The trooper "told [the] [d]efendant that his driver's license was okay[,] . . . issued a warning ticket [for speeding] [,] and asked [the] [d]efendant if he had any questions." *Id.* at ___, 791 S.E.2d at 489. The trooper then told the defendant "he was completely done with the traffic stop, but [that he] wanted to ask [the] [d]efendant additional questions." *Id.* (internal quotation marks omitted). The trooper's subsequent questioning of the defendant and the passenger led to the discovery of cocaine inside the defendant's vehicle.

This Court held the *Reed* trial court's findings of fact "[did] not support its conclusion that [the trooper] had reasonable suspicion of criminal activity to extend the traffic stop and conduct a search after the traffic stop concluded." *Id.* at ___, 791 S.E.2d at 493. The factors relied upon by the trial court in that case included that the defendant appeared "overly nervous;" initially refused to sit in the trooper's patrol vehicle with the door closed; and provided a rental car agreement for a different car than the vehicle he was operating. *Id.* at ___, 791 S.E.2d at 492-93. The trial court further found that the defendant was driving outside the geographic area approved in his rental car agreement; the trooper observed numerous air fresheners in the defendant's vehicle and other signs of "hard travel;" there was a female dog in the defendant's vehicle and "dog food scattered throughout the car[;]" and the defendant and his passenger "provided inconsistent travel plans." *Id.* at ___, 791 S.E.2d at 493. This Court concluded that the *Reed* defendant's nervousness, although "an appropriate factor to consider," was insufficient to support reasonable suspicion when considered together with other factors that were "consistent with innocent travel[,]" including the presence of a dog in the vehicle and the defendant's possession of energy drinks, trash, dog food, and air fresheners. *See id.*; *but see State v. Castillo*, ___ N.C. App. ___, ___, 787 S.E.2d 48, 54 (2016) (recognizing that "[f]actors consistent with innocent travel, *when taken together*, can give rise to reasonable suspicion, even though some travelers exhibiting those factors will be innocent." (citation and quotation marks omitted) (emphasis added)).

Our Supreme Court vacated and remanded this Court's decision in *Reed* for reconsideration in light of its holding in *Bullock*.[2] *Reed* is therefore unavailing to Defendant, and *Bullock* controls Defendant's appeal. In *Bullock*, our Supreme Court reversed a decision of this Court in which we held a law enforcement officer lacked reasonable articulable suspicion of criminal activity before extending the duration of a traffic stop. The *Bullock* defendant was pulled over for speeding and unsafe movement. In the course of the traffic stop, officers ultimately discovered a large amount of heroin inside the vehicle the defendant was driving. This Court held the police "unlawfully prolonged [the stop] by causing [the] defendant to be subjected to a frisk, sit in the officer's patrol car, and answer questions while the officer searched law enforcement databases for reasons unrelated to the mission of the stop and for reasons exceeding the routine checks authorized by *Rodriguez*." *State v. Bullock*, ___ N.C. App. ___, ___, 785 S.E.2d 746, 752 (2016).

Our Supreme Court reversed this Court's decision and held the traffic stop at issue in *Bullock* was not unlawfully prolonged under the framework set forth in *Rodriguez*. The Court began its analysis by noting that, under *Rodriguez*, "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, unless reasonable suspicion of another crime arose *before that mission was completed*[.]" *Bullock*, ___ N.C. at ___, 805 S.E.2d at 673 (citations omitted) (emphasis added). It further noted that "[t]he reasonable duration of a traffic stop . . . includes more than just the time needed to write a ticket[,]" *e.g.*, time spent conducting " 'ordinary inquiries incident to [the traffic] stop' " and taking certain precautionary safety measures. *Id.* (citation omitted).

The facts in *Bullock* showed that the officer who initiated the traffic stop was an experienced police officer specially trained in drug

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2. On remand, this Court found *Bullock* factually distinguishable and again held that the officer in *Reed* "did not have reasonable suspicion of criminal activity to justify prolonging the traffic stop." *State v. Reed*, ___ N.C. App. ___, ___, 810 S.E.2d 245, 249 (2018) ("*Reed II*"). This Court concluded that, under *Bullock*, the *Reed* officer's "actions of requiring [the] [d]efendant to exit his car, frisking him, and making him sit in the patrol car while he ran records checks and questioned [the] [d]efendant, did not unlawfully extend the traffic stop." *Id.* We further concluded, however, that "after [the officer] returned [the] [d]efendant's paperwork and issued the warning ticket, [the] [d]efendant remained unlawfully seized in the patrol car[,]" and the stop was improperly prolonged based on "legal activity consistent with lawful travel." *Id.* at ___, 810 S.E.2d at 249-50. The State filed a motion seeking a temporary stay of this Court's decision in *Reed II*, which our Supreme Court allowed by order entered 2 February 2018. *See State v. Reed*, ___ N.C. ___, 809 S.E.2d 130 (2018). We do not find the present case materially distinguishable from *Bullock*, and this Court's holding in *Reed II* does not alter our analysis.

interdiction. It was undisputed that the officer had reasonable suspicion to stop the defendant based on multiple traffic violations. After initiating the traffic stop, the officer asked to see the defendant's driver's license and registration. The defendant provided a driver's license, but indicated the vehicle was a rental car. The rental car agreement showed the car had been rented in another person's name, and the defendant "was not listed as an authorized driver on the rental agreement." *Id.* at ___, 805 S.E.2d at 674. During this initial interaction, the officer observed multiple cell phones inside the vehicle which, in the officer's experience, was common among "people who transport illegal drugs[.]" *Id.* The defendant told the officer he had recently moved to North Carolina. He also indicated he was going to a specific location, but the officer "knew that [the] defendant was well past his exit if [he] was going [where he said]." *Id.* The officer asked the defendant to exit the vehicle, told the defendant he would receive a warning for the traffic violations, and frisked the defendant. During the frisk, the officer found a large sum of cash in the defendant's pocket. After the frisk, the defendant sat in the officer's patrol car while the officer "[ran the] defendant's information through various law enforcement databases[.]" *Id.* at ___, 805 S.E.2d at 675.

While sitting in the patrol car, the *Bullock* defendant made certain self-contradictory statements and made inconsistent eye contact with the officer. The database checks revealed the defendant was issued a North Carolina driver's license more than a decade prior and had a criminal history in North Carolina, calling into question the defendant's earlier statement that he had only recently moved to North Carolina. The officer asked for the defendant's permission to search his vehicle. The defendant assented to a search of the vehicle but not certain personal possessions inside it. The officer removed a bag from the trunk of the defendant's vehicle and performed a dog sniff. The dog alerted to the bag, which was found to contain heroin. *Id.*

Our Supreme Court held the officer did not unlawfully prolong the stop by frisking the defendant, asking the defendant to sit in the patrol car while running several database checks, or talking to the defendant "up until the moment that all three database checks had been completed." *Id.* at ___, 805 S.E.2d at 677. The Court then concluded:

> The conversation that [the officer] had with [the] defendant while the database checks were running enabled [the officer] to constitutionally extend the traffic stop's duration. The trial court's findings of fact show[ed] that, by the time these database checks were complete, this conversation, *in conjunction with [the officer's]*

> *observations from earlier in the traffic stop*, permitted [the officer] to prolong the stop until he could have a dog sniff performed.

Id. (emphasis added). The Court noted that the officer "came into the stop with extensive experience investigating drug running, and he knew that [the route the defendant was traveling was] a major drug trafficking corridor." *Id.* "[E]ven before [the] defendant began talking[,]" the officer made several observations that "suggested possible drug-running," including the defendant's nervousness, the presence of multiple cell phones inside the defendant's vehicle, and the fact that the defendant was driving a rental vehicle that had been rented in another person's name. *Id.* "[The] [d]efendant's conversation with [the officer], and other aspects of their interaction, quickly provided more evidence of drug activity[,]" including the defendant's "illogical" statement about his intended destination and the cash found in the defendant's pocket. While speaking to the officer inside the patrol car, the defendant made self-contradictory statements and did not maintain consistent eye contact. The database checks also suggested the defendant had been untruthful about recently moving to North Carolina. Under these circumstances, "the officer legally extended the duration of the traffic stop to allow for the dog sniff." *Id.* at ___, 805 S.E.2d at 678.

In the present case, we likewise conclude the trial court's findings of fact supported its conclusion that Sergeant Bryson observed a sufficient number of "red flags" *before* issuing the warning citation to Pursley to support a reasonable suspicion of criminal activity and therefore justify extending the stop. Sergeant Bryson had extensive training in drug interdiction, including "the detection of behaviors by individuals that tend to indicate activity related to the use, transportation[,] and other activity [associated] with controlled substances." He had investigated more than one hundred drug cases for the MCSD and knew that U.S. Route 441 was a major thoroughfare for drug trafficking from Atlanta into western North Carolina. When Sergeant Bryson first saw Pursley's vehicle, he observed body language by both Pursley and Defendant that he considered evasive. Pursley exhibited "extreme and continued nervousness" throughout the ensuing traffic stop and was unable to produce any form of personal identification. Defendant and Pursley gave conflicting accounts of their travel plans and their relationship to each other. During Sergeant Bryson's initial conversation with Defendant – which Defendant has not challenged as improper – Sergeant Bryson observed an open sore on Defendant's face that appeared, based on Sergeant Bryson's professional training and experience, "related to [the]

use of methamphetamine[.]" Background checks further revealed that Pursley was driving with an expired license. Under *Bullock*, considering the totality of the circumstances, we conclude Sergeant Bryson formed reasonable suspicion of criminal activity, before issuing the written warning citation and returning Pursley's vehicle registration, sufficient to justify extending the traffic stop for further investigation.[3] *See Downey*, ___ N.C. App. at ___, 796 S.E.2d at 521-22.

III. Conclusion

Because the trial court's findings of fact supported its conclusion that Sergeant Bryson formed reasonable suspicion of criminal activity before the mission of the 10 December 2015 traffic stop was complete, we affirm the trial court's order denying Defendant's motion to suppress.

AFFIRMED.

Judges STROUD and BERGER concur.

3. We find it unnecessary to address Defendant's argument that one of the seven "red flags" relied upon by the trial court actually occurred after the issuance of Pursley's warning citation. The "red flags" that Defendant concedes did occur before the completion of the traffic stop were sufficient to support a conclusion that reasonable suspicion existed to justify extending the stop. *See State v. Rayfield*, 231 N.C. App. 632, 648, 752 S.E.2d 745, 757 (2014) (holding that "to the extent the trial court's other findings contain[ed] errors, they [were] not so severe as to undercut the court's conclusion of law that probable cause was present to justify [a] search[] . . . [i]n light of the other evidence cited by the trial court in support of its conclusion[.]").

STATE v. GRADY

[259 N.C. App. 664 (2018)]

STATE OF NORTH CAROLINA
v.
TORREY GRADY

No. COA17-12

Filed 15 May 2018

1. Appeal and Error—preservation of issues—failure to raise argument in trial court

The State waived an argument that satellite-based monitoring constitutes a special needs search by failing to raise the issue in the trial court.

2. Satellite-Based Monitoring—mandatory lifetime SBM—Fourth Amendment search—reasonableness

The trial court erred by determining the State met its burden of showing the imposition of lifetime satellite-based monitoring (SBM) was reasonable under the Fourth Amendment as to this defendant where the State failed to present any evidence of its need to monitor defendant or the procedures actually used to conduct SBM in unsupervised cases such as defendant's. While parolees and probationers have significantly diminished expectations of privacy as a result of their legal status, unsupervised offenders such as defendant, although statutorily determined to be recidivist sex offenders, have a greater expectation of privacy than supervised offenders.

Judge BRYANT dissenting.

Appeal by defendant from order entered 26 August 2016 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 8 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, and Everett & Everett, Attorneys at Law, by Lewis ("Luke") Everett, for defendant-appellant.

CALABRIA, Judge.

Torrey Grady ("defendant") appeals from the trial court's order determining that satellite-based monitoring ("SBM") of defendant is a

reasonable search under the Fourth Amendment. After careful review, we conclude that the State failed to prove the reasonableness of imposing SBM for defendant's lifetime. Accordingly, we reverse.

I. Factual and Procedural Background

In 1997, defendant pleaded no contest to a second-degree sex offense, and in 2006, he pleaded guilty to taking indecent liberties with a child. The trial court never made an SBM determination at either of defendant's sentencing hearings for these offenses. However, on 14 May 2013, the trial court held an SBM "bring-back" hearing pursuant to N.C. Gen. Stat. § 14-208.40B (2017). The court found that defendant's convictions were both "sexually violent offenses" pursuant to N.C. Gen. Stat. § 14-208.6(5), and therefore, defendant met the criteria of a "recidivist" under N.C. Gen. Stat. § 14-208.6(2b). Accordingly, the trial court ordered defendant to enroll in SBM for the remainder of his natural life, as required by N.C. Gen. Stat. § 14-208.40B(c).

Defendant appealed that order to this Court, arguing that SBM violated his right to freedom from unreasonable searches and seizures, as provided by the Fourth Amendment to the United States Constitution. In an unpublished decision filed 6 May 2014, we affirmed the trial court's order, concluding that we were bound by our Court's rejection of a nearly identical argument in *State v. Jones*, 231 N.C. App. 123, 750 S.E.2d 883 (2013). *State v. Grady*, 233 N.C. App. 788, 759 S.E.2d 712 (2014) (unpublished). After our Supreme Court dismissed defendant's appeal and denied discretionary review, *State v. Grady*, 367 N.C. 523, 762 S.E.2d 460 (2014), the United States Supreme Court granted defendant's petition for writ of certiorari.

The United States Supreme Court held that despite its civil nature, North Carolina's SBM program "effects a Fourth Amendment search." *Grady v. North Carolina*, 575 U.S. __, __, 191 L. Ed. 2d 459, 462 (2015) (per curiam). However, since "[t]he Fourth Amendment prohibits only *unreasonable* searches[,]" the Supreme Court remanded the case for North Carolina courts to "examine whether the State's monitoring program is reasonable—when properly viewed as a search . . . ." *Id.* at __, 191 L. Ed. 2d at 463.

On 16 June 2016, the trial court held a remand hearing on the reasonableness of defendant's lifetime enrollment in SBM. Officer Scott Pace, a probation supervisor for the Department of Public Safety, Division of Adult Correction, testified as the State's sole witness at the hearing. In addition to Officer Pace's testimony, the State presented photographs of the SBM equipment currently used to monitor offenders; certified copies

of the two sex offense judgments; and defendant's criminal record. At the close of the State's evidence, defendant moved for a directed verdict and dismissal, arguing that the State had failed to prove that SBM is a reasonable search under the Fourth Amendment. *See State v. Blue*, __ N.C. App. __, __, 783 S.E.2d 524, 527 (2016) (concluding that "the State shall bear the burden of proving that the SBM program is reasonable"). In response, the State offered arguments about the dangers of recidivism and the State's interest in protecting the public from sex offenders. After considering both parties' arguments, the trial court denied defendant's motion for a directed verdict. Defendant then presented evidence, but did not testify, and subsequently renewed his motion for judgment as a matter of law. The trial court determined that it would rule on defendant's motion out of term, subject to the parties' submission of briefs.

On 26 August 2016, the trial court entered an order concluding that (1) based on the totality of the circumstances, SBM of defendant is a reasonable search; and (2) the SBM statute is facially constitutional. Defendant appeals.

II. Standard of Review

"An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citation omitted). "The trial court's findings of fact are binding on appeal if they are supported by competent evidence, and they must ultimately support the trial court's conclusions of law." *Id.* (citation and quotation marks omitted).

III. Constitutionality

The Fourth Amendment, applied to the States through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV. It is clear that SBM "effects a Fourth Amendment search." *Grady*, 575 U.S. at __, 191 L. Ed. 2d at 462. Accordingly, the only remaining issue for the trial court to determine was whether SBM is reasonable under the Fourth Amendment.

On appeal, defendant first contends that the State failed to prove that lifetime SBM is a reasonable search of defendant. We agree.

"The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* (citations omitted). "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . .

reasonableness generally requires the obtaining of a judicial warrant" issued upon a showing of probable cause. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653, 132 L. Ed. 2d 564, 574 (1995). "But a warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either." *Id.* "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. __, __, 189 L. Ed. 2d 430, 439 (2014).

Grady directs us to consider two approaches for our analysis of the warrantless search in this case: (1) a "general Fourth Amendment approach" based on diminished expectations of privacy, and (2) "special needs" searches. *See* 575 U.S. at __, 191 L. Ed. 2d at 462-63 (citing *Samson v. California*, 547 U.S. 843, 165 L. Ed. 2d 250 (2006) (suspicionless search of parolee was reasonable); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995) (random drug testing of student athletes was reasonable)). Under either approach, we use the same context-specific balancing test to determine the reasonableness of the search. *Compare Samson*, 547 U.S. at 848, 165 L. Ed. 2d at 256 ("Whether a search is reasonable is determined by assessing on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (citation and quotation marks omitted)), *with Vernonia Sch. Dist.*, 515 U.S. at 652-53, 132 L. Ed. 2d at 574 ("[W]hether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." (citation and quotation marks omitted)).

However, because the special needs doctrine is typically used to uphold sweeping programmatic searches, it is a "closely guarded" exception to the warrant requirement, which only applies to a limited "class of permissible suspicionless searches." *Ferguson v. City of Charleston*, 532 U.S. 67, 80 n.17, 149 L. Ed. 2d 205, 218 n.17 (2001). In order for the exception to apply, the "special need" advanced to justify dispensing with a warrant or individualized suspicion must be "divorced from the State's general interest in law enforcement." *Id.* at 79, 149 L. Ed. 2d at 217.[1]

1. The Supreme Court has upheld warrantless searches based on a variety of "special needs." *See, e.g.*, *United States v. Flores-Montano*, 541 U.S. 149, 158 L. Ed. 2d 311 (2004) (suspicionless searches of vehicles at the international border); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995) (suspicionless drug testing of public high school athletes); *Griffin v. Wisconsin*, 483 U.S. 868, 97 L. Ed. 2d 709 (1987) (search of a probationer's home).

A. Special Needs

[1] On appeal, the State contends that SBM is a reasonable special needs search. However, according to the record, it does not appear that the trial court considered this argument, as neither the hearing transcript nor the State's Memorandum In Support of the Reasonableness of Satellite Based Monitoring mentions the special needs doctrine. The State was aware that defendant challenged the constitutionality of the SBM program; indeed, that was the entire purpose of the hearing. *See Grady*, 575 U.S. at __, 191 L. Ed. 2d at 463 (remanding for North Carolina courts to "examine whether the State's monitoring program is reasonable—when properly viewed as a search"). The State had ample opportunity to argue the special needs doctrine—both at the hearing and in its subsequent brief to the trial court—but nevertheless failed to do so. *Cf. State v. Romano*, 369 N.C. 678, 693-94, 800 S.E.2d 644, 654 (2017) ("[T]he trial court specifically asked the parties for additional research regarding the constitutionality of the statute in regard to the unconscious defendant. . . . The State had the opportunity at the suppression hearing to argue that the good faith exception to the exclusionary rule should apply if the court determined that the officer's actions were unconstitutional, but the State failed to raise the argument." (internal quotation marks omitted)). Since the State failed to advance this constitutional argument below, it is waived. *Id.* at 693, 800 S.E.2d at 654; N.C.R. App. P. 10.

Furthermore, our Court has interpreted the Supreme Court's mandate in *Grady* to require case-by-case determinations of reasonableness, now commonly referred to as "*Grady* hearings." *See, e.g.*, *State v. Spinks*, __ N.C. App. __, __, 808 S.E.2d 350, 361 (2017) (Stroud, J., concurring) ("The reasonableness of the search and the totality of the circumstances under which the SBM will operate will depend necessarily upon *the defendant's circumstances and the operation of SBM at the time the monitoring will be done of the defendant*." (emphasis added)), *disc. review denied*, No. 432P17, __ N.C. __, __ S.E.2d __ (filed Apr. 5, 2018). Following some initial uncertainty in our trial courts, the parties' burdens at *Grady* hearings are now well established. It is "clear that a case for satellite-based monitoring is the State's to make." *State v. Greene*, __ N.C. App. __, __, 806 S.E.2d 343, 345 (2017). And, as with other constitutional arguments, a defendant's Fourth Amendment SBM challenge must be properly asserted at the hearing in order to preserve the issue for appeal. *See State v. Bishop*, __ N.C. App. __, __, 805 S.E.2d 367, 370 (2017) (declining to issue a writ of certiorari or invoke Rule 2 to review the defendant's unpreserved *Grady* argument and dismissing

his untimely appeal for lack of jurisdiction), *disc. review denied*, No. 369P17, __ N.C. __, __ S.E.2d __ (filed Apr. 5, 2018).[2]

Accordingly, a "general Fourth Amendment approach" based on diminished expectations of privacy is consistent with our Court's prior decisions, as well as the State's arguments below. *See United States v. Knights*, 534 U.S. 112, 121-22, 151 L. Ed. 2d 497, 507 (2001) (explaining that "general or individual circumstances, including 'diminished expectations of privacy,' may justify an exception to the warrant requirement" (quoting *Illinois v. McArthur*, 531 U.S. 326, 330, 148 L. Ed. 2d 838, 847 (2001))).

B. Diminished Expectations of Privacy

[2] "The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.' " *Vernonia Sch. Dist.*, 515 U.S. at 654, 132 L. Ed. 2d at 575. "What expectations are legitimate varies . . . with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." *Id.* (citation omitted). "In addition, the legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State." *Id.*

The Supreme Court has held that parolees and probationers have significantly diminished expectations of privacy as a result of their legal status. *Samson*, 547 U.S. at 852, 165 L. Ed. 2d at 259; *Knights*, 534 U.S. at 119, 151 L. Ed. 2d at 505. These individuals "are on the 'continuum' of state-imposed punishments[,]" *Samson*, 547 U.S. at 850, 165 L. Ed. 2d at 258 (citation omitted), and may be required, as reasonable conditions of parole or probation, to submit to warrantless searches at any time. *Id.* at 852, 165 L. Ed. 2d at 259; *Knights*, 534 U.S. at 119, 151 L. Ed. 2d at 505. Moreover, "a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Samson*, 547 U.S. at 853, 165 L. Ed. 2d at 260.

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2. *But see State v. Bursell*, No. COA16-1253, __ N.C. App. __, __, __ S.E.2d __, __, 2018 WL 1953403, at *4 (filed March 20, 2018) ("In view of the gravity of subjecting someone for life to a potentially unreasonable search of his person in violation of his Fourth Amendment rights, especially when considering defendant's young age, the particular factual bases underlying his pleas, and the nature of those offenses, combined with the State's and the trial court's failures to follow well-established precedent in applying for and imposing SBM, and the State's concession of reversible *Grady* error, even if this argument was unpreserved, in our discretion we would invoke Rule 2 to relax Rule 10(a)(1)'s issue-preservation requirement in order to prevent manifest injustice to defendant.").

The Supreme Court has never addressed whether a convicted sex offender has a diminished expectation of privacy solely due to the individual's prior conviction. However, the Court has recognized a state's strong interest in protecting its citizens, particularly minors, from sex offenders. *E.g.*, *Smith v. Doe*, 538 U.S. 84, 103, 155 L. Ed. 2d 164, 183-84 (2003). The North Carolina General Assembly also recognizes "that protection of the public from sex offenders is of paramount governmental interest" and accordingly enacted mandatory "Sex Offender and Public Protection Registration Programs," including SBM. N.C. Gen. Stat. § 14-208.5.

At the hearing, Officer Pace testified that North Carolina's SBM program includes supervised and unsupervised offenders. Supervised offenders include probationers and individuals under post-release supervision following active sentences in the custody of the Division of Adult Correction. These individuals "are on the 'continuum' of state-imposed punishments[,]" *Samson*, 547 U.S. at 850, 165 L. Ed. 2d at 258, and their expectations of privacy are accordingly diminished. Unsupervised offenders, however, are statutorily required to submit to SBM, but are not otherwise subject to any direct supervision by State officers.

Defendant is an unsupervised offender. He is not on probation or supervised release, but rather was enrolled in lifetime SBM more than three years after "all rights of citizenship which were forfeited on conviction including the right to vote, [we]re by law automatically restored" to him.[3] Solely by virtue of his legal status, then, it would seem that defendant has a greater expectation of privacy than a supervised offender. Yet, as a recidivist sex offender, defendant must maintain lifetime registration on DPS's statewide sex offender registry. N.C. Gen. Stat. § 14-208.23. The sex offender registry provides public access to "necessary and relevant information" about defendant, including his name, home address, offense history, driver's license number, fingerprints, and current photograph. *Id.* at §§ 14-208.5, -208.7, -208.22. Defendant's expectation of privacy is therefore appreciably diminished as compared to law-abiding citizens.

However, it is unclear whether the trial court considered the legitimacy of defendant's privacy expectation. The trial court found, from the evidence presented at the hearing, that SBM affects defendant's Fourth Amendment interests in the following ways:

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3. *But see* N.C. Gen. Stat. § 14-415.1 (making it "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction").

> Officer Pace testified about how the ankle monitor operates and how it affects the person wearing it. Included in his testimony, Officer Pace testified that the device weighs 8.7 oz., it can be worn underneath socks and/or long pants, it can be worn while bathing, showering, and swimming in pools and the ocean. The ankle monitor does not prohibit any defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes. It does not prohibit or restrict air travel. Officer Pace has monitored defendants wearing the ankle monitor who have worked both physical labor jobs and office jobs, travelled by airplane and engaged in sporting activities including surfing. The ankle monitor does not monitor or reveal the activities of the offender—it merely monitors his location. The device does not confine the person to their residence or any other specific location. The ankle monitor and related equipment requires a quarterly (three months) review/inspection by the State to ensure that the device is in proper working order.

These findings address "the nature and purpose" of SBM, but not "the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 575 U.S. at __, 191 L. Ed. 2d at 462. This is a significant omission, because the Supreme Court has consistently emphasized the importance of viewing the "character of the intrusion" in context. *See*, *e.g.*, *Knights*, 534 U.S. at 119, 151 L. Ed. 2d at 505 ("Knights' status as a probationer subject to a search condition informs both sides of th[e reasonableness] balance."); *Vernonia Sch. Dist.*, 515 U.S. at 665, 132 L. Ed. 2d at 582 ("We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: *that the Policy was undertaken in furtherance of the government's responsibilities*, *under a public school system*, *as guardian and tutor of children entrusted to its care*." (emphasis added)).

Viewed in context, SBM intrudes to varying degrees upon defendant's privacy through (1) the compelled attachment of the ankle monitor, and (2) the continuous GPS tracking it effects. We consider each in turn.

1. Ankle Monitor

Officer Pace testified that the SBM program currently uses an electronic monitoring device called the ExacuTrack One ("ET-1"), which is "installed" on an offender's ankle with tamper-proof fiber-optic straps.

The ET-1 is physically unobtrusive: it weighs a mere 8.7 ounces and is small enough to be covered by a pant leg or sock. Unlike prior SBM devices, the ET-1 is waterproof up to 15 feet and may be worn in the ocean. The ET-1 does not physically limit an offender's movements; employment opportunities; or ability to travel, even on airplanes.[4]

On appeal, defendant complains about the audible voice warning messages that the ET-1 occasionally utters, and the need to remain near an electrical outlet for two hours each day while its lithium battery charges. However, we consider those aspects of SBM to be more inconvenient than intrusive, in light of defendant's diminished expectation of privacy as a convicted sex offender. *Cf. Belleau v. Wall*, 811 F.3d 929, 935 (7th Cir. 2016) (observing that "the plaintiff's privacy has already been severely curtailed" due to Wisconsin's mandatory sex offender registration law, and reasoning that any additional privacy loss he experiences when "his trouser leg hitches up and reveals an anklet monitor that may cause someone who spots it to guess that this is a person who has committed a sex crime must be slight"); *see also Bowditch*, 364 N.C. at 347, 700 S.E.2d at 9 (rejecting that SBM enrollment is akin to house arrest, because "[i]n this day and age, finding a source of available electricity, whether at a home, hotel, place of employment, or even in a moving vehicle, should be little or no challenge").

2. Continuous GPS Monitoring

In addition to physically intruding on defendant's body, "a constitutionally protected area," *United States v. Jones*, 565 U.S. 400, 406 n.3, 181 L. Ed. 2d 911, 919 n.3 (2012), the ET-1 also effects a continuous, warrantless search of defendant's location through the use of GPS technology. Notwithstanding defendant's diminished expectation of privacy, this aspect of SBM is "uniquely intrusive" as compared to other searches upheld by the United States Supreme Court. *Belleau*, 811 F.3d at 940 (Flaum, J., concurring).

As a recidivist sex offender, defendant is required by law to notify the State—and by extension, the public—whenever he moves to a new address, enrolls as a student, or obtains employment at an institution of higher education. N.C. Gen. Stat. § 14-208.9(a),(c),(d). Nevertheless, this type of static information is materially different from the continuous,

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4. Compare the water resistance and travel flexibility afforded by the current SBM device with the one used in 2010. *See Bowditch*, 364 N.C. at 339-40, 700 S.E.2d at 4-5 ("Submerging the ankle bracelet in three feet or more of water generates a 'bracelet gone' alert[,] . . . and commercial airplane flight is likely limited due to security regulations.").

dynamic location data SBM yields. "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Jones*, 565 U.S. at 415, 181 L. Ed. 2d at 924 (Sotomayor, J., concurring). At the hearing, Officer Pace acknowledged that through analysis of SBM location data, the State could ascertain whether an offender was regularly visiting a doctor's office, an ABC store, or a place of worship.

However, the only portion of the trial court's order which addresses GPS monitoring is the finding that the "ankle monitor does not monitor or reveal the activities of the offender—it merely monitors his location." On appeal, the State contends that this aspect of SBM is similar to the compulsory drug testing of Oregon public high school student-athletes upheld in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995). *See id.* at 658, 132 L. Ed. 2d at 578 (observing that one "privacy-invasive aspect of urinalysis is . . . the information it discloses concerning the state of the subject's body, and the materials he has ingested"). We agree that the type of information disclosed through the search is certainly an important consideration. However, the State's *use* of the information is also relevant. *See id.* (deeming it "significant" that, *inter alia*, the tests "look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic[,]" and that the results were "not turned over to law enforcement authorities or used for any internal disciplinary function").

Here, it is significant that law enforcement is not required to obtain a warrant in order to access defendant's SBM location data. The ability to track a suspect's whereabouts is an undeniably powerful tool in a criminal investigation. However, the State presented no evidence of defendant's current threat of reoffending, and the record evidence regarding the circumstances of his convictions does not support the conclusion that lifetime SBM is objectively reasonable.[5] Although the State has no

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5. The only evidence within the appellate record of the circumstances underlying defendant's sex offense convictions is in the Memorandum In Support of Defendant's Motion for Judgment As a Matter of Law, which states:

"[T]he evidence that the State did present shows that although [defendant] was convicted of second degree sexual offense in 1996 when he was 17 years old, and that he pled 'no contest' to that charge. *See* State's Exhibit 5. The State also relied on the prior court record in this case to show that [defendant] was convicted in 2006 of indecent liberties. The indictment, also a part of that court record, indicates that this conviction was based on [defendant]'s having had [a] non-forcible sexual relationship with a fifteen-year-old female, when he was 26 years old."

State's Exhibit 5 was not provided to this Court.

guidelines for presentation of evidence at *Grady* hearings, nevertheless, there must be sufficient record evidence to support the trial court's conclusion that SBM is reasonable as applied to *this particular defendant*.

In concluding that SBM is reasonable, the trial court heavily relied on *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016).[6] However, the circumstances in *Belleau* are starkly different from those in the instant case. In *Belleau*, the 7th Circuit upheld lifetime GPS monitoring of a 73-year-old man who, from 2004-2010, had been civilly committed as a "sexually violent person" by the state of Wisconsin. *Id.* at 931 (citing Wis. Stat. §§ 980.01(7), 980.06); *see also id.* at 935 ("[P]ersons who have demonstrated a compulsion to commit very serious crimes and have been civilly determined to have a more likely than not chance of reoffending must expect to have a diminished right of privacy as a result of the risk of their recidivating[.]"). In holding that "Wisconsin's ankle monitoring of Belleau is reasonable[,]" *id.* at 937, the Court considered a plethora of record evidence regarding the plaintiff's long history of molesting prepubescent children, *id.* at 931; his medical diagnosis as a pedophile and documented inability to "reduce[] his sexual deviance . . . [and] suppress or manage his deviant arousal," *id.* at 934; the plaintiff's statistical likelihood of reoffending, as determined by his evaluating psychologist, *id.*; and studies regarding the general recidivism rates of sex offenders and serious underreporting of sex crimes against children, *id.* at 933-34.[7]

By contrast, here, the State failed to present any evidence concerning its specific interest in monitoring defendant, or of the general

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6. The trial court also relied on *People v. Hallak*, 873 N.W.2d 811 (Mich. Ct. App. 2015), *rev'd on other grounds*, 876 N.W.2d 523 (Mich. 2016) (mem.). However, that case is readily distinguishable. The *Hallak* defendant, a medical doctor, was sentenced to lifetime electronic monitoring due to his conviction for second-degree criminal sexual conduct for improperly touching a 12-year-old patient. *See* 873 N.W.2d at 826 ("[A]lthough this monitoring lasts a lifetime, the Legislature presumably provided shorter prison sentences for these . . . convictions because of the availability of lifetime monitoring."). Unlike Michigan's electronic monitoring program, North Carolina's SBM program is civil and nonpunitive in nature. *Compare id.* at 825 ("[I]t is evident that in enacting this monitoring provision, the Legislature was seeking to provide a way in which to both punish and deter convicted child sex offenders and to protect society from a group known well for a high recidivism rate."), *with Bowditch*, 364 N.C. at 342, 700 S.E.2d at 6 ("[T]he legislative objective in enacting SBM was to establish a nonpunitive, regulatory program.").

7. The concurring judge would have upheld Wisconsin's monitoring program as a reasonable special needs search. *See Belleau*, 811 F.3d at 940 (Flaum, J., concurring) ("[T]he GPS monitoring provided under the Wisconsin law occurs constantly, lasts indefinitely, and is the subject of periodic government scrutiny. Accordingly, this monitoring program is uniquely intrusive, likely more intrusive than any special needs program upheld to date by the Supreme Court." (citations omitted)).

procedures used to monitor unsupervised offenders. Instead, the State submitted copies of the two sex offense judgments and defendant's criminal record, arguing that defendant himself was "Exhibit Number 1" of SBM's success in deterring recidivists, because "[s]ince he's been monitored, guess what: He hasn't recommitted, he hasn't been charged with another sex offense." However, Officer Pace, the State's sole witness, testified that the ET-1 cannot actually prevent an offense from occurring. And although knowledgeable about the ET-1 and monitoring supervised offenders, Officer Pace was unaware of the procedures used to monitor unsupervised offenders such as defendant, "because [he] do[es]n't deal with those" cases. "[P]eople out of Raleigh" monitor unsupervised offenders, and Officer Pace did not know "their requirements [for] checking their system."

We acknowledge the State's compelling interest in protecting the public, particularly minors, from dangerous sex offenders. Of course, it is axiomatic that "the sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. And it is clear that a legislature may pass valid laws to protect children and other victims of sexual assault from abuse." *Packingham v. North Carolina*, 582 U.S. __, __, 198 L. Ed. 2d 273, 281 (2017) (citations and quotation marks omitted). "The government, of course, need not simply stand by and allow these evils to occur. But the assertion of a valid governmental interest cannot, in every context, be insulated from all constitutional protections." *Id.* (citations and quotation marks omitted); *see also id.* at __, 198 L. Ed. 2d at 283 (holding that N.C. Gen. Stat. § 14-202.5—banning registered sex offenders from accessing "a commercial social networking Web site" known to permit minors "to become members or to create or maintain personal Web pages"—violates the First Amendment).

At the time of defendant's remand hearing, the SBM program had been in effect for approximately ten years. However, the State failed to present any evidence of its efficacy in furtherance of the State's undeniably legitimate interests. The State conceded this point on 8 August 2017 during oral arguments before this Court. Defendant, however, presented multiple reports authored by the State and federal governments rebutting the widely held assumption that sex offenders recidivate at higher rates than other groups. Although the State faulted defendant for presenting statistics about supervised offenders, the State bears the burden of proving reasonableness at *Grady* hearings. *Blue*, __ N.C. App. at __, 783 S.E.2d at 527. Here, we are compelled to conclude that the State failed to carry its burden.

We emphasize, however, that our holding is limited to the facts of this case. We reiterate the continued need for individualized determinations of reasonableness at *Grady* hearings. As we held in *Greene*, the State will have only one opportunity to prove that SBM is a reasonable search of the defendant. __ N.C. App. at __, 806 S.E.2d at 344-45 (reversing without remanding the lifetime SBM order where "[t]he State offered no further evidence beyond defendant's criminal record"). And the defendant will have one opportunity to assert a Fourth Amendment challenge or risk appellate waiver of the issue. *See Bishop*, __ N.C. App. at __, 805 S.E.2d at 370 ("Bishop is no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step.").

IV. Conclusion

As a recidivist sex offender, defendant's expectation of privacy is appreciably diminished as compared to law-abiding citizens. However, the State failed to present any evidence of its need to monitor defendant, or the procedures actually used to conduct such monitoring in unsupervised cases. Therefore, the State failed to prove, by a preponderance of the evidence, that lifetime SBM of defendant is a reasonable search under the Fourth Amendment. Because we have determined that the trial court erred by concluding that SBM is a reasonable search of defendant, we need not address the parties' remaining arguments. We reverse the trial court's order.

REVERSED.

Judge STROUD concurs.

Judge BRYANT dissents in a separate opinion.

BRYANT, Judge, dissenting.

I firmly believe that unless the statutes enacting North Carolina's satellite-based monitoring (SBM) program are deemed to be unconstitutional on their face, the State's burden of proof to show that SBM is a reasonable search in accordance with the Fourth Amendment is not so high as the majority has set forth. By requiring the State to establish an interest in monitoring defendant and the efficacy of the

SBM program beyond that which has been defined and codified by our General Assembly, the majority asks the State to meet a burden of proof greater than our General Assembly envisioned as necessary and greater than Fourth Amendment jurisprudence requires. For these reasons, I respectfully dissent.

The Fourth Amendment sets forth "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462 (2015) (citing *Samson v. California*, 547 U.S. 843, 165 L. Ed. 2d 250 (2006); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995)). "Whether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' " *Samson*, 547 U.S. at 848, 165 L. Ed. 2d at ___ (citing *United States v. Knights*, 534 U.S. 112, 118–19, 151 L. Ed. 2d 497 (2001)).

Defendant's Privacy

"The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.' " *Vernonia Sch. Dist. 47J*, 515 U.S. at 654, 132 L. Ed. 2d at 575; *see*, *e.g.*, *Samson*, 547 U.S. 843, 165 L. Ed. 2d 250 (upholding warrantless search of parolee); *Knights*, 534 U.S. 112, 151 L.Ed.2d 497 (upholding warrantless search of probationer's home based on reasonable suspicion and condition of probation); *Griffin v. Wisconsin*, 483 U.S. 868, 875–80, 97 L.Ed.2d 709, 718–22 (1987) (upholding warrantless search of probationer's home based on special needs).

The physical limitations imposed by the SBM system's ET-1 monitoring device are minimal: it weighs 8.7 oz., can be worn under socks, can be worn in the water, does not prohibit physical activity or travel, but must be charged daily. The majority deems these limitations "more inconvenient than intrusive," and I agree. The issue is to what degree continuous monitoring—which generates a history of the wearer's movements—intrudes upon a legitimate expectation of privacy.

As to this defendant, the majority concludes that his expectation of privacy is diminished as compared to that of a law-abiding citizen. I agree. Due to defendant's enrollment in North Carolina's sex offender

registry,[1] defendant's name, sex, address, physical description, picture, conviction date, offense for which registration was required, sentence imposed as a result of conviction, and registration status are made available to the public. N.C. Gen. Stat. § 14-208.10(a).

Next, I consider the State's interests.

Legitimate Governmental Interest

> "Sex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32, 153 L.Ed.2d 47 (2002) (plurality opinion). "[T]he victims of sex assault are most often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault." *Id.*, at 32–33 . . . . **[E]very . . . State, has responded to these facts by enacting a statute designed to protect its communities from sex offenders and to help apprehend repeat sex offenders**.

Connecticut Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4, 155 L. Ed. 2d 98, 103 (2003).

The U.S. Supreme Court has noted "[t]here is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals" and that "[t]here is also conflicting evidence on the point." *United States v. Kebodeaux*, 570 U.S. ___, ___, 186 L. Ed. 2d 540, 549 (2013) (citations omitted). Our General Assembly has determined that those convicted of specific sex offenses or those who have multiple convictions for specific sex offenses pose a danger to the public safety and welfare that is to be guarded against in the form of public registries for sex offenders and in some categorical cases, SBM programs available to law enforcement agencies.

In the enabling language of our Sex Offender and Public Protection Registration Programs, our General Assembly stated the purpose of these programs.

> The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and

1. Defendant's prior record reflects a 2004 conviction for failure to register as a sex offender. Also, defendant's 1996 and 2006 convictions, both determined to be sexually violent offenses qualify him for enrollment in the Sex Offender and Public Protection Registration Program. *See* N.C. Gen. Stat. § 14-208.6A.

> that protection of the public from sex offenders is of paramount governmental interest.
>
> The General Assembly also recognizes that persons who commit certain other types of offenses against minors . . . pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. Release of information about these offenders will further the governmental interests of public safety so long as the information released is rationally related to the furtherance of those goals.
>
> Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5 (2017).

In this effort, the General Assembly directed the Division of Adult Correction and Juvenile Justice of the Department of Public Safety to establish a SBM program to monitor *three categories of sex offenders*.

> Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) [(an offense against a minor or a sexually violent offense)] and who is required to register under Part 3 [("Sexually Violent Predator Registration Program")] of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a *recidivist*, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6.

Id. § 14-208.40(a)(1) (emphasis added). Additionally, "[i]f the court finds that the offender . . . is a *recidivist* . . . , the court *shall* order the offender to enroll in a satellite-based monitoring program for life." *Id.* § 14-208.40A(c) (emphasis added).[2] Defendant does not challenge on appeal the legitimacy of these governmental interests.

The majority concludes that the State failed to put forth any evidence establishing a specific interest in monitoring defendant and the efficacy of the SBM program. I submit that our General Assembly has categorically determined and described those with a threat of reoffending significant enough to warrant SBM. The SBM statutes specifically describe three categories of sex offenders the program is designed to monitor. *See id.* § 14-208.40(a). So long as the State presents sufficient evidence to establish that a defendant meets the requisite statutory definitions and criteria for a court to order the defendant be enrolled in our SBM program, the State has presented sufficient evidence to establish a specific interest in monitoring the defendant.

During the bring-back hearing, the State presented evidence that defendant's convictions were reportable, sexually violent convictions, and that defendant met the statutory definition of a recidivist. And it should be noted that upon making these findings, the trial court was bound by statute to order defendant to enroll in SBM for life. *See id.* § 14-208.40A(c) ("If the court finds that the offender . . . is a recidivist, . . . the court shall order the offender to enroll in a satellite-based monitoring program for life.").

Defendant's prior record of reportable, sexually violent convictions, as well as his status as a recidivist in conjunction with our General Assembly's codified categorical assessment that offenders who meet those criteria are to be enrolled in our SBM program to better assist law enforcement agencies' efforts to protect communities, *see id.* § 14-208.40(a)(1), establishes the State's interest in monitoring this particular defendant.

Weighing Expectation Against Interest

The question is whether the State's interest in protecting the public from defendant, a recidivist sex offender who qualifies for participation in our State's SBM program, outweighs defendant's diminished expectation of privacy. I believe that it does.

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2. "An offender . . . who is required to submit to satellite-based monitoring for the offender's life may file a request for termination of monitoring requirement with the Post-Release Supervision and Parole Commission." N.C. Gen. Stat. § 14-208.43(a) (2017). Thereafter, while required initially, SBM for life does not necessarily mean one is monitored for life.

The evidence before the trial court as to defendant was as follows: In 1996, defendant pled no contest to second-degree sex offense (a Class C felony); and in 2006, defendant was indicted on charges of statutory rape and indecent liberties with a child before he pled guilty to taking indecent liberties with a child (a Class F felony) and admitted that the victim was impregnated as a result of his actions.[3] The trial court found both offenses to be "sexually violent offenses," as defined by N.C. Gen. Stat. § 14-208.6, and further found defendant met the definition of a "recidivist" under the same statute. *See id.* § 14-208.6(2b), (5). By statute, the trial court was compelled to order defendant's enrollment in our SBM program. *See id.* § 14-208.40A(c) ("If the court finds that the offender . . . is a recidivist, . . . the court shall order the offender to enroll in a satellite-based monitoring program for life."). Therefore, our General Assembly had determined that the State's burden of proof is not so high as the majority would require.[4]

Weighing the degree to which participation in the SBM program intrudes upon defendant's privacy and, on the other hand, the degree to which SBM participation promotes legitimate governmental interests—the prevention of criminal conduct or the apprehension of defendant should he reoffend—the trial court's determination that the intrusion upon defendant's privacy was outweighed by the legitimate governmental interest was supported by the evidence in this case. Given the totality of the circumstances—including the nature of the search (the collection of location data for a recidivist sex offender), the purpose of the search (to protect the public against sex offenses), and the extent to which the search intrudes upon defendant's diminished expectations of privacy (an accumulated history of defendant's movements[5])—I believe defendant's participation in the SBM program is reasonable and in accordance with our statutory scheme. Accordingly, I would affirm the trial court's order.

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3. Though not germane to the statutory scheme for SBM enrollment, it should be noted that in 2004, defendant was convicted of failing to register as a sex offender.

4. The majority notes that the State "failed to present any evidence of [the] efficacy [of the SBM program which had been in effect for approximately ten years] in furtherance of its undeniably legitimate interest," and that defendant presented evidence rebutting the assumption of the high rate of recidivism by sex offenders. While this may be a valid legislative argument, I do not believe it to be a persuasive argument that defendant's participation in the SBM program, when viewed as a search, was unreasonable.

5. While there may be an argument that over a long course of time accumulated location data of an individual revealing no criminal conduct will become more burdensome than the Fourth Amendment can tolerate, I do not believe we need to address this argument at this point. Presently, defendant has been convicted of two sexually violent offenses and designated a recidivist and does not have a lengthy history devoid of assaults on minors.

STATE OF NORTH CAROLINA
v.
MOLLIE ELIZABETH B. McDANIEL

No. COA17-856

Filed 15 May 2018

Larceny—doctrine of recent possession—sufficiency of evidence—possession of stolen property

Defendant's mere possession of stolen property by briefly transporting it in her truck approximately two weeks after it was alleged to have been stolen was not sufficient evidence to support her convictions for breaking and entering and larceny after breaking and entering under the doctrine of recent possession, where the State failed to demonstrate defendant's possession was to the exclusion of all persons not party to the crime.

Judge TYSON dissenting.

Appeal by Defendant from judgments entered 24 January 2017 by Judge J. Thomas Davis in Superior Court, McDowell County. Heard in the Court of Appeals 22 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Deborah M. Greene, for the State.

Gilda C. Rodriguez for Defendant.

McGEE, Chief Judge.

Mollie Elizabeth B. McDaniel ("Defendant") appeals her convictions for felonious breaking and entering and larceny after breaking and entering. For the reasons discussed below, we vacate Defendant's convictions.

I. Factual and Procedural Background

Daniel Sheline ("Mr. Sheline") inherited five acres of real property and a three-bedroom house located at 30 Woody Street in Marion, North Carolina, in February 2014. Mr. Sheline visited the house at 30 Woody Street on 20 March 2014 to "check on it, [and] make sure nothing had been bothered." Mr. Sheline observed a number of items of personal property in the house during the 20 March 2014 visit, including an aluminum ladder and push lawnmower, both in the basement; an

unrestored cuckoo clock; miscellaneous furniture; aluminum pots and pans; heirloom china; an Atari electronic gaming system; and a monitor heater, located behind the front door of the house, which was wired and plumbed through copper tubing to a kerosene oil tank outside the house. The monitor heater was in working order, the copper tubing was intact, and there was kerosene in the outside oil tank.

When Mr. Sheline left the house on 20 March 2014, he locked the front door's knob lock. Mr. Sheline did not have a key to the deadbolt lock, which could only be locked from the inside, so he left the deadbolt unlocked. The door to the basement of the house was pulled shut and secured from the inside with a padlock that "had a screwdriver through it [so that] nobody could open it from the outside." Mr. Sheline testified "[t]he only way . . . [to] open [the basement door] would be to crawl through a window or have a key and go down the [interior] steps and open it [from inside the house]." The house also had a side door that was nailed shut. Mr. Sheline posted a "no trespassing" sign on the front door of the house, and stated that, as of 20 March 2014, "[n]o one [else] had permission to go into the house at all."

When Mr. Sheline returned to the house at 30 Woody Street on 1 April 2014, the deadbolt to the front door was locked and the doorknob lock was unlocked. The basement door and a window next to the basement door were both open, and the padlock to the basement door was missing. As Mr. Sheline walked up the stairs from the basement into the house, he smelled a strong odor of kerosene. He "found the whole living room floor was full of [leaked] kerosene and the monitor heater was missing." The piping from the heater to the outside oil tank had been cut and the copper tubing was missing. Mr. Sheline noticed that other items were missing from the house, including the aluminum ladder, lawnmower, and cuckoo clock. The house's electrical wiring had been ripped from the electric box and removed, and various plumbing fixtures were also missing. Mr. Sheline's wife called the police to report the stolen property.

Lieutenant Detective Andy Manis ("Lt. Det. Manis") of the McDowell County Sherriff's Office ("MCSO") received information on 2 April 2014 that the property missing from the house at 30 Woody Street was located at a house at 24 Ridge Street. Lt. Det. Manis went to investigate and found a monitor heater, lawnmower, aluminum ladder, pipes, and wiring outside the residence at 24 Ridge Street. Lt. Det. Manis knocked on the door. Stephanie Rice ("Ms. Rice") answered the door and provided information to Lt. Det. Manis indicating a person driving a white pickup truck had unloaded the property at 24 Ridge Street earlier that day.

Mr. Sheline later identified the items found at 24 Ridge Street as the property missing from 30 Woody Street.

Detective Jason Grindstaff ("Det. Grindstaff") of the MCSO received a report on 4 April 2014 that someone had again entered the house at 30 Woody Street, left in a white pickup truck, and turned down Ridge Street. Det. Grindstaff went to Ridge Street and found a white Chevrolet pickup truck parked directly across the street from the house at 24 Ridge Street. Defendant was sitting in the driver's side of the truck. Det. Grindstaff asked Defendant for identification and permission to search the vehicle. With Defendant's permission, Det. Grindstaff searched the truck's interior cabin and outer truck bed. He found an Atari gaming system, glassware, china, and an antique clock in the bed of the truck. Det. Grindstaff arrested Defendant. Mr. Sheline later confirmed the items found in the truck were property from 30 Woody Street. Mr. Sheline testified the property found in the white pickup truck on 4 April 2014 "might have been" in the house at 30 Woody Street when he was there on 1 April 2014.

According to Det. Grindstaff, Defendant said she "got [the property in the pickup truck] from a residence on Woody Street[,]" but indicated "[s]omeone gave her . . . permission to go inside the residence and get the property." Defendant stated that a friend of hers, Michael Nichols ("Nichols") "told her a neighbor [of] Mr. Sheline [] gave them permission to enter the residence." Defendant also told Det. Grindstaff that Nichols had been at 24 Ridge Street shortly before Det. Grindstaff arrived, but "had just left the residence . . . [and] she did not know where [Nichols] was going."

Defendant testified she met Nichols in 2012 and worked with him "doing some salvage work at [an] old abandoned place at 50 Woody Street[,] . . . going through and taking some old metal and stuff, working together on that." Defendant stated she and Nichols went to the residence at 30 Woody Street in October 2013 and spoke to an elderly man who answered the door. According to Defendant, the elderly man gave Nichols and Defendant permission to remove a plow and some scrap metal from the basement at 30 Woody Street. Nichols and Defendant took the items to the building at 50 Woody Street, where they were collecting scrap metal to sell. Defendant stopped working with Nichols in late 2013. She collected unemployment benefits for several months and, when those benefits ended, she began working with Nichols again.

Defendant testified that on 2 April 2014, at Nichols's request, she drove a white pickup truck to the building at 50 Woody Street and

"loaded some stuff on the truck" from a crawl space underneath the building, including a ladder, monitor heater, "and various other things that were all under there in that spot." Defendant testified she believed the items belonged to a friend of Nichols who was storing them at 50 Woody Street. Nichols asked Defendant "to bring the truck up and carry [the property] down [the hill] for him." Defendant testified she drove the items to 24 Ridge Street and deposited them outside the residence, "up against the side of the building."

Defendant testified Nichols called her on 4 April 2014 and

> asked me to give him a ride to the scrap yard. He said he had a load of aluminum or something. I got to his house and he said he wasn't ready to go yet, but that I could go up the hill [to the building at 50 Woody Street]. There was still a bunch of stuff over there in the house he thought I might be interested in. . . . In the meantime, [Nichols said] if I wanted to go up there and look around and see if there [was] anything that I might be interested in, there was still a lot of stuff up there at the house at 50 [Woody Street]. . . . So I went up there and got the items that [Det. Grindstaff found] on my truck out of the attic of [the] house at [50 Woody Street] at that time.

Defendant stated she drove the truck to 24 Ridge Street, where she saw Nichols and another man loading bags of aluminum cans into the trunk of a car. According to Defendant, Nichols and the man drove away hurriedly and, as Nichols was driving away, Defendant saw Det. Grindstaff approaching. Defendant admitted she told Det. Grindstaff that she had recently removed the property in her truck from a house "on Woody Street," but testified she was referring to the building at 50 Woody Street. Defendant testified she had not been to the house at 30 Woody Street since going there with Nichols in October 2013.

Defendant was charged by separate indictments on 21 July 2014 with (1) one count of felony breaking and entering and one count of larceny after breaking and entering, on or about 20 March 2014, in connection with the lawnmower, aluminum ladder, monitor heater, kerosene, electrical wiring, flooring, and cuckoo clock found at 24 Ridge Street on 2 April 2014; and (2) one count of felony breaking and entering and one count of larceny after breaking and entering, on 4 April 2014, in connection with the Atari game system, heirloom china, and antique radio found in Defendant's truck on that date. The charges were joined for trial.

At the close of the State's evidence, Defendant moved to dismiss the charges related to the alleged 20 March 2014 breaking and entering and larceny based on insufficiency of the evidence. The State conceded it was

> a circumstantial case, obviously, that [Defendant was] the one that broke into the house [at 30 Woody Street] the first time and brought the items and deposited them at [24] Ridge Street, and then two days later [] broke[] in [to the house at 30 Woody Street] again and [came] back to Ridge Street with another load.

Nevertheless, the State contended the evidence that, on 4 April 2014, Defendant was found in possession of certain stolen property from a purported second break-in was sufficient to show Defendant was "also responsible for the larceny [of the other property] and the break-in for the first time because it[] [was] Ridge Street [again]." Defense counsel noted Defendant was not present when the stolen property was discovered at 24 Ridge Street on 2 April 2014, and further observed "it wasn't [Defendant's] residence[.]"

The trial court initially indicated it would allow Defendant's motion to dismiss with respect to the 20 March 2014 charges only. Before the presentation of Defendant's evidence, however, the court revisited the matter, stating it "may have dismissed the wrong one[.]" The court expressed some confusion over the dates of the alleged offenses:

> TRIAL COURT: I did dismiss the [20 March 2014 breaking and entering charge], but what I am telling you is I may have gotten them backwards. I should have dismissed the April 4 [2014] [breaking and entering charge] and left the March 20 [2014] [charge] in place based on this evidence. I want to make sure I have time to correct that since nothing has happened at this point in time. . . . The way I see it is the only testimony as to opening the window, the door [at 30 Woody Street], all the situations are from one incidence. We don't have any testimony there was any sort of entry that second time, and that admission that [Defendant] makes was not peculiar to win. The evidence that [the State] brought out [that] somebody reported seeing the [white pickup truck], I think all that does is goes to the state of mind of this officer. I think it's only offered for that purpose. . . . [T]herefore, it cannot be used as substantive evidence of any particular crime. As a result

> [], I may have dismissed – by dismissing the April 4 [2014] allegation, I am basically – I may have committed error to the State because that's the later one, and it would be hard for you to relate the original breaking and entering that was testified to today to that indictment because it was the wrong date. I may have missed [sic] the wrong one. . . . I can correct it right now without any prejudice to [] [D]efendant. I was thinking it over through lunch and I may have dismissed the wrong one.

After further discussion, the trial court concluded the State had presented insufficient evidence to support two separate charges of breaking and entering. The court reinstated both charges in the indictment dated 20 March 2014, *i.e.*, one count of felonious breaking and entering and one count of larceny after breaking and entering. It dismissed the 4 April 2014 charge of breaking and entering, but left in place the 4 April 2014 charge of larceny after breaking and entering, finding there was "evidence to show that the [property found in Defendant's possession on 4 April 2014] was acquired as a result of the original breaking and entering [that allegedly occurred on 20 March 2014]." However, the court indicated that, if the jury ultimately convicted Defendant of both larcenies, it "would have to entertain whether or not arrested judgment would be appropriate to combine those larcenies into [a] single larceny[.]"

Defendant was found guilty of one count of felony breaking and entering and two counts of larceny after breaking and entering on 24 January 2017. The trial court arrested judgment on the 4 April 2014 larceny conviction. Defendant was sentenced to an active sentence of four months' imprisonment, to be followed by sixty months of supervised probation. Defendant appeals.[1]

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1. Defendant filed a petition for writ of *certiorari* with this Court on 11 September 2017 in light of procedural defects in her notice of appeal. Defendant failed to comply with N.C.R. App. P. Rule 4, which provides that a party entitled to appeal in a criminal case may do so by (1) giving oral notice of appeal at trial, or (2) filing a written notice of appeal with the clerk of superior court within fourteen days of entry of judgment. *See* N.C.R. App. P. 4(a). In the present case, Defendant failed to comply with either provision. Defendant contends she gave oral notice of appeal after the trial concluded and after defense counsel had left the courtroom. Thus, although the trial court entered appellate entries dated 24 January 2017, Defendant's notice of appeal was not recorded and does not appear in the trial transcript. *See, e.g.*, *State v. Hughes*, 210 N.C. App. 482, 485, 707 S.E.2d 777, 778 (2011) ("Although the record includes appellate entries . . . which indicate through boilerplate that defendant gave notice of appeal, mere appellate entries are insufficient to preserve the right to appeal." (citation and quotation marks omitted)). Defendant also did not file a written notice of appeal with the clerk of court. *See, e.g.*, *State v. Blue*, 115 N.C. App. 108, 113, 443 S.E.2d 748, 751 (1994) (concluding defendant did not preserve right to appeal

II. Defendant's Appeal

Defendant argues the trial court erred by denying her motion to dismiss because the State presented insufficient evidence Defendant was the perpetrator of a breaking and entering or a larceny that allegedly occurred on or about 20 March 2014. We agree.

A. *Standard of Review*

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "The standard of review for a motion to dismiss in a criminal case is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Irons*, 189 N.C. App. 201, 204, 657 S.E.2d 733, 735 (2008) (citation and internal quotation marks omitted). The trial court should consider the evidence in the light most favorable to the State, and "the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. Burke*, 185 N.C. App. 115, 118, 648 S.E.2d 256, 258-59 (2007) (citation and internal quotation marks omitted). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations and quotation marks omitted).

B. *Analysis*

Defendant was convicted for felonious breaking and entering and larceny after breaking and entering that allegedly occurred on or about 20 March 2014. "The elements of felonious breaking and entering under [N.C. Gen. Stat.] § 14-54(a) are (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *State v. Poore*, 172 N.C. App. 839, 841, 616 S.E.2d 639, 640 (citation and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 14-54(a)

convictions where record "contained no written notices of appeal as required by Rule 4 of the Rules of Appellate Procedure."). Defendant failed to preserve her right to appeal, subjecting the appeal to dismissal. *See State v. Briley*, 59 N.C. App. 335, 337, 296 S.E.2d 501, 503 (1982) ("Rules of Appellate Procedure are mandatory and failure to observe them is grounds for dismissal of an appeal." (citations omitted)). The State did not raise the issue of defective notice. We exercise our discretion to issue the writ of *certiorari* and reach the merits of Defendant's appeal. *See State v. Hammonds*, 218 N.C. App. 158, 162-63, 720 S.E.2d 820, 823 (2012).

(2017). "The essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002) (citations omitted). "[W]here larceny is committed pursuant to breaking and entering, it constitutes a felony without regard to the value of the property in question." *State v. Richardson*, 8 N.C. App. 298, 301, 174 S.E.2d 77, 79 (1970) (citation omitted); *see also* N.C. Gen. Stat. § 14-72(b)(2) (2017).

In the present case, the State conceded at trial its evidence against Defendant was entirely circumstantial. The State advanced the doctrine of recent possession, which our Supreme Court has described as

> a rule of law that, upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property. The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and the discovery of them in [a] defendant's possession. Furthermore, when there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering.

State v. Maines, 301 N.C. 669, 673-74, 273 S.E.2d 289, 293 (1981) (citations omitted). "For the doctrine of recent possession to apply, the State must show: (1) the property was stolen, (2) [the] defendant had possession of the property, subject to his control and disposition to the exclusion of others, and (3) the possession was sufficiently recent after the property was stolen[.]" *State v. McQueen*, 165 N.C. App. 454, 460, 598 S.E.2d 672, 676-77 (2004) (citations omitted); *see also State v. Pickard*, 143 N.C. App. 485, 487, 547 S.E.2d 102, 104 (2001) (noting State must prove each element of recent possession "beyond a reasonable doubt." (citation omitted)).

The "mere possession of stolen property is insufficient to raise a presumption of guilt." *McQueen*, 165 N.C. App. at 460, 598 S.E.2d at 677 (citations omitted). This Court has held that "[e]xclusive possession does not necessarily mean sole possession. Exclusive possession means possession *to the exclusion of all persons not party to the crime*." *State v. Foster*, 149 N.C. App. 206, 209, 560 S.E.2d 848, 851 (2002) (citation and

internal quotation marks omitted) (emphasis added). "The possession must be so recent after the breaking or entering and larceny as to show that the possessor could not have reasonably come by it, except by stealing it himself or by his concurrence." *State v. Hamlet*, 316 N.C. 41, 43, 340 S.E.2d 418, 420 (1986) (citations omitted).

As an initial matter, we observe that Defendant was not convicted of breaking and entering, or sentenced for larceny, in connection with the stolen property *actually found in her possession* on 4 April 2014. Defendant was convicted on charges stemming from a breaking and entering and larceny that, according to the relevant indictment, occurred "on or about" 20 March 2014. That indictment specifically described the property stolen on that date as "a Sears pushmower, aluminum ladder, monitor heater, 100 gallons of kerosene, electrical wiring, flooring[,] and a German [cuckoo] clock." These items were discovered by Lt. Det. Manis at 24 Ridge Street on 2 April 2014, outside Defendant's presence, although Defendant admitted she drove a short distance with the property in her truck earlier that day. Thus, the State's own evidence suggested that up to two weeks may have passed between the alleged breaking and entering and larceny, on or around 20 March 2014, and the discovery of the stolen property, on 2 April 2014, and the property was not actually found in Defendant's possession.

In *Maines*, which the dissent cites for its statement of the elements of recent possession, our Supreme Court explicitly defined the second element of the doctrine as follows: "[T]he stolen goods were found in [the] defendant's custody and subject to his control and disposition *to the exclusion of others* though not necessarily found in [the] defendant's hands or on his person so long as he had *the power and intent to control* the goods[.]" 301 N.C. at 674, 273 S.E.2d at 293 (emphases added). "Exclusive" possession may include joint possession by "co-conspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all." *Id.* at 675, 273 S.E.2d at 294. Regardless, under *Maines*, "the evidence must show the person accused of the theft had *complete dominion*, *which might be shared with others*, *over the property* . . . which sufficiently connects the accused person to the crime[.]" *Id.* (emphasis added).

Defendant acknowledged she was briefly in possession of the stolen property on 2 April 2014, when she transported it a few blocks from a building at 50 Woody Street, where the property was being stored, to the residence at 24 Ridge Street. The dissent appears to conclude this constituted "requisite actual possession and control over the recently stolen property" sufficient to connect Defendant with the theft that

occurred two weeks prior. As noted above, however, "mere possession of stolen property is insufficient to raise a presumption of guilt." *McQueen*, 165 N.C. App. at 460, 598 S.E.2d at 677 (citations omitted). In *Maines*, the mere fact that the defendant "was driving the car [containing the stolen property] and presumably in control of it and its contents" was insufficient to support an inference that he was the thief based on the doctrine of recent possession. *Maines*, 301 N.C. at 676, 273 S.E.2d at 294. In this case, like the *Maines* defendant, Defendant testified she did not know the property was stolen, and believed it belonged to a friend of Nichols, when she put it in her truck on 2 April 2014. She also testified that, as of 2 April 2014, her last contact with Nichols was in "November or early December of 2013." There was no evidence tending to show Defendant possessed, controlled, or exercised dominion over the stolen property during the two weeks between the date of the alleged theft and her admitted transport of that property. *Compare with State v. Lytton*, 88 N.C. App. 758, 759, 365 S.E.2d 6, 7 (1988) (holding evidence was sufficient to raise recent possession doctrine where "evidence [did] not suggest that anyone other than [the] defendant and [another individual who was party to the crime] possessed, controlled, or had anything to do with the [stolen property]; instead . . . only they had and controlled the [stolen property] by showing [it] to [a third party], offering to sell [it], setting their price, and receiving the purchase money.").

Moreover, the State was required to demonstrate Defendant possessed the stolen property "to the exclusion of all persons *not party to the crime*." *Maines*, 301 N.C. at 675, 273 S.E.2d at 294 (emphasis added). The dissent asserts that, in this case, "[n]o one disputes Nichols was a party to taking the [stolen] items hidden underneath 50 Woody Street[.]" We note the record does not indicate whether Nichols was charged in connection with the stolen property identified in either indictment, and the State did not assert a criminal conspiracy between Defendant and Nichols. However, even assuming *arguendo* that Nichols *was* a party to the crime, the State failed to show that, between 20 March 2014 and 2 April 2014, the possession of the stolen property by Defendant and/or Nichols was "to the exclusion of all persons *not party to the crime*." *Id.* The evidence suggests the stolen property was stored at an abandoned building at 50 Woody Street after its theft and before Defendant took it to 24 Ridge Street two weeks later. There was no evidence tending to show that, between 20 March 2014 and 2 April 2014, Defendant possessed, controlled, or even knew of the stolen property located at 50 Woody Street. The evidence also did not show the stolen property was not possessed or controlled by any third parties unconnected to the crime during those two weeks. In the absence of such showing, the

State's evidence was insufficient to support an inference that Defendant broke into Mr. Sheline's residence on 20 March 2014 and stole the property she transported to 24 Ridge Street two weeks later.

This case is factually distinguishable from *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985), and *State v. Foster*, 149 N.C. App. 206, 560 S.E.2d 848 (2002), cases cited by the dissent. In *Wilson*, our Supreme Court held "[i]t is not always necessary that the stolen property be actually in the hands of the defendant in order to trigger the inference that [the defendant was] the thief. The doctrine [of recent possession] is equally applicable where the stolen property is *under the defendant's personal control*." *Id.* at 536, 330 S.E.2d at 464 (citations omitted) (emphasis added). In *Wilson*, the Court held the jury was properly instructed on the doctrine of recent possession where a stolen watch "was seen [after the theft] *only* in the hands of the [defendant's girlfriend] or the defendant until it was sold by the defendant." *Id.* (emphasis in original). The defendant's girlfriend was seen wearing the watch "two or three weeks after the crime[] [was] committed[,] [and a] week later the watch was seen in the hands of the defendant." *Id.* at 535, 330 S.E.2d at 463-64. Under these circumstances, a jury instruction on recent possession was appropriate, notwithstanding "the intervening possession of the watch by [the defendant's girlfriend][.]" *Id.* at 535, 330 S.E.2d at 464.

In *Foster*, the defendant was seen driving a truck containing stolen property mere hours after the property was stolen. There were two passengers in the truck. On appeal, the defendant did not argue the jury was improperly instructed on the doctrine of recent possession; he contended the trial court erroneously refused to include the instruction that "the [stolen] goods must be found in [the] defendant's possession 'to the exclusion of others.' " 149 N.C. App. at 209, 560 S.E.2d at 850. This Court held the trial court properly denied the defendant's request for the additional instruction because "[t]he evidence [did] not suggest that anyone other than [the] defendant or the other passengers possessed or controlled the [stolen property] seen in the back of the truck [the] defendant was driving." *Id.* at 209, 560 S.E.2d at 851.

Unlike in *Wilson*, there was no evidence in the present case connecting the property found at 24 Ridge Street on 2 April 2014 to Defendant during the two weeks between its theft and her admitted transport of the property from 50 Woody Street to 24 Ridge Street. There was no evidence Defendant went to 50 Woody Street during those two weeks, or that the stolen property was otherwise under Defendant's "personal control." Further, even assuming possession of the property by Nichols could be imputed to Defendant, the State did not establish that *only*

Nichols possessed or controlled the property after it was stolen, *i.e.*, to the exclusion of any third parties not connected to the crime.

The dissent also cites *State v. Johnson*, 60 N.C. 235 (1864), in which stolen property was found six weeks after its theft in a house occupied exclusively by the defendant and his wife. Our Supreme Court affirmed the trial court's jury instruction that

> owing to the length of time which had elapsed from the stealing of the goods until the discovery of them in the possession of the defendant, *no presumption could arise that [the defendant] had stolen them*; but the fact of his having them in possession was evidence which [the jury] would consider with the other evidence in the cause in determining [the defendant's] guilt or innocence.

60 N.C. at 236 (emphasis added). The Court explicitly held that, although the defendant's possession of stolen goods was "evidence to be considered[,]" the mere fact of possession *did not* "raise a legal presumption of the taking[.]" *Id.* at 237. *Johnson* thus offers little guidance in the present case, because the precise question before us is whether the State's evidence *did* "raise a legal presumption" of Defendant's guilt based on the theory of recent possession.

The State's argument that Defendant broke into Mr. Sheline's residence around 20 March 2014 and stole the items that were found at 24 Ridge Street on 2 April 2014 was based entirely on the evidence that Defendant admitted transporting the property on 2 April 2014, and, two days later, Det. Grindstaff found Defendant in a white pickup truck, parked across from the house at 24 Ridge Street, in possession of entirely different personal property that was also missing from the house at 30 Woody Street.[2] We find this evidence insufficient to support Defendant's convictions on the 20 March 2014 charges based on the doctrine of recent possession. Defendant admitted the stolen property found outside the house at 24 Ridge Street was briefly in her possession on 2 April 2014. However, the State presented no evidence that, other than that brief period of time on 2 April 2014, the property was in Defendant's possession or subject to Defendant's control, much less "to the exclusion of all persons not party to the crime." *See Foster*, 149 N.C. App. at 209, 560 S.E.2d at 851 (citation and quotation marks omitted). As discussed above, there was no evidence suggesting Defendant had exclusive possession or control of the stolen property during the two

2. We note Defendant was not charged with possession of stolen property in either indictment at issue in this case.

weeks that elapsed between the alleged crimes, on or about 20 March 2014, and Defendant's admitted transport of the property on 2 April 2014.

The State contends that, because Defendant "ha[d] the power and intent to control the access to and use of [her truck][,] [she] ha[d] possession of the [vehicle's] known contents[]" when, by her own admission, she transported the stolen property on 2 April 2014. According to the State, Defendant was "the driver and only authorized user of the truck[,]"[3] and "there [was] no evidence that [] Nichols was present in the truck at the time [Defendant] had possession of the stolen items."[4] Even taking these statements as true, they do not establish exclusive possession.

In *Maines*, our Supreme Court held that "the fact [that the defendant] was driving the car [containing stolen property] and presumably in control of its contents" was alone insufficient to support an inference that "he was the thief who stole [the property] based on the possession of stolen goods." *Maines*, 301 N.C. at 676, 273 S.E.2d at 294. In that case, the State failed to show the stolen goods found in the defendant's possession were "subject to his control and disposition to the exclusion of others." *Id.* at 675, 273 S.E.2d at 294. In this case, Defendant testified she did not know the property was stolen when Nichols told her it belonged to a friend and asked her to drive it to another residence. She also testified that, prior to 2 April 2014, she last spoke with Nichols in November or December 2013. Under *Maines*, the mere fact that Defendant transported stolen property did not demonstrate the property was "subject to [her] control and disposition to the exclusion of others." *Id.*

Because the State failed to prove beyond a reasonable doubt the second element[5] of the doctrine of recent possession, the evidence was

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3. The State did not present evidence Defendant was the "only authorized user of the truck[.]" Defendant testified the white pickup truck "belonged to [her] father[.]" When asked whether "[she was] the one driving [the truck] all the time," Defendant stated: "I [] borrowed it during that week [in April 2014]. I didn't drive it all the time, but [my father] let me borrow it occasionally."

4. The parties dispute whether Defendant ever represented that Nichols was a passenger in the truck when she transported the stolen property to 24 Ridge Street on 2 April 2014, but Defendant submits that she "was not charged with conspiracy, nor was the jury instructed on acting in concert, [so] [] Nichols was 'not a party to the crime' and his [hypothetical] possession of the alleged[ly] stolen items could not be attributed to [Defendant]."

5. The dissent contends that "[w]hether the two weeks, which may have passed between the breaking and entering and larceny and the discovery of the property being stolen, and Defendant's admitted possession, is too remote to apply the doctrine of recent possession was a proper question for the jury[.]" We note that whether a defendant's possession of stolen property was sufficiently "recent" after the larceny is the third element of the doctrine of recent possession, and our holding in this case "turns upon the second

insufficient to support Defendant's convictions for the breaking and entering and larceny that allegedly occurred on or about 20 March 2014. Accordingly, we vacate Defendant's convictions. As a result, we need not address Defendant's remaining argument regarding the length of her probation. *See, e.g.*, *State v. Martin*, 222 N.C. App. 213, 222, 729 S.E.2d 717, 724 (2012).

VACATED.

Judge DAVIS concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion correctly states the applicable standard of review of the trial court's ruling on Defendant's motion to dismiss, yet erroneously concludes the State failed to introduce any competent evidence tending to show, and as the jury found, an essential element of the doctrine of recent possession and reverses Defendant's convictions for breaking and entering and larceny. My review and vote concludes no error occurred in Defendant's conviction by the jury or in the judgment entered thereon. I respectfully dissent.

I. Possession of Recently Stolen Goods

Defendant's recent possession of stolen goods raises a presumption of guilt, where the State's evidence tends to show the stolen goods were in Defendant's custody or control recently after the larceny thereof. The elements of this crime are:

> (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and (3) the possession was recently

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element [of the doctrine]: whether the stolen goods were found in [D]efendant's custody and subject to [her] control and disposition to the exclusion of others." *See Maines*, 301 N.C. at 675, 273 S.E.2d at 294. Because we have concluded the State failed to prove exclusive possession, it is unnecessary to consider whether Defendant's possession of the stolen property was "too remote to apply the doctrine of recent possession[.]"

> after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

State v. Maines, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981) (citations omitted).

In *Maines*, our Supreme Court held the recent possession doctrine did not apply to that defendant. The stolen items were found inside a vehicle the defendant was driving. *Id.* at 670, 273 S.E.2d at 291. Three other individuals were also present inside the car, including the registered owner of the vehicle. *Id.* at 676, 273 S.E.2d at 294.

The Supreme Court noted the "[d]efendant did not have actual or personal possession of the stolen property. None of the goods were on his person[.]" *Id.* The Court found that the defendant's possession of the stolen goods was "at most constructive, based on the fact he was driving the car and presumably in control of it and its contents." *Id.* The Supreme Court reversed the defendant's conviction because this analysis was "based on stacked inferences." *Id.* The jury was required to infer that the defendant possessed the recently stolen goods from the lone fact that he was driving the car with the car's owner and others inside, and then the jury was required to further infer he was the perpetrator who had broken and entered and stolen the items. *Id.*

Here, and as acknowledged in the majority's opinion, it is both admitted and undisputed that Defendant traveled alone to 50 Woody Street, loaded the items onto her truck with Nichols' assistance, and while again alone, with actual and exclusive possession, drove the stolen items to 24 Ridge Street. It is also undisputed when she was approached by Detective Grindstaff, Defendant actually and exclusively possessed other items, which had also been recently stolen from exactly the same location.

The State's evidence was properly admitted and tends to show: "[D]efendant had possession of the [recently stolen] property, subject to [her] control and disposition to the exclusion of others." *State v. McQueen*, 165 N.C. App. 454, 460, 598 S.E.2d 672, 677 (2004).

The defendant's constructive possession in *State v. Maines* is factually distinguishable from Defendant's admitted and actual possession of recently stolen goods.

II. *State v. Foster*

The majority's opinion cites *State v. Foster*, 149 N.C. App. 206, 560 S.E.2d 848 (2002), and asserts Defendant's possession was not "to the exclusion of all persons not party to the crime," and the presumption

of guilt, spawned by her recent possession, would not apply. In *Foster*, the store owner locked his doors on 10 December. *Id.* at 207, 560 S.E.2d at 849. When he returned on 11 December, items including a Lawn Boy mower, trailer, tires, rims, and other items were missing. In the interim early morning hours, police had observed the defendant-Foster and two other individuals in the defendant's truck. The Lawn Boy and tires and rims were in the truck at the time. *Id.*

This Court recognized, "[e]xclusive possession does not necessarily mean sole possession. Exclusive possession means possession to the exclusion of all persons *not party to the crime*." *Id.* (citations omitted) (emphasis supplied). The evidence in *Foster* showed the defendant and the two other passengers in the truck were all parties to the crime. The evidence did "not suggest that anyone other than defendant or the other passengers possessed or controlled the tires, rims, and Lawn Boy seen in the back of the truck defendant was driving." *Id.*

Whether Defendant possessed the recently stolen items to the exclusion of anyone else, who was not a party to the crime is not the issue before us. No one disputes Nichols was a party to taking the items hidden underneath 50 Woody Street and loading them into Defendant's truck. Defendant admits Nichols was involved with the stolen items.

In *State v. Lytton*, 88 N.C. App. 758, 365 S.E.2d 6 (1988), the defendant was charged with and convicted by a jury of felony larceny. This Court held evidence was sufficient to raise the recent possession doctrine where another man, in addition to the charged defendant, was a party to the crime and the evidence did not suggest that anyone other than the defendant and this other man "possessed, controlled, or had anything to do with" the stolen guns; instead, it tended "to show that only they had and controlled the stolen guns." *Id.* at 759, 365 S.E.2d at 7. Defendant's argument, asserting she was not charged with conspiracy and the jury was not instructed on acting in concert, and "no other persons party to the crime[s]" were charged for the jury to consider, is irrelevant to the issue before us on her motion to dismiss.

Once the stolen items were loaded into her truck, Defendant had the requisite actual possession and control over the recently stolen property. Whether Nichols could have also controlled the stolen property is irrelevant to the sufficiency of the State's evidence to overcome and deny Defendant's motion to dismiss and to support the jury's verdict of Defendant's guilt under the doctrine of recent possession of stolen goods. *See id.*

Further, the majority's opinion acknowledges Defendant was briefly in possession of the stolen property. The length of time Defendant possessed the stolen property is not material to the State's evidence tending to show and raising the presumption that Defendant was the thief, who had stolen the goods under the doctrine of recent possession to sustain her motion to dismiss.

III. *State v. Wilson*

In *State v. Wilson*, the Supreme Court recognized no bright line test exists for the length of time to allow the inference of guilt of the theft spawned by the recent possession of the goods stolen. *State v. Wilson*, 313 N.C. 516, 536, 330 S.E.2d 450, 464 (1985). The Court recognized "[t]here is no specific period, however, beyond which possession can no longer be considered 'recent.' Rather, the term is a relative one and will depend on the circumstances of each case." *Id.* (citations omitted).

In light of all of the other circumstances in *Wilson*, our Supreme Court held the defendant and his girlfriend's possession of the stolen watch, one to three weeks after the victim had been stabbed and his watch was stolen "was sufficiently recent to support a reasonable inference of the defendant's guilt under the doctrine of recent possession." *Id.* at 536-37, 330 S.E.2d at 464.

Here, Defendant admitted she alone had transported the items that had been stolen on or about 20 March 2014 in her truck and she had unloaded them at the Ridge Street address. Her possession of the recently stolen goods was exclusive and 100% within her control at that time. Whether the two weeks, which may have passed between the breaking and entering and larceny and the discovery of the property being stolen, and Defendant's admitted possession, is too remote to apply the doctrine of recent possession was a proper question for the jury and does not support vacating Defendant's conviction as a matter of law. *See id.* at 536-37, 330 S.E.2d at 464.

IV. Conclusion

The State's evidence tended to show Defendant's exclusive possession of recently stolen goods. The trial court correctly submitted the case to the jury. The jury considered and weighed the evidence and properly convicted Defendant. *See State v. Johnson*, 60 N.C. 235, 237-38 (1864) (upholding larceny conviction where goods were stolen six weeks prior to when they were found in a house rented by the defendant and

his wife). "It appears to have been fairly laid before the jury, according to the view here taken, and the jury have come to a conclusion with which we have no right to interfere, if we had the inclination." *Id.*

Correctly applying the standard of review to Defendant's motion to dismiss, Defendant has failed to show any prejudicial and reversible errors occurred at trial which would entitle her to a new trial. I find no error in the jury's conviction or in the judgment entered thereon. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
HOWARD A. SHARPE, DEFENDANT

No. COA17-602

Filed 15 May 2018

Probation and Parole—revocation—sufficient basis—clerical error

While the trial court made a clerical error by checking a box on the revocation form referring to multiple violations of probation, only one of which could be an independent basis for revocation pursuant to statute, it was clear from the court's rendition and order as a whole that the court properly based revocation on the commission of a criminal offense and not the other two violations of failure to pay court indebtedness and probation supervision fees.

Appeal by defendant from judgment entered on or about 5 December 2016 by Judge Walter H. Godwin, Jr. in Superior Court, Wilson Court. Heard in the Court of Appeals 11 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason R. Rosser, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

STROUD, Judge.

Defendant appeals the revocation of his probation. We affirm and remand for correction of a clerical error.

On 2 November 2016, while on probation for another offense, defendant was convicted of possession of drug paraphernalia. Probation Officer Noah Kearney filled out a probation violation report noting three violations: "arrears $800.00 in court indebtedness[,]" "$720.00 in probation supervision fees[,]" and conviction of the 2 November 2016 offense. (Original in all caps.) Defendant appeared *pro se* before the trial court and admitted that he had violated his probation as alleged in the probation violation report, but explained to the trial court he had pled guilty in order to receive a reduced sentence,

> And as far as the new conviction, I know you can see it was a really large drop in the case so I received 120 days on it. So I had a decision to make, whether to go to trial and face eight years, or take 120 days. It was pretty sure for me so I just took that.[1]

In December of 2016, the trial court entered an order revoking defendant's probation. Defendant appeals.

Defendant's only argument on appeal is that "the trial court abused its discretion, and acted under a misapprehension of the law, when it revoked defendant's probation based on three alleged violations of which only one provided a statutory basis for revocation." (Original in all caps.)

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Jones, 225 N.C. App. 181, 183, 736 S.E.2d 634, 636 (2013) (citation omitted).

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1. Defendant does not raise the argument of lack of willfulness on appeal, nor is there a legal basis for the argument. "Once convicted, whether as a result of a plea of guilty, nolo contendere, or of not guilty (followed by trial), convictions stand on the same footing, unless there be a specific statute creating a difference." *State v. Outlaw*, 94 N.C. App. 491, 494, 380 S.E.2d 531, 533 (1989) (citation omitted), *aff'd*, 326 N.C. 467, 390 S.E.2d 336 (1990).

Defendant's argument is based upon his contention that the trial court mistakenly believed that *each* of the violations was a sufficient basis upon which to revoke probation, although only one of the violations – commission of a crime while on probation – is actually a proper basis for revocation of probation. *See* N.C. Gen. Stat. §§ 153A-1343(b)(1), -1344(a) (2017). On the Judgment and Commitment Upon Revocation of Probation – Felony, Form AOC-CR-607, Rev. 12/13, the trial court checked the box for the second sentence of Finding 4:

> Each of the conditions violated as set forth above is valid; the defendant violated each condition willfully and without valid excuse; and each violation occurred at a time prior to the expiration or termination of the period of the defendant's probation.
>
> ☒ *Each* violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.

(Emphasis added.)

Probation can be revoked under North Carolina General Statute § 15A-1343(b)(1) if the defendant commits a "criminal offense in any jurisdiction" while on probation. N.C. Gen. Stat. § 15A-1343(b)(1). North Carolina General Statute § 153A-1344(a) provides in pertinent part that "[t]he court may only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1)[.]" N.C. Gen. Stat. § 15A-1344(a). Because defendant committed a criminal offense while on probation, the trial court could properly revoke his probation on that ground. *See* N.C. Gen. Stat. §§ 153A-1343(b)(1), -1344(a); *see also State v. Seay*, 59 N.C. App. 667, 670–71, 298 S.E.2d 53, 55 (1982) ("It is sufficient grounds to revoke the probation if only one condition is broken.").

Although defendant acknowledges that the trial court could have exercised its discretion to revoke probation based only upon the criminal offense, he argues that "the trial court's decision to revoke probation based on two violations that could not support an order revoking probation likely influenced the trial court's decision to revoke probation." It is true that the trial court could not have revoked probation based upon the other two violations of failure to pay court indebtedness and probation supervision fees. *See generally* N.C. Gen. Stat. § 15A-1344(a). Defendant is also correct that because the trial court checked the box for the second sentence of Finding 4, it found that "[*e*]*ach violation is*, *in and of itself*, a sufficient basis" for revocation of probation. (Emphasis added.) Defendant argues:

> Given that we do not know which alleged violation, or combination thereof, was the basis for the trial court's revocation, and that only one of the three alleged violation[s] provides a statutory basis for revocation, Mr. Sharpe's probation revocation sentence must be vacated and remanded back to the trial court for a new hearing.

Contrary to defendant's argument, we do know the trial court's basis for the revocation of probation, and it was the commission of a criminal offense. It is apparent from the trial court's rendition and the order as a whole that the trial court did not act under a misapprehension of law that *each* violation alone could have been sufficient to revoke defendant's probation. But there is a clerical error in the order because the trial court checked the box in Finding 4, which was unnecessary based upon the trial court's rendition and Finding 5. Finding 5 states the basis for revocation: "5. The Court may revoke defendant's probation . . . (a) for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A-1343(b)(1) . . . as set out above." In addition, the trial court stated during rendition of the ruling:

> I find and conclude that the Defendant violated the conditions as set forth in the violation report. Each of those conditions is valid. You violated those conditions willfully, without valid excuse, prior to the expiration of the probationary period. *One of the violations is in and of itself sufficient to justify revocation and the activation of the suspended sentence.* Therefore, probation is revoked and the sentence is activated.

(Emphasis added.)

The trial court recognized that "[o]*ne* of the violations is in and of itself sufficient to justify revocation and the activation of the suspended sentence." That "one violation" was committing another criminal offense, as noted in Finding 5. The trial court did not say "*each* of the violations" is sufficient to justify revocation. This difference in wording is significant, since it demonstrates that the trial court was basing the revocation on *one* of the violations, and the order notes in Finding 5 that the *one* violation justifying revocation was the commission of a criminal offense. But since the second sentence of Finding 4 should not have been checked, 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)).

AFFIRMED and REMANDED for correction of clerical error.

Judges DILLON and INMAN concur.

STATE OF NORTH CAROLINA
v.
WADE LEON SHAW, DEFENDANT

No. COA17-1061

Filed 15 May 2018

Criminal Law—motion for post-conviction DNA testing—appropriate review—statutory factors

The trial court erroneously addressed defendant's motion for post-conviction DNA testing as a motion for appropriate relief, and consequently failed to conduct the relevant analysis of the factors contained in N.C.G.S. § 15A-269 to determine whether defendant satisfied the requirements for post-conviction DNA testing. Therefore, the Court of Appeals could not evaluate whether defendant's motion was properly denied, necessitating remand to the trial court to conduct a review under the appropriate statute.

Appeal by defendant from order entered 14 December 2015 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 8 March 2018.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

ZACHARY, Judge.

Defendant Wade Leon Shaw appeals from the trial court's order denying his "Request for Post Conviction DNA Testing and Discovery" pursuant to N.C. Gen. Stat. § 15A-269. We vacate and remand.

Background

In June 2011, defendant was indicted for second-degree burglary, first-degree kidnapping, assault by strangulation, first-degree rape, first-degree sexual offense, and attaining habitual felon status. The matter was tried before a jury beginning on 30 January 2012.

The evidence presented at defendant's trial included, among other things, testimony by the State's expert in forensic DNA analysis concerning the DNA evidence that was recovered from the victim. The DNA analyst concluded that defendant's DNA "cannot be excluded as a contributor to the DNA mixture" that was recovered, and that "the chance of selecting an individual at random that would be expected to be included for the observed DNA mixture profile" was approximately, "for the North Carolina black population, 1 in 14.5 million[.]" Defendant was convicted on all charges, and this Court affirmed defendant's convictions in May 2013.

On 22 October 2015, defendant filed a *pro se* motion with the trial court entitled "Request for Post Conviction DNA Testing and Discovery N.C. Gen. Stat. § 15A-269, § 15A-902." This motion simply paraphrased the applicable statute, stating only that defendant was moving for post-conviction DNA testing "because the evidence is material to [his] defense, is related to the investigation or prosecution . . . , and it was previously tested and the requested DNA retesting would provide results that are significantly more accurate and probative, having a reasonable probability of contradicting prior test results." Defendant also provided a sworn affidavit maintaining his innocence.

Although defendant moved for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269, the trial court decided that "the caption of Defendant's Motion notwithstanding, this Court will review it as a Motion for Appropriate Relief" pursuant to N.C. Gen. Stat. § 15A-1411(c). The trial court then determined that defendant had not complied with the service and filing requirements provided for motions for appropriate relief in N.C. Gen. Stat. § 15A-1420(a)(2). The trial court also concluded that "Defendant does not allege newly discovered evidence or other genuine issues that would require an evidentiary hearing, and that the claims raised either were or could have been raised upon direct appeal[,]" which are grounds for denial of a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1419. The trial court denied defendant's motion on 14 December 2015.

On 29 June 2017, defendant filed a petition for writ of certiorari asking this Court to review the trial court's order denying his motion for post-conviction DNA testing. We granted certiorari on 10 July 2017.

On appeal, defendant argues that the trial court erred in denying his motion for post-conviction DNA testing because the facts at issue are sufficient to satisfy "the criteria for additional DNA testing" provided in N.C. Gen. Stat. § 15A-269. Defendant also argues that his motion for post-conviction DNA testing was denied in error by the trial court "based on a statute [pertinent to motions for appropriate relief] that was inapplicable to [defendant's] motion."

Discussion

In response to the ever-developing nature of DNA technology, N.C. Gen. Stat. § 15A-269 allows convicted defendants to submit requests for post-conviction DNA testing. Pursuant to N.C. Gen. Stat. § 15A-269,

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . if the biological evidence meets all of the following conditions:
>
> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. 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.
>
> (b) The court shall grant the motion for DNA testing . . . upon its determination that:
>
> (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
>
> (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) and (b) (2017).

I. Post-Conviction Procedures

A motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 is distinct from a motion for appropriate relief under N.C. Gen. Stat. § 15A-1411, -1420. *State v. Howard*, ___ N.C. App. ___, ___, 783 S.E.2d 786, 793-94 (2016); *see also State v. Brown*, 170 N.C. App. 601, 607, 613 S.E.2d 284, 288, *disc. review denied*, 360 N.C. 68, 621 S.E.2d 882 (2005), *superseded by statute on other grounds as recognized in State v. Norman*, 202 N.C. App. 329, 332, 688 S.E.2d 512, 515, *disc. review denied*, 364 N.C. 439, 702 S.E.2d 792 (2010). Wholly separate from the post-conviction procedures that govern motions for appropriate relief, N.C. Gen. Stat. § 15A-269 "provide[s] a specific procedural vehicle for asserting, and obtaining relief on, claims for relief based on post-conviction DNA testing." *Howard*, ___ N.C. App. at ___, 783 S.E.2d at 794. In fact, even where a defendant files a motion for appropriate relief that contains multiple claims, one of which involves post-conviction DNA testing, the trial court must still "evaluat[e] each individual claim on the merits and under the applicable substantive law." *Id.* at ___, 783 S.E.2d at 795. Accordingly, where a defendant brings a motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269, the trial court's task is to rule on the motion in accordance with the applicable substantive law as set forth in N.C. Gen. Stat. § 15A-269(b). A trial court may not supplant the analysis contemplated by N.C. Gen. Stat. § 15A-269(b) with the evaluation applicable to motions for appropriate relief.

In the instant case, defendant filed a motion entitled "Request for Post-Conviction DNA Testing" requesting relief pursuant to N.C. Gen. Stat. § 15A-269. As such, the trial court was obliged to resolve various questions under N.C. Gen. Stat. § 15A-269(b). For instance, the trial court was required to determine whether the biological evidence was material to the defense, N.C. Gen. Stat. § 15A-269(a)(1), whether the re-testing of the DNA would be "significantly more accurate and probative" than the prior testing, N.C. Gen. Stat. § 15A-269(a)(3)(b), and whether "there exist[ed] a reasonable probability that the verdict would have been more favorable to . . . defendant" had the requested testing been conducted, N.C. Gen. Stat. § 15A-269(b)(2). However, the trial court conducted no such inquiry, and denied defendant's motion on the grounds set forth in N.C. Gen. Stat. § 15A-1420(a)(2) and 1419(a) for evaluation of motions for appropriate relief. While the trial court in its order did note

that defendant had "not allege[d] newly discovered evidence or other genuine issues[,]" the trial court was required to analyze the relevance of that deficit in light of the requirements of N.C. Gen. Stat. § 15A-269.

In that the trial court's order does not address the requisite factors provided in N.C. Gen. Stat. § 15A-269, we cannot determine whether defendant's motion for post-conviction DNA testing was properly denied. Accordingly, we vacate the trial court's order and remand for the trial court's review consistent with the provisions of N.C. Gen. Stat. § 15A-269.

II. Grounds to Grant Relief

Defendant also argues that sufficient grounds exist to warrant post-conviction DNA testing of the biological evidence in the instant case. Although defendant's motion merely paraphrases the statute, on appeal he submits a factual basis for the allegations of his motion. Most significantly, defendant maintains that the prior testing was not reliable because of the inability of the DNA analyst from the State Crime Laboratory who examined the biological evidence at issue in defendant's trial to pass the required certification examination.

In that this matter is being vacated and remanded to the trial court on other grounds, however, we decline to address defendant's additional arguments in support of his motion for post-conviction DNA testing.

Conclusion

For the reasons set forth above, the matter is

VACATED AND REMANDED.

Judges HUNTER, JR. and DIETZ concur.

STATE OF NORTH CAROLINA
v.
KAREEM STANLEY

No. COA17-1000

Filed 15 May 2018

Search and Seizure—knock and talk doctrine—back door

The trial court erred in denying defendant's motion to suppress where law enforcement officers violated his Fourth Amendment right against unreasonable searches by approaching the back door of an apartment to perform a knock and talk. Although the officers had observed their confidential informant using the back door on several occasions to purchase illegal drugs from the occupants of the apartment, the permission granted by a resident to certain individuals to use a door other than the front entrance does not automatically extend to members of the public, including law enforcement.

Appeal by defendant from judgment entered 13 February 2017 by Judge Beecher R. Gray in Durham County Superior Court. Heard in the Court of Appeals 19 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Martin T. McCracken, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.

DAVIS, Judge.

This case presents the question of whether the Fourth Amendment permits law enforcement officers to conduct a knock and talk at the back door of a residence rather than at the clearly visible and unobstructed front door. Kareem Stanley ("Defendant") appeals from his convictions for trafficking in heroin by transportation; trafficking in heroin by possession; possession with intent to manufacture, sell, or deliver a Schedule I controlled substance; possession with intent to sell or deliver a Schedule II controlled substance; and possession of drug paraphernalia. On appeal, he argues that the trial court erred by denying his motion to suppress evidence of the drugs seized from his person as a result of an illegal knock and talk. Because we conclude that (1) the knock and talk was unconstitutional; and (2) the evidence obtained by the officers

would not have been discovered but for the knock and talk, we reverse the trial court's denial of his motion to suppress.

Factual and Procedural Background

In 2015, Investigator Joseph Honeycutt was working for the Special Operations Division of the Durham Police Department. In December 2015, a confidential informant contacted the police department stating that he had purchased heroin from a person at Apartment A at 1013 Simmons Street ("Apartment A") in Durham. The informant identified James Meager as the person from whom he had bought heroin at Apartment A.

Investigator Honeycutt subsequently became aware that Apartment A belonged to an individual named James Hazelton. Investigator Honeycutt also learned that Meager did not actually live at the apartment.

Nevertheless, Investigator Honeycutt used the informant to conduct controlled drug sales involving Meager at Apartment A on three separate occasions. On 8 December 2015, Investigator Honeycutt observed the informant walk up the driveway to the back door of the apartment in order to purchase heroin from Meager. On 16 December 2015, Investigator Honeycutt once again used the informant to buy heroin from Meager at the back door of Apartment A. Finally, on a third occasion, Investigator Honeycutt observed the informant purchase heroin from the back door of the apartment.

On 1 March 2016, Investigator Honeycutt, Investigator Thomas Thrall, and four to five other members of the Durham Police Department approached Apartment A in order to locate Meager and serve him with a warrant for his arrest. They were dressed in protective vests with the word "Police" written across their chests. The officers did not possess a warrant to search the apartment.

Upon the officers' arrival at the apartment, they immediately walked down the driveway that led to the back of the apartment, and Investigator Honeycutt knocked on the back door. In response to an inquiry from a person inside Apartment A as to who was knocking, Investigator Honeycutt responded: "Joey."

Defendant, who had been staying with Hazelton as a houseguest at Apartment A from January through March of 2016, answered the door, and Investigator Honeycutt "immediately detected . . . the odor of marijuana." He stepped into the apartment and began conducting a protective sweep of the premises. One or two other officers also entered

Apartment A to assist him. During the protective sweep, the officers located Hazelton and handcuffed him. A "crack pipe" was discovered on the nightstand in one of the bedrooms of the residence. Investigator Honeycutt also observed a handgun laying on a couch in the living room.

In the meantime, Investigator Thrall waited with several other officers outside the back door. At some point, he directed Defendant to accompany him outside. After Defendant complied with his request, Investigator Thrall told him to take his hands out of his pockets and asked if he was carrying any weapons. Defendant denied possessing any weapons but kept his hands in his pockets. Investigator Thrall asked Defendant a second time to remove his hands from his pockets, and Defendant once again failed to do so.

At that point, Investigator Thrall pulled Defendant's hands out of his pockets, placed them on his head, and informed Defendant that he was going to search him for safety reasons. He then proceeded to conduct a pat-down of Defendant's person. While patting down Defendant's right pants pocket, he felt a bulge. He asked Defendant what was in the pocket, and Defendant responded that it was "some Vaseline." Investigator Thrall then patted down Defendant's left pants pocket and felt a larger bulge. He asked Defendant what was in that pocket, and Defendant replied that it was cocaine.

At that point, Investigator Thrall handcuffed Defendant and reached into Defendant's pockets to retrieve the items contained therein. Inside Defendant's left pants pocket, Investigator Thrall discovered a "plastic baggy that contained some small yellow baggies with a white substance that [he] believed . . . to be cocaine." He also found three smaller tan baggies that appeared to contain heroin. Investigator Thrall retrieved a small bag of marijuana from Defendant's right pants pocket.

After Defendant had been searched, Investigator Honeycutt returned to the back door with Hazelton in handcuffs. He informed Investigator Thrall that he was going to obtain a search warrant for the apartment. Investigator Thrall and the other officers then waited outside Apartment A with Hazelton and Defendant, both of whom remained handcuffed. Once a search warrant was obtained, the officers searched the apartment and found a digital scale near the crack pipe on the nightstand.

Defendant was arrested and charged with trafficking in heroin by transportation; trafficking in heroin by possession; possession with intent to manufacture, sell, or deliver a Schedule I controlled substance; possession with intent to sell or deliver a Schedule II controlled substance; and possession of drug paraphernalia. On 10 February 2017,

Defendant filed a motion to suppress all of the evidence that had been seized from his pockets on the ground that the seizure violated his rights under the Fourth Amendment. A hearing was held before the Honorable Beecher R. Gray in Durham County Superior Court on 13 February 2017, and the trial court denied Defendant's motion.

On that same day, Defendant pled guilty to all of the charged offenses but expressly reserved his right to appeal the denial of his motion to suppress. The trial court consolidated all five offenses and sentenced Defendant to a term of 70 to 93 months imprisonment.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Specifically, he argues that the officers violated his Fourth Amendment rights by (1) unlawfully conducting a knock and talk at the back door of Apartment A rather than the front door; (2) entering the apartment without the existence of probable cause and exigent circumstances; and (3) conducting an illegal pat-down search of his person.

"When a motion to suppress is denied, this Court employs a two-part standard of review on appeal: 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). "Unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review." *State v. Warren*, 242 N.C. App. 496, 498, 775 S.E.2d 362, 364 (2015) (internal citations and quotation marks omitted), *aff'd per curiam*, 368 N.C. 756, 782 S.E.2d 509 (2016).

In its written order denying Defendant's motion to suppress, the trial court made the following findings of fact:

> 1. On March 01, 2016, Investigator Honeycutt and other members of the Special Operations Division of the Durham Police Department conducted a knock and talk at 1013 Simmons Street, Apartment A to locate James Meagher [sic], for whom they had an outstanding arrest warrant and who had been identified by a confidential informant as the person the informant had purchased cocaine from on at least three (3) previous

occasions from the back door of the residence identified as Apartment A, 1013 Simmons Street in Durham, including cocaine purchases on December 08, 2015 and December 16, 2015.

2. Each time the confidential informant purchased narcotics under the surveillance and supervision of the investigators, the confidential informant went to the back door at 1013 Simmons Street, Apartment A. The back door of Apartment A is more hidden from public view than the front door of Apartment A at 1013 Simmons Street.

3. On March 01, 2016, Investigator Honeycutt went directly to the back door of 1013 Simmons Street, Apartment A and knocked, identifying himself as Joey Honeycutt.

4. Kareem Stanley (hereinafter "Defendant") opened the door.

5. As soon as the door was opened, Investigators could smell a strong odor of marijuana coming from inside of the residence. The police officers were wearing vests which had the word "Police" across the front of each vest. No weapons were drawn by police officers at any time during this visit to 1013 Simmons Street, Apartment A.

6. Officer Honeycutt and 1 or 2 other officers entered 1013 Simmons Street, Apartment A and conducted a safety sweep based on the odor of marijuana and prior drug sales occurring at 1013 Simmons Street, Apartment A. This safety sweep lasted an estimated one to one and one-half minutes in this small duplex apartment. During the safety sweep, Officer Honeycutt and other officers found a single individual identified as James Hazleton [sic], observed in plain view what appeared to be a crack pipe, and observed in plain view a handgun. James Meagher [sic], the object of an outstanding arrest warrant, was not in the apartment. Following the completion of this safety sweep, Officer Honeycutt departed 1013 Simmons Street in order to obtain a search warrant for the Apartment, the individuals found there, and any automobile located there.

7. As officers entered Apartment A to begin the safety sweep, the Defendant stepped out of the 1013 Simmons Street Apartment A, upon request by officer Thomas Thrall.

8. The Defendant had his hands in his pockets and was asked twice by Investigator Thrall to take his hands out of his pockets. Rather than comply with Investigator Thrall's request to remove his hands from his pockets for officer safety, Defendant pushed his hands deeper into his pockets.

9. After the Defendant did not comply with Investigator Thrall's requests[,] Investigator Thrall removed the Defendant's hands from his pockets and placed the Defendant's hands on top of his head, as he had been trained to do.

10. Investigator Thrall verbally notified the Defendant that he was about to conduct a pat down and then conducted a Terry frisk to check whether any kind of weapon was being concealed in the Defendant's pockets that could be used to harm Investigator Thrall or one of the other investigators present.

11. Investigator Thrall patted down on the Defendant's right front pocket and felt a small bulge. The Investigator asked about the bulge in Defendant's right front pocket and the Defendant responded "Vaseline." The bulge on the pat down of Defendant's right front pocket did not feel like Vaseline to Investigator Thrall, but since the item did not feel like a weapon when patted, Investigator Thrall moved on to the Defendant's left side front pocket.

12. Investigator Thrall patted down on the Defendant's left front pocket and felt an even larger bulge. When asked about the larger bulge in his left pocket, the Defendant said "cocaine."

13. After the Defendant told Investigator Thrall the bulge in his left front pocket was cocaine, the Defendant was handcuffed and placed in custody. Defendant was not questioned further, except for his identification, until after Investigator Honeycutt's search warrant

> was served on the Defendant at 1220 p.m. on March 01, 2016; he was transported to the Durham Police Department; and given Miranda warnings prior to being interrogated.

Based on these findings of fact, the trial court determined that the officers did not violate Defendant's Fourth Amendment rights by conducting the knock and talk, entering the apartment, or conducting a pat-down search of Defendant's person. Therefore, the court denied Defendant's motion to suppress.

As an initial matter, Defendant challenges the second sentence of Finding No. 2 to the extent it implies that (1) the front door was partially obstructed and not clearly visible from the street; and (2) the back door was not hidden from public view. We agree with Defendant that photographs of the apartment contained in the record on appeal reveal that the front door was, in fact, clearly visible from the street and unobstructed whereas the back door could not be seen.

The remaining pertinent findings of fact made by the trial court are unchallenged and, therefore, binding on appeal. *See Warren*, 242 N.C. App. at 498, 775 S.E.2d at 364 (holding that unchallenged findings in order denying motion to suppress are deemed to be supported by competent evidence and binding on appeal).

We first address Defendant's argument that the knock and talk conducted by the officers constituted an unlawful search for purposes of the Fourth Amendment.[1] "A 'knock and talk' is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant." *State v. Marrero*, __ N.C. App. __, __, 789 S.E.2d 560, 564 (2016). Our appellate courts "have recognized the right of police officers to conduct knock and talk investigations, so long as they do not rise to the level of Fourth Amendment searches." *Id.* at __, 789 S.E.2d at 564.

In *Florida v. Jardines*, 569 U.S. 1, 185 L. Ed. 2d 495 (2013), the United States Supreme Court explained the permissible scope of a knock and talk as follows:

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1. The State does not challenge the fact that Defendant possessed a reasonable expectation of privacy in Apartment A for purposes of the Fourth Amendment based on his status as a houseguest who had been living there for over a month. *See Minnesota v. Olson*, 495 U.S. 91, 96-97, 109 L. Ed. 2d 85, 93 (1990) (holding that defendant's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable").

> [T]he knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. . . . This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.

Id. at 8, 185 L. Ed. 2d at 502 (internal citations, quotation marks, and footnote omitted).

"[I]n North Carolina, law enforcement officers may approach a front door to conduct 'knock and talk' investigations that do not rise to the level of a Fourth Amendment search." *State v. Smith*, __ N.C. App. __, __, 783 S.E.2d 504, 509 (2016) (citation and quotation marks omitted). We recently addressed the legality of a knock and talk conducted at the back door of a residence in *State v. Huddy*, __ N.C. App. __, __, 799 S.E.2d 650, 654 (2017). In *Huddy*, an officer was patrolling an area that he believed to be "at risk of home invasions" and observed a parked vehicle with the car doors open at the end of a long driveway leading to the rear of the defendant's home. *Id.* at __, 799 S.E.2d at 653. The officer became suspicious and approached the front door of the house. He observed that the front door of the residence was covered in cobwebs and walked to the back of the residence. *Id.* at __, 799 S.E.2d at 653.

The officer entered the backyard and "approached a storm door on the rear porch, which was not visible from the street" in order to conduct a knock and talk. *Id.* at __, 799 S.E.2d at 653. As he got closer to the storm door, the officer smelled marijuana. He knocked on the back door and spoke to the defendant, who opened the door. Based on the odor of marijuana at the storm door, the officer later obtained a search warrant for the home. During a search of the residence, the officer ultimately discovered a large quantity of marijuana. The defendant was charged with possession of marijuana with intent to sell or deliver and moved to suppress the evidence seized from the home. *Id.* at __, 799 S.E.2d at 653.

On appeal, we held that the defendant's Fourth Amendment rights had been violated. In so ruling, we stated the following:

> We begin with the knock and talk doctrine. Because no search of the curtilage occurs when an officer is in a place where the public is allowed to be, *such as at the front door of a house*, officers are permitted to approach the *front* door of a home, knock, and engage in consensual conversation with the occupants. . . . Put another way, law enforcement may do what occupants of a home implicitly permit anyone to do, which is approach the home by the *front* path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.
>
> Importantly, law enforcement may not use a knock and talk as a pretext to search the home's curtilage. No one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search. *Likewise, the knock and talk doctrine does not permit law enforcement to approach any exterior door to a home.* An officer's implied right to knock and talk extends only to the entrance of the home that a reasonably respectful citizen unfamiliar with the home would believe is the appropriate door at which to knock. . . . This limitation is necessary to prevent the knock and talk doctrine from swallowing the core Fourth Amendment protection of a home's curtilage. Without this limitation, law enforcement freely could wander around one's home searching for exterior doors and, in the process, search any area of a home's curtilage without a warrant.

Id. at __, 799 S.E.2d at 654 (internal citations, quotation marks, and brackets omitted and emphasis added).[2]

Huddy is consistent with prior decisions from this Court in which we have held that knock and talks taking place at a home's back door were unconstitutional. *See*, *e.g.*, *State v. Gentile*, 237 N.C. App. 304, 310, 766 S.E.2d 349, 353 (2014) (motion to suppress properly granted where detectives briefly knocked on front door and then attempted knock and talk at back door); *State v. Pasour*, 223 N.C. App. 175, 179, 741 S.E.2d 323, 326 (2012) (trial court erred in denying motion to suppress where officers attempted knock and talk at back door after no one answered knock on front door).

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2. We note that the trial court did not have the benefit of our decision in *Huddy* at the time it denied Defendant's motion to suppress as *Huddy* was decided approximately two months later.

In the present case, the officers knew that Meager did not live at Apartment A but believed that they could either locate him at the apartment or learn more about his whereabouts by conducting a general inquiry of the occupants. Therefore, they elected to utilize a knock and talk. However, in order to pass constitutional muster, the officers were required to conduct the knock and talk by going to the front door, which they did not do. Rather than using the paved walkway that led directly to the unobstructed front door of the apartment, the officers walked along a gravel driveway into the backyard in order to knock on the back door, which was not visible from the street. Such conduct would not have been reasonable for "solicitors, hawkers [or] peddlers . . . ." *See Jardines*, 569 U.S. at 8, 185 L. Ed. 2d at 502 (citation and quotation marks omitted). Thus, it was also unreasonable for law enforcement officers.

The trial court determined that the officers had an implied license to approach the back door of Apartment A because a confidential informant had been observed purchasing drugs from Meager by utilizing the back door on three separate occasions. However, the fact that the resident of a home may choose to allow certain individuals to use a back or side door does not mean that similar permission is deemed to have been given generally to members of the public. As we made clear in *Huddy*, "[a]n officer's implied right to knock and talk extends only to the entrance of the home that a reasonably respectful citizen *unfamiliar with the home* would believe is the appropriate door at which to knock." *Huddy*, __ N.C. App. at __, 799 S.E.2d at 654 (citation and quotation marks omitted and emphasis added); *see also id.* at __, 799 S.E.2d at 656-57 (Tyson, J., concurring) ("The home's occupants, family, or frequent invitees may use a closer side or back door or a door within a garage to enter the home, rather than walk further to use a front door. Nonetheless, even a seldom-used front door is the door uninvited members of the public are expected to use when they arrive. . . . Even if the back door was the entrance primarily used by [the defendant] or regular visitors, an uninvited visitor would not necessarily acquire any 'implied license' to also use that door." (internal citation omitted)).

We recognize that the existence of unusual circumstances in some cases may allow officers to lawfully approach a door of a residence other than the front door in order to conduct a knock and talk. *See, e.g.*, *State v. Grice*, 367 N.C. 753, 754, 761, 767 S.E.2d 312, 314, 318 (2015) (holding that officers were "implicitly invited into the curtilage to approach the home" where front door was "inaccessible, covered with plastic, and obscured by furniture" and side door "appeared to be used as the main entrance"), *cert. denied*, __ U.S. __, 192 L. Ed. 2d 882 (2015). However,

no such unusual circumstances are presented here. As a result, the knock and talk was unconstitutional.

Finally, it is clear from the record that absent the unlawful knock and talk at Apartment A the officers would not have had any contact at all with Defendant much less had occasion to conduct a pat-down search of his person resulting in the discovery of the drugs in his pockets. Thus, because the knock and talk itself was unlawful the evidence of the drugs seized from him as a result was required to be suppressed. *See State v. Jackson*, 199 N.C. App. 236, 244, 681 S.E.2d 492, 498 (2009) (holding that drugs "discovered as a direct result of the illegal search . . . should have been suppressed as fruit of the poisonous tree").

Therefore, the trial court erred in denying Defendant's motion to suppress. Accordingly, we reverse the trial court's order.[3]

Conclusion

For the reasons stated above, we reverse the trial court's order denying Defendant's motion to suppress and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges INMAN and MURPHY concur.

3. In light of our holding, we need not reach the other arguments raised by Defendant.

STATE v. TURNAGE

[259 N.C. App. 719 (2018)]

STATE OF NORTH CAROLINA
v.
TONI TURNAGE, DEFENDANT

No. COA17-803

Filed 15 May 2018

Search and Seizure—motorist stopped in roadway—unmarked police car—no seizure without submission to show of authority

A law enforcement officer's activation of his blue lights fifteen seconds after defendant inexplicably stopped her vehicle in the middle of the road did not constitute a seizure where the officer was in an unmarked car, defendant had not violated any laws prior to stopping, and there was no evidence defendant knew or reasonably believed the individuals in the unmarked car were law enforcement. The evidence did not indicate defendant submitted to a show of authority until after a subsequent high-speed car chase, which ended when another law enforcement vehicle impeded defendant's progress.

Appeal by State of North Carolina from an order entered 29 March 2017 by Judge Joshua W. Willey, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 23 January 2018.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Shultz, for defendant-appellee.

BERGER, Judge.

On October 3, 2016, the Duplin County Grand Jury indicted Toni Turnage ("Defendant") for fleeing to elude arrest, resisting a public officer, and two counts of child abuse. Defendant filed a Motion to Suppress in Duplin County Superior Court alleging law enforcement did not have reasonable suspicion to stop Defendant's vehicle, and the seizure of Defendant violated the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution. The trial court granted Defendant's motion. We reverse.

Factual and Procedural Background

Defendant's Motion to Suppress was heard in Duplin County Superior Court on March 21, 2017. The State's only witness at the suppression hearing was Detective Shane Miller of the Duplin County Sheriff's Department. Defendant did not put on any evidence.

The evidence tended to show that detectives with the Duplin County Sheriff's Department received several complaints regarding apparent drug activity at 155 John David Grady Road in Duplin County. On March 23, 2016, detectives conducted surveillance of the area. Lieutenant Chuck Weaver and Detective Allen Williams were in an unmarked Ford pickup truck with Detective Miller, while Detectives Michael Tyndall, Matthew Strickland, and Jay Lanier were in an unmarked Chevrolet pickup truck. The detectives were in plain clothes.

As Detective Miller was arriving to the area, Detective Tyndall's unit reported a burgundy van leaving 155 John David Grady Road. Detective Miller observed the burgundy van traveling west on John David Grady Road, approaching the intersection of Woodland Church Road. Detective Miller noticed the van was driven by a female and that there was a male passenger. Detective Miller followed the burgundy van for approximately one-half mile after the female driver turned onto Woodland Church Road.

Suddenly, and without warning, the burgundy van stopped in the middle of Woodland Church Road. Detective Miller waited approximately fifteen seconds, and activated the blue lights on the patrol unit because he "didn't want anybody coming down the road . . . [to] hit the vehicle, [and] cause a[n] accident." Detective Miller testified:

> Well, the van was obviously stopped in the roadway so we didn't know what was going on. We didn't know if the van had broken down or if there was a problem in the van or what was going on in the van. So at that point in time I activated my blue lights because there was a van in the roadway.

Detective Miller further elaborated that "[i]f a vehicle is stopped in the roadway, [blocking] traffic, impeding traffic, broke down, whatever, I want to know what's going on with that vehicle. So I activate my emergency equipment to let people know, hey, something going on here, be careful."

The Ford pickup truck driven by Detective Miller was located approximately fifteen feet from the burgundy van in the middle of the

roadway. As Detective Miller attempted to approach the driver's side of the vehicle, he noticed a male subject exit the passenger side of the burgundy van. Detective Miller recognized the male subject to be Donnie Barton, an individual known to Detective Miller through prior law enforcement encounters. Detective Miller testified:

> I went to get out of the [patrol vehicle] and all of a sudden a male subject from the passenger side of the van gets out of the van, hands in pocket, and starts walking toward the patrol vehicle. At that point in time I told Detective Williams who was in the passenger side of my patrol vehicle to get out of the vehicle because he was approaching us with his hands in his pockets.
>
> . . . .
>
> We didn't know if there was a weapon in his pocket, if there were drugs in his pocket or what he was up to.

Mr. Barton then ran back to the van, yelling, "Go, go, go." The burgundy van sped away, and Detective Miller returned to the Ford pickup truck, activated the siren, and began pursuing the burgundy van.

During the mile and a half pursuit, Detective Miller observed the burgundy van run off the shoulder of the road, cross the center line, and travel in excess of eighty miles per hour in a fifty-five mile-per-hour zone. Deputy Anthony Toler positioned his vehicle at an intersection and prevented the burgundy van from advancing. Defendant was removed from the driver's seat. Detective Miller then heard two children, ages two and three, crying in the back of the burgundy van.

No illegal drugs or contraband were located in the burgundy van. Defendant was arrested for fleeing to elude arrest, resisting a public officer, and two counts of child abuse. The Department of Social Services was contacted by law enforcement and Mr. Barton's father assumed custody of the two children.

In open court, the trial court made findings of fact, including:

> The burgundy vehicle came to a stop on Woodland Church Road. The officer drove up behind the vehicle and activated his blue lights about 10 to 15 seconds after the vehicle had stopped.
>
> . . . .

> Immediately after stopping his vehicle, Detective Miller exited the driver's door and began approaching the driver's door of the burgundy van. Detective Williams exited from the passenger door of the law enforcement vehicle and began approaching the passenger door of the burgundy van.
>
> The male exited the passenger side of the burgundy van with his hands in his pockets. At some point after that, he turned, hollered to the driver of the van, "Go, go, go" and ran and jumped in the van. At this point, the van rapidly accelerated and sped off.

The trial court concluded that "there was a seizure of the van and its occupants when Detective Miller came up behind the stopped van and activated his blue lights." The trial court further concluded that there was no reasonable suspicion of criminal activity and Defendant's rights preserved under the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution had been violated.[1]

The State timely entered notice of appeal in open court immediately following the March 21, 2017 hearing on the motion to suppress. However, the trial court subsequently entered a written order on March 29, 2017, finding that "[s]topping the van was inconsistent with criminal activity inside the van[,]" and "[t]here was no objectively reasonable basis for Detective Miller to believe the van was disabled or that its occupants were in danger."

The trial court's written order concluded that a seizure of Defendant had occurred when Detective Miller pulled "behind the stopped van and activated his blue lights." The trial court further concluded "there was no reasonable suspicion of criminal activity to justify a stop or a seizure of the van or its occupants."

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1. The State did not argue during the pre-trial hearing or on appeal whether a defendant stopping a vehicle in the middle of a lane of travel on a public roadway, standing alone, constituted a moving violation justifying a stop. As such, this opinion does not address that issue, but rather whether a seizure occurs when a motorist inexplicably stops in the middle of a public roadway and an officer subsequently activates his blue lights.

In addition, the trial court made conclusions of law regarding the community caretaker exception which we need not address as the issue is not argued by the State on appeal, and because of our holding that Defendant was not seized when Detective Miller initially activated his blue lights.

Standard of Review

In determining whether the trial court properly granted a defendant's motion to suppress, our review "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cathcart*, 227 N.C. App. 347, 349, 742 S.E.2d 321, 323 (2013) (citation omitted). "Conclusions of law are reviewed *de novo*." *State v. Gerard*, ___ N.C. App. ___, ___, 790 S.E.2d 592, 594 (2016) (citation omitted).

The State does not challenge the trial court's findings of fact despite some difference with regards to Detective Miller's testimony. Thus, the trial court's findings are binding on appeal. *State v. McLeod*, 197 N.C. App. 707, 711, 682 S.E.2d 396, 398 (2009) ("Unchallenged findings of fact, where no exceptions have been taken, are presumed to be supported by competent evidence and binding on appeal." (citation, quotation marks, ellipses and brackets omitted)).

Analysis

The State argues the trial court erred in concluding a seizure of Defendant occurred when Detective Miller activated his blue lights approximately fifteen seconds after Defendant stopped the burgundy van in the middle of Woodland Church Road. We agree, and reverse the trial court.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

U.S. Const. amend. IV. "Article I, Section 20 of the Constitution of North Carolina likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause." *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 303 (2016). A seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968). There must be "a physical application of force or submission to a show of authority" for a seizure to be found. *State v. Cuevas*, 121 N.C. App. 553, 563, 468 S.E.2d 425, 431, *disc. review denied*, 343 N.C. 309, 471 S.E.2d 77 (1996) (citation omitted).

"The activation of blue lights on a police vehicle has been included among factors for consideration to determine when a seizure occurs." *State v. Baker*, 208 N.C. App. 376, 386, 702 S.E.2d 825, 832 (2010). However, a simple show of authority by law enforcement does not rise to the level of a seizure unless the suspect submits to that show of authority. *California v. Hodari D.*, 499 U.S. 621, 626, 113 L. Ed. 2d. 690, 697 (1991) ("The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.").

This Court held that an individual is not seized for Fourth Amendment purposes by a mere show of authority by law enforcement, but rather when that individual is physically restrained. *State v. Leach*, 166 N.C. App. 711, 717, 603 S.E.2d 831, 835 (2004), *appeal dismissed*, 359 N.C. 640, 614 S.E.2d 538 (2005). In *State v. Leach*, officers attempted to arrest the defendant on drug-related charges. *Id.* at 713, 603 S.E.2d at 833. The officers identified themselves as law enforcement, and surrounded the defendant in his vehicle. *Id.* The defendant fled and led officers on a high-speed chase that ended after he crashed the vehicle in a ditch and officers detained the defendant when he attempted to flee on foot. *Id.* At different points during the chase, the defendant threw away a firearm and a plastic bag containing cocaine. *Id.* In upholding the trial court's denial of the defendant's motion to suppress, this Court held that a seizure did not occur "until defendant was physically restrained." *Id.* at 717, 603 S.E.2d at 835.

In *State v. Mewborn*, officers drove alongside the defendant, who was walking in the roadway of a high-crime area. Neither defendant nor his companion were violating any laws at the time. *State v. Mewborn*, 200 N.C. App. 731, 732, 684 S.E.2d 535, 536 (2009). Officers asked the two if they would stop to talk for a few minutes. *Id.* at 733, 684 S.E.2d at 536. When officers were exiting the vehicle, the defendant ran away from the officers, and they began pursuit. *Id.* During the pursuit, the defendant threw a firearm on the ground. *Id.* at 733, 684 S.E.2d at 537. After he was apprehended, the defendant threw a plastic bag containing crack cocaine on the ground. *Id.* The defendant was charged with possession with intent to sell and deliver a controlled substance, carrying a concealed weapon, possession of a firearm by a felon, and resisting a public officer. *Id.* at 733-34, 684 S.E.2d at 537.

The defendant argued that he was unconstitutionally seized by officers when they asked him to stop and talk without reasonable suspicion. *Id.* at 734, 684 S.E.2d at 537. This Court noted that "[t]he dispositive

issue in the case before us is a determination of whether [d]efendant was seized before or after he ran from the officers." *Id.* at 735, 684 S.E.2d at 537. This Court held that the defendant had not been seized when he initially fled because he did not submit to a show of authority, stating, "[T]he officers were in various stages of exiting the vehicle and that [d]efendant began to run away before stopping and submitting to their authority." *Id.* at 735-36, 684 S.E.2d at 538.

In *State v. Mangum*, officers received an anonymous tip concerning an impaired driver. *State v. Mangum*, ___ N.C. App. ___, ___, 795 S.E.2d 106, 109 (2016), *writ denied*, *disc. review denied*, *appeal dismissed*, 369 N.C. 536, 797 S.E.2d 283 (2017). Officers located the vehicle, and observed that it was traveling fifteen miles per hour below the speed limit, and that it stopped in the roadway on two occasions, once at an intersection where there were no traffic control devices, and subsequently at a railroad crossing without active traffic signals. *Id.* at ___, 795 S.E.2d at 110. The officer following the defendant activated his blue lights, but the defendant did not pull over immediately. *Id.* After approximately two minutes, the officer activated the siren on his patrol vehicle, and the defendant stopped in the roadway a short time later. *Id.* The defendant was arrested for driving while impaired. *Id.* This Court held the defendant was not seized when the officer activated his blue lights and siren, but rather when he stopped the vehicle, yielding to the officer's show of authority. *Id.* at ___, 795 S.E.2d at 116.

Here, no officer in the unmarked Ford pickup truck identified himself as a law enforcement officer before Defendant stopped her vehicle. While the trial court did find that "[t]he detective noted the driver and passenger look[ed] at him and seem[ed] to stare at him before" turning onto Woodland Church Road, there was no evidence that Defendant knew or reasonably believed the three individuals in the Ford pickup truck were law enforcement officers. Detective Miller was following Defendant in an unmarked vehicle, and Defendant had not violated any laws. There was no action on the part of law enforcement that caused Defendant to stop her vehicle or otherwise impede her movement. Defendant's motionless vehicle in the middle of a public roadway invited an encounter with any concerned motorist, including law enforcement officers.

"Police are free to approach and question individuals in public places when circumstances indicate that citizens may need help or mischief might be afoot." *State v. Icard*, 363 N.C. 303, 311, 677 S.E.2d 822, 828 (2009) (citations omitted). A vehicle inexplicably stopped in the middle of a public roadway is a circumstance sufficient, by itself, to indicate someone in the vehicle may need assistance, or that mischief is

afoot. At the very least, it is a situation which warrants notice to other motorists and it is not the role of this, or any other court, to "indulg[e] in unrealistic second-guessing of [a] law enforcement [officer's] judgment call[]." *Mangum*, ___ N.C. App. at ___, 795 S.E.2d at 118 (citation and quotation marks omitted).

Here, Detective Miller waited behind Defendant's vehicle for approximately fifteen seconds before activating his blue lights. By his testimony, he was unsure if the vehicle had broken down, and was attempting to alert other possible motorists of a potential hazard in the roadway.

Further, for reasons known only to her and perhaps Mr. Barton, Defendant inexplicably stopped the burgundy van in the middle of Woodland Church Road prior to any show of authority from law enforcement. Detectives were not identified as law enforcement until Detective Miller activated his blue lights approximately fifteen seconds after Defendant stopped the burgundy van. Thus, the earliest point at which detectives made a show of authority was activation of the blue lights on the Ford pickup truck. Consistent with *Mangum*, the mere activation of the vehicle's blue lights did not constitute a seizure as Defendant did not yield to the show of authority.

Mr. Barton exited Defendant's vehicle as Detective Miller was attempting to approach. However, he instructed Defendant to flee. As in *Leach* and *Mewborn*, Defendant fled prior to submitting to a show of authority.

Defendant then led officers on a lengthy, high-speed chase with two small children in the vehicle. She did not submit to the officers' show of authority until she discontinued fleeing from officers and further movement was prevented by Deputy Toler's vehicle. It was at this point that Defendant was seized pursuant to the Fourth Amendment. The criminal activity observed by Detective Miller during the mile and a half car chase, and subsequently his observations of the two minor children in the van, justified Defendant's arrest for fleeing to elude arrest, resisting a public officer, and two counts of child abuse.

Conclusion

Defendant was not seized under the Fourth Amendment when Defendant stopped her burgundy van in the middle of Woodland Church Road. The trial court erred in granting Defendant's motion to suppress. Accordingly, we reverse and remand to the trial court.

REVERSED AND REMANDED.

Judges BRYANT and MURPHY concur.

PAUL W. SWAUGER, PETITIONER
v.
UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE, RESPONDENT

No. COA17-1303

Filed 15 May 2018

Jurisdiction—subject matter—administrative law judge's final decision—judicial review

The trial court properly dismissed, for lack of subject matter jurisdiction, a petition for judicial review of an administrative law judge's final decision in a contested case involving an employee's dismissal from a state university. Sections 7A-29(a) and 126-34.02(a) provided a legally sufficient method for obtaining judicial review by direct appeal to the Court of Appeals, and the plain language of section 150B-43 prohibited petitioner from seeking judicial review in the superior court.

Appeal by Petitioner from Order entered 10 July 2017 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 3 May 2018.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward and Matthew J. Millisor, for Petitioner-Appellant Paul W. Swauger.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for Respondent-Appellee University of North Carolina at Charlotte.

INMAN, Judge.

Petitioner Paul Swauger ("Petitioner") appeals an order dismissing his petition for judicial review for lack of subject matter jurisdiction. Petitioner contends the Cabarrus County Superior Court erred in failing to review an Administrative Law Judge's final decision pursuant to Sections 150B-43 and 150B-45 of our General Statutes. Because Sections 7A-29(a) and 126-34.02(a) provided Petitioner with an adequate procedure for judicial review by direct appeal to this Court, we affirm the trial court's dismissal of Petitioner's petition.

I. FACTS AND PROCEDURAL HISTORY

Petitioner was a career state employee at the University of North Carolina at Charlotte (the "University"), where he worked as a mechanic.

During Petitioner's employment, the University switched its email provider from Microsoft Outlook to Google's Gmail. Petitioner refused to agree to Google's Terms of Service for Gmail and was dismissed from his job as a result.

Petitioner filed a petition for contested case hearing in the Office of Administrative Hearings ("OAH") on 5 May 2016, alleging he was dismissed without just cause. On 4 January 2017, the administrative law judge ("ALJ") that heard Petitioner's case issued a Final Decision concluding that the University sufficiently proved it had just cause to dismiss Petitioner.

On 2 February 2017, Petitioner filed a petition in Cabarrus County Superior Court for review of the ALJ's Final Decision. The University filed a motion to dismiss the petition, contending that the superior court did not have subject matter jurisdiction. On 10 July 2017, the trial court granted the motion to dismiss. Petitioner timely appealed the trial court's dismissal order to this Court.

II. ANALYSIS

A. Standard of Review

The standard of review for an appeal based on subject matter jurisdiction is *de novo*. *Country Club of Johnston Cty., Inc. v. United States Fid. & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002). Issues of statutory interpretation are also subject to *de novo* review. *Matter of Dippel*, ___ N.C. App. ___, ___, 791 S.E.2d 684, 685 (2016). This standard requires the Court to "consider the question anew, as if not previously considered or decided." *In re Soc'y for Pres. of Historic Oakwood*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002) (citation omitted).

B. The Superior Court Was Without Jurisdiction to Hear Petitioner's Petition

The University, as a state agency, is protected by sovereign immunity. *Guthrie v. N.C. State Ports Authority*, 307 N.C. 522, 532, 299 S.E.2d 618, 624 (1983). "It has long been established that an action cannot be maintained against the State of North Carolina *or an agency thereof* unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified*." *Id.* at 534, 299 S.E.2d at 625 (emphasis in original) (citation omitted). The waiver of immunity by the State must not be considered lightly, and statutes waiving immunity shall be construed strictly and in favor of immunity. *Id.* at 537-38, 299 S.E.2d at 627.

It is not contested that North Carolina has waived its sovereign immunity for State employees to bring suit through the OAH. What the parties dispute, however, is the procedure required for an employee to pursue an appeal from an OAH decision.

Section 7A-29(a) of our General Statutes allows a party to immediately appeal "any final decision or order of . . . the [OAH] under [N.C. Gen. Stat. §] 126-34.02" to this Court. N.C. Gen. Stat. § 7A-29 (2017). Section 126-34.02 allows a former State employee to file a contested case with the OAH pursuant to the procedures set forth in Sections 150B-22 through 150B-37. N.C. Gen. Stat. § 126-34.02(a) (2017). Since its amendment in 2013, this same section also provides that "[a]n aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in [N.C. Gen. Stat. §] 7A-29(a)." N.C. Gen. Stat. § 126-34.02(a).

Section 150B-43 of our General Statutes also provides for judicial review of decisions by ALJs in contested cases. N.C. Gen. Stat. § 150B-43 (2017). This statute provides:

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

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

The University argues, and the superior court held below, that Petitioner's appeal falls outside the scope of Section 150B-43 and must be pursued as provided in Section 126-34.02, because that statute provides an adequate procedure for judicial review of OAH decisions regarding State employees.

Petitioner asserts that Section 126-34.02 is not an "adequate procedure for judicial review . . . provided by another statute[.]" N.C. Gen. Stat. § 150B-43. Petitioner relies on this Court's decision in *Harris v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, 798 S.E.2d 127, *aff'd per curiam*, ___ N.C. ___, 808 S.E.2d 142 (2017), which addressed whether the "adequate procedure" language in Section 150B-43 precluded the application of the standard of review contained in Section 150B-51 to an appeal pursuant to Section 7A-29(a). ___ N.C. App. at ___, 798 S.E.2d at 131-34. Petitioner asserts that *Harris* held that "Chapter 126 does not

provide 'an adequate procedure for judicial review[,]' " as the majority in that case wrote the following in addressing the dissent: "The separate opinion asserts N.C. Gen. Stat. § 126-34.02 is 'another statute,' which provides 'an adequate procedure for judicial review.' We disagree." *Harris* at ___, 798 S.E.2d at 133.

Petitioner's broad interpretation of *Harris* mistakenly considers the above language in that decision out of context. First, the appeal in *Harris* was itself pursuant to Section 7A-29(a), and we held that the "appeal is properly before us." *Id.* at ___, 798 S.E.2d at 131. Presumably, if that statute did not provide an adequate means of review, this Court could not have addressed the merits of that appeal. Second, the issue raised by the dissent and addressed by the majority in *Harris* was not whether Section 7A-29(a) was an adequate procedure for judicial review, but whether the standard of review found in Section 150B-51 applies to this Court's review of a decision on appeal pursuant to Sections 7A-29(a) and 126-34.02(a). *Harris* at ___, 798 S.E.2d at 133-34. The majority opinion in Harris explained why it held, unlike the dissent in that case, that the standard of review provisions in Chapter 150B should apply to an appeal from an employment claim:

> The scope and standard of review of this Court's review of the ALJ's final decision is expressly set forth in § 150B-51. Chapter 126 is silent on this issue. While Chapter 126 governs the proceeding before the ALJ and provides the aggrieved party the right to appeal to this Court, Chapter 150B sets forth our standard of review . . . .

Harris at ___, 798 S.E.2d at 133. In sum, *Harris* did not foreclose direct judicial review of an employment dispute by this Court pursuant to Sections 7A-29(a) and 126-34.02(a).

Petitioner also contends that the "adequate procedure" language in Section 150B-43 is ambiguous. We disagree. Ambiguity exists only where the statute is "fairly susceptible of two or more meanings[.]" *State v. Sherrod*, 191 N.C. App. 776, 778, 663 S.E.2d 470, 472 (2008) (internal quotation marks and citation omitted). Where there is no ambiguity, this Court does not employ the canons of statutory interpretation, and instead "giv[es] the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted).

Petitioner fails to advance any alternative meaning for the language in question, instead conclusively asserting that the entire statutory framework for judicial review of ALJ decisions is ambiguous. Section 150B-43 is straightforward and susceptible of only one interpretation.

Giving the words "procedure[,]" "judicial review[,]" and "adequate" their ordinary meanings, N.C. Gen. Stat. § 150B-43, review by a superior court under Article 4 of Chapter 150B is not available when another statute provides "[a] specific method or course of action" for "[a] court's review of a lower court's or administrative body's factual or legal findings[,]" that is "[l]egally sufficient[.]" Black's Law Dictionary, 1241, 864, 42 (8th ed. 2004) (defining "procedure," "judicial review," and "adequate," respectively). Because Sections 7A-29(a) and 126-34.02(a) provide a legally sufficient method for obtaining judicial review of the ALJ's decision by direct appeal to this Court,[1] the plain language of Section 150B-43 prohibited Petitioner from seeking judicial review in superior court under Article 4 of Chapter 150B. N.C. Gen. Stat. § 150B-43. We therefore hold that the trial court properly dismissed Petitioner's petition.

III. CONCLUSION

The superior court correctly dismissed Petitioner's petition because it lacked subject matter jurisdiction to review the ALJ's final decision in the matter, as an adequate procedure for judicial review by direct appeal to this Court was provided by Sections 7A-29(a) and 126-34.02(a). As a result, the right to file a petition in superior court under Section 150B-43 was foreclosed by the plain language of that statute.

AFFIRMED.

Judges DAVIS and MURPHY concur.

1. Petitioner's brief asserts that a difference exists between "judicial review" under Sections 150B-43 and "appellate review" under Section 126-34.02(a). We see no distinction. Section 126-34.02 provides for "judicial review . . . by appeal to the Court of Appeals[,]" N.C. Gen. Stat. § 126-34.02(a), and Section 150B-43 prohibits review by a superior court under Article 4 of Chapter 150B where "judicial review is provided by another statute[.]" N.C. Gen. Stat. § 150B-43.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 MAY 2018)

BOWMAN v. BROS. AIR & HEAT, INC. No. 17-1203	Mecklenburg (16CVS20217)	Dismissed
CHURCH v. DECKER No. 17-1119	Caldwell (01CVD1391)	Dismissed
CHURCH v. DECKER No. 17-1120	Caldwell (01CVD1391)	Affirmed
DUNNIGAN v. MACK No. 17-1148	Watauga (13CVD579)	Affirmed
HEWITT v. HEWITT No. 17-791	Mecklenburg (14CVD1152)	Vacated and Remanded in Part; Affirmed in Part.
HILL v. HILL No. 17-1125	Buncombe (09CVD4748)	Affirmed
IN RE A.L. No. 17-1298	Durham (15J59-61)	Affirmed
IN RE E.D. No. 17-1254	Catawba (15JT263)	Affirmed
IN RE ESTATE OF WARD No. 17-454	New Hanover (13E901)	No error in part; Dismissed in part.
IN RE J.W. No. 17-1278	Harnett (17JA48)	Affirmed
IN RE S.P. No. 17-616	Wake (16SPC8520)	Affirmed
IN RE T.L.B. No. 17-1326	Wake (15JT280)	Affirmed
KISH v. FRYE REG'L MED. CTR. No. 17-1314	N.C. Industrial Commission (031980)	Affirmed
PRINCE v. UNDERGROUND CONSTR. CO., INC. No. 17-1195	N.C. Industrial Commission (13-731249)	Dismissed

PRYOR v. EXPRESS SERVS. No. 17-1060	N.C. Industrial Commission (X86647)	Affirmed
STATE v. BROWN No. 17-944	Stanly (15CRS1383)	NO ERROR AT TRIAL JUDGMENT VACATED AND REMANDED FOR RESENTENCING.
STATE v. CURLEE No. 17-1379	Davie (13CRS50224) (14CRS358)	Vacated and Remanded
STATE v. DANCY No. 17-1103	Cabarrus (13CRS56014)	Dismissed
STATE v. FORD No. 17-817	Guilford (13CRS100080) (13CRS100186-87) (14CRS24169)	No error in part; No plain error in part.
STATE v. GARLAND No. 17-1097	Davidson (14CRS2181-82) (14CRS53960)	No Error
STATE v. GIBSON No. 17-1012	Gaston (14CRS58642)	No Error
STATE v. GLADNEY No. 17-831	Guilford (14CRS23273) (14CRS87645)	No Error
STATE v. HINES No. 17-1141	Johnston (15CRS2030) (15CRS54562)	No Error
STATE v. HUNTER No. 17-1256	Wake (14CRS224200) (16CRS99)	Affirmed
STATE v. JIMENEZ No. 17-1050	Carteret (16CRS1485) (16CRS52297-98)	NO PLAIN ERROR.
STATE v. LUKER No. 17-886	Jackson (16CRS50084) (16CRS99)	No Error
STATE v. MACKINS No. 17-1277	Cabarrus (15CRS1126) (15CRS51906)	No Error

`STATE v. McCLELLAND No. 17-1231	Davidson (15CRS1548) (15CRS51334)	No Error
STATE v. MILLER No. 17-1049	Iredell (11CRS53855) (11CRS53915)	Affirmed
STATE v. MILLS No. 17-747	McDowell (09CRS51654)	REVERSED AND REMANDED WITH INSTRUCTIONS.
STATE v. MOORE No. 17-1225	Wake (16CRS210610-12)	Vacated and Remanded for Resentencing
STATE v. PAYNE No. 17-650	Forsyth (15CRS54023)	NO ERROR IN PART; DISMISSED IN PART
STATE v. PURSLEY No. 17-830	Macon (15CRS51402) (16CRS35)	Affirmed
STATE v. SMITH No. 17-925	Gaston (15CRS55427) (15CRS55430) (16CRS6)	NO PREJUDICIAL ERROR.
STATE v. STROUPE No. 17-1059	Graham (15CRS308-309)	No Error
STATE v. TRUESDALE No. 18-3	Mecklenburg (16CRS219217)	No Error
STATE v. TWINE No. 17-1094	Washington (15CRS50069-70)	No Error
STATE v. XIONG No. 17-1185	Cleveland (16CRS204)	DISMISSED in part; NO ERROR in part.
SUTTON v. ESTATE OF SHACKLEY No. 17-824	Pitt (13CVS2887)	Affirmed
TALLEY v. PRIDE MOBILITY PRODS. CORP. No. 17-896	Lee (16CVS348)	Affirmed
WHITMAN v. STIMPSON No. 17-922	Forsyth (16CVS342)	Affirmed

BEASLEY v. BEASLEY

[259 N.C. App. 735 (2018)]

BRIAN CARTER BEASLEY, PLAINTIFF
v.
KATHERINE LEIGH BEASLEY, DEFENDANT

No. COA17-787

Filed 5 June 2018

1. Appeal and Error—interlocutory appeal—family law—significant amount of attorneys' fees—substantial right

Although N.C.G.S. § 50-19.1 does not list orders for attorney fees as immediately appealable while other claims in a family matter remain pending, an issue regarding attorney fees is not a pending "claim" for purposes of that statute. Even if interlocutory, an order that completely disposes of the issue of attorney fees is immediately appealable as affecting a substantial right—particularly where, as here, the award orders a party to make immediate payment of a significant amount.

2. Attorney Fees—findings of fact—sufficiency of evidence—reliance on prior orders

Plaintiff appropriately preserved a challenge to an award of attorney fees in a family law case by objecting to the trial court's findings of fact as not being based on new evidence. Although the trial court did not allow new evidence at the hearing on attorney fees, the court did not abuse its discretion in awarding fees based on findings made in prior hearings dealing with matters of support and custody and where the content of the findings was supported by voluminous filings in the record on appeal.

3. Attorney Fees—conclusions of law—dependent spouse—sufficiency of findings

The trial court's detailed findings of fact supported its conclusion that defendant wife was a dependent spouse with insufficient means to defray the cost of her legal expenses and that she was entitled to an award of attorney fees incurred in this action for child support and custody. The trial court's determination of the amount of attorneys' fees to be awarded was not an abuse of discretion.

Judge BERGER concurring in the result only.

Judge MURPHY dissenting.

Appeal by plaintiff from order entered 28 December 2016 by Judge Lisa V.L. Menefee in Forsyth County District Court. Heard in the Court of Appeals 6 February 2018.

Jones Law PLLC, by Brian E. Jones, for plaintiff-appellant.

Halvorsen Bradshaw, PLLC, by Ruth I. Bradshaw for defendant-appellee.

BRYANT, Judge.

Where the trial court's order for attorney's fees effectively disposes of plaintiff's claim for attorney's fees as they relate to the issues of child support and child custody; and plaintiff's interlocutory appeal affects a substantial right, we review plaintiff's appeal. Where the trial court's findings of fact are supported by competent evidence and in turn support the conclusion that defendant is entitled to receive a portion of her attorney's fees, we affirm the order of the trial court.

Plaintiff Brian Carter Beasley and defendant Katherine Leigh Beasley were married for sixteen years. The parties separated on 2 September 2015. They have one minor child, currently seven years old.

Plaintiff initiated the instant lawsuit on 25 September 2015 by filing claims for child custody, child support, motion for medical records of defendant, and attorney's fees. Defendant filed a Motion to Strike, Answer, and Counterclaims on 23 November 2015. Meanwhile, the parties were unable to reach a mediated parenting agreement as to child custody.

When the cross-claims for child custody came on for hearing on 18 February 2016, the parties resolved the issue by consent in a Memorandum of Judgment/Order entered that same day. A consent order for child custody was entered on 29 July 2016 *nunc pro tunc* 18 February 2016, which reserved any and all pending claims, including but not limited to attorney's fees. Pursuant to the consent order, the parties also agreed that defendant would relocate from Winston-Salem, North Carolina, to Madison County, Alabama, in May 2016. In April, the parties entered into a Consent Order to Sell Former Marital Residence, in which they agreed the funds from the sale of the marital home would be held in the parties' attorneys' trust accounts until resolution of the pending cross-claims for equitable distribution.

Plaintiff and defendant again reached an impasse at private mediation. On 31 May, the parties proceeded to a hearing before the

Honorable Lisa V. L. Menefee, Chief Judge presiding in Forsyth County District Court on the pending cross-claims for child support and defendant's claim for post-separation support. Judge Menefee rendered an oral ruling for plaintiff to pay defendant child support and post-separation support. Thereafter, the trial court entered its written order on 5 July 2016 *nunc pro tunc* 31 May 2016 which detailed that beginning on 1 June 2016 "and continuing on the first day of the month thereafter," plaintiff was to pay defendant $3,445.93 in post-separation support and $1,116.00 in child support.

On 12 July 2016, defendant filed a motion for contempt, attorney's fees, and a show cause order asking the trial court to hold plaintiff in civil and/or criminal contempt for failing to pay child support or post-separation support. Defendant's motion alleged that plaintiff owed defendant "at least $1,116 in child support arrears and at least $5,168.91 in post-separation support arrears." Defendant alleged that as of the date of filing the motion,

> [p]laintiff ha[d] failed to comply with the Order in that the only money [p]laintiff has given [d]efendant is one check on June 8, 2016 in the amount of $1,116 for child support. Defendant cashed the check on June 9 or 10th at State Employees' Credit Union (SECU). On or about June 14, 2016, [d]efendant received a call from SECU notifying her that [p]laintiff's BB&T check bounced. SECU began seeking fees and reimbursement from [d]efendant.

That same day, the trial court entered a show cause order, ordering plaintiff to appear in Forsyth County District Court on 25 July 2016.

On 22 July 2016, plaintiff filed a motion to continue, stating that he had moved to Alabama where he had taken a new job and that he had been unemployed for several weeks leading up to his move. As such, plaintiff argued, he was financially unable to comply with the 5 July 2016 order. Plaintiff's motion was denied. When plaintiff failed to appear on 25 July on the show cause order, the Honorable Camille Banks-Payne, Judge presiding, entered a Commitment Order for Civil Contempt against plaintiff.

On 31 August 2016, defendant noticed for hearing the issue of attorney's fees related to her resolved claims for child custody, child support, and post-separation support, and the hearing was set for 26 October 2016. At the hearing, the court received into evidence, without objection, the affidavit of attorney's fees of defendant's counsel. On 28 December 2016 *nunc pro tunc* 26 October 2016, the trial court entered

its Order for Attorney's fees, stating it had considered the "voluminous pleadings of record to include[,] but not limited to[,] the Order for Child Support and Order for Post-Separation Support[,] . . . the Consent Order for Child Custody[,]. . . the motions to continue, . . . the verified Affidavit of Attorney's fees presented by Defendant's counsel, and arguments of counsel[.]" The trial court ordered that "Plaintiff shall pay directly to Defendant's attorneys . . . attorney's fees in the total amount of $48,188.15 by no later than December 31, 2016." Plaintiff appeals.

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[1] Plaintiff concedes that his appeal from the trial court's Order for Attorney's Fees is interlocutory, as other claims in this case remain outstanding. We first address the interlocutory nature of plaintiff's appeal.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Musick v. Musick*, 203 N.C. App. 368, 370, 691 S.E.2d 61, 62–63 (2010) (quoting *McIntyre v. McIntyre*, 175 N.C. Ap. 558, 561–62, 623 S.E.2d 828, 831 (2006)).

> While a final judgment is always appealable, an interlocutory order may be appealed immediately only if (i) the trial court certifies the case for immediate appeal pursuant to N.C.G.S. § 1A-1, Rule 54(b), or (ii) the order "affects a substantial right of the appellant that would be lost without immediate review."

Id. at 370, 691 S.E.2d at 63 (quoting *McIntyre*, 175 N.C. App. at 562, 623 S.E.2d at 831). As the trial court in the instant case did not certify the order for attorney's fees pursuant to N.C. Gen. Stat. § 1A–1, Rule 54(b), plaintiff's right to an immediate appeal, if one exists, necessarily depends on whether the trial court's order denying his motion affects a substantial right. *See id.* (citation omitted).

"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." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) (citation omitted). "Th[e] [substantial right] rule is grounded in sound policy considerations. Its goal is to 'prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.' " *Id.* at 165, 545 S.E.2d at 261–62 (quoting *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980)).

However, "an order which completely disposes of one of several issues in a lawsuit affects a substantial right." *Case v. Case*, 73 N.C. App. 76, 78, 325 S.E.2d 661, 663 (1985) (citation omitted) (allowing immediate appeal of the trial court's entry of summary judgment on the defendant's counterclaim for equitable distribution as it affected a substantial right, even though claims for absolute divorce, child custody, and child support were still pending in the trial court).

In August 2013, the following statutory provision ("Maintenance of certain appeals allowed") became effective and applies to the instant appeal:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action. A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in this section. An appeal from an order or judgment under this section shall not deprive the trial court of jurisdiction over any other claims pending in the same action.

N.C. Gen. Stat. § 50-19.1 (2017). In other words, this provision creates a kind of intermediate class of "quasi-interlocutory" orders that would be final if considered in isolation, but would technically not otherwise be "final" under Rule 54(b) because another related claim (or "issue") is still pending in the larger action. *See id.*

In *Comstock v. Comstock*, this Court dismissed attempted interlocutory appeals from an injunction order and domestic relations order on the grounds that these types of orders "are not included on the list of immediately appealable interlocutory orders." 240 N.C. App. 304, 322, 771 S.E.2d 602, 615 (2015) (citing N.C.G.S. § 50–19.1). Based on this reasoning and interpretation of section 50-19.1, it appears this Court was guided by the doctrine of *expressio unius est exclusio alterius*, which, in the context of statutory construction, "provides that the mention of such specific exceptions implies the exclusion of others." *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (citations omitted). In other words, this reasoning in *Comstock* implies that only the types of orders specifically included on the list in

Section 50-19.1—absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution—may be appealed pursuant to N.C. Gen. Stat. § 50-19.1. Not "specifically included on the list" of claims in section 50-19.1 are any of the provisions for attorney's fees included in Chapter 50. *See*, *e.g.*, N.C. Gen. Stat. § 50-13.6 (2017) ("Counsel fees in actions for custody and support of minor children"); N.C. Gen. Stat. § 50-16.4 (2017) ("Counsel fees in actions for alimony, post-separation support"). Following the reasoning in *Comstock* and the doctrine of *expressio unius est exclusio alterius*, it could be inferred that the legislature's intent in excluding orders for attorney's fees from section 50-19.1 means these issues are not appealable (when interlocutory) under this provision. *See Comstock*, 240 N.C. App. at 322–23, 771 S.E.2d at 615.

However, *Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013), which was decided in June 2013—two months before N.C. Gen. Stat. § 50-19.1 was enacted, *see* N.C. Sess. Laws 2013-411, § 2, eff. Aug. 23, 2013—possibly complicates this issue.

In *Duncan*, the Supreme Court "clarif[ied] the effect of an unresolved request for attorney's fees on an appeal from an order that otherwise fully determines the action." 366 N.C. at 545, 742 S.E.2d at 800. The Supreme Court held that

> [o]nce the trial court enters an order that decides all *substantive* claims, the right to appeal commences. Failure to appeal from that order forfeits the right. Because *attorney's fees and costs are collateral to a final judgment on the merits*, an unresolved request for attorney's fees and costs does not render interlocutory an appeal from the trial court's order.

Id. (emphasis added). In other words, (1) "attorney's fees" is a non-substantive "issue," and not a substantive "claim" (at least in relation to a claim for alimony); and (2) entry of an alimony order constitutes entry of a final order for purposes of Rule 54(b), notwithstanding the fact that a related attorney's fees "issue" might still be pending. *See id.* at 546, 742 S.E.2d at 801 ("Though an open request for attorney's fees and costs necessitates further proceedings in the trial court, the unresolved issue does not prevent judgment on the merits from being final." (internal citations omitted)). Thus, per the analysis set forth in *Duncan*, a pending attorney's fees "issue" would not count as a pending "claim" for purposes of Section 50-19.1. *See id*; *but see* N.C. Sess. Laws 2013-411, § 2, eff. Aug. 23, 2013 (enacting N.C. Gen. Stat. § 50-19.1 two months

after *Duncan* was decided). Notably, neither *Duncan* nor *Comstock* (nor any other case) has interpreted N.C. Gen. Stat. § 50-19.1 through the particular factual lens facing us in the instant appeal.

Here, the trial court's order as to attorney's fees has effectively (and completely) disposed of the "issue" of attorney's fees relating to the parties' "claims" for child support, child custody, and post-separation support. These substantive "claims" (for child support, child custody, and post-separation support), *see Duncan*, 366 N.C. at 545–46, 742 S.E.2d at 800–01, have been fully litigated and decided, as has the "issue" of attorney's fees as it relates to the aforementioned claims. The parties' claims for equitable distribution, however, remain pending before the trial court. Thus, the question we are presented with is whether an order for attorney's fees, which completely disposes of that issue as it relates to other substantive claims, is immediately appealable pursuant to N.C. Gen. Stat. § 50-19.1; particularly where, as here, it is nevertheless "an order which completely disposes of one of several issues in a lawsuit," and it arguably "affects a substantial right." *See Case*, 73 N.C. App. at 78, 325 S.E.2d at 663 ("[A]n order which completely disposes of one of several issues in a lawsuit affects a substantial right." (citation omitted)).

In *Case*, the trial court's order for partial summary judgment "concluded that [a] separation agreement [between the plaintiff and the defendant] was valid" and therefore the agreement served as "a bar to the [defendant's] counterclaim for equitable distribution[.]" *Id.* at 78–79, 325 S.E.2d at 663. In other words, the order "completely dispose[d] of the issue of equitable distribution," including the defendant's counterclaim for equitable distribution, "thereby affecting a substantial right of [the] defendant and rendering the appeal reviewable." *Id.*; *see Honeycutt v. Honeycutt*, 208 N.C. App. 70, 75, 701 S.E.2d 689, 692–93 (2010) (discussing the reasoning in *Case* regarding why an interlocutory appeal should be heard and how it affected a defendant's substantial right).

Here, the trial court's order as to attorney's fees functions in a similar way as did the order in *Case*, which barred the defendant's counterclaim for equitable distribution—it effectively disposes of plaintiff's claim for attorney's fees as they relate to the litigating of the issues of child support, child custody, and post-separation support. In plaintiff's original complaint,[1] he included a claim for attorney's fees.

1. On 9 January 2016, plaintiff filed a motion to amend his complaint in order to include a claim for equitable distribution. There is nothing in the record to indicate whether this motion to amend was allowed by the court.

The child support, child custody, and post-separation support claims have been fully litigated and decided, and the issue of attorney's fees as it relates to the aforementioned claims has also been finally determined. As such, to delay plaintiff's appeal from the order regarding attorney's fees until a final determination on the merits of all the parties' remaining claims would jeopardize plaintiff's substantial right not only because it is "an order which completely disposes of one of several issues in a lawsuit . . . ." *Case*, 73 N.C. App. at 78, 325 S.E.2d at 663 (citation omitted), but also because it orders plaintiff to pay a not insignificant amount—$48,188.15—in attorney's fees, *see Estate of Redden ex rel. Morely v. Redden*, 179 N.C. App. 113, 116–17, 632 S.E.2d 794, 798 (2006) ("The Order appealed affects a substantial right of [the] Defendant . . . by ordering her to make immediate payment of a significant amount of money; therefore this Court has jurisdiction over the Defendant's appeal pursuant to N.C. Gen. Stat. 1–277 and N.C. Gen. Stat. 7A–27(d)." (citations omitted)), *remanded on other grounds*, 361 N.C. 352, 649 S.E.2d 638 (2007).

Furthermore, this Court has allowed interlocutory family law appeals from orders which "affect a substantial right." In *Sorey v. Sorey*, this Court held that an order denying a claim for post-separation support (a claim not included in the list of immediately appealable claims in section 50-19.1) affected a substantial right and, thus, was subject to immediate interlocutory appeal. 233 N.C. App. 682, 684, 757 S.E.2d 518, 519 (2014) (relying on *Mayer v. Mayer*, 66 N.C. App. 522, 525, 311 S.E.2d 659, 662 (1984)); *see also McConnell v. McConnell*, 151 N.C. App. 622, 624–25, 566 S.E.2d 801, 803–04 (2002) (allowing an interlocutory appeal from a child custody order based on a "substantial right" where a child was deemed to be subject to an immediate threat of sexual molestation).

We conclude that while N.C. Gen. Stat. § 50-19.1 restricts interlocutory family law appeals to those claims listed in that section, an avenue for appeal nevertheless exists. Based on this Court's precedent, which has allowed interlocutory appeals in family law cases based on a "substantial right," we determine that the traditional "substantial right" exception may also apply to other interlocutory orders entered in a family law case—such as the one here for attorney's fees—but that do not appear listed in section 50-19.1. As such, we consider the merits of plaintiff's appeal.

Plaintiff argues (I) the trial court abused its discretion when it awarded $48,188.15 in attorney's fees because Findings of Fact 14–24

are unsupported by competent evidence and (II) the trial court's findings of fact do not in turn support the conclusion that defendant be awarded attorney's fees.

I

[2] Plaintiff first argues Findings of Fact 14–24 are unsupported by competent evidence. Specifically, plaintiff contends that the findings are unsupported by competent evidence because the trial transcript indicates that "the trial court heard no evidence of any kind . . . . There was no testimony taken at the hearing, and no evidence that would establish that [defendant] is the dependent spouse or that she lacked means and ability to defray the cost of the litigation." However, defendant argues that plaintiff has waived his right to review of this issue because he failed to properly preserve for appellate review his challenges to Findings of Fact 14–24. We first address defendant's waiver argument.

" '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' and must have 'obtain[ed] a ruling upon the party's request, objection, or motion.' " *In re J.H.*, 224 N.C. App. 255, 269, 789 S.E.2d 228, 239 (2015) (alteration in original) (quoting N.C. R. App. P. 10(a)(1)).

A. Finding of Fact 14

In the instant case, plaintiff's attorney objected to the trial court's decision to not hear evidence and to incorporate findings from affidavits and prior hearings:

> [Plaintiff's attorney]: . . . I just wanted to object for the record to findings being incorporated from a prior hearing. I don't believe that hearing -- I could be wrong. I don't believe that hearing was noticed for attorney's fees.
>
> THE COURT: You are correct. It was not noticed for attorney's fees. Attorney's fees were reserved for a later date. However, continue.
>
> [Plaintiff's attorney]: Just again for the record, so I would object to any findings being incorporated from a prior hearing at this point because of facts that existed at the time that that hearing was for [post-separation support] are different from the facts that exist today. The motion for attorney's fees was noticed for today. So we are here to adjudicate facts as they exist today, primarily [defendant's]

> allegation that she does not have the means and ability to defray the cost of litigation. So I would argue that I have the -- I should be able to require that [defendant] take the stand and present evidence in the form of testimony or otherwise and I have the opportunity to cross-examine her on that evidence, testimony or otherwise.
>
> I -- I do not have the opportunity to do that, and I would just argue that that would need to be the basis for which the Court makes its findings of fact and so that is my sole objection at this point.

Plaintiff's attorney objected again at the end of the hearing:

> I had no contention whatsoever about a single minute that [defendant's attorney] is alleging that she or her staff or anyone in her office spent on this case. None of my objection is rooted in that, so I just want to make that clear.
>
> My objection is simply limited to the vary narrow proposition that the facts need to be provided today in this hearing for the Court to make its findings of fact, and there is no testimony today and no -- therefore, no facts upon which the Court can make its findings of fact. I understand the Court's position, but I'm just making that limited objection and that anything that [defendant's attorney] says in the form of facts about the case I would -- I would object to that because [defendant's attorney] can't testify as a witness.
>
> But none of my objections are aimed at any amount of time that [defendant's attorney] or her office or staff has -- has had to partake to get these things to whatever phases they had to . . . .

Defendant appears to challenge plaintiff's failure to object to specific findings of fact—14–24—but ignores the crux of plaintiff's objection, which was that no additional evidence was presented to the trial court; and therefore, no basis existed upon which the court could make those findings of fact. As such, plaintiff's objection to the trial court's method of making its findings without hearing evidence is sufficient to preserve his challenge on appeal to the substance of the trial court's findings of fact as not supported by competent evidence. Accordingly, we conclude plaintiff properly preserved his objection to Findings of Fact 14–24 for appellate review, and we next address the merits of plaintiff's argument.

Pursuant to N.C. Gen. Stat. § 50-16.4, a party is entitled to attorney's fees for a post-separation support claim if the party is "(1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Barrett v. Barrett*, 140 N.C. App. 369, 374, 536 S.E.2d 642, 646 (2000) (citing *Clark v. Clark*, 301 N.C. 123, 135–36, 271 S.E.2d 58, 67 (1980)). Pursuant to N.C. Gen. Stat. § 50-13.6, in a case involving claims for child custody and child support, the trial court has authority to award a party attorney's fees after first finding that the party seeking attorney's fees was "(1) acting in good faith and (2) has insufficient means to defray the expense of the suit." *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citation omitted). "When the statutory requirements have been met, the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." *Id.* (quoting *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980)).

In *Schneider v. Schneider*, this Court determined that where a trial court held a hearing on the issue of attorney's fees, considered documentary exhibits, and, *inter alia*, "explicitly noted that the order was based not just on this hearing, but also on the evidence presented at the hearings regarding the other matters at issue[,]" the findings of fact in a trial court's order awarding attorney's fees was supported by competent evidence. ___ N.C. App. ___, ___, 807 S.E.2d 165, 167 (2017). Similarly, in the instant case, the trial court noted in its order that it "considered the voluminous pleadings of record to include but not be limited to the Order for Child Support and Order for Post-Separation Support . . . the Consent Order for Child Custody . . . the motions to continue, . . . the verified Affidavit of Attorney's fees presented by Defendant's counsel, and arguments of counsel . . . ."

However, unlike the hearing in *Schneider*, at which the party challenging the trial court's award of attorney's fees testified, in the instant case, neither party testified at the hearing. Instead, as the trial court stated in Finding of Fact 14, which plaintiff challenges on appeal, the trial court found as follows:

> 14. The Court is not in receipt of any additional evidence and is relying upon the Findings of Fact as set forth in the Custody Order and the Support Order. Additionally, the Court incorporates the Findings of Fact as set forth in the Custody Order and the Support Order into this Attorney's fees Order as set forth fully herein.

In other words, the trial court allowed no new evidence (aside from the affidavit for attorney's fees) and otherwise relied solely on the findings of fact in other orders, which regarded issues of custody and support and were not related to attorney's fees.

These differences between the order for attorney's fees entered in the instant case and the one entered in *Schneider* notwithstanding, we conclude that the trial court did not abuse its discretion when it relied on the voluminous pleadings and the court record, including the Custody and Support Orders, neither of which have been challenged or appealed by plaintiff. Nevertheless, plaintiff challenges the following findings of fact in the trial court's order, including Finding of Fact 14 discussed above, as not supported by competent evidence, and we address each finding in turn.

B. Findings of Fact 15–16

> 15. Upon information and belief, Plaintiff left his employment at BB&T and moved to Alabama. The Court has received no information as to his current income nor his individual and shared expenses.
>
> 16. As addressed in the Custody Order and Support Order, Defendant relocated from North Carolina to Alabama in June 2016, and the Support Order includes a finding of fact that Defendant estimated her expenses after the move to Madison, Alabama would equate those of the former marital residence to ensure the minor child attends a comparable school to Vienna Elementary and to maintain her accustomed standard of living for herself and the minor child.

These findings are supported by the trial court's Custody Order, Support Order, and plaintiff's own motion to continue filed in July 2016, in which he stated he had moved to Alabama and begun a new job there. In his amended complaint, which included a motion for attorney's fees, plaintiff did not include an affidavit detailing those fees, nor did he include updated information as to his current income since his move to Alabama. Thus, these findings are supported by the evidence.

C. Findings of Fact Nos. 17, 19–20, 22

> 17. A review of the Affidavit for Attorney's fees presented by Defendant movant through counsel includes a summary of attorney's fees as of September 30, 2016, as follows:

a. Total fees related to Child Custody equal $32,199.00;

b. Total fees related to Child Support equal $16,722.15;

c. Total fees related to Post-Separation Support equal $16,700.41; and

d. Total costs related to child custody, child support, and post-separation support equal $3,566.00.

. . . .

19. The normal and reasonable value of the legal services rendered on behalf of Plaintiff for an attorney of the experience and expertise of Ruth I. Bradshaw is $250 per hour and for legal assistant/ paralegal time is at least $75 per hour. The law firm of Halvorsen Bradshaw, PLLC having spent over 100 hours in connection with Plaintiff, a reasonable fee through September 30, 2016, would be at least $64,928.78 for Defendant's claims for child custody, child support, and post-separation support. These fees and hourly rates are customary in this area.

20. Defendant is an interested party acting in good faith who has insufficient means to defray the expense of this suit, including attorney's fees, and Plaintiff should be required to pay a portion of the expense of this suit, including attorney's fees. Counsel for Defendant's use of paralegals and legal assistants was appropriate and consistent with how staff members are utilized and billed in matters like Defendant's claims for child custody, child support, and post-separation support. This Court reviewed the Affidavit for Attorney's fees, and the amount of time that was spent by Ms. Bradshaw and her staff to prepare for the trial of child custody a minimum of three times custody, to prepare for the trial of child support and post-separation support, to prepare for hearing only for the hearings to be continued, to prepare for depositions, to issue, reissue, and reissue subpoenas, respond to motions, and overall the time and energy spent in dealing with what had become a highly litigious matter.

. . . .

> 22. As set forth in the Affidavit for Attorney's fees filed on October 26, 2016, by Defendant's counsel, from the beginning of representation concerning Defendant's counterclaims for child custody, child support, post-separation support, and attorney's fees, the attorneys have consulted with Defendant, counseled and advised Defendant, prepared pleadings and other documents, and otherwise prepared for the hearings of these matters. From the beginning of this litigation, Defendant's counsel has conferred with her at length and at frequent intervals. The nature of the litigation, its difficulty, and its substance required these conferences and necessitated preparation for litigation.

The Affidavit for Attorney's fees lists the total fees related to child custody as $32,199.22, the total fees related to child support as $16,722.15, and the total fees related to post-separation support as $16,007.41. In sum, these fees total $64,928.78, the exact amount listed in Finding of Fact 19. Findings of Fact 19 and 22 are also supported by paragraphs 2 and 6, respectively, in the Affidavit for Attorney's fees. Thus, Findings of Fact 17, 19, and 22 are supported by the evidence.

The first sentence of Finding of Fact 20, however, is actually a conclusion of law and will be reviewed as such and addressed in Section II, *infra*. *See China Grove 152, LLC v. Town of China Grove*, 242 N.C. App. 1, 5, 773 S.E.2d 566, 569 (2015) ("[T]he labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." (quoting *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012)). As for the remainder of this finding, it is supported by the extensive filings present in the record before this Court and before the trial court. The record contains almost 400 pages of motions and trial court orders, including several amended filings of notices of depositions, motions for extensions of time, and four motions to continue; three of which were filed by plaintiff. Accordingly, this finding is supported by competent evidence.

D. Findings of Fact 18 & 23

> 18. Defendant's attorney's fees are reasonable in light of the parties' respective earnings (wherein Defendant earns approximately 0% of the income and Plaintiff earns approximately 100% of the income) and all facts set forth in the Custody Order and Support Order.

. . . .

> 23. Defendant is unable to employ adequate counsel in order to proceed as a litigant to meet Plaintiff as a litigant in this action[.]

These findings are supported by the evidence namely, the Support Order, which states that "Plaintiff earns 100% of the combined income. Defendant earns 0% of the combined income."

E. Findings of Fact 21 & 24

> 21. Counsel for Plaintiff is holding approximately $85,000 in his trust account and Counsel for Defendant is also holding approximately $85,000 in her trust account, with said total equaling approximately $170,000 representing the proceeds from the sale of the former marital residence. The Court finds that both parties may have access to some funds in relation to the sale of the former marital residence, which could be utilized to pay their respective fees. The parties' claims for equitable distribution have not been resolved or decided by the Court. The Court is taking into consideration each parties' access to the funds held in trust by counsel in the determination of allocation of attorney's fees.
>
> . . . .
>
> 24. As it relates to the claims for child custody Defendant has the means, ability, and some responsibility for a portion of her attorney's fees, the Court allocates to Plaintiff attorney's fees in the amount of $21,466.00.

Plaintiff challenges Finding of Fact 21 as tending to "disprove the conclusion that defendant lacks sufficient means" to defray the cost of the litigation. However, as to the trial court's determination of whether the statutory requirements have been met as a matter of law in order to award attorney's fees, "[d]isparity of financial resources and the relative estates of the parties is not a required consideration." *Cox v. Cox*, 133 N.C. App. 221, 231, 515 S.E.2d 61, 68 (1999) (citing *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996)). As such, where this finding is supported by the evidence in the record, and the trial court's Finding of Fact 24 plainly contemplates the amount of funds available to defendant in her trust account, plaintiff's argument on this point is overruled.

Accordingly, where the competent evidence supported the trial court's Findings of Fact 14–24, *see Beall v. Beall*, 290 N.C. 669, 673, 228 S.E.2d 407, 409 (1976) ("When the trial judge is authorized to find the facts, his findings, if supported by competent evidence, will not be disturbed on appeal despite the existence of evidence which would sustain contrary findings." (citations omitted)), we now address whether these findings support the trial court's conclusion that defendant is entitled to receive a portion of her attorney's fees from plaintiff.

II

[3] Plaintiff also argues that the trial court's findings of fact do not support the trial court's conclusion of law that defendant should be awarded attorney's fees. Specifically, plaintiff argues the Order for Attorney's fees does not establish that defendant is in fact a dependent spouse or that she lacks sufficient means to defray the costs of her legal expenses. We disagree.

> In a custody suit or a custody *and* support suit, the trial judge . . . has the discretion to award attorney's fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. The facts required by the statute must be alleged and proved to support an order for attorney's fees. Whether these statutory requirements have been met is a question of law, reviewable on appeal. When the statutory requirements have been met, the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion.

Hudson, 299 N.C. at 472, 263 S.E.2d at 723–24 (internal citations omitted).

The order for attorney's fees contains detailed findings of fact, *see* Section I, *supra*, which clearly establish and support the trial court's conclusion of law that defendant is a dependent spouse with insufficient means to defray the cost of her legal expenses incurred in this litigation. The trial court specifically found that "Defendant is the 'dependent spouse,' " and "Plaintiff is the 'supporting spouse,' " two findings which plaintiff does not challenge on appeal and are therefore presumed correct and binding on appeal. *See In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008). These findings are also supported by the trial court's Support Order (incorporated by reference), which plaintiff did not appeal, and which ordered plaintiff to pay post-separation support to defendant in the amount of $3,445.93 per month.

Thus, where the trial court's findings of fact support its conclusion that defendant "is the dependent spouse, is entitled to post-separation support and has insufficient means to defray her expenses and taking into account Plaintiff is the supporting spouse and his ability to pay . . . Defendant is entitled to receive a portion of her attorney's fees[,]" and where "the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion[,]" *Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (emphasis added) (quoting *Hudson*, 299 N.C. at 472, 263 S.E.2d at 724), we affirm the order of the trial court.

AFFIRMED.

Judge BERGER concurs in the result only.

Judge MURPHY dissents in a separate opinion.

MURPHY, Judge, dissenting.

In reaching the merits of this appeal, the Majority concludes that the order requiring plaintiff to pay $48,188.15 in attorney fees affects a substantial right warranting immediate appellate review because it is "an order which completely disposes of one of several issues in a lawsuit" and "it orders plaintiff to pay a not insignificant amount—$48,188.15—in attorney's fees." I respectfully dissent from the Majority's exercise of jurisdiction over this interlocutory appeal because I do not believe that plaintiff has met his burden to demonstrate that the order for $48,188.15 in attorney fees affects a substantial right.

Initially, I note plaintiff's theory of substantial right, upon which the Majority predicates the exercise of jurisdiction, was not included in plaintiff's opening brief; it was only addressed in his reply brief. Under our Rules of Appellate Procedure, the appellant's brief shall contain a "statement of the grounds for appellate review[,]" and when an appeal is interlocutory "the statement must contain *sufficient facts* and *argument* to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4) (emphasis added). It is the appellant's "burden to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order[.]" *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 804 (2002).

The Statement of the Grounds for Appellate Review in the opening brief provides no substantive argument explaining how the order for attorney fees affects a substantial right of the party seeking review. Rather, the opening brief contains a single conclusory statement that the order affects a substantial right and a citation to *Peeler v. Peeler*, a case overruled over 35 years ago. *Peeler v. Peeler*, 7 N.C. App. 456, 172 S.E.2d 915 (1970), *overruled by Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981). *Stephenson* overruled *Peeler* and other prior decisions recognizing a right of immediate appeal from awards *pendente lite* and held that these orders and awards were interlocutory decrees that "necessarily do not affect a substantial right from which lies an immediate appeal pursuant to [N.C. Gen. Stat. §] 7A-27(d)." *Stephenson*, 55 N.C. App. at 252, 285 S.E.2d at 282.

Ordinarily, conclusory statements and "bare assertions" such as this are insufficient to confer appellate jurisdiction. *See, e.g.*, *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) ("The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right.").

Presumably in response to defendant's brief, which cited *Stephenson* and argued this Court was without jurisdiction to hear this appeal, plaintiff used his reply brief to take another bite at the apple and attempt to demonstrate how the order affects a substantial right. The reply brief contends that the "present order is nonetheless appealable . . . [because] it requires the payment of a considerable sum of money in a very short span of time." However, since the appellee typically has no opportunity to respond to the reply brief, it is not the proper place for an appellant to make completely new arguments.

Procedural issues notwithstanding, the jurisdictional argument contained in plaintiff's reply brief is still insufficient to demonstrate that the award of attorney fees in this case affects a substantial right of plaintiff's. Our jurisdictional inquiry is limited to the traditional "two-part test of the appealability of interlocutory orders under the 'substantial right' exception provided in [N.C. Gen. Stat. §] 1-277(a) and [N.C. Gen. Stat. §] 7A-27(d)(1)." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5, 362 S.E.2d 812, 815 (1987). "First, the right itself must be 'substantial.' " *Id.* Second, the appellant must demonstrate "that the right [will] be lost or prejudiced if not immediately appealed." *Id.* at 6, 362 S.E.2d at 816.

We have recognized that an interlocutory order may affect a substantial right when a party is required to "make immediate payment

of a significant amount of money." *See, e.g.*, *Estate of Redden v. Redden*, 179 N.C. App. 113, 117, 632 S.E.2d 794, 798 (2006) (concluding that an order for partial summary judgement requiring the defendant to pay the sum of $150,000.00 and costs affected a substantial right). However, the mere fact that plaintiff here would have to expend thousands of dollars to comply with the terms of this order does not alone satisfy his burden to show how the right affected is "substantial." Since our substantial right precedent requires a "case by case" analysis, *Stafford v. Stafford*, 133 N.C. App. 163, 165, 515 S.E.2d 43, 45 (1999), where an appellant argues that an interlocutory order affects a substantial right because that order requires him to pay a certain sum of money, we cannot properly assess the merits of that argument without some explanation as to why the sum owed is significant in light of the financial resources and constraints of the appellant. The amount at issue here–$48,188.15–may be the annual earnings for one litigant, or the monthly salary for another.

More importantly, the appellant seeking review must also show why "the right [will] be lost or prejudiced if not immediately appealed." *J & B Slurry Seal Co.*, 88 N.C. App. at 6, 362 S.E.2d at 816. In *Hanna v. Wright*, the defendant appealed an interlocutory order which allowed the plaintiff to repossess a piece of heavy equipment, a "track loader." *Hanna v. Wright*, ____ N.C. App. ____, ____, 800 S.E.2d 475, 476 (2017). The defendant alleged that the loss of the track loader would irreparably prejudice him and, thus, affected a substantial right. However, the defendant did not allege how the loss of the track loader would cause such prejudice. *Id.* Nor did the defendant "argue that losing possession of the [t]rack [l]oader would prevent [the defendant] from practicing his livelihood *as a whole*." *Id.* We held that the defendant's argument "does not evince sufficient grounds for an interlocutory appeal." *Id.*

Here, plaintiff failed to explain how the payment of $48,188.15 particularly affects him in light of his financial resources. He has also failed to explain why he would be "irremediably adversely affected" if the order for attorney fees is not immediately reviewed by this court. *See McConnell*, 151 N.C. App. at 625, 566 S.E.2d at 804. Plaintiff merely asserts that the order requires the payment of a considerable sum of money in a very short span of time. The Majority relies on this undeveloped argument and finds additional support for it by adopting an overly broad interpretation of *Case v. Case*, 73 N.C. App. 76, 325 S.E.2d 661 (1985). In *Case*, we held that the granting of plaintiff's motion for partial summary judgment affected his substantial right because the order concluded that a separation agreement was valid and thus posed a bar to defendant's

counterclaim for equitable distribution. *Id.* at 82, 325 S.E.2d at 665. I agree that the *Case* opinion does state and stand for the general proposition that "[i]t has been held that an order which completely disposes of one of several issues in a lawsuit affects a substantial right." *Id.* at 78, 325 S.E.2d at 663. However, the Majority goes too far in its reliance on *Case* by concluding that this order for attorney fees "completely disposes of one of several issues in a lawsuit" and "arguably affects a substantial right." *Case* does not control here, because this interlocutory order is for attorney fees, and the one in *Case* was a summary judgment order containing a legal conclusion that would absolutely bar a "substantive" counterclaim.[1] Plaintiff has not made the necessary showing that error, if any, cannot be corrected through the course of a timely appeal. We do not have jurisdiction to hear this premature appeal.

I also have great concern with the Majority's conclusion that N.C. Gen. Stat. § 50-19.1 is applicable to the instant appeal. First, this is not an argument advanced by plaintiff, and our inquiry should stop there. Second, the statute is not applicable because the present appeal is not from a final order adjudicating a claim for child custody, child support, alimony, or equitable distribution. This case is an appeal from an interlocutory order for attorney fees, a subject left unaddressed by the authors of N.C. Gen. Stat. § 50-19.1, and the statute has no direct application to the resolution of this appeal. Third, "[i]t is not the role of this Court . . . to flush out incomplete arguments[,]" *Estate of Hurst v. Jones*, 230 N.C. App. 162, 178, 750 S.E.2d 14, 25 (2013), and it is "not the duty of this Court to construct arguments for or find support for appellant's right to appeal." *Slaughter v. Swicegood*, 162 N.C. App. 457, 463, 591 S.E.2d 577, 581 (2004) (alterations and citations omitted).

Furthermore, our law governing interlocutory appeals seeks to discourage "piecemeal litigation." *Whiteco Indus., Inc. v. Harrelson*, 111 N.C. App. 815, 818, 434 S.E.2d 229, 232 (1993). "[J]udicial economy favors the hearing of petitioner's motion for attorney's fees only after the judgment has become final, thereby avoiding piecemeal litigation of the issue." *Id.* Further, interlocutory appeals are disfavored in order to "prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to [resolve] a case fully and finally before it is presented to the appellate division." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). There are two substantive claims

1. The Majority opinion recognizes that attorney fees are a "non-substantive issue" and not a "substantive claim."

still outstanding in the present action, one for alimony and another for equitable distribution, and attorney fees could still be awarded for those claims. *See* N.C. Gen. Stat. §§ 50-16.4 (permitting recovery of counsel fees in actions for alimony) and 50-21(e)(1) (permitting award of attorney fees as sanction against party in equitable distribution action who has "willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding"). Since these claims are yet to be resolved, it is plausible that plaintiff may file another appeal in the coming months challenging those resolutions and/or another order for attorney fees arising out of the same civil action.

Plaintiff's opening brief failed to sufficiently state the grounds for appellate review over this interlocutory order, and we should not consider arguments advanced for the first time in a reply brief. However, even if it were proper to reach plaintiff's jurisdictional argument, I believe that he has failed to demonstrate that the interlocutory order for attorney fees affects a substantial right in this case and/or satisfies N.C. Gen. Stat. § 50-19.1. I respectfully dissent.

WILLIAM P. EMERSON, JR., PLAINTIFF
v.
CAPE FEAR COUNTRY CLUB, INCORPORATED, DEFENDANT

No. COA17-1149

Filed 5 June 2018

1. Corporations—nonprofits—membership—termination—notice and opportunity to be heard

The Nonprofit Corporation Act does not require prior notice and an opportunity to be heard whenever a nonprofit terminates a person's membership. Even assuming that the relevant statute, N.C.G.S. § 55A-6-31(a), required notice and an opportunity to be heard in the particular case of plaintiff, whose country club membership was summarily terminated by the club's board of directors, plaintiff's claim for damages was barred by his failure to mitigate damages because he declined to attend a subsequent meeting to which the board invited him for the purpose of speaking on his own behalf regarding his termination.

2. Declaratory Judgments—relief—mootness

Where the Court of Appeals held that plaintiff's claim for compensatory and punitive damages against a country club was barred by his failure to mitigate damages, his two other claims, which were made under the Declaratory Judgment Act and which sought only a determination that a board of directors' actions were unlawful and did not seek any form of relief, were rendered moot.

Chief Judge McGEE concurring in result with separate opinion.

Appeal by Plaintiff from order entered 5 June 2017 by Judge Andrew Heath in New Hanover County Superior Court. Heard in the Court of Appeals 5 March 2018.

Block, Crouch, Keeter, Behm & Sayed, LLP, by Daniel Lee Brawley and Auley M. Crouch, III, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, LLP, by Benton L. Toups and Elizabeth C. King, for defendant-appellee.

MURPHY, Judge.

N.C.G.S. § 55A-6-31(a) calls for nonprofit corporations to act "in a manner that is fair and reasonable and . . . in good faith" when they terminate or suspend a membership. N.C.G.S. § 55A-6-31(a) (2017). However, it does not require a country club's board of directors, in all situations, to provide a member with prior notice or an opportunity to be heard regarding the termination of a membership.

Plaintiff, William P. Emerson, Jr. ("Emerson"), appeals from the trial court's order granting summary judgment in favor of Defendant, Cape Fear Country Club, Inc. ("Club"), a nonprofit corporation, on all of Emerson's three claims. In his Complaint, filed 21 April 2016, Emerson sought declaratory judgments as to (1) Emerson's membership status in the Club and (2) whether the Club could, in alleged compliance with N.C.G.S. § 55A-6-31(a), conduct a curative hearing after Emerson's membership had been terminated. Emerson's third claim for relief sought compensatory and punitive damages for his hypothetical expenses in joining a comparable country club and for the Club's purportedly wrongful and malicious termination of his membership.

Below, we address (1) the statutory requirement of N.C.G.S. § 55A-6-31(a), (2) Emerson's failure to mitigate his alleged damages, and

(3) the mootness of Emerson's remaining claims. While we hold that the statute does not require prior notice and a participatory hearing in all situations, even if notice and a hearing are required here, Emerson failed to mitigate his alleged damages resulting from the Club's alleged violation of N.C.G.S. § 55A-6-31(a). Thus, Emerson is barred from recovering the compensatory and punitive damages sought in his Complaint. Due to our resolution of Emerson's third claim for relief, his first two claims under the Declaratory Judgment Act are moot, and we decline to address them. Accordingly, we affirm the trial court's grant of summary judgment in favor of the Club on each of Emerson's claims.

BACKGROUND

On 1 January 2016, Emerson, who had been a member of the Club for approximately 30 years, had a disagreement with an employee in the golf shop.[1] The employee reported the incident to the Club's General Manager, Mary Geiss, who brought the matter to the attention of the Executive Committee by email on 2 January 2016. This was not Emerson's first act of misbehavior, and Club President Buck Beam and other members of the Executive Committee met on 5 January 2016 to discuss the incident. The Executive Committee then called a special meeting of the Board of Directors ("Board"), which met and voted on 7 January 2016 to terminate Emerson's membership.

It is uncontested that Emerson was aware neither of the Executive Committee's nor the Board's deliberations until 8 January 2016, when the Club President and two other Board members called Emerson to advise him of his termination. Emerson also received a letter from the Club President dated 8 January 2016 informing him of his termination. The letter provided the grounds for termination, stating that it was "in response to [Emerson's] actions on club property on January 1, 2016 and [Emerson's] cumulative disciplinary history while a member of Cape Fear Country Club." Emerson's disciplinary history at the Club included one incident on or about 27 February 2005 and another incident on 29 April 2007.

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1. The nature and content of the 1 January 2016 incident are somewhat in dispute. In his affidavit, the Club President relayed the contents of an email from the Club Manager, who wrote that Emerson used expletives in his conversations with Club employees and in front of Club guests during the 1 January 2016 exchange and declared, "[T]his is war," to one of the Club employees. In his deposition testimony, Emerson claimed that he was not shouting or cursing during the exchange and disagreed with one Club employee's characterization of the exchange between Emerson and the employee. Later in his deposition, Emerson did not object to another witness's description of the incident as a "profanity-laced tirade" by Emerson.

In the February 2005 incident, Emerson got in an argument with another Club member, which resulted in damage to Club property. Emerson also threatened a Club employee's job. In response to the 2005 incident, Emerson was suspended for thirty days, placed on a twelve-month probation period, given a twelve-month alcohol prohibition, fined $1,500, and required to replace the damaged property and apologize to the employees involved. Emerson appealed and was given an opportunity to appear before the Board. The Club eliminated the twelve-month probationary period, the twelve-month alcohol prohibition, and the $1,500 fine as conditions of Emerson's punishment. Although the record reflects that Emerson came on to Club premises during his suspension, thus violating its terms, his written apology of 3 June 2005 prompted the Club's then-President to lift Emerson's suspension.

In the April 2007 incident, Emerson had some sort of dispute with another Club member in the Card Room after a disagreement over a golf bet. As a result, Emerson's membership was suspended for six months. Emerson's initial readmittance was unsuccessful after Emerson's "address at the Board of Directors meeting," and the Board decided to extend Emerson's suspension for an additional six months. The Board received letters on Emerson's behalf from other Club members and decided to invite Emerson back to his membership approximately two months after imposing the additional six-month suspension.

In the instant matter, after notifying Emerson of the termination of his membership by letter dated 8 January 2016, the Club President sent Emerson another letter dated 5 February 2016. This subsequent letter advised Emerson that the Board "[was] prepared to provide [Emerson] an opportunity to speak on [his] behalf concerning the termination of [his] membership." Emerson acknowledged receipt by letter on 12 February 2016 but declined to attend the proposed 15 February 2016 meeting.

Emerson filed his Complaint on 21 April 2016. After discovery and depositions, the trial court disposed of Emerson's claims by entering summary judgment in favor of the Club. Emerson timely appealed.

ANALYSIS

"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). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56

(2017). Additionally, we draw all inferences of fact in favor of the nonmoving party. *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385.

Emerson's Complaint raises questions about the procedural requirement of N.C.G.S. § 55A-6-31, which governs the termination, expulsion, and suspension of an individual's membership in a nonprofit corporation.

N.C.G.S. § 55A-6-31 states:

> (a) No member of a corporation may be expelled or suspended, and no membership may be terminated or suspended, except in a manner that is fair and reasonable and is carried out in good faith.
>
> (b) Any proceeding challenging an expulsion, suspension, or termination shall be commenced within one year after the member receives notice of the expulsion, suspension, or termination.
>
> (c) A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made by the member prior to expulsion or suspension.

Emerson's Complaint alleges various deficiencies with the Board's termination, including: the failure to notify Emerson of the 7 January 2016 meeting, the lack of opportunity for Emerson to appear, hear, or present evidence at the meeting, and the alleged failure by the Board to hear from witnesses against Emerson at the meeting.

Our only precedent interpreting the requirement of N.C.G.S. § 55A-6-31(a) has involved First Amendment issues not argued here.[2] *See Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 330, 605 S.E.2d 161, 165 (2004) ("A church's criteria for membership and the manner in which membership is terminated are core ecclesiastical matters protected by the First and Fourteenth Amendments of the United States Constitution and section 13 of Article I of the Constitution of the State of North Carolina."). Because this case does not implicate core ecclesiastical matters and no other First Amendment arguments are before us, we proceed to consider Emerson's arguments regarding the procedural requirement of N.C.G.S. § 55A-6-31(a).

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2. Although our opinion in *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 509, 512-13, 714 S.E.2d 806, 809, 811 (2011) cited N.C.G.S. § 55A-6-31, we did not interpret the "fair and reasonable and . . . good faith" requirement of the statute in that case.

A. Compensatory and Punitive Damages

[1] To determine whether N.C.G.S. § 55A-6-31 includes participatory rights—the purported violation of which forms the basis of Emerson's claim for compensatory and punitive damages—we begin with the text of the statute. *See Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) ("Legislative purpose is first ascertained from the plain words of the statute."). The terms "fair and reasonable and . . . good faith" do not have a statutory definition, so it is useful to look to the enactment of the statute to discover legislative intent. Our Supreme Court has interpreted legislative intent based on the similarity between model legislation submitted to the General Assembly and the statutory provisions ultimately adopted. *See Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 51-52, 56, 213 S.E.2d 563, 565-66, 568-69 (1975) (considering the applicability of N.C.G.S. § 31A-3(3), in light of the Model Act upon which it was based, to a person convicted of involuntary manslaughter).

The General Assembly enacted the first version of the North Carolina Nonprofit Corporation Act in 1955 ("1955 Act"). *See* 1955 N.C. Sess. Laws 1239 (amended 1993). The 1955 Act borrowed many provisions from the A.B.A. Model Nonprofit Corporation Act ("Model Act"), which had been created in 1952. *See* Comm. on Corp. Laws of the Section of Corp., Banking, and Bus. Law of the A.B.A., *Model Non-Profit Corporation Act* (1952). The early versions of the Model Act and the 1955 Act lacked provisions describing procedures for member expulsion or termination. *See* 1955 N.C. Sess. Laws 1250-52 (defining membership and quorum, describing procedures to protect property rights of expelled members, and providing for meetings, notice of meetings, and voting); Comm. on Corp. Laws of the Section of Corp., Banking, and Bus. Law of the A.B.A, *supra*, at 8-11 (providing for membership, meetings, notice of meetings, voting, and quorum).

Both the 1955 Act and the Model Act have been amended over the years. The A.B.A. adopted the Revised Model Nonprofit Corporation Act in 1987 ("Revised Model Act"). *See* Subcomm. on the Model Nonprofit Corp. Law of the Bus. Law Section, A.B.A., *Revised Model Nonprofit Corporation Act* (1988). The General Assembly then amended the 1955 Act in 1993, which added many new provisions and re-codified the North Carolina Nonprofit Corporation Act ("1993 Act") to mimic the Revised Model Act in many ways. *See* 1993 N.C. Sess. Laws 1334.

For example, Section 6.20 of the Revised Model Act states:

(a) A member may resign at any time.

> (b) The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made prior to resignation.

Subcomm. on the Model Nonprofit Corp. Law of the Bus. Law Section, *supra*, at 112-13. N.C.G.S. § 55A-6-30 provides:

> (a) Any member may resign at any time.
>
> (b) The resignation of a member does not relieve the member from any obligations incurred or commitments made to the corporation prior to resignation.

N.C.G.S. § 55A-6-30; *see also* 1993 N.C. Sess. Laws 1359. Accordingly, the General Assembly was aware of the Revised Model Act at the time of the enactment of N.C.G.S. § 55A-6-31, which was added as a part of the 1993 amendments. *See* 1993 N.C. Sess. Laws 1359. The 1993 session laws included N.C.G.S. § 55A-6-21, the language of which mimics § 6.21 in the Revised Model Act, although N.C.G.S. § 55A-6-21 ultimately became effective on 1 July 1994 as N.C.G.S. § 55A-6-31. *See* N.C.G.S. § 55A-6-31; 1993 N.C. Sess. Laws 1359, 1428.

When the General Assembly adopts verbatim some provisions of a model code and rejects others, we assume that the General Assembly consciously chose to author its own alternate provisions. *See Newbold v. Globe Life Ins. Co.*, 50 N.C. App. 628, 633-34, 274 S.E.2d 905, 908-09 (1981) (concluding that the General Assembly's rejection of one model provision in light its verbatim adoption of other Model Act language "indicated a specific intent to reject the Model Act provision").

Here, although the General Assembly adopted some parts of the Revised Model Act's § 6.21 in N.C.G.S. § 55A-6-31, other parts of N.C.G.S. § 55A-6-31 deviated from the Revised Model Act's language. N.C.G.S. § 55A-6-31(a) provides: "No member of a corporation may be expelled or suspended, and no membership may be terminated or suspended, except in a manner that is fair and reasonable and is carried out in good faith."

In contrast, the Revised Model Act's § 6.21(b) provides:

> (b) A procedure is fair and reasonable when either:
>
> (1) The articles or bylaws set forth a procedure that provides:

(i) not less than fifteen days prior written notice of the expulsion, suspension or termination and the reasons therefore; and

(ii) an opportunity for the member to be heard, orally or in writing, not less than five days before the effective date of the expulsion, suspension or termination by a person or persons authorized to decide that the proposed expulsion, termination or suspension not take place; or

(2) It is fair and reasonable taking into consideration all of the relevant facts and circumstances.

Subcomm. on the Model Nonprofit Corp. Law of the Bus. Law Section, *supra*, at 114. Omitting these procedural considerations, the General Assembly copied almost all the Revised Model Act's language for the remaining sections of N.C.G.S. § 55A-6-31. N.C.G.S. § 55A-6-31(b) and (c) are nearly identical to the Revised Model Act's § 6.21(d) and (e), respectively. *Compare* N.C.G.S. § 55A-6-31(b)-(c), *with* Subcomm. on the Model Nonprofit Corp. Law of the Bus. Law Section, *supra*, at 114.[3]

3.

The General Assembly adopted the following language from the Revised Model Act: (b) Any proceeding challenging an expulsion, suspension, or termination *shall* be commenced within one year after the *member receives notice* of the expulsion, suspension, or termination. (c) A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made *by the member* prior to expulsion or suspension. N.C.G.S. § 55A-6-31(b)-(c) (emphasis added). N.C.G.S. § 55A-6-31(b) replaces "must" with "shall" and allows for members to challenge decisions within one year of notice. The italicized portion of N.C.G.S. § 55A-6-31(c) does not appear in § 6.21(e) of the Revised Model Act.	The Revised Model Act provides: (d) Any proceeding challenging an expulsion, suspension or termination, *including a proceeding in which defective notice is alleged*, *must* be commenced within one year after the *effective date* of the expulsion, suspension or termination. (e) A member who has been expelled or suspended may be liable to the corporation for dues, assessments or fees as a result of obligations incurred or commitments made prior to expulsion or suspension. Subcomm. on the Model Nonprofit Corp. Law of the Bus. Law Section, *supra*, at 114 (emphasis added). The italicized portion of § 6.21(d) does not appear in N.C.G.S. § 55A-6-31(b).

The General Assembly had the opportunity to codify a notice or hearing procedure within N.C.G.S. § 55A-6-31(a)—as expressly provided in the Revised Model Act, upon which N.C.G.S. § 55A-6-31 is based—and declined to do so. Therefore, the General Assembly did not intend to provide for the Revised Model Act's notice or hearing procedures in N.C.G.S. § 55A-6-31(a). *See Newbold*, 50 N.C. App. at 633-34, 274 S.E.2d at 908-09. As a result, we decline to hold that prior notice or a participatory hearing is a per se requirement in all cases in order for a nonprofit corporation to comply with the "fair and reasonable and . . . good faith" requirement of N.C.G.S. § 55A-6-31(a).

Assuming *arguendo* that N.C.G.S. § 55A-6-31(a) as applied to the situation here required the Club to provide Emerson with prior notice and a hearing—the lack of which forms the basis of Emerson's claim for compensatory and punitive damages—Emerson failed to mitigate his damages allegedly resulting from the Club's failure to provide notice and a hearing. "Under the law in North Carolina, an injured plaintiff must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If plaintiff fails to mitigate his damages, 'for any part of the loss incident to such failure, no recovery can be had.' " *Lloyd v. Norfolk S. Ry. Co.*, 231 N.C. App. 368, 371, 752 S.E.2d 704, 706 (2013) (quoting *Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 73-74 (1968)). For example, when a plaintiff asserts a claim for wrongful discharge from at-will employment, we have considered the diligence with which a plaintiff seeks and accepts comparable employment. *See Blakeley v. Town of Taylortown*, 233 N.C. App. 441, 449-50, 756 S.E.2d 878, 884-85 (2014). However, "the failure to mitigate damages is *not* an absolute bar to all recovery; rather, a plaintiff is barred from recovering for those losses which could have been prevented through the plaintiff's *reasonable efforts*." *Smith v. Childs*, 112 N.C. App. 672, 683, 437 S.E.2d 500, 507 (1993) (emphasis in original).

Here, Emerson acknowledged that the Club offered him "an opportunity to speak on [his] behalf," and Emerson chose not to attend this proposed meeting on 15 February 2016. Rather, Emerson claimed that the meeting was "a disingenuous effort to validate an invalid termination." Even assuming that the Club's failure to provide Emerson with notice and an opportunity to be heard violated N.C.G.S. § 55A-6-31(a), Emerson had an obligation to "lessen the consequences of the [the Club]'s wrong." *See Lloyd*, 231 N.C. App. at 371, 752 S.E.2d at 706. Under the circumstances, attending the meeting and contesting the termination decision from which Emerson's compensatory damages supposedly flow would have been reasonable. Emerson's failure to mitigate the damages

that he claims resulted from the Club's alleged violation of N.C.G.S. § 55A-6-31(a) was unreasonable and bars his recovery here. *See Lloyd*, 231 N.C. App. at 371, 752 S.E.2d at 706; *Smith*, 112 N.C. App. at 683, 437 S.E.2d at 507. The trial court did not err in entering summary judgment on his claim for damages.

B. Declaratory Judgment Act

[2] Emerson's claims for declaratory judgments are rendered moot by our determination that Emerson failed to mitigate his alleged damages. A cause of action may be moot under the Declaratory Judgment Act when a litigant seeks only a determination that some action was unlawful without seeking some form of relief from the allegedly unlawful conduct. *See Hindman v. Appalachian State Univ.*, 219 N.C. App. 527, 530, 723 S.E.2d 579, 581 (2012); *Citizens Addressing Reassignment & Educ., Inc. v. Wake Cty. Bd. of Educ.*, 182 N.C. App. 241, 246, 641 S.E.2d 824, 828 (2007). "[A] moot question is not within the scope of our Declaratory Judgment Act." *Morris v. Morris*, 245 N.C. 30, 36, 95 S.E.2d 110, 114 (1956). Unlike in federal courts, where mootness is a jurisdictional issue, our state courts decline to answer moot questions as an exercise of judicial restraint. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). We apply a "traditional mootness analysis" to an action filed under the Declaratory Judgment Act. *Citizens*, 182 N.C. App. at 246, 641 S.E.2d at 827. A moot question "presents only an abstract proposition of law," and the resolution of a moot question is one that would have "no practical effect on the controversy." *Id.* at 246, 641 S.E.2d at 828.

In *Citizens*, we declined to decide an "abstract proposition of law" where plaintiffs sought a legal determination that a building was unlawful but did not seek closure of the building. *Id.* at 827-28. There, plaintiffs sought a declaratory judgment that the school board had violated N.C.G.S. § 115C-521(d) by entering into a lease agreement and arranging for a modular school to be placed on land not owned by the school board. *Id.* We held that the school was already operating and that a declaration that the building was unlawful—absent some effort by the plaintiffs to close the school—"would have no practical effect on the controversy" and was thereby moot. *Id.*

Similarly, in *Hindman*, plaintiff professors at Appalachian State University ("University") sued their employer for its failure to pay the salary provided in plaintiffs' employment contracts. *Hindman*, 219 N.C. App. at 528, 723 S.E.2d at 579-80. The professors sued for breach of contract and for a declaratory judgment that the University had breached the employment contracts with the professors and other similarly

situated faculty members. *Id.* at 528, 723 S.E.2d at 580. However, in *Hindman*, "[professors] did not seek any damages or any form of relief or redress for the alleged breach of contract." *Id.* We affirmed the trial court's grant of summary judgment in favor of the University because a legal determination that the University had breached the employment contract would not "have any practical effect." *Id.* at 530, 723 S.E.2d at 581 (quoting *Citizens*, 182 N.C. App. at 246, 641 S.E.2d at 827). We noted that the "breach was in the past, is not alleged to be likely to recur, is the only redress [professors] seek, and [professors] are barred from bringing further action on this same claim or issue." *Id.*

Here, Emerson's first claim for relief in his Complaint states that "Emerson is entitled to a declaratory judgment relating to the status of his membership in [the Club]." Emerson's second claim for relief states that "Emerson is entitled to a declaratory judgment as to whether or not the Board can now conduct a curative hearing in a manner that is fair and reasonable and carried out in good faith, having previously terminated his membership in violation of [N.C.G.S. § 55A-6-31(a)]."

Were we to issue a judgment stating that the manner of Emerson's membership termination fell short of the "fair and reasonable and . . . good faith" requirement in N.C.G.S. § 55A-6-31(a) or that post-termination hearings are impermissible under N.C.G.S. § 55A-6-31(a), such determinations would have no practical effect in this case. Unlike *Hindman*, where the plaintiff professors sought a declaratory judgment without any other remedy or damages, Emerson does seek compensatory and punitive damages alongside the declaratory judgments. *See Hindman*, 219 N.C. App. at 528, 723 S.E.2d at 580. However, as discussed above, Emerson failed to mitigate his purported damages and is therefore barred from recovery. As a result, the questions about which Emerson sought a declaratory judgment are moot notwithstanding his claim for damages.

Emerson seeks declaratory relief with respect to the *manner* of his termination from the Club, and such a declaration would not alter the rights or obligations of the parties.[4] Similar to *Citizens* and *Hindman*,

4. Emerson's Complaint did not seek injunctive relief in the form of reinstated membership. Had Emerson sought a mandatory injunction requiring reinstatement, the declaratory judgment may not have been moot because this remedy would constitute further relief, which was lacking in *Citizens* and *Hindman*. However, without deciding issues not present, we observe that the question of judicial reinstatement of membership in a nonprofit corporation may implicate a nonprofit corporation's First Amendment associational rights. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48, 120 S. Ct. 2446, 2451 (2000) ("Government actions that may unconstitutionally burden [the right to associate]

it may be possible here to identify a violation of N.C.G.S. § 55A-6-31(a), but the proposition would be abstract or academic, like a judgment that a school building is unlawful or that a contract has been breached when no further relief is sought. *See Hindman*, 219 N.C. App. at 530-31, 723 S.E.2d at 581; *Citizens*, 182 N.C. App. at 246, 641 S.E.2d at 827.

CONCLUSION

Emerson failed to mitigate his alleged damages and is barred from recovering compensatory and punitive damages for the Club's alleged violation of N.C.G.S. § 55A-6-31(a). Accordingly, the issues presented in Emerson's requests for declaratory judgments are moot, as a resolution of these questions would not have any practical effect on the controversy, and we decline to address them. The trial court's grant of summary judgment in favor of the Club on each of Emerson's claims is affirmed.

AFFIRMED.

Judge CALABRIA concurs.

Chief Judge McGEE concurs in result with separate opinion.

McGEE, Chief Judge, concurring in result with separate opinion.

I agree the trial court properly granted summary judgment in favor of Defendant. However, I write separately to respectfully express my view that this Court's analysis should be limited to the issues specifically raised by Plaintiff's appeal. It is sufficient to conclude Plaintiff has failed to show that N.C.G.S. § 55A-6-31(a) requires prior notice and a hearing *as a matter of law*.

Plaintiff asserts in his appellate brief that the termination of his club membership (1) was neither fair and reasonable nor executed in good faith, as required by N.C.G.S. § 55A-6-31(a); and (2) was inconsistent with various other sources of non-binding authority. Plaintiff begins by noting the general proposition that

> [t]o determine whether the established facts [show a] termination [was] in a manner that [was] fair and reasonable and [was] carried out in good faith, this Court

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may take many forms, one of which is 'intrusion into the internal structure or affairs of an association' like a 'regulation that forces the group to accept members it does not desire.'") (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 3252 (1984)).

> is left to "[t]he first maxim of statutory construction [which] is to ascertain the intent of the legislature. To do this[,] this Court should consider the statute as a whole, the spirit of the statute, the evils it is designed to remedy, and what the statute seeks to accomplish."

(quoting *State v. Johnson*, 298 N.C. 47, 56, 257 S.E.2d 597, 606 (1979)). Plaintiff then states that, "[i]n doing so, [this] Court may look to other authorities of import, including industry standards, decisions from other jurisdictions, and other recognized authorities."

By its plain language, N.C.G.S. § 55A-6-31(a) does not provide that a termination or suspension of membership will *only* be deemed "fair and reasonable" and "carried out in good faith" *if* the member subject to termination or suspension is afforded prior notice and an opportunity to be heard. Nevertheless, Plaintiff asks this Court to hold that Defendant violated N.C.G.S. § 55A-6-31(a) *as a matter of law* by not providing him "notice of the charges against him and a hearing or an opportunity to respond to those charges prior to termination [of his membership][.]" " 'The primary rule of statutory construction is that the intent of the [L]egislature controls the interpretation of a statute.' " *Belk v. Belk*, 221 N.C. App. 1, 9, 728 S.E.2d 356, 361 (2012) (quoting *Tellado v. Ti-Caro Corp.*, 119 N.C. App. 529, 533, 459 S.E.2d 27, 30 (1995)). "In ascertaining the legislative intent courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish. Other indicia considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption[.]" *Carter-Hubbard Pub'lg Co. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 625, 633 S.E.2d 682, 685 (2006) (citations and quotation marks omitted).

Notably, in his appellate brief, Plaintiff offers no substantive discussion of "the text, structure, and policy of [N.C.G.S. § 55A-6-31(a)]," the statute's legislative history, or the purpose of our General Assembly in enacting it. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 295 (1991). Plaintiff asserts various public policy arguments why corporations *should be* required to provide prior notice and an opportunity to be heard before suspending or terminating a membership, but "these arguments are more properly directed to the [L]egislature. The sole issue before this Court is one of statutory construction," *see State v. Anthony*, 351 N.C. 611, 618, 528 S.E.2d 321, 325 (2000), and we are not persuaded that N.C.G.S. § 55A-6-31(a) implicitly imposes *per se* notice and hearing requirements.

In support of his argument that prior notice and an opportunity to be heard are mandatory under N.C.G.S. § 55A-6-31(a), Plaintiff relies *entirely* upon the following sources of authority: (1) guidelines and recommendations published by the Club Managers Association, a professional trade association; (2) case law from other jurisdictions, interpreting and applying non-North Carolina law and legal principles; (3) Robert's Rules of Order; and (4) statements purportedly made by attorneys who were members of Defendant's Board during internal discussions about Plaintiff's termination. These sources are insufficient to support a violation of N.C.G.S. § 55A-6-31(a). Plaintiff has not argued, for example, that the General Assembly intended N.C.G.S. § 55A-6-31(a) to reflect or incorporate the "industry standards" he cites. Defendant's alleged failure to follow Robert's Rules of Order, and the internal discussions of its own attorneys regarding the termination of Plaintiff's membership, likewise lack relevance to the question of statutory construction. Plaintiff does not explain why Defendant's alleged violation of Robert's Rules of Order constituted a violation of N.C.G.S. § 55A-6-31(a); Plaintiff argues only that Defendant "failed to follow its [own] requirements or guidelines." Similarly, the opinions expressed by attorneys serving on Defendant's Board that, prior to the termination of Plaintiff"s membership, "there should be some due process[,]" and that the Board "may want to allow [Plaintiff] an opportunity to . . . speak on his actions[,]" do not establish that such measures were *mandated by N.C.G.S. § 55A-6-31(a)*, or that the Board violated the statute by deciding not to follow those recommendations. Finally, while this Court may consider the non-binding decisions of other jurisdictions if we find such authority "instructive[,]" *see Carolina Power & Light Co. v. Employment Sec. Comm'n of N.C.*, 363 N.C. 562, 569, 681 S.E.2d 776, 780 (2009), the out-of-state and federal cases cited by Plaintiff "have very little persuasive weight" here, in light of various factual, procedural, and legal distinctions among the cases. *See Wal-Mart Stores E., Inc. v. Hinton*, 197 N.C. App. 30, 44, 676 S.E.2d 634, 645 (2009).

Plaintiff has failed to identify any controlling or persuasive authority to support his proposed construction of N.C.G.S. § 55A-6-31(a) as imposing *per se* notice and hearing requirements and, as discussed by the majority, aspects of the statute's legislative history suggest our General Assembly intentionally omitted *per se* notice and hearing requirements from the plain language of the statute. This concludes our inquiry. It is unnecessary to address Plaintiff's alleged failure to mitigate damages, since Plaintiff's claim for damages is premised upon a violation of N.C.G.S. § 55A-6-31(a) and, absent a statutory violation, those claims necessarily fail. It is also important to note that our holding

in the present case does not *preclude* a finding that, under the facts and circumstances of a particular case, a lack of prior notice and/or hearing could violate the "fair and reasonable" and "good faith" language in N.C.G.S. § 55A-6-31(a). Plaintiff has simply failed to persuade this Court that the statute mandates prior notice and a hearing in *all* instances.

FRENCH BROAD PLACE, LLC, PLAINTIFF
v.
ASHEVILLE SAVINGS BANK, S.S.B., DEFENDANT

No. COA17-1087

Filed 5 June 2018

1. Appeal and Error—record—supplement—consideration of documents contained therein

In an appeal from a summary judgment, the Court of Appeals was not required to consider documents contained within a Rule 11(c) supplement to the record filed on appeal where the additional documents were served with the motion to supplement the brief but were not offered into evidence or filed with the superior court. Rule 56 requires that summary judgment be decided on the materials on file. Moreover, plaintiff did not make a timely objection.

2. Contracts—breach—commercial real estate financing

There was no issue of material fact regarding the breach of a commercial real estate financing plan where there was no issue as to whether defendant failed to provide initial funding or was not obligated to provide an initial amount under a Change in the Terms of Agreement. Moreover, plaintiff did not produce any writing or agreement indicating that defendant underfunded the loan. Plaintiff waived any claims relating to a purported delay in funding change-order requests and nothing in the terms of the commitment, Loan Agreement, or related modifications obligated defendant to provide take-out loans.

3. Contracts—implied covenant of good faith and fair dealing—commercial loan—no breach

There was no breach of the implied covenant of good faith and fair dealing in a commercial real estate loan where the undisputed terms of the note and deed of trust indicated that defendant had

disbursed all of the loan funds it was contractually obligated to disburse under the agreement and modifications.

4. Unfair Trade Practices—commercial real estate loan—summary judgment

There was no genuine issue of material fact in a claim for unfair or deceptive trade practices where there was no issue that defendant had breached any of the parties' agreements.

5. Fiduciary Relationship—commercial real estate loan—no fiduciary relationship

The trial court properly granted summary judgment for defendant on a claim for breach of fiduciary duty arising from a commercial real estate transaction. There was no genuine issue that plaintiff and defendant were in a debtor-creditor relationship, which is not per se a fiduciary relationship and, although plaintiff argued that its will was so thoroughly dominated by defendant that a fiduciary relationship existed, nothing tended to show that the relationship was anything other than an agreement between two sophisticated commercial entities dealing at arm's length.

6. Negotiable Instruments—note—counterclaim on payment

Summary judgment was properly granted on defendant's counterclaim on a commercial real estate note where plaintiff did not present any evidence to contradict an affidavit that plaintiff was in default.

Appeal by plaintiff from order entered 30 January 2017 by Judge Robert C. Ervin in Transylvania County Superior Court. Heard in the Court of Appeals 2 May 2018.

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

Long, Parker, Warren, Anderson, Payne & McClellan, P.A., by Ronald K. Payne and Thomas K. McClellan, for defendant-appellee.

TYSON, Judge.

French Broad Place, LLC ("Plaintiff") appeals the trial court's order granting summary judgment to Asheville Savings Bank, S.S.B. ("Defendant") and dismissing all of Plaintiff's claims. We affirm the trial court's order.

I. Background

A. The Project

Plaintiff initiated development of a mixed-use construction and development project in downtown Brevard, North Carolina, called "French Broad Place" (the "Project") in 2007. The Project was planned as a four-story building, which would include office space, retail space, restaurants, residential condominiums, and an attached parking garage. The project's estimated cost was approximately $19,000,000. Plaintiff sought a construction lender to finance the Project, and eventually selected Defendant as a lender.

Plaintiff alleges Defendant proposed a tiered or "waterfall financing structure" that involved financing the Project in phases of development. Phase 1 allegedly included financing for purchasing the land for the Project, designing and constructing the building, and completion of the building shells of the individual units to the extent that a certificate of occupancy could be obtained. Phase 1 was projected to cost approximately $14,000,000.

Phase 2 was to allegedly include financing for finishing the build-out of the residential units and finishing certain common areas. Phase 2 was projected to cost approximately $5,000,000.

Plaintiff and Defendant executed a loan commitment dated 6 December 2007 (the "Loan Commitment"). The Loan Commitment specified Defendant would loan Plaintiff the sum of $9,950,000. Defendant denies that the loan it proposed to Plaintiff was to be phased, tiered, or include "waterfall financing."

The Loan Commitment included several conditions required to be met before closing. One Loan Commitment condition required Plaintiff to obtain $700,000 in "pre-sales" funds.

The "pre-sales" requirement of the Loan Commitment specifically states,

> Prior to any Bank funding Borrower shall provide copies of purchase agreements totaling a minimum of $8,820,000 with a minimum of 10% non-refundable deposits. Of these pre-sales a minimum of $4,300,000 must be either commercial or office space. All purchase agreements must be reviewed and deemed acceptable by Asheville Savings Bank prior to Bank funding.
>
> Asheville Savings Bank shall be given first right of refusal on all pre-sales or sales to affiliated buyers. On those

> loans where Bank does not exercise that right, the Bank must receive and approve any and all written takeout commitments as well as any applicable lease agreements.

Plaintiff alleges that after execution of the Loan Commitment, "Defendant agreed to accept commercial leases with options to purchase in lieu of regular pre-sale contracts, and agreed to count the leases with purchase options toward the 'pre-sale contract requirement' " in the Loan Commitment. Plaintiff purportedly relied upon Defendant's alleged allowing of the lease-option contracts to count towards the Loan Commitment's pre-sales requirement, and it continued development and construction of the Project.

According to the affidavit of Joshua Burdette, a principal of Plaintiff, on 20 March 2008, several principals of Plaintiff purportedly met with officers of Defendant, to discuss the method by which Defendant would apply the lease-option contracts to meet Plaintiff's pre-sale requirements under the Loan Commitment. At that meeting, Defendant's officers purportedly explained to Plaintiff's principals:

> [T]hat the lease option contracts alone could not be counted [towards] the required pre-sales under the Loan Commitment, but that [Defendant] could convert Plaintiff's construction loan into individual "Takeout Loans," . . . on any commercial units which were secured by a lease option contract, in lieu of a presale, and that the commercial units could simply be retained by Plaintiff as investment property to satisfy the presale requirements of the Loan Commitment.

Around 10 June 2008, Bradley Hines, a vice-president of Defendant, contacted members of Plaintiff, and informed them that the "Takeout Loans" arrangement would have to change. Plaintiff alleges Defendant instructed it to establish a separate legal entity to purchase the commercial units for which Plaintiff had previously obtained lease-option contracts: (1) the new entity was to establish deposit accounts in an entirely different bank than Defendant; (2) the new entity would enter into purchase agreements with Plaintiff for the commercial units that were subject to lease-option contracts; (3) the new entity would be pre-qualified to obtain take-out loans from Defendant on the commercial units secured by lease-option contracts; and, (4) Plaintiff's guarantors were to seek out and obtain financing term sheets from other banks to demonstrate the marketability of the commercial units.

Plaintiff followed Defendant's purported recommendations, and several of Plaintiff's officers and guarantors formed LBS Properties, LLC ("LBS") and implemented the steps allegedly proposed by Defendant.

In addition to the pre-sales requirement, another specific condition of the Loan Commitment provided Defendant was to "seek participant funding for no less than $2,000,000 from a participant Bank." Plaintiff alleges it did not understand the $9,950,000 loan commitment to be contingent upon Defendant actually obtaining the participation from another bank. Prior to the loan closing, Defendant informed Plaintiff that it had not been able to obtain the participation from another bank, and, as a result, that it would only be funding $7,750,000 of the $9,950,000 amount specified in the Loan Commitment. Defendant also requested Plaintiff to seek a replacement lender for the un-funded $2,000,000 of the loan.

Plaintiff had commenced construction on the Project well in advance of the loan closing. Plaintiff owed Metromont Corporation ("Metromont"), a subcontractor on the Project, for portions of the Project, which had already been erected. Plaintiff convinced Metromont to subordinate its contractor's lien for $2,200,000 for costs incurred in exchange for a secured interest in the Project.

On 8 August 2008, Plaintiff and Defendant closed on the construction loan agreement (the "Loan Agreement") in the specific amount of $7,750,000.00 (the "Loan"). The Loan was evidenced by a promissory note (the "Note") and deed of trust in favor of Defendant. Plaintiff asserts the Loan Commitment required Defendant to loan the sum of $9,950,000, but that Defendant required Metromont to provide $2,200,000 in order to close. Plaintiff also alleges Defendant underfunded the Loan by approximately $300,000 at closing on 8 August 2008, and then wrongfully deducted another $300,000 from a draw Plaintiff sought on the Loan for October 2008.

In November 2008, Plaintiff submitted a change order request to Defendant in the amount of $725,801. Defendant approved the request and the parties agreed to a written loan modification (the "First Change in Terms Agreement"), which increased the stated total amount of the Loan outstanding from $7,750,000 to $8,475,801. Plaintiff alleges Defendant unnecessarily delayed in approving the change order until closing in January 2009.

By March 2009, three businesses were opening on the ground floor of the Project, several more were being constructed, and initial condominium sales were several months away from closing. Plaintiff

alleges that in March 2009, Defendant began to refuse to finance the continued construction of the Project under the alleged phased or tiered funding, or "waterfall financing structure," as Defendant had allegedly promised. Defendant also refused to provide the allegedly promised take-out loans, which Plaintiff avers ultimately caused the Project to fail due to lack of funding.

Pursuant to a modification agreement the parties executed on 8 June 2009 (the "Second Change in Terms Agreement"), Defendant waived the required payment of the first $1,000,000 in release fees, due to Defendant upon the sale of commercial units in the Project, to help Plaintiff complete the construction on the Project. As required by the Second Change in Terms Agreement, the parties also executed a modification of Plaintiff's note, deed of trust and related loan documents regarding the Project. This Modification was recorded at Book 510, Page 398 of the Transylvania County Registry ("Modification of Note and Deed of Trust").

According to the express terms of this Modification, as of 8 June 2009:

> The total amount of all funds disbursed by Lender to Borrower to date under said Note, CLA [Construction Loan Agreement] and Deed of Trust, as amended by the LMA [Loan Modification Agreement] and Modification of Deed of Trust, included those funds deposited in the Interest Reserve Account, is $8,475,801.00. There are presently no Construction Loan funds left to be disbursed.

B. The Complaint

Plaintiff filed a verified complaint against Defendant on 28 December 2011. In its complaint, Plaintiff asserts claims for breach of contract, unfair trade practices, and breach of a fiduciary duty. Defendant filed a motion to dismiss, an answer and counterclaim on 12 March 2012. In its counterclaim, Defendant seeks payment in full on the Note and asserts Plaintiff had failed to pay the balance Defendant is owed.

Upon a joint motion of the parties, the Chief Justice of North Carolina designated the matter as an exceptional case pursuant to Rule 2.1 of the General Rules of Practice of the Superior and District Courts on 1 October 2012.

Following discovery, Defendant filed a motion for summary judgment on 15 November 2016. Attached to Defendant's motion for summary judgment was an affidavit of Brian Gillespie, an employee of Defendant, and an affidavit of David A. Kozak, an executive vice-president of

Defendant. In response to Defendant's affidavits, Plaintiff submitted affidavits of Joshua Burdette and Scott Latell, principals of Plaintiff.

The trial court entered an order granting summary judgment in favor of Defendant on all of Plaintiff's claims and also granting summary judgment in favor of Defendant on its counterclaim against Plaintiff. Plaintiff filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) as an appeal from a final judgment of the superior court.

III. Standard of Review

Upon ruling on a motion for summary judgment, the court views the evidence in the light most favorable to the non-moving party and engages in a two-part analysis of whether:

> (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.
>
> Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party.

Erthal v. May, 223 N.C. App. 373, 377-78, 736 S.E.2d 514, 517 (2012) (citations and quotation marks omitted), *disc. review denied*, 366 N.C. 421, 736 S.E.2d 761 (2013).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating

> specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citations and quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

An order granting summary judgment is reviewed *de novo* on appeal. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The trial court's interpretation of a contract is also reviewed *de novo*, because it involves a question of law. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000).

IV. Analysis

A. Materials Considered by the Trial Court

[1] Plaintiff argues this Court should not consider documents contained within a Rule 11(c) supplement to the record on appeal filed by Defendant. Plaintiff contends Defendant only filed four documents in support of its motion for summary judgment: (1) the motion, (2) Defendant's unverified answer, (3) the affidavit of Brian Gillespie, and (4) the affidavit of David A. Kozak.

Rule 56(c) of the N.C. Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017).

The proposed record on appeal was settled by agreement between the parties on 15 September 2017 and filed with this Court on 2 October 2017. The parties stipulated that they disagreed on whether numerous documents constituting Defendant's Rule 11(c) supplement are properly part of the record on appeal. Plaintiff contends, while Defendant *served* the additional documents contained in and constituting its Rule 11(c) supplement with its brief in support of its motion for summary judgment upon opposing counsel and the trial court, Defendant did not *offer* the documents into evidence nor *file* the documents with the clerk of superior court. Defendant did present a copy to the trial court.

Presuming, *arguendo*, the trial court did consider the materials attached to Defendant's brief submitted to the court, Plaintiff failed to

make any timely objection. Plaintiff argues it did not have to object, because the materials were not "filed" or "offered into evidence," even though they were provided in advance to Plaintiff and attached to Defendant's brief in support of its motion and were submitted to the trial court.

To support its assertion that it did not have to object to the documents at issue, Plaintiff cites the reasoning of Judge Greene's dissenting opinion in *Barnhouse v. Am. Exp. Fin. Advisors, Inc.*, 151 N.C. App. 507, 566 S.E.2d 130 (2002), as non-binding, but persuasive, authority. *Barnhouse* involved a pre-trial motion to stay proceedings and compel arbitration. 151 N.C. App. at 507, 566 S.E.2d at 131. The trial court denied the defendants' pre-trial motion to stay the proceedings and compel arbitration. *Id.* at 507-08, 566 S.E.2d at 130. On the defendants' motion to stay and compel arbitration, the trial court had conducted a hearing and the defendants had submitted a brief in support of their motion and attached the alleged arbitration agreement to their brief. *Id.* at 510, 566 S.E.2d at 133.

The trial court denied the defendants' motion to stay and compel arbitration. *Id.* On appeal, this Court noted there was "no indication that the trial court made any determination regarding the existence of an arbitration agreement" and the "dispositive issue is whether the trial court properly denied [the] defendants' motion to stay proceedings without first determining whether or not an agreement to arbitrate existed between the parties." *Id.* at 508, 509, 566 S.E.2d at 131-32. This Court reversed the trial court's order because the trial court had not made a determination as to whether or not an agreement to arbitrate existed, and remanded to the trial court to make that determination. *Id.* at 509, 566 S.E.2d at 132.

Judge Greene disagreed with the majority's opinion that the trial court was to make findings regarding the existence of an arbitration agreement. *Id.* at 510, 566 S.E.2d at 132 (Greene, J., dissenting). He stated the "dispositive issue is whether defendants met their burden of showing the existence of a written agreement to arbitrate." *Id.* at 511, 566 S.E.2d at 133.

> Although defendants' attorney attached a copy of the alleged agreement to the memorandum submitted to the trial court, the memorandum does not qualify as a Rule 56(e) affidavit for two reasons: it was not sworn to, and it does not "show affirmatively that [the attorney] is competent to testify" with respect to the agreement. *See* N.C.G.S.

> § 1A-1, Rule 56(e). Furthermore, the attachment to the memorandum does not qualify as documentary evidence because the memorandum was not filed with the trial court or otherwise presented into evidence.

Id. at 512, 566 S.E.2d at 134 (footnote omitted). Without reference to any authority, the dissenting opinion argued,"[b]ecause [the arbitration agreement] was neither presented into evidence nor filed with the trial court, plaintiff had no obligation to lodge an objection to its consideration." *Id.* at 512, n. 6, 566 S.E.2d at 134, n. 6. Judge Greene voted to affirm the trial court's order denying the defendants' motion to stay the proceedings and compel arbitration. *Id.* at 512, 566 S.E.2d at 134.

Judge Greene's reasoning in *Barnhouse* is inapplicable to the case at bar for several reasons. *Barnhouse* involved a motion to stay the proceedings and to compel arbitration, not a motion for summary judgment. *See id.* at 507, 566 S.E.2d at 131. The majority's opinion in *Barnhouse* did not instruct the trial court to disregard the unverified agreement in determining whether an agreement to arbitrate existed upon remand, despite the dissenting opinion's viewpoint that the trial court could not and properly did not consider the unverified agreement to arbitrate, attached to the defendant's memorandum. *Id.* at 509, 566 S.E.2d at 132.

Plaintiff also cites *Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co. of Hartford* to support its assertion that it did not have to object to Defendant's submission of the documents at issue provided for the trial court's consideration. 192 N.C. App. 376, 665 S.E.2d 505 (2008). *Gemini* involved a bench trial on the plaintiff's contractual claims. *Id.* at 378-80, 665 S.E.2d at 507-08. On appeal, the defendant argued "the trial court erred by rejecting and refusing to consider certain exhibits that defense counsel had marked as exhibits but did not formally offer into evidence." *Id.* at 386, 665 S.E.2d at 511. This Court noted, "[d]uring the trial, defendant marked twenty-seven exhibits, but only formally offered into evidence five of them." *Id.*

The defendant claimed its trial counsel had used the same language to enter into evidence the five admitted exhibits as it had eleven of the non-admitted exhibits "but, 'without Trial Counsel's notice, the Court's manner of reply changed, effectively denying admission even though the gist of the Court's response suggested that the documents were entered as evidence.' " *Id.* (emphasis omitted). The defendant asserted the trial judge had made the comment, "All the evidence has now been presented. Anything which was marked but not offered into evidence is

not in evidence in this particular case[,]" right as the trial judge left the bench, leaving the defendant no opportunity to request the trial court to consider the exhibits that had not been formally offered into evidence. *Id.*

This Court, after reviewing the trial record, concluded the defendant "had ample opportunity to clarify and rectify the situation[,]" because the trial judge did not make the comment in question, quoted above, literally as the trial judge was leaving the bench, but before closing arguments. *Id.* After the trial judge made the comment in question, "[b]oth attorneys conversed with [the trial judge] before he closed court and [the trial judge] specifically asked defense counsel if there was '[a]nything else' that he wanted the court to consider." *Id.* at 387, 665 S.E.2d at 512.

Gemini is easily distinguished from the case at bar and does not support Plaintiff's argument. The issue in *Gemini* regarded the trial exhibits and did not involve a motion for summary judgment. *See id.* The exhibits in *Gemini* had been presented at trial, and were not documents submitted in support of a pre-trial motion for summary judgment. *See id.*

The reasoning of *Gemini* actually rebuts Plaintiff's argument. The trial court in *Gemini* put the defendant on notice that it would not consider exhibits that had been marked, but not offered into evidence. *Id.* On appeal, this Court overruled the defendant's assignment of error, because the defendant had "an ample opportunity to clarify and rectify the situation." *Id.*

The materials at issue were not "on file" with the trial court because they had not been filed with the clerk of court in accordance with Rule 5(d) of the Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 5(d). Plaintiff does not deny the documents at issue were served upon it and attached to Defendant's brief in support of Defendant's motion for summary judgment in accordance with Rule 5(a1) of the Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 5 (2017) (requiring briefs or memoranda in support of summary judgment, and other dispositive motions, to be served upon each of the parties at least two days before the hearing on the motion). Defendant repeatedly referred to material in the documents at issue during the trial court's hearing on its motion for summary judgment, in which Plaintiff had ample opportunity to object to Defendant's submission of the documents.

Plaintiff has failed to cite any binding authority, which supports its assertion that it was not required to object to Defendant's submission of the documents at issue. Rule 56 of the Rules of Civil Procedure indicates a trial court is to only consider "the pleadings, depositions,

answers to interrogatories, and admissions *on file*" in deciding whether to grant or deny summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56 (emphasis supplied).

In other contexts, this Court has repeatedly held that a party's failure to object to materials submitted to a trial court, which do not comply with the requirements of Rule 56, waives that party's objection. *See Yamaha Int'l Corp. v. Parks*, 72 N.C. App. 625, 629, 325 S.E.2d 55, 58 (1985) (stating that, "[o]n a motion for summary judgment, uncertified or otherwise inadmissible documents may be considered if not challenged by timely objection."); *Whitehurst v. Corey*, 88 N.C. App. 746, 748, 364 S.E.2d 728, 729-30 (1988) (stating that "failure to object to form or sufficiency of pleadings and affidavits waives objection on summary judgment" and an "affidavit not conforming to Rule 56(e) is subject to motion to strike," but objection is waived absent the motion); *Crocker v. Roethling*, 217 N.C. App. 160, 165, 719 S.E.2d 83, 87-88 (2011) (holding, in part, that the plaintiff waived ten-day procedural notice requirement of Rule 56(c) by participating in summary judgment hearing); *N. Carolina Nat. Bank v. Harwell*, 38 N.C. App. 190, 192, 247 S.E.2d 720, 722 (1978) (stating that "[f]ailure to make a timely objection to the form of affidavits supporting a motion for summary judgment [under Rule 56] is deemed a waiver of any objections." (citations omitted)).

Plaintiff acknowledges the materials were timely served upon it in connection with Defendant's brief in support of its motion for summary judgment accordance with Rule 5(c). N.C. Gen. Stat. § 1A-1, Rule 5(c). Plaintiff had adequate notice of the materials because of Defendant's repeated reference to them during the hearing on the motion for summary judgment. Plaintiff has offered no argument to support its notion that this Court should treat the disputed materials here any differently than other materials that do not conform to the requirements of Rule 56, and for which a party fails to make a timely objection before the trial court. Plaintiff was required to object to the disputed material's failure to be filed and failed to do so. *See Yamaha*, 72 N.C. App. at 629, 325 S.E.2d at 58; *Whitehurst*, 88 N.C. App. at 748, 364 S.E.2d at 729-30; *Crocker*, 217 N.C. App. at 165, 719 S.E.2d at 87-88; *Harwell*, 38 N.C. App. at 192, 247 S.E.2d at 722. Plaintiff's argument is overruled.

B. Affidavit of Scott Latell

Defendant challenges the trial court's consideration of the affidavit of Scott Latell and two attached telephone conversation transcripts submitted by Plaintiff to the trial court. Although the trial court ultimately granted summary judgment in favor of Defendant, Defendant contends

the trial court erred in admitting and considering the affidavit and the two attached transcripts. In light of our holding to affirm the trial court's order granting summary judgment to Defendant, it is not necessary, and we decline, to address Defendant's objection to the trial court's consideration of Scott Latell's affidavit and the two attached transcripts.

C. Breach of Contract

[2] Plaintiff argues genuine issues of material fact exist in regard to its breach of contract claim. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000).

Plaintiff's verified complaint alleges Defendant committed several breaches of the agreements the parties had entered into with regard to financing the Project, including:

a. failing to provide the required amount of initial financing;

b. underfunding the loan;

c. delaying change-order requests;

d. refusing to finance the Take-Out Loans as promised; and

e. violating the covenant of good faith and fair dealing.

We analyze each alleged breach in turn.

1. Failure to Provide the Required Amount of Initial Financing

Plaintiff asserts the parties' Loan Commitment required Defendant to provide $9,950,000 in funds for initial financing from the Loan Agreement instead of the $7,750,000 provided and advanced at closing. Viewing the evidence in the light most favorable to Plaintiff including the loan documents attached to Plaintiff's complaint, no genuine issue of material fact exists of whether Defendant failed to provide the initial amount of financing. When the parties closed on the loan on 8 August 2008, in addition to the Loan Agreement, they executed a notice of final agreement containing a merger clause indicating it supersedes the earlier executed Loan Commitment. Specifically, the notice of final agreement states, in relevant part:

> BY SIGNING THIS DOCUMENT EACH PARTY REPRESENTS AND AGREES THAT: *(A) THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES*, (B) THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE

> PARTIES, AND (C) THE WRITTEN LOAN AGREEMENT MAY NOT BE CONTRADICTED BY EVIDENCE OF ANY PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OR UNDERSTANDINGS OF THE PARTIES. [Emphasis supplied].

In addition, the Loan Agreement provides:

> RELATIONSHIP TO THE AGREEMENT: *The terms and provisions of this Agreement, the Note and the Related Documents supersede any inconsistent terms and conditions of Lender's construction loan commitment letter to Borrower*, provided that all obligations of Borrower under this commitment to pay any fees to Lender or any costs and expenses relating to the Loan on the commitment shall survive the execution and delivery of this Agreement, the Note and the Related Documents. [Emphasis supplied].

The plain language in the Loan Agreement, which Plaintiff does not contest it executed, indicates the Loan Agreement's provision for $7,750,000 in financing supersedes the earlier Loan Commitment's provision for $9,950,000.

The parties also executed the Second Change in Terms Agreement in June 2009, several months after Plaintiff alleges Defendant had failed to provide the initial amount of financing. The Second Change in Terms Agreement provides in relevant part:

> 13. Ratification of all Loan Documents, as Modified. Borrower and Lender agree that the Note, Deed of Trust, *CLA [Construction Loan Agreement] and all other Loan Documents*, as modified by the LMA [Loan Modification Agreement], the Modification of Deed of Trust and this Modification, are hereby ratified and confirmed to be in full force and effect and Borrower further confirms and agrees that there presently exists no defenses, offsets, or other claims with respect to the same, as modified hereby. [Emphasis supplied].

Based upon the clear and unambiguous language of the Loan Agreement and the two Change in Terms Agreements, Defendant was not obligated to provide the $9,950,000 in financing initially specified by the Loan Commitment. Presuming, *arguendo*, Defendant was obligated to provide the $9,950,000 under the Loan Agreement, Plaintiff waived

any claims it may have had for Defendant's failure to provide the initial amount of financing in the Second Change in Terms Agreement. Plaintiff does not dispute they entered into these agreements. No genuine issue of material fact exists with respect to this alleged breach. Defendant's argument is overruled.

2. Underfunding the Loan

Plaintiff also alleges Defendant breached the parties' loan contracts by underfunding the Loan. According to the Modification of Note and Deed of Trust executed by the parties on 18 June 2009, Defendant had disbursed all of the loan funds it was required to disburse under the parties' Loan Commitment, Loan Agreement, and later modifications. The Modification of Note and Deed of Trust both parties executed specifically provides:

> The total amount of all funds disbursed by Lender to Borrower to date under said Note, CLA [Construction Loan Agreement] and Deed of Trust, as amended by the LMA [Loan Modification Agreement] and Modification of Deed of Trust, including those funds deposited in the Interest Reserve Account, is $8,475,801.00. There are presently no Construction Loan funds left to be disbursed.

Plaintiff has failed to produce any writing or agreement contradicting the Modification of Note and Deed of Trust to indicate Defendant underfunded the loan. Plaintiff has not alleged Defendant entered into any subsequent modification of the Loan Agreement after 18 June 2009, which obligated Defendant to loan additional funds beyond the stated amount. Plaintiff's arguments regarding Defendant's alleged underfunding of the loan are overruled.

3. Delaying Change Order Requests

Plaintiff also alleges Defendant breached the parties' loan agreements by its delay in approving Plaintiff's November 2008 change order request for $725,801. The Loan Agreement does not indicate Defendant was required to loan any more money at the time Plaintiff submitted its change order request. The Modification of Note and Deed of Trust executed by the parties and attached to Plaintiff's verified complaint specifically states:

> WHEREAS, at the request of Borrower, Lender agreed to lend Borrower an additional $725,801.00 by increasing the amount of the Construction Loan from $7,750,000 to $8,475,800.00. To reflect this increase in the amount of the

> Construction Loan, Borrower and Lender entered into a Change In Terms Agreement dated January 23, 2009 (the "LMA") increasing the amount of the Construction Loan, and the principal amount of the Note, from $7,750,000.00 to $8,475,801.00.

As analyzed above, Plaintiff specifically waived claims relating to the parties' obligations under the Loan Agreement and related documents in the Modification of Note and Deed of Trust, which states:

> Borrower and Lender agree that the Note, Deed of Trust, CLA [Loan Agreement] and all other Loan Documents, as modified by the LMA [Change in Terms Agreement], the Modification of Deed of Trust and this Modification, are hereby ratified and confirmed to be in full force and effect and Borrower further confirms and agrees that there presently exists no defenses, offsets or other claims with respect to the same, as modified hereby.

Plaintiff has specifically waived any claim asserting Defendant has breached the Loan Agreement and related agreements by its purported delay in funding Plaintiff's change order request. The Loan Agreement and related modifications, which Plaintiff does not deny it executed and which are attached and referenced in its verified complaint, establish no genuine issue of material fact exists with regard to Defendant's alleged breach due to any purported delay in funding Plaintiff's change order request. Plaintiff's arguments are overruled.

4. Refusing to Finance Take-Out Loans

Plaintiff also alleges Defendant breached its loan agreements by failing to provide take-out financing for the purchase of commercial units by LBS, the additional ownership entity established by Plaintiff. Nothing in the terms of the Loan Commitment, Loan Agreement, and any related modifications obligated Defendant to provide take-out loans to either Plaintiff or LBS.

Brian Gillespie's affidavit, submitted by Defendant in support of its motion for summary judgment, states, in relevant part:

> 18. Shortly after the closing, Bradley Hines, with whom I worked on this project, and I began to make inquiry of French Broad Place, LLC as to how it was going with respect to obtaining loan commitments for the purchases by LBS. These communications continued over a period of time and we were constantly told that LBS had a lot of

> interest from other lenders to make the "take-out loans" to LBS.
>
> 19. Thereafter, an email was sent to Lyle Priest who had sent two emails requesting loans for take-outs for LBS and Mr. Priest was informed that certain documentation would be needed in order for the LBS loan requests to be considered by Asheville Savings Bank.
>
> 20. Subsequent to the request for financial information sought in an email dated February 17, 2010 from Bradley Hines, neither LBS nor any of the principals submitted any of the requested information necessary for Asheville Savings Bank to determine whether or not such loan could be approved.

Viewing the evidence in the light most favorable to Plaintiff, nothing in the record challenges or contradicts Brian Gillespie's sworn statement that the LBS financial information requested by Defendant was not provided. Additionally, Plaintiff has not provided written documents detailing the specific terms of any take-out loans that Defendant allegedly agreed to make, only an affidavit of Joshua Burdette, recollecting the essential terms of potential take-out loans discussed between the parties on 20 March 2008. As discussed *supra*, when the parties closed on the construction loan on 8 August 2008, they executed a notice of final agreement which states, in relevant part:

> BY SIGNING THIS DOCUMENT EACH PARTY REPRESENTS AND AGREES THAT: (A) THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES, (B) *THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES*, AND (C) THE WRITTEN LOAN AGREEMENT MAY NOT BE CONTRADICTED BY EVIDENCE OF ANY PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OR UNDERSTANDINGS OF THE PARTIES. [Emphasis supplied].

Plaintiff has failed to produce or indicate the existence of any written agreement, which obligated Defendant to provide the alleged take-out loans. To the extent Defendant or its representatives may have orally promised to provide take-out financing prior to the execution of the Loan Agreement, the notice of final agreement entered into between the parties expressly disclaims the existence of any oral agreement or contract obligating Defendant to do so.

Additionally, any commitment to make a commercial loan in excess of $50,000 must be in writing and signed by the parties pursuant to the relevant statute of frauds. N.C. Gen. Stat. § 22-5 (2017).

Undisputed evidence indicates LBS did not make requests for take-out loans until February 2010, when it made requests for two loans. Both of these requests were for take-out loans of $460,000 and $797,000, respectively, well in excess of the $50,000 limit to trigger the statute of frauds.

Any commitment Defendant would have made to provide take-out loans in excess of $50,000 was required to be in writing and signed by the parties. *Id.* Plaintiff has not produced any such writing nor alleged such a writing exists. Plaintiff has failed to demonstrate any genuine issue of material fact exists that Defendant breached an agreement to provide take-out loans.

5. Violating the Implied Covenant of Good Faith and Fair Dealing

[3] Plaintiff alleges Defendant breached their loan agreements by violating the implied covenant of good faith and fair dealing. "In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation omitted).

The undisputed terms of the parties' Modification of Note and Deed of Trust indicates Defendant had disbursed all of the loan funds it was contractually obligated to disburse under the parties' Loan Agreement and related modifications. Defendant exceeded the initial terms of the parties' Loan Agreement by agreeing to waive the first $1,000,000 in release fees owed in order to help Plaintiff. Plaintiff has failed to demonstrate any genuine issue of material fact that Defendant breached the covenant of good faith and fair dealing.

D. Unfair or Deceptive Trade Practices

[4] Plaintiff alleges Defendant engaged in unfair or deceptive trade practices based upon Defendant's alleged breaches of the loan agreements. "Breach of contract, even if intentional, can only create a basis for an unfair [or] deceptive trade practices claim if substantial aggravating circumstances attend the breach." *Rider v. Hodges*, __ N.C. App. __, __, 804 S.E.2d 242, 249 (2017) (citing *Watson Elec. Constr. Co. v. Summit Cos., LLC*, 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003)).

We decline to address if aggravating circumstances tend to support Plaintiff's unfair or deceptive trade practices claim. Plaintiff has failed

to demonstrate any genuine issues of material fact exist that Defendant breached *any* of the parties' loan agreements. *See id.*

E. Breach of Fiduciary Duty

[5] Plaintiff alleges Defendant owed it a fiduciary duty "to act in good faith and with due regard to the interests of Plaintiff" and that Defendant breached its fiduciary duty by: (1) failing to provide the required amount of initial financing; (2) underfunding the loan; (3) delaying change-order requests; and (4) refusing to finance take-out loans as promised.

> For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. Such a relationship has been broadly defined by this Court as one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . [and] it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Dalton v. Camp, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001) (internal quotation marks omitted).

To establish a claim for breach of a fiduciary duty, claimants are "required to produce evidence that (1) defendants owed them a fiduciary duty of care; (2) defendants . . . violat[ed] . . . their fiduciary duty; and (3) this breach of duty was a proximate cause of injury to plaintiffs." *Farndale Co., LLC v. Gibellini*, 176 N.C. App. 60, 68, 628 S.E.2d 15, 20 (2006). In North Carolina, the general rule holds:

> Ordinary borrower-lender transactions . . . are considered arm's length and do not typically give rise to fiduciary duties. In other words, the law does not typically impose upon lenders a duty to put borrowers' interests ahead of their own. Rather, borrowers and lenders are generally bound only by the terms of their contract and the Uniform Commercial Code.

Dallaire v. Bank of Am., N.A., 367 N.C. 363, 368, 760 S.E.2d 263, 266-67 (2014) (internal citations omitted); *see Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 95, 143 S.E.2d 270, 276 (1965) ("There was no fiduciary relationship; the relation was that of debtor and creditor.").

"Nonetheless, because a fiduciary relationship may exist under a variety of circumstances, it is possible, at least theoretically, for a particular bank-customer transaction to give rise to a fiduciary relation given the proper circumstances." *Id.* at 368, 760 S.E.2d at 267 (internal citations and quotation marks omitted). To establish a fiduciary relationship in the creditor-debtor context, there "must [be] some additional fact which tends to elevate the relationship above that of a typical debtor and creditor." *Lynn v. Federal Nat. Mort. Ass'n*, 235 N.C. App. 77, 82, 760 S.E.2d 372, 376 (2014).

> A fiduciary duty, in the context of a financing party to a corporation, arises only when the evidence establishes *that the party providing financing to a corporation completely dominates and controls its affairs. Edwards v. Bank*, 39 N.C. App. 261, 277, 250 S.E.2d 651, 662 (1979); *Pappas v. NCNB Nat. Bank of North Carolina*, 653 F.Supp. 699, 704 (M.D.N.C. 1987). Further, to justify the imposition of a fiduciary obligation on a party financing the affairs of a corporation, it must be shown that the financing party essentially dominated the will of its debtor. *In re Prima Co.*, 98 F.2d 952 (7th Cir. 1938), *cert. denied*, 305 U.S. 658, 83 L.Ed. 426 (1939).

Multifamily Mortg. Tr. 1996-1 v. Century Oaks Ltd., 139 N.C. App. 140, 146, 532 S.E.2d 578, 581-82 (2000) (emphasis supplied).

Here, there is no genuine issue that Plaintiff and Defendant were in a debtor-creditor relationship, which is not *per se* a fiduciary relationship. *See Dallaire*, 367 N.C. at 368, 760 S.E.2d at 266-67. Plaintiff alleges and argues Defendant so thoroughly dominated the will of Plaintiff with respect to the Project that a fiduciary relationship existed between them.

Plaintiff asserts the following facts tend to show Defendant dominated and controlled Plaintiff's affairs: Defendant's control of distribution and withdrawals to members and all buy/sell agreements between the members for membership interests, Defendant's giving of legal advice regarding how to set up LBS, Defendant's dictating of financing regarding Metromont, Defendant's promise to make take-out loans upon which Plaintiff relied, and Plaintiff's utter dependence on Defendant's financing.

"As a matter of law, there can be no fiduciary relationship between 'parties in equal bargaining positions dealing at arm's length, even though they are mutually interdependent businesses.' " *Dreamstreet Investments, Inc. v. MidCountry Bank*, 842 F.3d 825, 831 (4th Cir. 2016)

(quoting *Strickland v. Lawrence*, 176 N.C. App. 656, 662, 627 S.E.2d 301, 306 (2006)).

Reviewing the evidence in the light most favorable to Plaintiff, nothing tends to show the relationship between Plaintiff and Defendant was anything other than an agreement between two sophisticated commercial entities dealing at arm's length. Undisputed evidence in the record indicates Plaintiff's development team members had accumulated nearly 150-years' worth of combined experience in commercial real estate construction and development before entering into the loan agreements with Defendant.

Additionally, Mark Latell, a principal of Plaintiff, indicated in his deposition that Plaintiff had retained a consultant, Lyle Preest, to help them find lenders for the Project. Mr. Latell described Mr. Preest as "very knowledgeable with banking and lending and borrowing." Numerous emails submitted to the trial court show correspondence between Mr. Preest and Bradley Hines, the vice-president of commercial lending of Defendant, dating from before and after the closing of the Loan Agreement. These emails discuss several critical matters relating to the loan agreements, including Plaintiff obtaining third-party financing, obtaining take-out financing, and the pre-sales of commercial units.

Nothing indicates Plaintiff reposed any sort of special confidence in Defendant to create a fiduciary relationship. *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707. Plaintiff's consultation with Lyle Preest as an outside expert is inconsistent with a fiduciary relationship. *See Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (1992) (finding no fiduciary relationship on action for summary judgment where party asserting fiduciary relationship with bank consulted with banker and accountant before entering into agreement); *see also Sullivan v. Mebane Packaging Grp., Inc.*, 158 N.C. App. 19, 33, 581 S.E.2d 452, 462 (2003) (finding evidence that complaining party obtained outside counsel rebuts existence of fiduciary relationship necessary for constructive fraud claim). Furthermore, nothing in the record indicates Plaintiff was foreclosed from consulting with an attorney, or other advisors of its choice, prior to executing the Loan Commitment and Loan Agreement with Defendant.

No evidence tends to show Defendant "essentially dominated the will" of Plaintiff or "completely dominate[d] and control[led]" Plaintiff's affairs. *Multifamily Mortg.*, 139 N.C. App. 140, 146, 532 S.E.2d 578, 581-82 (2012) (citations omitted).

No genuine issue of material facts exists of whether Plaintiff and Defendant were in a fiduciary relationship. Plaintiff has not produced evidence tending to show this essential element of a breach of fiduciary relationship claim. The trial court's order properly granted Defendant summary judgment on this claim.

F. Defendant's Counterclaim on Promissory Note

[6] Plaintiff argues the trial court erred in granting Defendant's motion for summary judgment on Defendant's counterclaim for payment on the promissory note. The promissory note was executed by Plaintiff on 8 August 2008 for the principal amount of $7,750,000.00. This note was modified by the First Change in Terms Agreement on 23 January 2009, and the principal amount was increased to $8,475,801.00. On 8 June 2009, Plaintiff executed a Second Change in Terms Agreement, which altered the formula used to calculate the interest rate.

In support of Defendant's motion for summary judgment, Defendant submitted the affidavit of David A. Kozak, executive vice-president of Defendant. David A. Kozak stated that Defendant was owed $10,491,440.16 along with interest and attorney's fees per the parties' Loan Agreement and that Plaintiff had defaulted.

Plaintiff argues due to Defendant allegedly breaching its obligations under the loan agreements, Plaintiff is not obligated to pay on the note. The uncontradicted evidence in the form of the parties' 18 June 2009 Modification of Note and Deed of Trust shows Defendant disbursed all funds it was required to loan under the agreements evidenced by the note. Plaintiff has not presented any evidence to contradict David A. Kozak's affidavit stating Plaintiff was in default.

Based upon our holding to affirm the trial court's determination that Defendant is entitled to summary judgment on Plaintiff's breach of contract claims, no genuine issue of material fact exists with regard to Defendant's counterclaim for collection on the stated and uncontested sums in the note with interest and contractually-agreed attorney's fees. Plaintiff's arguments are overruled.

V. Conclusion

Viewing the evidence in the light most favorable to Plaintiff, Plaintiff has failed to establish any genuine issue of material fact exists with regard to its claims for breach of contract, unfair or deceptive trade practices, and breach of fiduciary duty. Plaintiff has also failed to demonstrate any genuine issue of material fact exists with respect to Defendant's counterclaim for contribution on the promissory note.

Defendant is entitled to summary judgment as a matter of law with respect to Plaintiff's claims and its counterclaim. The trial court's order granting summary judgment to Defendant is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and ZACHARY concur.

JENNIFER L. HAULCY, EMPLOYEE, PLAINTIFF
v.
THE GOODYEAR TIRE & RUBBER CO., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA17-844

Filed 5 June 2018

1. Workers' Compensation—compensable injury—material aggravation of pre-existing condition—sufficiency of evidence

The N.C. Industrial Commission's determination that plaintiff employee's aggravation of a prior back injury while moving tires constituted a compensable injury stemming from a specific workplace incident was supported by competent evidence, including doctors' testimony which took into account the employee's history, a physical examination, and diagnostic studies in shaping their opinion that the injury resulted from the new incident.

2. Workers' Compensation—compensable injury—causal link—sufficiency of evidence

The N.C. Industrial Commission's determination that plaintiff employee's back injury sustained while moving tires was a compensable injury was supported by competent evidence establishing a causal link between a specific workplace incident and the employee's lower back injuries. Testimony by two doctors showed that causation was based not merely on the temporal relationship between the workplace incident and the aggravation of the employee's pre-existing condition but also on the employee's medical history, a physical examination, and diagnostic evidence.

3. Workers' Compensation—issue preservation—award of credit to employer—disability payments

The N.C. Industrial Commission did not err in awarding defendants employer and insurer a credit for weekly disability payments

paid to the employee under an employer-funded disability plan where defendants appropriately challenged the deputy commissioner's award of benefits. Even if the issue had not been properly preserved, the Commission has the power to amend an award.

4. Workers' Compensation—disability payments—employer-funded accident-and-sickness plan—credit awarded to employer

The N.C. Industrial Commission did not err in awarding credit to defendants employer and insurer for disability payments made to plaintiff employee under the employer-funded accident-and-sickness plan where competent evidence, included as an exhibit to the record on appeal, showed the frequency and amount of payments made to the employee under the plan.

Appeals by plaintiff and by defendants from opinion and award entered 25 April 2017 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 24 January 2018.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner; and Law Office of David P. Stewart, by David P. Stewart, for plaintiff-appellant and plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Matthew J. Ledwith, for defendant-appellees and defendant-appellants.

ELMORE, Judge.

In this workers' compensation case, employer Goodyear Tire & Rubber Co. and carrier Liberty Mutual Ins. Co. (defendants), and employee Jennifer L. Haulcy (plaintiff), both appeal from an opinion and award of the North Carolina Industrial Commission, which awarded Haulcy retroactive workers' compensation benefits and awarded defendants a credit for disability payments paid to Haulcy under an employer-funded accident-and-sickness (A&S) disability plan during that time.

In defendants' appeal, they assert the Commission's conclusion that Haulcy suffered a compensable injury in the form of a material aggravation of her pre-existing lower back condition while maneuvering a fifty-five pound tire during the course of her employment on 23 April 2014 was unsupported by competent evidence and its findings. In Haulcy's appeal, she asserts the Commission erred by awarding defendants the A&S credit because they failed to preserve the issue, and

because the Commission's dispositive finding supporting its conclusion on the matter was unsupported by competent evidence.

Because competent evidence supports the dispositive findings that support the challenged conclusions, we affirm the Commission's opinion and award in full.

I. Background

The Commission's opinion and award reveals the following facts. Jennifer Haulcy is forty-six years old and has worked with Goodyear Tire for the last eighteen years. During her employment there, Haulcy has worked as a tire sorter, a Banbury operator, and, since 2007, a paint machine operator.

Paint machine operators work in pairs. When the paint machine is working properly, one operator removes tires from an elevated flatbed and places them onto an entrance conveyor, where the tires move under the paint machine to be sprayed with lubricant. When the lubricated tires exit the conveyor, the other operator puts the tires back onto the elevated flatbed, a process known as "throwing" tires. If a paint machine breaks down, the tires need to be manually lubricated. One operator picks up a tire, hangs it on a hook, spins the tire while brushing it with the lubricant, and then throws it back on the elevated flatbed. The other operator pushes the flatbed of tires to and from the lubricating area.

On 19 March 2013, Haulcy injured her back while attempting to push a flatbed with a stuck wheel. She presented to the on-site medical clinic, was diagnosed with a low back strain, and was put on modified duty until 3 May, when she was released to return to full duty and prescribed to wear a back brace. Haulcy returned to work, continued to wear her back brace, and never filed a workers' compensation claim for that incident. Haulcy's medical records do not reveal she received any further treatment for her lower back after 3 May 2013.

On 23 April 2014, Haulcy and her paint-machine-operator partner were manually lubricating larger tires that weighed approximately fifty-five pounds because their paint machine was inoperable. At that time, Haulcy was wearing her back brace, throwing the tires, and lubricating them, while her partner was pushing the flatbed of tires to and from the area. Around 8:00 a.m., Haulcy leaned back to throw a tire and felt pain in her lower back. She attempted to throw a few more tires but her back pain increased as she continued to twist her body to throw the tires onto the elevated flatbed. Haulcy asked her partner to change positions, and she started pushing the flatbed before determining she needed

to present to the on-site medical facility for her back pain. MRIs later revealed, *inter alia*, a small disc herniation at L5-S1 and facet arthropathy at L4-L5, and Haulcy was diagnosed with multiple injuries to her lumbar spine. Haulcy started working modified duty on 24 April 2014.

On 29 April 2014, Haulcy filed a Form 18 "Notice of Accident," alleging she sustained a back injury at work. On 27 May, defendants filed a Form 63 "Notice to Employee of Payment of Medical Benefits Only." In accordance with Goodyear Tire's 90-day modified-duty policy, Haulcy worked modified duty until that policy expired on 4 August, when Goodyear Tire prohibited her from working because she had neither been released to full duty work nor had she been assigned permanent restrictions to allow a job match. Starting 14 August 2014, Goodyear Tire paid Haulcy weekly disability payments from an employer-funded A&S disability plan.

On 17 September, Haulcy filed a Form 33 "Request for Hearing" because defendants had failed to accept or deny her workers' compensation claim, and were directing her medical care but refused to pay workers' compensation benefits when she was out of work. On 27 February 2015, defendants filed a Form 61 "Denial of Workers' Compensation Claim." Following physical therapy, steroid injections, and radio frequency intervention for her lower back pain and symptoms, Haulcy eventually returned to work with Goodyear Tire on 4 November 2015, earning wages at or above her pre-April 2014 incident wages.

After the hearing arising from Haulcy's Form 33, Deputy Commissioner Wanda Blanche Taylor entered an opinion and award on 29 December 2015. In her opinion and award, Deputy Commissioner Taylor concluded Haulcy sustained a compensable injury on 23 April 2014 and awarded her continuing weekly workers' compensation benefits, but did not address Haulcy having returned to work or the A&S disability payments she received during the period the deputy commissioner awarded her retroactive workers' compensation benefits. After defendants' motion to add evidence and to reconsider the deputy commissioner's opinion and award was denied, they appealed to the Commission.

After a hearing, the Commission entered its opinion and award on 25 April 2017. The Commission concluded Haulcy sustained a compensable injury on 23 April 2014 and awarded her retroactive workers' compensation benefits from 5 August 2014 until 3 November 2015. It further concluded defendants were entitled to a $15,521.90 credit for the weekly A&S disability payments they furnished to Haulcy

during that period and awarded defendants that credit. Both defendants and Haulcy appeal.

II. Review Standard

" 'In reviewing an opinion and award from the Industrial Commission, the appellate courts are bound by the Commission's findings of fact when supported by any competent evidence; but the [Commission's] legal conclusions are fully reviewable.' " *Harrison v. Gemma Power Sys., LLC*, 369 N.C. 572, 580, 799 S.E.2d 855, 861 (2017) (quoting *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 90, 106, 530 S.E.2d 54, 60 (2000)).

III. Defendants' Appeal

Defendants assert the Commission erred by concluding Haulcy sustained a compensable injury because (1) Haulcy "did not prove . . . an actual 'injury' occurred," and (2) "the medical evidence concerning the causal link between [Haulcy's] incident and her employment . . . is not competent to support a conclusion of causation."

A. Challenged FOFs

[1] Defendants challenge the Commission's findings of fact (FOF) nos. 9, 11, 13, 14, 16, 17, 18, and 20, "as these findings detail [Haulcy's] complaints following her alleged injury at work." The challenged FOFs follow:

> 9. Plaintiff received medical treatment at the on-site medical clinic following the April 23, 2014 incident. On May 7, 2014, Dr. Perez-Montes examined Plaintiff and assessed chronic, recurrent back pain, prescribed tramadol, and restricted Plaintiff to modified duty work. Plaintiff underwent lumbar and thoracic MRIs without contrast on May 15, 2014. On May 28, 2014, Plaintiff underwent a thoracic MRI with contrast. Dr. Perez reviewed the MRIs and assessed multi-level degenerative facet arthropathy, a disc bulge with left nerve root encroachment at L5-S1, and thoracic myelomalacia with a small syrinx at T4-T5. Dr. Perez continued modified duty and referred Plaintiff to pain management.
>
> . . . .
>
> 11. On August 6, 2014, Plaintiff presented to Dr. Larry Carson of FirstHealth Neurosurgery. Dr. Carson is board-certified in neurosurgery and plastic surgery. Plaintiff reported she was placing a tire onto a rack when she

extended too far overhead and felt back pain. Plaintiff also reported her 2013 incident which required her to use a back brace. Plaintiff's symptoms were pain in the back and right leg and weakness in the right leg. Plaintiff's physical examination was consistent with the lumbar MRI findings and suggestive of an acute issue rather than a chronic issue. Dr. Carson assessed lumbar disc degeneration and felt Plaintiff's pain symptoms were emanating from her lumbar spine condition.

. . . .

13. On January 16, 2015, Plaintiff presented to Dr. Paul Singh of Carolina Spine Center. Dr. Singh is a board certified physiatrist. Plaintiff complained of low back pain radiating to her right anterior thigh to the knee. Dr. Singh noted Plaintiff had symptoms in 2013 that improved and she was able to return to work with the use of a back brace, but then exacerbated her condition on April 23, 2014. Dr. Singh reviewed the lumber MRI and interpreted it as revealing a small disc herniation at L5-S1 and facet arthropathy at L4-L5. Dr. Singh's opinion was that Plaintiff's symptoms were due to the facet arthropathy at L4-L5. He recommended Plaintiff "close out her case from a workman's comp perspective, and she can seek treatment for her facet joint pain that is largely arthritic in nature, not likely related to work related injury, and is largely exacerbated by her challenge with obesity."

14. At his deposition, Dr. Singh was asked to confirm his opinion that Plaintiff[']s facet joint pain was not likely related to her April 23, 2014 injury. In response, Dr. Singh testified that Plaintiff has arthritic changes based upon the fact that she has worked for 18 years doing physically demanding jobs with Defendant-Employer. He further testified that given Plaintiff had an episode in 2013, received treatment and was able to return to work, her exacerbation in symptoms after putting a tire on top of a flatbed in April 2014 is probably related to the job. Dr. Singh further explained his reasoning in stating in his medical record that it was not work related was because he did not feel that Plaintiff would ever be able to return to her job and it would be best for her to settle her claim and obtain medical treatment under private health insurance.

Ultimately, Dr. Singh again testified that, "when it comes down to it," when Plaintiff leaned back to place the tire on the top level of the flatbed, she performed an extension-type movement, which can exacerbate an underlying arthritic condition in a facet joint.

. . . .

16. The parties deposed Dr. Carson on June 1, 2015. After the August 6, 2014 evaluation, Plaintiff returned to Dr. Carson on April 13, 2015 and reported improvement in her pain following physical therapy, steroid injections, and radio frequency intervention. Dr. Carson recommended repeat electrodiagnostic testing, which was completed on May 29, 2015. Dr. Carson reviewed the results of the May 29, 2015 EMG and nerve conduction studies at his deposition, and testified that the results showed Plaintiff had a permanent irritation, but it was a less than complete study.

17. Dr. Carson testified, to a reasonable degree of medical certainty, that Plaintiff aggravated her prior back injuries when she was lubricating and throwing tires on April 23, 2014 and that this incident, more likely than not, caused Plaintiff's back symptoms that he treated in August 2014 and April 2015. Dr. Carson's opinion was based upon Plaintiff's history, his physical examination findings, and the findings of the MRIs and electrodiagnostic studies. On cross-examination, Dr. Carson was questioned as to whether his opinion was solely based upon Plaintiff reporting that her back pain was worse following the April 23, 2014 incident than it was prior to the incident. In response, Dr. Carson reiterated his opinion was based on Plaintiff's history, including her report of the 2013 incident and her symptoms resulting from it, and his findings on examination, which indicated an acute problem rather than a chronic condition, were consistent with the mechanism of the April 23, 2014 incident, and were consistent with the results of the diagnostic studies.

18. Based upon the preponderance of the credible evidence and competent expert opinions, Plaintiff sustained a compensable injury by accident arising out of and in the course of her employment on April 23, 2014 and sustained an injury in the form of a material aggravation to her pre-existing low back condition as a result.

. . . .

> 20. The medical treatment Plaintiff has received for her low back condition since April 23, 2014, has been reasonably necessary to effect a cure, provide relief, or lessen Plaintiff[']s period of disability. Defendant paid for all Plaintiffs medical treatment received following the April 23, 2014 incident up until approximately May 2015.

However, defendants have failed to specifically argue how any of these findings were unsupported by competent evidence. Rather, they argue the Commission's findings are insufficient because they are limited to "back pain" or "symptoms" caused by the April 2014 incident, not any particular "injury." Defendants cite to *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985), to support their position that, because the Commission never made "a finding of an 'injury,' " its conclusion that Haulcy suffered a compensable injury was unsupported.

In *Jackson*, we held the Commission's finding that an employee "experienced pain," standing alone, was insufficient to support a conclusion that the employee suffered a compensable injury, since "pain is not in and of itself a compensable injury." *Id.* at 414, 337 S.E.2d at 111–12. Because "no specific finding was made that [the employee] sustained an injury or that determined the nature of that injury, if any," we reversed the opinion and award, and remanded for "specific findings of fact regarding the injury, if any, sustained by [the employee] and the nature of that injury." *Id.* at 414, 337 S.E.2d at 112. Here, contrarily, in FOF no. 18 the Commission explicitly found Haulcy suffered a "compensable injury . . . in the form of a material aggravation to her pre-existing low back condition." Accordingly, *Jackson* is inapplicable. Further, the Commission's finding of injury is supported by its FOF nos. 14 and 17, which are supported by competent evidence.

As to FOF no. 14, when Dr. Singh was asked whether the April 2014 incident caused Haulcy's current medical condition, he replied: "The cause is multifactorial." He elaborated that Haulcy "probably had some arthritic changes relating to 18 years being in Goodyear, doing physical work, then she got an injury[,]" but "when it comes down to it, . . . this particular [April 2014] incident, . . . is a work-related injury, in my opinion." When asked why Dr. Singh's medical record indicated the April 2014 injury was not work-related, he explained he believed Haulcy's injury should be treated quickly and that she would be unable to return to her job, so he thought it best she close out her workers' compensation claim

and receive necessary treatment through private insurance. Finally, Dr. Singh confirmed the "facet[ ] . . . pain acceleration" Haulcy described when treating her was "a result of the [April 2014] incident" because the body mechanics involved in "putting a tire up" creates "an extension" of the lumbar spine, and such an "extension-type movement can exacerbate an underlying arthritic condition in a facet joint[.]" FOF no. 14 is therefore supported by competent evidence.

As to FOF no. 17, Dr. Carson confirmed "within a reasonable degree of medical certainty" the April 2014 incident "was a materially exacerbating factor in the exacerbation of [Haulcy's] back pain" and "symptoms," and that incident "more likely than not" "cause[d] [Haulcy's] symptoms and back pain for which [he] treated her . . . ." Dr. Carson rejected the suggestion that his opinion was merely based on Haulcy's report that her lower back pain and symptoms worsened after the April 2014 incident and explained his opinion was based upon "the history provided, [his] physical examination, and the diagnostic studies available to [him] at the time." He confirmed that even if the Commission found Haulcy had persistent lower back pain from the 2013 March incident until the April 2014 incident, it would not "invalidate [his] opinion that there was an aggravation or acceleration of her pre-existing condition" and reiterated his diagnosis was "based on history confirmed by the physical exam and then supported by . . . diagnostic tests." Finally, when asked "was there anything in the physical examination findings that gave [him] reason to believe . . . [Haulcy's] back condition was related to a[n] acute trauma versus an active degenerative disc disease," Dr. Carson opined that "because [Haulcy] had decreased range of motion and tenderness, that suggested . . . it was more acute . . . than all—just chronic[.] . . ." Accordingly, FOF no. 17 is supported by competent evidence.

Because FOF nos. 14 and 17 support the portion of the Commission's FOF no. 18 that Haulcy sustained a compensable "injury" in the form of a "material aggravation to her pre-existing low back condition," we overrule this argument.

B. Causation

[2] Defendants next assert the Commission's conclusion of compensability was unsupported because no competent evidence established the requisite causal link between the April 2014 incident and Haulcy's lower back injuries. They argue Drs. Singh's and Carson's expert opinions on medical causation were insufficient because they were based merely on the temporal relationship between the April 2014 incident and

Haulcy's reported exacerbation of her back pain and symptoms. Thus, defendants continue, the doctors committed the logical fallacy of *post hoc, ergo propter hoc*—that is, confusing sequence with consequence. Defendants cite to *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 538 S.E.2d 912 (2000), for support.

In *Young*, the only evidence linking an employee's fibromyalgia diagnosis to a work-related accident was an expert who testified he related the two " 'primarily because . . . it was not there before and she developed it afterwards. *And that's the only piece of information that relates the two*.' " *Id.* at 232, 538 S.E.2d at 916 (emphasis added). Our Supreme Court determined that the expert's opinion was grounded upon "[t]he maxim " *'post hoc, ergo propter hoc*,' [which] denotes 'the fallacy of . . . confusing sequence with consequence,' and assumes a false connection between causation and temporal sequence." *Id.* (quoting *Black's Law Dictionary* 1186 (7th ed. 1999)). After noting fibromyalgia is a diagnostically unidentifiable illness of unknown etiology, *id.* at 231, 538 S.E.2d at 915, our Supreme Court held that "[i]n a case where the threshold question is the cause of a controversial medical condition, the maxim of '*post hoc, ergo propter hoc*,' is not competent evidence of causation." *Id.* at 232, 538 S.E.2d at 916.

Here, contrarily, as defendants' concede, Dr. Carson explicitly rejected the suggestion his expert opinion on causation was based only on temporality, but reiterated it was grounded in his consideration of Haulcy's medical history, the reported incident, his physical exam, and the diagnostic evidence. Nor did Dr. Singh testify his causation opinion was based only on temporality. Rather, both doctors testified their opinions were based on other diagnostic evidence. Additionally, unlike the injury in *Young*, Haulcy's lower back injuries can be, and were, diagnostically identifiable. Further, the exacerbation of Haulcy's pre-existing lower back condition could be precisely identified based on diagnostic evidence, her medical history, her reported pain and symptoms, and the reported movements she made while throwing tires during the April 2014 incident, implicating the exact mechanism by which that incident may have exacerbated her pre-existing lower back condition. Accordingly, *Young* is inapplicable. Because competent evidence supported FOF nos. 14 and 17, which established the requisite causal link, we overrule this argument.

In summary, because competent evidence supported the Commission's dispositive FOFs challenged on appeal, which in turn supported its challenged conclusion that Haulcy suffered a compensable

injury on 23 April 2014, we affirm the Commission's opinion and award with respect to defendants' appeal.

IV. Plaintiff's Appeal

In her appeal, Haulcy asserts the Commission erred by awarding defendants a credit for $15,521.90 in weekly disability payments Goodyear Tire paid her through an employer-funded A&S disability plan. Under N.C. Gen. Stat. § 97-42 (2017), the Commission may credit an employer for disability payments made to an employee under an employer-funded disability plan if it awards retroactive workers' compensation benefits during that period. Haulcy does not dispute that defendants would be eligible for a credit for disability benefits paid under a plan fully-funded by Goodyear Tire during the time she was eligible for workers' compensation benefits. She argues (1) the Commission lacked jurisdiction to award the A&S credit because defendants failed to preserve this issue, and (2) its finding that the disability plan was fully funded by Goodyear Tire was unsupported by competent evidence.

A. Issue Preservation

[3] Haulcy first asserts the Commission lacked jurisdiction to award defendants the A&S credit because they failed to preserve this issue in their pretrial agreement to the deputy commissioner and again in their Form 44 "Application for Review" to the Commission. We disagree.

On 29 April 2014, the parties entered into a pretrial agreement stipulating to facts and exhibits to be used by the deputy commissioner in deciding whether Haulcy suffered a compensable injury and, if so, what benefits she is due. In the pretrial agreement, defendants argued Haulcy did not sustain a compensable injury but requested, alternatively, that if she did, the deputy commissioner determine "what benefits [she is] entitled." The deputy commissioner's opinion and award demonstrates she considered "Stipulated Exhibit 2," which included "Goodyear Accident & Sickness Payment Information," but she never addressed the A&S credit issue in her opinion and award. On 13 January 2016, defendants filed a "Motion to Add Evidence and Reconsider Opinion & Award," explicitly moving, *inter alia*, for the Commission to revise the deputy commissioner's opinion and award "to document . . . an A&S credit in the amount set forth in [the] Stipulated Exhibit[.]"

On 14 January 2016, Haulcy filed a response to defendants' motion in which she, *inter alia*, acknowledged the stipulated "Goodyear Accident and Sickness Payment Information" exhibit and argued "defendants failed to properly preserve the issue of a credit[,]" but "nevertheless

[agreed to] abide by the [Commission's] discretion" as to the A&S credit. After the deputy commissioner denied the motion on 1 February 2016, defendants filed a Form 44 to appeal to the Commission. While defendants never specifically claimed entitlement to the A&S credit in their Form 44, they did challenge the deputy commissioner's award of benefits.

Even if defendants failed to preserve this issue, the Commission has "the duty and responsibility to decide all matters in controversy between the parties." *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). Haulcy's argument that defendants waived this issue by failing to specifically raise it in the pretrial agreement fails because in reviewing a deputy commissioner's opinion and award, the Commission has the "power . . . , if proper, to amend the award," *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962), even based on an issue not presented to the deputy commissioner. *See, e.g.*, *Penegar v. United Parcel Serv.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, slip op. at 20–22 (May 1, 2018) (No. 17-404) (rejecting a similar argument that the Commission lacked jurisdiction to amend an aspect of a deputy commissioner's opinion and award based on an issue not raised by either party). Haulcy's argument that defendants waived this issue by failing to raise it in their Form 44 to the Commission also fails.

Although Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission contemplates that a Form 44 "shall state the grounds for . . . review . . . . with particularity" and that "[g]rounds for review not set forth in the Form 44 . . . are deemed abandoned," our Supreme Court has explained these "rules do not limit the power of the Commission to review[or] modify . . . the findings of fact found by a Deputy Commissioner . . . ." *Brewer*, 256 N.C. at 182, 123 S.E.2d at 613. Accordingly, the Commission had jurisdiction to amend the deputy commissioner's opinion and award by making findings on the A&S credit issue and adjudicating the matter even if it were not adequately presented. *See Penegar*, ___ N.C. App. at ___, ___ S.E.2d at ___, slip op. at 22 ("[T]he Commission was well within its authority and therefore had jurisdiction to amend an aspect of the Deputy Commissioner's opinion and award, even those not raised by either party on appeal."). Accordingly, we overrule this argument.

B. A&S Credit

[4] Haulcy argues, alternatively, that even if the A&S credit issue was preserved, the Commission erred by awarding the credit because its dispositive finding, FOF no. 24, was unsupported by competent evidence. We disagree.

In challenged FOF no. 24, the Commission found in relevant part:

> 24. Beginning August 14, 2014, Plaintiff began receiving weekly disability payments from an accident and sickness disability plan provided by Defendant-Employer. As of April 12, 2015, Plaintiff had received $15,521.90 through the Defendant-Employer-funded plan.

Based on this finding, the Commission concluded:

> 6. . . . Defendants are entitled to a credit for the employer-funded accident and sickness disability benefits received by Plaintiff beginning August 11, 2014 for any weeks in which Plaintiff is entitled to indemnity compensation pursuant to the below award of the Commission. . . .

Here, in defendants' 13 January 2016 motion to revise the deputy commissioner's opinion and award, they sought a credit for the A&S disability benefits paid to Haulcy because the program was "fully funded by Employer-Defendant" and "[s]uch credit is established through numerous Opinions & Award of the Commission in relation to Goodyear's A&S program." The A&S records, labeled "Goodyear Accident and Sickness Payment Information," were included as an exhibit on appeal. That exhibit establishes the A&S records were generated from "Human Resource Management Systems," lists "A&S / SWC Benefit Records from 4/14/14 to present," and details forty-one payments to "employee Haulcy, Jennifer L" for periods beginning 11 August 2014 and ending 12 April 2015, totaling $15,521.90. (Original in all caps.) Accordingly, competent evidence supported the Commission's FOF no. 24, which in turn supported its COL no. 6. We therefore overrule this argument.

V. Conclusion

As to defendants' appeal, competent evidence supported the Commission's dispositive FOFs, which supported its conclusion Haulcy suffered a compensable injury on 23 April 2014 and its award of workers' compensation benefits. As to Haulcy's appeal, the Commission properly addressed and adjudicated the A&S credit issue, and competent evidence supported the dispositive FOF, which supported its conclusion defendants were entitled to the A&S credit and its award of that credit. Therefore, we affirm the Commission's 25 April 2017 opinion and award in full.

AFFIRMED.

Judges HUNTER, JR. and DIETZ concur.

IN RE A.J.C.

[259 N.C. App. 804 (2018)]

IN THE MATTER OF A.J.C.

No. COA18-41

Filed 5 June 2018

Termination of Parental Rights—jurisdiction—personal—service of summons—service by publication

The trial court lacked personal jurisdiction over a father in a termination of parental rights proceeding where the county Department of Social Services (DSS) attempted service by publication after personal service by the deputy sheriff was unsuccessful, because DSS failed to file an affidavit showing the circumstances warranting the use of service by publication and counsel's mere act of notifying the court of her client's absence did not constitute a general appearance by the father.

Appeal by respondent-father from order entered 11 October 2017 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 10 May 2018.

No brief filed for petitioner-appellee New Hanover County Department of Social Services.

Winston & Strawn LLP, by Joanna C. Wade and Elizabeth J. Ireland, for guardian ad litem.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Joyce L. Terres, for respondent-appellant father.

ARROWOOD, Judge.

Respondent-father appeals from an order terminating his parental rights in the minor child "Alex."[1] Because the trial court lacked personal jurisdiction over respondent-father, we vacate the order.

I. Background

In March 2016, New Hanover County Department of Social Services ("DSS") obtained non-secure custody of three-year-old Alex and filed a

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

juvenile petition alleging he was neglected and dependent. At the time the petition was filed, Alex was living with respondent-father and his girlfriend, Ms. H. Respondent-mother had not been in contact with Alex for two years, and her location was unknown. DSS alleged it had received a series of child protective services ("CPS") reports regarding substance abuse by respondent-father, domestic violence by Ms. H., and general "parenting concerns." Respondent-father acknowledged to DSS that he was taking Ms. H.'s subutex prescription and "needed the Department to take custody of [Alex] so he could go to substance abuse treatment." However, he declined an inpatient treatment bed arranged by DSS and did not seek outpatient treatment. Ms. H., who was Alex's primary caretaker, had served time in prison for felony child abuse and had additional convictions for cocaine possession and "multiple domestic violence related charges."

Based on the parties' stipulation to the petition's allegations, the trial court adjudicated Alex neglected and dependent by order entered 29 April 2016. The court ordered respondent-father to comply with conditions of his Family Services Agreement ("FSA") with DSS by following all recommended mental health and substance abuse treatment; submitting to random drug screens requested by DSS or the guardian *ad litem* ("GAL"); taking all medications as prescribed; completing an approved parenting course; maintaining stable employment and housing; and attending scheduled visitations with Alex. If respondent-father chose to remain in a relationship with Ms. H., the court ordered them to attend couples counseling and follow any recommendations. It further ordered Ms. H. to complete an approved parenting course.

In January 2017, the trial court established concurrent permanent plans for Alex of reunification with respondent-mother and reunification with respondent-father. Based on respondents' lack of progress with their FSAs, the court on 2 June 2017 changed the concurrent permanent plans to adoption and reunification and ordered DSS to file for termination of parental rights.

DSS filed a petition to terminate the parental rights of respondent-mother and respondent-father on 19 June 2017. On 11 July 2017, the trial court granted a motion to withdraw filed by respondent-father's appointed counsel in the neglect and dependency proceeding. By order entered 18 July 2017, the court appointed counsel Dawn Oxendine to represent respondent-father in the termination proceeding. *See* N.C. Gen. Stat. § 7B-1101.1(a) (2017).

The trial court held a hearing on the petition to terminate respondent-father's parental rights on 11 September 2017.[2] When respondent-father did not appear at the hearing, the court released his appointed counsel, Ms. Oxendine. The court heard testimony from the CPS worker and foster care social worker assigned to Alex's case and adjudicated the existence of grounds for termination of respondent-father's parental rights for neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2017). The court received the GAL's report with regard to disposition and determined that Alex's best interest would be served by termination. It entered its order terminating respondent-father's parental rights on 11 October 2017. Respondent-father filed timely notice of appeal.

II. Discussion

On appeal, respondent-father challenges the trial court's conclusion that it obtained personal jurisdiction over him in the termination proceeding. He contends he was not properly served with the petition and summons in accordance with N.C. Gen. Stat. § 1A-1, Rule 4(j) (2017). We agree with respondent-father that the trial court lacked personal jurisdiction in this cause and that its order must be vacated.

The relevant law was summarized by this Court in *In re C.A.C.*, 222 N.C. App. 687, 731 S.E.2d 544 (2012):

> Upon the filing of a petition to terminate parental rights, N.C. Gen. Stat. § 7B-1106(a)(1) (201[7]) requires that a summons regarding the proceeding be issued to the parents of the juvenile. Issuance of the summons is necessary to obtain personal jurisdiction over the parents. "Service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j)." N.C. Gen. Stat. § 7B-1106(a) (201[7]). However, when the whereabouts of a parent are unknown, service may be by publication in accordance with N.C. Gen. Stat. § 1A-1, Rule 4(j1).

Id. at 688, 731 S.E.2d at 545 (citations omitted).[3]

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2. The court continued the hearing with regard to respondent-mother in order to allow DSS additional time to effect service upon her by publication. *See* N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2017).

3. As ordered by the trial court, DSS filed a petition for termination of respondents' parental rights. We note DSS could have filed a motion in the ongoing neglect and dependency proceeding under N.C. Gen. Stat. § 7B-1102(a) (2017). Absent circumstances listed in N.C. Gen. Stat. § 7B-1102(b) (2017), a motion is subject only to the notice requirements of N.C. Gen. Stat. § 7B-1106.1 (2017) and may be served by the less exacting methods authorized by N.C. Gen. Stat. § 1A-1, Rule 5(b) (2017), rather than

Here, a summons was issued on the date the petition was filed by DSS, 19 June 2017, but was returned unserved on respondent-father on 12 July 2017. The deputy sheriff who attempted to serve respondent-father noted on the summons that respondent-father "does not stay" at the address listed on the summons or at a second address tried by the deputy.

After failing to obtain personal service, DSS attempted to serve respondent-father by publication under Rule 4(j1) by publishing a notice for three consecutive weeks in *The Duplin Times* between 27 July 2017 and 10 August 2017. When respondent-father did not appear at the termination hearing on 11 September 2017, counsel for DSS advised the trial court as follows:

> Your Honor, we're here for the termination of parental of rights on [Father] on [Alex]. We do have service by publication on the father. We attempted at least three or four addresses to serve him personally. We were under the impression that he lives in Duplin County I believe, and the social worker has made many visits out there. He has lived there, we've been unable to get personal service. It was returned from the Sheriff's Department saying that he was not living there, so we did serve via publication.

The court found that respondent-father "was served with Notice of the Termination of Parental Rights Proceeding by publication in Duplin County . . . pursuant to the North Carolina Rules of Civil Procedure Rule 1A-1, Rule 4([j1])," and that "[a]ll Summons, Service of Process and Notice requirements have been met as to Respondent-Father."

"A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void." *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980) (citing *Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974)). The following requirements are set forth in Rule 4(j1):

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. . . . If the party's post-office address is known or can with reasonable

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Rule 4(j). However, as DSS did not comply with even the lesser notice and service requirements for a motion in the cause, its decision to proceed by petition is of no consequence.

> diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(a)(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

N.C. Gen. Stat. § 1A-1, Rule 4(j1). "Failure to file an affidavit showing the circumstances warranting the use of service by publication is reversible error." *Cotton v. Jones*, 160 N.C. App. 701, 703, 586 S.E.2d 806, 808 (2003) (citation omitted).

The record before this Court contains "no affidavit showing the circumstances warranting a use of service by publication, or showing [DSS's] due diligence in attempting to locate defendant." *Id.* Although counsel for DSS filed an "Affidavit of Service by Publication" on 16 August 2017, the affidavit merely identifies the affiant as DSS counsel and affirms that notice was run for three consecutive weeks in *The Duplin County Times* on the dates listed. The affidavit did not satisfy Rule 4(j1) because it included no statement of facts regarding diligent attempts to locate respondent-father. *Cotton*, 160 N.C. App. at 703, 586 S.E.2d at 808. We further note DSS adduced no evidence of its compliance with the rule at the termination hearing. Accordingly, the service of respondent-father by publication was invalid. *Id.* at 704, 586 S.E.2d at 808. ("As service by publication on defendant was invalid, the trial court did not have personal jurisdiction over [respondent-father].").

Despite a defect in service, "a court 'may properly obtain personal jurisdiction over a party who consents or makes a general appearance[.]' " *In re C.A.C.*, 222 N.C. App. at 688, 731 S.E.2d at 545 (quoting *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009)). " '[A]ny act which constitutes a general appearance obviates the necessity of service of summons and waives the right to challenge the court's exercise of personal jurisdiction over the party making the general appearance.' "*In re A.J.M.*, 177 N.C. App. 745, 752, 630 S.E.2d 33, 37 (2006) (quoting *In re A.B.D.*, 173 N.C. App. 77, 83, 617 S.E.2d 707, 712 (2005)). Moreover, "it has long been the rule in this jurisdiction that a general appearance by a party's attorney will dispense with process and service." *Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E.2d 25, 27 (1980).

Here, respondent-father did not attend the termination hearing and did not otherwise make a general appearance in the proceeding. Although his appointed counsel was present at calendar call the morning of the hearing, she was released by the trial court after the following exchange:

> MS. OXENDINE: I have not been able to contact with [respondent-father]. We do have an interpreter. I don't think he's here yet or we can -- or if we're expecting him, but I sent a letter to him that wasn't returned and hasn't responded to my letter.
>
> THE COURT: All right. I'll come back to that in just a minute, and before I release you, I'll just ask you to step out in the lobby one last time.
>
> MS. OXENDINE: Absolutely.
>
> (Other matters heard 9:42 a.m. until 9:50 a.m.)
>
> THE COURT: Ms. Oxendine, have you checked.
>
> MS. OXENDINE: I did. He's not [*inaudible*].
>
> THE COURT: All right, then you're released. Thank you.
>
> MS. OXENDINE: Thank you.

Contrary to the GAL's argument on appeal, counsel's mere act of notifying the court of her client's absence does not constitute a general appearance:

> No instance can be found in which a party has been held to have impliedly bound himself to submission, without having asked or received some relief in the cause or *participated in some step taken therein*. Mere presence in the courtroom when the case is called, or examination of the papers in it filed in the clerk's office, is not enough. Nor could a conversation with plaintiff's counsel or the judge of the court, about the case, be regarded as an appearance . . . . The test, . . . is whether the defendant became *an actor in the cause*. . . .

Williams, 46 N.C. App. at 789, 266 S.E.2d at 27 (internal quotation marks and citation omitted; emphasis and ellipses in original); *see also Woodard & Woodard v. Tri-State Milling Co.*, 142 N.C. 98, 100, 55 S.E. 70, 71 (1906) ("The character of the appearance is to be determined by what the attorney actually did when he appeared in Court, at the call of the case.").

"A judgment against a defendant is void where the court was without personal jurisdiction." *Macher v. Macher*, 188 N.C. App. 537, 539, 656 S.E.2d 282, 284, *aff'd per curiam*, 362 N.C. 505, 666 S.E.2d 750 (2008). Absent proper service of process or a waiver of service by general appearance, the trial court did not obtain personal jurisdiction over respondent-father. Accordingly, we vacate the termination order. *See In re C.A.C.*, 222 N.C. App. at 689, 731 S.E.2d at 545-46.[4]

VACATED.

Judges CALABRIA and INMAN concur.

IN THE MATTER OF J.A.M.

No. COA16-563-2

Filed 5 June 2018

Child Abuse, Dependency, and Neglect—neglect—past injurious environment—failure to remedy

The trial properly adjudicated infant juvenile J.A.M. neglected upon evidence that the mother: (1) continued to fail to acknowledge her role in her rights being terminated as to her six other children; (2) denied the need for social services for J.A.M.'s case; and (3) became involved with the father, despite his past engagement in domestic violence, which contributed to the removal of the other children from the home. This evidence, along with the parents' failure to remedy the injurious environment they created for their children, was sufficient to show a substantial risk of future abuse or neglect of J.A.M.

Judge TYSON dissenting.

On remand by order of Supreme Court in *Matter of J.A.M.*, 370 N.C. 464, 809 S.E.2d 579 (2018), reversing and remanding the unanimous decision of the Court of Appeals in *Matter of J.A.M.*, 251 N.C. App. 114, 795 S.E.2d 262 (2016). Originally appealed by respondent from order entered

4. In light of our holding, we do not address respondent-father's additional claim that he was denied effective assistance of counsel.

30 March 2016 by Judge Louis A. Trosch in Mecklenburg County District Court. Originally heard in the Court of Appeals 5 December 2016.

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

Richard Croutharmel for respondent-appellant.

Poyner Spruill LLP, by Caroline P. Mackie, for guardian ad litem.

ARROWOOD, Judge.

This case comes before us on remand from the North Carolina Supreme Court for reconsideration and for proper application of the appellate standard of review to the trial court's findings and conclusions of law. On remand, we consider respondent-mother's appeal from an order adjudicating her daughter, juvenile J.A.M., neglected and ceasing all future reunification efforts with respondent-mother. After careful review, we affirm.

I. Background

Respondent-mother has a long history of involvement with Mecklenburg Department of Social Services, Youth and Family Services ("YFS") that began in 2007 due to allegations of domestic violence. Since then, YFS' involvement with respondent-mother has been primarily related to her history of violent relationships with the fathers of her previous six children, in which the children witnessed domestic violence, and also were caught in the middle of physical altercations. During this time, respondent-mother repeatedly declined YFS services and continued to deny, minimize, and avoid talking about the violence. The most serious incident of violence occurred in June 2012 when "following another domestic violence incident between herself and" one of her children's father, respondent-mother placed one of her children "in an incredibly unsafe situation sleeping on the sofa with [his father] for the night, which resulted in [the child] suffering severe, life-threatening injuries, including multiple skull fractures, at the hands of [the father.]" *Matter of J.A.M.*, 370 N.C. at 465, 809 S.E.2d at 580. After observing the severity of the injuries the following morning, respondent-mother "did not dial 911 for over two hours[,]" and, "[a]fterwards, she refused to acknowledge [the child's] 'significant special needs' that resulted from his injuries, claiming 'there is nothing wrong with him,' and proceeded to have another child with [the same father] in 2013 when he was out

on bond for charges of felony child abuse." *Id.* at 465, 809 S.E.2d at 580. Subsequently, on 21 April 2014, respondent-mother's parental rights were terminated to her six children, largely because she failed "to take any steps to change the pattern of domestic violence and lack of stability for the children since 2007." *Id.* at 465, 809 S.E.2d at 580 (internal quotation marks omitted).

YFS received a report on 25 February 2016 that respondent-mother had given birth to J.A.M. On 29 February 2016, DSS filed a juvenile petition alleging neglect of J.A.M. The trial court conducted a contested adjudication hearing on 30 March 2016. The trial court received the adjudication and termination of parental rights orders for respondent-mother and J.A.M.'s father's other children into evidence. J.A.M.'s father's criminal record was also admitted into evidence.

Respondent-mother testified at the hearing, vaguely acknowledging that she made " 'bad decisions' and 'bad choices' in the past, without offering specific examples except for 'giv[ing] men benefits of the doubts.' " *Matter of J.A.M.*, 370 N.C. at 465, 809 S.E.2d at 580. She also testified:

> Q. Why were your rights terminated?
>
> A. Because when my child came back into -- my kids came back into custody, due to my child being physical injury [*sic*] by his father [ ]. That's --
>
> Q. So your understanding is that your rights to your six other children was -- were terminated because of one child being physically abused?
>
> A. Oh, yes, ma'am. . . .
>
> Q. And what role do you think you played in your child getting hurt by that father?
>
> A. I was upstairs sleeping.
>
> Q. Okay.
>
> A. I didn't have -- I didn't have a role into what my child being hurt [*sic*]. I didn't play a role in that.
>
> Q. And so basically, do you feel that your rights to the six other children, your rights were unjustly terminated?
>
> A. Yes, ma'am. I do feel that way.

On 30 March 2016, the trial court entered an order finding that J.A.M.'s parents had failed to make any substantive progress in their prior cases, and both parents declined to work with YFS and reported not needing any services. The trial court also found:

> Previously [respondent-mother]'s children were returned to her care and ended up back in [YFS'] custody due to the abuse of one of the juveniles and it appeared [respondent-mother] was not demonstrating skills learned by service providers. [Father] did not dispute allegations in the petition. [Respondent-mother] has a [history] of dating violent men and [father] in this case has been found guilty at least twice for assault on a female. [Respondent-mother] acknowledged being aware [father] had been charged [with] assaulting his sister but [respondent-mother] said she never asked [father] if he assaulted his sister despite testifying about the "red flags" she learned in DV servs. [Respondent-mother] testified to having a child [with] the man who abused one of her kids. Dept. [*sic*] received a total of 12 referrals regarding [respondent-mother] and at least 11 referrals pertained to domestic violence. Ct. [*sic*] took into consideration all the exhibits (1-4) submitted by YFS when making its decision. To date, [respondent-mother] failed to acknowledge her role in the juvs. [*sic*] entering custody and her rights subsequently being terminated.

Based on these findings of fact, the trial court adjudicated J.A.M. neglected:

> The child(ren) is/are neglected in that Juv. [*sic*] resides in an environment in which both parents have a [history] of domestic violence/assault and each parent had a child enter [YFS] custody that was deemed abused while in the care of each parent. All of juveniles' siblings were adjudicated [n]eglected. No evidence the parents have remedied the injurious environment they created for their other children.

The trial court placed J.A.M. in DSS custody and ceased all future reunification efforts with respondent-mother. Respondent-mother appeals.

In *Matter of J.A.M.*, 251 N.C. App. 114, 795 S.E.2d 262 (2016) ("*J.A.M. I*"), this Court first considered respondent-mother's appeal, reversing the trial court's order, holding the findings did not support the conclusion that J.A.M. was neglected, and the trial court's findings of fact were not

supported by clear, cogent, and convincing evidence. *Id.* at 120, 795 S.E.2d at 266. The Supreme Court determined that our Court misapplied the standard of review in *J.A.M. I*, and remanded to our Court for reconsideration and proper application of the standard of review. *Matter of J.A.M.*, 370 N.C. at 466-67, 809 S.E.2d at 581.

II. Discussion

On appeal, respondent-mother argues the trial court erred in adjudicating J.A.M. to be a neglected juvenile because this conclusion of law is not supported by sufficient findings of fact that are supported by clear and convincing competent evidence. Specifically, she argues there was insufficient evidence related to the care and supervision of J.A.M., and that the trial court erred by relying almost exclusively on the prior neglect adjudications of respondent-mother and J.A.M.'s father's other children. We disagree.

As noted by the Supreme Court, "[i]n a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re J.A.M.*, __ N.C. at __, 809 S.E.2d at 580 (citations and internal quotation marks omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010) (citation and internal quotation marks omitted).

A neglected juvenile

> 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 . . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or 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) (2017). Under N.C. Gen. Stat. § 7B-101(15), "evidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile." *Matter of Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994). "[T]he statute affords the trial judge some discretion in determining the weight to be given such

evidence." *Id.* at 94, 440 S.E.2d at 854. The decision "must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

Here, the trial court's determination that J.A.M. is a neglected juvenile was based primarily on events that took place before J.A.M. was born. The trial court previously terminated respondent-mother's parental rights as to six children on grounds of neglect, willfully leaving the children in foster care or placement outside the home for more than twelve months, and willfully failing to pay a reasonable portion of the cost of care. The trial court also adjudicated J.A.M.'s father's other child, from a previous relationship, as abused and neglected. The records of these past adjudications were incorporated into J.A.M.'s adjudication order by reference. Our Supreme Court held "there was clear and convincing evidence to support the trial court's finding of fact that respondent 'failed to acknowledge her role' both in her previous six children 'entering custody' and in 'her rights subsequently being terminated.' " *In re J.A.M.*, 370 N.C. at 466, 809 S.E.2d at 581.

The evidence at the adjudication hearing "tended to show that respondent has a long history of violent relationships with the fathers of her previous six children, in which [her] children not only witnessed domestic violence, but were caught in the middle of physical altercations." *Matter of J.A.M.*, 370 N.C. at 465, 809 S.E.2d at 580 (internal quotation marks omitted). In the most serious incident, one of her children suffered life-threatening injuries, including multiple skull fractures, and, the morning following the abuse, respondent-mother did not dial 911 for over two hours. *Id.* at 465, 809 S.E.2d at 580. The trial court found "[n] o evidence the parents have remedied the injurious environment they created for their other children."

In predicting risk of future neglect in a newborn case, the trial court "must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case" and can consider the parents' failure to remedy conditions as evidence of future neglect. *See In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127. Nonetheless, citing *In re A.K.*, 178 N.C. App. 727, 637 S.E.2d 227 (2006), respondent-mother argues that the trial court erred by relying on the prior neglect adjudications of her, and J.A.M.'s father's, children.

In *In re A.K.*, A.K. was adjudicated neglected based upon a previously adjudicated child's neglect and his father's continued failure to

acknowledge the cause of the injuries suffered by the previously adjudicated child. *Id.* at 731, 637 S.E.2d at 229. On appeal, this Court determined that due to the passage of time, the trial court could not find that A.K. was at " 'substantial risk of neglect' because of the father's failure to acknowledge the cause of [the father's other child's] injuries[,]" as the most recent findings that the parents' failed to acknowledge the cause of the injuries "were based on a hearing date nine (9) months before the date A.K. was removed from the home and as many as fifteen (15) months before the petition alleging A.K. was a neglected juvenile came on for hearing." *Id.* at 731, 637 S.E.2d at 229.

The case before us is factually distinguishable from *In re A.K.* Unlike the instant case, the trial court in *In re A.K.* did not receive evidence besides records from the prior adjudication, the "parents were actively involved in the juvenile cases . . . and were cooperating with social workers and reunification requirements established by the [trial] court[,]" and there was no evidence that the conditions that led to the prior adjudication still existed. *See id.* at 729, 731-32, 637 S.E.2d at 228-30.

After our Court decided *In re A.K.*, we considered a case more similar to the case *sub judice*, *In re N.G.*, 186 N.C. App. 1, 650 S.E.2d 45 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008), and distinguished *In re A.K.* therein. In *In re N.G.*, we affirmed an adjudication of neglect based in part on a previously adjudicated child where the parents' continued refusal to accept responsibility for injury to previously adjudicated child and an unwillingness to engage in recommended services or to work with or communicate with DSS was evidence that was predictive of future neglect. *See In re N.G.*, 186 N.C. App. at 9-10, 650 S.E.2d at 51. *In re N.G.* specifically noted that the evidence of the parents' unwillingness to work and communicate with DSS, and failure to engage in DSS' services was not present in *In re A.K. Id.* at 9-10, 650 S.E.2d at 51.

Therefore, similarly, the trial court's findings in the case at bar that respondent-mother (1) continued to fail to acknowledge her role in her rights being terminated to her six other children, (2) denied the need for any services for J.A.M.'s case, and (3) became involved with the father, who engaged in domestic violence, resulting in at least two convictions, even though domestic violence was one of the reasons her children were removed from her home, constitute evidence that the trial court could find was predictive of future neglect. *See In re N.G.*, 186 N.C. App. at 9-10, 650 S.E.2d at 51.

Despite these findings, which are supported by clear and competent evidence, the dissent maintains that the trial court neither found

nor cited evidence that the parents had not remedied the prior injurious environment. We disagree. The trial court found that respondent-mother continued to refuse to work with YFS, failed to acknowledge her role in her rights being terminated to her other six children, and became involved with the father, who the trial court found engaged in domestic violence, even though that was one of the reasons her other children were removed from her home. It was within the trial court's discretion to weigh this evidence in light of the severity of past neglect towards her other children, including the uncontroverted evidence that one child was nearly killed while living in the home, and other children were traumatized. In accordance with our case law, this evidence is consistent with a substantial risk of future injury in the home. *See In re N.G.*, 186 N.C. App. at 9-10, 650 S.E.2d at 51.

The cumulative weight of the trial court's findings are sufficient to support an adjudication of neglect, and our Court may not reweigh the underlying evidence on appeal. Accordingly, we affirm the adjudication of neglect.

AFFIRMED.

Judge BRYANT concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion concludes the trial court's findings support the trial court's conclusion that J.A.M. was neglected. I disagree and respectfully dissent.

I. Definition of Neglect

North Carolina statutes and precedents have consistently required departments of social services to prove by clear and convincing competent evidence that "there be some physical, mental or emotional impairment of the juvenile or substantial risk of such impairment as a consequence of the [parent's] failure to provide 'proper care, supervision, or discipline.' " *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citation omitted). "[T]he decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re E.N.S.*, 164 N.C. App. 146, 151, 595 S.E.2d 167, 170 (2004) (citation omitted).

"[H]istorical facts of the case" necessarily means the current case and not past or closed cases involving other juveniles. *See id.* Petitioner cannot assert a *post hoc ergo propter hoc* fallacy from prior cases to avoid its burden of proof or to overcome the mandates of statutory and case law "procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]"N.C. Gen. Stat. § 7B-100 (2017).

While N.C. Gen. Stat. § 7B-101(15) provides evidence of abuse of another child in the home is *relevant* in determining whether a child is a neglected juvenile, it does not require nor support, standing alone, a determination of present or future neglect. *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994). That fact, while relevant, cannot overcome the parent's constitutional rights and serve as the only basis to support a finding of current neglect or the probability of future neglect of a different child, who is not impacted by the past neglect. *See id.* This lack of support is particularly clear where all other evidence before the court shows no neglect of the child at issue has occurred, and where, as here, YFS' evidence shows the parents are meeting and exceeding the needs of the child. Cases cited in the majority's opinion are inapposite and do not control the facts and conclusions before us.

II. *In re E.N.S.*

In the case of *In re E.N.S.*, the respondent's older child had been removed from her custody. 164 N.C. App. at 148, 595 S.E.2d at 168. The respondent gave birth to E.N.S., while the respondent was a resident in a residential drug treatment facility, and the child was immediately removed from her care. *Id.* Soon after E.N.S.' birth, the respondent violated her established curfew at the treatment facility and took a sleeping pill, which was considered a violation of the facility's policy. *Id.* at 149, 595 S.E.2d at 169.

The respondent subsequently stayed out all night again and smoked marijuana. *Id.* at 151, 595 S.E.2d at 170. The respondent was discharged from the treatment facility. *Id.* Further evidence established that the respondent "still struggle[d] with substance abuse." *Id.* This Court recognized the evidence revealed that the respondent's behavior had not improved and "the trial court carefully weighed and assessed the evidence regarding a past adjudication of neglect and the likelihood of its continuation in the future before concluding that E.N.S. would be at risk if allowed to remain with respondent." *Id.* Unlike those facts, here the evidence shows Respondent gave birth to another healthy child who was taken to an appropriate home. Nothing shows Respondent is taking

drugs or engaging in any activities to put J.A.M. at risk for neglect. All evidence shows J.A.M. is receiving proper care from both parents. *In re E.N.S.* provides no support for the trial court's order or the analysis and conclusions in the majority's opinion.

III. *In re C.G.R.*

In the case of *In re C.G.R.*, 216 N.C. App. 351, 360, 717 S.E.2d 50, 56 (2011), and also unlike the facts before us, "the trial court's finding that Mary was a neglected juvenile was not based only on respondent's prior neglect of Charlie." The trial court made additional findings that the respondent had failed to maintain stable employment and housing and continued to be dependent upon others. *Id.*

In light of the respondent's prior neglect of another child in *C.G.R. and* her demonstrated ongoing inability to maintain housing and employment to support her current child, this Court held "the trial court's finding that Mary 'is at a substantial risk of continued neglect as a result of [the respondent's] failure to provide and maintain stable housing and maintain employment' was supported by the evidence and findings." *Id.*

Here, the trial court's order contains no findings of fact, which are supported by any evidence, and certainly not "clear and convincing competent evidence," that J.A.M. is presently at substantial risk of neglect by Respondent-mother. The trial court's decision "must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child *based on the historical facts of the case*." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999) (emphasis supplied). The historical and current facts *of this case*, regarding J.A.M's care, shows no evidence to support either YFS' allegations or an adjudication of neglect. YFS' allegations of neglect of J.A.M. cannot be validated solely on what occurred to Respondent's other children in a wholly different past and closed case where all evidence before the court shows J.A.M. is receiving proper care. *See id.*

IV. Lacking Findings of Fact

The trial court neither found nor cited *any* evidence presented by YFS that either of the parents had not remedied the issues that caused the prior injurious environments. I do not diminish Respondent's prior history in a closed and unrelated case with her other children, and the fact one of her children was seriously injured by that child's father, while Respondent slept. However, the uncontroverted testimony both YFS and Respondent presented at J.A.M.'s adjudication hearing "on the historical facts of the case" shows she has not been neglected by either parent. *See id.*

The court did not find J.A.M. had suffered from any neglect or abuse, or that there is any future probability that she is at a substantial risk to suffer from any physical, mental, or emotional impairment as a consequence of living in Respondent-mother's home. *See In re M.P.M.*, 243 N.C. App. 41, 52, 776 S.E.2d 687, 694 (2015) *aff'd per curiam*, 368 N.C. 704, 782 S.E.2d 510 (2016). The trial court also made no findings of fact regarding any current domestic violence. No evidence was presented of any instances of domestic violence between Respondent-mother and J.A.M.'s father or anyone else, or that either parent had engaged in domestic violence while in J.A.M.'s presence.

The uncontroverted testimony at the adjudication hearing showed Respondent's home is safe and appropriate for J.A.M., that she was "well-cared-for" by both parents, that no evidence of domestic violence between the parents had been displayed, and that the police had never been called to their residence.

A YFS supervisor testified that Respondent refused to sign their safety assessment, which was solely based upon YFS' previous history with Respondent and her other children, and in direct conflict with the findings from the home visit and subsequent supervised visits. The YFS supervisor testified that when her social worker went to Respondent's home, Respondent reported "she had gone through services, she didn't need any services, and that there was no domestic violence going on[.]" The supervisor testified the home was appropriate for the child, with adequate supplies for her, and there were utilities, adequate food, clothing and a bed.

All the evidence before the trial court shows Respondent-mother and J.A.M.'s father maintained an appropriate home, and both denied any YFS services were required to meet J.A.M.'s needs, or to correct conditions in their home or its suitability for J.A.M. Based upon the home visits and interviews with both parents, YFS had no evidence any such services were needed or authorized. No evidence in the record and no findings support any lack of suitability of J.A.M.'s current home environment or J.A.M.'s need for YFS' intervention in this case.

The trial court's order further does not reflect any current or continuing concern regarding domestic violence involving J.A.M.'s father, as the court's disposition order directs a primary plan of care for J.A.M. to be "reunification with father." Given the intervening years between the prior cases and the record facts found before us, the trial court's findings do not support a legal conclusion that J.A.M. is a neglected juvenile. *See In re A.K.*, 178 N.C. App. 727, 732, 637 S.E.2d 227, 230 (2006) (holding

the trial court erred in relying solely upon nine- and fifteen-month-old orders concluding a juvenile's sibling was neglected to support a conclusion that the juvenile was also neglected).

These findings do not support any conclusion that J.A.M. is a neglected juvenile because she lives in an environment injurious to her welfare. YFS has failed to show any current neglect or "a substantial risk of future abuse or neglect of [J.A.M.] based on the historical facts of the case[.]" *In re E.N.S.* at 151, 595 S.E.2d at 170.

The trial court makes no findings of fact, which are supported by "clear and convincing competent evidence" to support an adjudication that J.A.M. is presently at substantial risk of neglect by Respondent-mother to warrant YFS' intervention. Respondent-mother and J.A.M.'s father have the absolute constitutional, statutory, and natural rights as parents to refuse YFS' services or involvement in raising and parenting their daughter in the absence of any statutory basis for YFS' intervention. *Troxel v. Granville*, 530 U.S. 57, 68-69, 147 L. Ed. 2d 49, 58 (2000), *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982), *In re Stumbo*, 357 N.C. 279, 286, 582 S.E.2d 255, 261 (2003).

YFS failed to provide any "clear and convincing competent evidence" of any provision in the statute to either trigger and mandate their intervention and new involvement. The *only* evidence YFS received and acted upon was a report that Respondent had given birth to another child. YFS' follow-up visit to that report at the home showed J.A.M. was healthy and receiving proper care from both parents, and the conditions in the home were appropriate.

The trial court's disposition order directs a primary plan of care for J.A.M. to be "reunification with father," even though he had also had his parental rights terminated to another child, not involving Respondent-mother. Father's adjudication is not before us.

At this initial adjudication disposition, the trial court failed to allow any unsupervised or meaningful visitation between the parents and their child, notwithstanding that the YFS' court summary admitted at the disposition hearing indicated that the visits between Respondent-mother and J.A.M. were positive and entirely appropriate. The trial court also failed to find or provide for J.A.M.'s reunification with Respondent-mother as either a primary or alternative plan for J.A.M.'s care, custody, or control. This failure, in light of all the "clear and convincing competent evidence" of J.A.M. receiving proper care from both parents in an appropriate home, is deeply troubling, and is a *de facto* termination of

Respondent's parental rights. The majority's opinion fails to recognize, reconcile and properly apply our statutes and case law to this case.

V. Conclusion

A prior and closed case with other children and a different father, standing alone, cannot support an adjudication of current or future neglect of J.A.M by Respondent. The majority's opinion presumes Respondent's continued lack of being a fit and proper parent, based upon past adjudications of her other children. YFS has no authority to intervene and inject itself into these parents' care, custody and control of their child in an appropriate home or to demand a services agreement in the absence of a statutory basis to compel their involvement.

On remand from the Supreme Court of North Carolina for proper application of the appellate standard of review to the trial court's findings and conclusions of law, the majority's opinion wholly fails to follow the statutory and constitutional mandates. Both the Constitution of the United States, the North Carolina Constitution, and the General Assembly's public policy, expressed in the statutes, demands YFS and the trial court to provide "procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]" N.C. Gen. Stat. § 7B-100; *Troxel v. Granville*, 530 U.S. at 68-69, 147 L. Ed. 2d at 58.

YFS failed to carry its burden to show any evidence to support an adjudication of any neglect. The trial court's findings do not support its conclusion to adjudicate J.A.M. as neglected. Exercising the applicable standard of review, Respondent's constitutional and statutory rights as a parent, and the Supreme Court's mandate, the trial court's order is properly reversed. The majority opinion's analysis and conclusions are erroneous. I respectfully dissent.

JOHNSON v. JOHNSON

[259 N.C. App. 823 (2018)]

ERNIE FRANKLIN JOHNSON, PLAINTIFF
v.
KRISTY HUMPHREY JOHNSON, DEFENDANT

No. COA17-502

Filed 5 June 2018

1. Appeal and Error—interlocutory order—substantial right—separation agreement

The trial court's order denying defendant wife's motion to set aside a separation agreement, while interlocutory, affected multiple substantial rights including child custody, division of marital property acquired over sixteen years, and spousal support and was therefore immediately appealable.

2. Divorce—separation agreement—consideration—mutual benefits

A separation agreement was not void for lack of consideration where both parties received items of value and benefits and the agreement included a provision explicitly acknowledging the sufficiency of the consideration.

3. Divorce—separation agreement—date of separation—sufficiency of evidence

There was competent evidence regarding a husband and wife's intention to live separate and apart so as to support the trial court's finding that they separated on the date the separation agreement was signed.

4. Divorce—separated spouses—reconciliation—totality of circumstances

Despite defendant wife's assertion that she and her husband resumed marital relations when she moved back into the home after the parties' date of separation, there was competent evidence to support the trial court's finding that the parties had not reconciled. Where there is conflicting evidence regarding the resumption of marital relations, it is within the province of the trial judge to weigh the evidence and credibility of the witnesses.

5. Divorce—separation agreement—unconscionability

Procedural unconscionability of a separation agreement was not established where the trial court made an unchallenged finding of fact based upon competent evidence that the parties had discussed separation for several weeks prior to preparing the agreement and

that defendant understood what she was signing, and where there was no evidence that defendant was forced to sign the agreement without legal representation or under duress. Further, the agreement was not substantively unconscionable even though plaintiff received most of the marital property where defendant willingly and voluntarily signed the agreement, under which she received benefits such as visitation rights to the children, beneficiary status under plaintiff's life insurance policy, health insurance, and any personal property from the marital residence.

Appeal by defendant from an order entered on 14 December 2016 by Judge Deborah P. Brown in Iredell County District Court. Heard in the Court of Appeals 2 November 2017.

Tharrington Smith, LLP, by Evan B. Horwitz and Jeffrey R. Russell, for plaintiff-appellee.

Homesley, Gaines, Dudley, & Clodfelter, LLP, by Leah Gaines Messick and Christina E. Clodfelter, for defendant-appellant.

BERGER, Judge.

Kristy Humphrey Johnson ("Defendant") appeals from an order entered on December 14, 2016 denying her motion to set aside a separation agreement executed by the parties on May 19, 2015. Defendant argues the trial court erred because the separation agreement (1) lacks consideration, (2) is void as a matter of public policy, and (3) is procedurally and substantively unconscionable. Defendant further argues her marital relationship with Ernie Franklin Johnson ("Plaintiff") was reconciled, thereby voiding the separation agreement. We disagree and affirm the trial court.

Factual and Procedural Background

Plaintiff and Defendant were married on October 16, 1999, and two minor children were born of the marriage. Defendant was convicted of larceny in 2014, and was subject to supervised probation during the last year of the marriage. In January 2015, Plaintiff engaged an attorney to begin drawing up a separation agreement due to familial problems over the Christmas holiday. Plaintiff and Defendant began discussing separation due to Defendant's criminal activity and drug addiction, resulting in the execution of the Separation Agreement on May 19, 2015. Defendant moved out of the marital residence on that day.

In June 2015, Plaintiff allowed Defendant to return to the marital residence under the condition that she not expose the family to drug use or other illegal activity. Defendant lived in the marital residence from June 2015 until August 14, 2016. Upon learning of Defendant's arrest for felonious hit and run on August 14, 2016, Plaintiff changed the locks on the residence. Defendant was incarcerated for one week, and on August 20, 2016, attempted to return to the residence, but was denied entry. Defendant moved to a motel in Statesville where she was employed at the time.

On August 26, 2016, Plaintiff filed a complaint for child custody and child support, and a motion for immediate temporary custody of the minor children. The trial court entered an *ex parte* order granting Plaintiff temporary custody until September 6, 2016. On September 12, 2016, the trial court entered an order granting both Plaintiff and Defendant shared custody of the minor children. Both parties were ordered to complete a Partners in Parenting Education class.

On September 7 and 14, 2016, Defendant filed an answer and counterclaims and an amended answer and counterclaims, respectively, for child custody, child support, post-separation support and alimony, equitable distribution, and attorney's fees. Defendant also filed a motion to set aside the Separation Agreement. On September 12, 2016, the trial court held a hearing on Defendant's motion. On December 14, 2016, the trial court entered an order denying Defendant's motion to set aside the Separation Agreement, finding that the Separation Agreement was enforceable, and that Defendant had not proven by a preponderance of the evidence that the parties had reconciled. From this order, Defendant timely appeals.

Analysis

Defendant argues that the trial court erred in (1) finding the Separation Agreement was supported by consideration; (2) finding that Plaintiff and Defendant did not reconcile; and (3) finding that the Separation Agreement is enforceable because it is not procedurally and substantively unconscionable. We disagree.

I. Jurisdiction

[1] Initially, we must consider if this Court has jurisdiction to hear Defendant's appeal. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Kanellos v. Kanellos*, ___ N.C. App. ___, ___,

795 S.E.2d 225, 228 (2016) (citation and quotation marks omitted). "Generally, there is no right to appeal from an interlocutory order." *Id.* (citation and quotation marks omitted). Here, the appealed order did not resolve all issues of this case and is interlocutory. Defendant had pending claims of child custody, child support, post-separation support, alimony, equitable distribution, and attorney's fees. The trial court had not made a final determination of all rights of all parties in this action.

"An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding . . . ." N.C. Gen. Stat. § 1-277(a) (2017); *see also Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). A two-part test has evolved to evaluate whether a substantial right is implicated: "(1) the right itself must be substantial, and (2) the enforcement of the substantial right must be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *Beroth Oil Co. v. NC Dept. of Transp.*, ___ N.C. App. ___, ___, 808 S.E.2d 488, 496 (2017) (citation and quotation marks omitted).

In the case *sub judice*, Defendant appeals from an order denying Defendant's motion to set aside the Separation Agreement in an action for child custody, child support, post-separation support and alimony, equitable distribution, and attorney's fees. Certainly, Defendant's interests in custody, division of marital property acquired over sixteen years, and spousal support are substantial rights. *See Case v. Case*, 73 N.C. App. 76, 78-79, 325 S.E.2d 661, 663, *disc. rev. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985) (holding that a summary judgment order validating a separation agreement affected equitable distribution as a substantial right and thus was proper for interlocutory review). The trial court's determination of the validity and enforceability of the Separation Agreement directly impacts those rights in this action as Defendant stands to gain or lose rights associated with the Separation Agreement. The trial court's order affected Defendant's substantial rights, and this Court has jurisdiction to consider Defendant's appeal.

II. Separation Agreement

"In reviewing a trial judge's findings of fact, we are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal . . . ." *Reeder v. Carter*, 226 N.C. App. 270, 274, 740 S.E.2d 913, 917 (2013) (citation and internal quotation marks omitted).

"Findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary." *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (citation, quotation marks, brackets, and ellipses omitted), *rehearing denied*, 364 N.C. 442, 702 S.E.2d 65 (2010).

A. Consideration

[2] Defendant contends the Separation Agreement is void for lack of consideration because both parties did not receive a valuable bargained-for exchange at the execution of their Separation Agreement on May 19, 2015. We disagree.

> Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b).

N.C. Gen. Stat. § 52-10.1 (2017). "[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." *Raymond v. Raymond*, ___ N.C. App. ___, ___, 811 S.E.2d 168, 174 (2018) (citation, internal quotation marks, and brackets omitted). "A separation agreement is a contract," and must be supported by consideration. *Id.*; *see Harris v. Harris*, 50 N.C. App. 305, 314, 274 S.E.2d 489, 494, *appeal dismissed*, 302 N.C. 397, 279 S.E.2d 351 (1981). Generally, separation agreements establish consideration through the material terms of the mutual promises entered into between the parties. *McDowell v. McDowell*, 61 N.C. App. 700, 704-05, 301 S.E.2d 729, 731 (1983); 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 14.8 (5th rev. ed. 2002).

In the case *sub judice*, the parties entered into a Separation Agreement on May 19, 2015, in which both parties acknowledged there was sufficient consideration at the time of its execution. The contract included a provision defining consideration as "the promises, undertakings and agreements herein contained, as well as other good and valuable consideration, the receipt of which is hereby acknowledged." The Separation Agreement established benefits and rights for both Plaintiff and Defendant, including language giving Defendant rights to child custody and visitation for both minor children, property settlement and distribution, and insurance policy benefits. The Separation Agreement is not void due to a lack of consideration because both parties received

items of value and benefits accorded to them through the execution of the contract.

B. Separation

[3] Defendant next contends the trial court erred by finding the parties separated at the time of the signing of the Separation Agreement, thereby rendering the Separation Agreement void. We disagree.

A separation agreement is valid if it is "executed while the parties are separated or are planning to separate immediately." *Napier v. Napier*, 135 N.C. App. 364, 367, 520 S.E.2d 312, 314 (1999) (citation and internal quotation marks omitted), *disc. review denied*, 351 N.C. 358, 543 S.E.2d 132 (2000). "[S]eparation agreements entered into while the parties are still living together but *planning to separate* may be valid." *Newland v. Newland*, 129 N.C. App. 418, 420, 498 S.E.2d 855, 857 (1998) (citation, internal quotation marks, and ellipses omitted). "The heart of a separation agreement is the parties' intention and agreement to live separate and apart forever[.]" *Williams v. Williams*, 120 N.C. App. 707, 710, 463 S.E.2d 815, 818 (1995) (citation, quotation marks, brackets, and ellipses omitted), *aff'd per curiam*, 343 N.C. 299, 469 S.E.2d 553 (1996).

Here, Plaintiff and Defendant separated on May 19, 2015 when the Separation Agreement was executed. The trial court heard evidence that tended to show Defendant moved out of the marital residence immediately after the execution of the Separation Agreement with no intention of returning. The trial court found Defendant moved out for at least "several weeks," but also recognized that "no other testimony by any other witness . . . substantiate[d] either the Plaintiff's or Defendant's claims."

Despite Defendant's testimony that she never left the marital residence, it is the "trial judge [that] passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (citation and internal quotation marks omitted), *rehearing denied*, 337 N.C. 807, 449 S.E.2d 750 (1994). "[W]e cannot reweigh the evidence and credibility of the witnesses." *Romulus v. Romulus*, 215 N.C. App. 495, 502, 715 S.E.2d 308, 314 (2011). The trial court's finding that the parties separated on May 19, 2015 is supported by competent evidence.

C. Reconciliation

[4] Defendant next contends that if this Court holds the parties separated on May 19, 2015, the parties subsequently reconciled upon Plaintiff moving back into the marital residence a few weeks thereafter. We disagree.

Section 52-10.2 sets the standard of reconciliation between separated spouses: " 'Resumption of marital relations' shall be defined as voluntary renewal of the husband and wife relationship, as shown by *the totality of the circumstances*. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations." N.C. Gen. Stat. § 52-10.2 (2017) (emphasis added). "There are two lines of cases regarding the resumption of marital relations: those which present the question of whether the parties hold themselves out as man and wife as a matter of law, and those involving conflicting evidence . . . ." *Schultz v. Schultz*, 107 N.C. App. 366, 369, 420 S.E.2d 186, 188 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). If there is conflicting evidence as to whether reconciliation occurred, "the issue of the parties' mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation." *Hand v. Hand*, 46 N.C. App. 82, 87, 264 S.E.2d 597, 599, *disc. review denied*, 300 N.C. 556, 270 S.E.2d 107 (1980) (citation, quotation marks, and brackets omitted).

Here, the trial court made findings of fact that Defendant lived in the marital home at some point in June 2015 until her subsequent arrest and incarceration on or about August 14, 2016. The specific instances of possible reconciliation were found to be unreliable by the trial court, and are specifically addressed in Finding of Fact #7 in the order on appeal:

> Both parties testified that the Defendant moved out of the marital residence for several weeks. The Defendant claims that she moved back in and resumed the marital relationship, including sexual relations. The Plaintiff testified that the last time the Parties had sexual intercourse was in February of 2015, prior to the separation. The Plaintiff allowed the Defendant to live in the marital home at the urging of family members, because the Defendant had no place to live and was struggling to support herself after losing her job at the Department of Social Services. The Defendant, at that time, had a number of criminal charges related to her addiction issues. While the Defendant alleges that she and the Plaintiff shared a bedroom, the Plaintiff testified that they did not share a bedroom, and that the Defendant shared a bedroom with one of their daughters. The Plaintiff did agree that the Defendant went on a family vacation with the Plaintiff and the children, but the Defendant shared a room with the girls. There was no other testimony by any other witness to substantiate either Plaintiff's or Defendant's claims; and, as the

> Defendant has the burden of proof, the Court cannot find there was a reconciliation.

Although there was evidence to the contrary, the competent evidence supports the trial court's finding that the parties did not reconcile after Defendant moved back into the marital residence. *See Sisk*, 364 N.C. at 179, 695 S.E.2d at 434. Plaintiff testified:

> My family and I had discussions that she really had no place to go, nothing--no family. I talked to her dad, her dad wouldn't allow her in her home--or in their home. It ended up where we offered--stay here, we're not reconciling. There will be no marriage. We'll help, but no drugs, no trouble, no money, no money loss, it can't continue.

It is not this Court's role to "reweigh the evidence and credibility of the witnesses." *Romulus*, 215 N.C. App. at 502, 715 S.E.2d at 314. "The 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." *Phelps*, 337 N.C. at 357, 446 S.E.2d at 25 (citations and quotation marks omitted). The trial court's findings that the parties did not reconcile is supported by competent evidence and is conclusive on appeal. *See Sisk*, 364 N.C. at 179, 695 S.E.2d at 434. Accordingly, we hold the trial court did not err in determining Plaintiff and Defendant did not reconcile because the trial court's findings of fact are supported by competent evidence, despite some evidence to the contrary.

Because we hold the parties did not reconcile, we do not reach Defendant's argument that the reconciliation clause in the Separation Agreement is void under public policy. For the clause to be implemented, reconciliation would have had to occur. Therefore, this issue is dismissed.

D. Unconscionability

[5] Defendant next contends the Separation Agreement is unenforceable as a whole because (1) it is procedurally unconscionable since Defendant signed the Separation Agreement under duress and without legal representation; and (2) it is substantively unconscionable because Plaintiff received too much of the marital property and Defendant waived her rights of post-separation support and alimony. We disagree.

"Unconscionability is an affirmative defense, and the party asserting it bears the burden of establishing it." *Rite Color Chemical Co. v. Velvet*

Textile Co., 105 N.C. App. 14, 20, 411 S.E.2d 645, 649 (1992) (citation omitted). "The question of unconscionability must be determined as of the time the contract was executed, N.C.G.S. § 52B-7(a)(2), and after any issues of fact are resolved, presents a question of law for the court." *King v. King*, 114 N.C. App. 454, 458, 442 S.E.2d 154, 157 (1994) (citation omitted).

"Separation and/or property settlement agreements are contracts and as such are subject to recission on the grounds of (1) lack of mental capacity, (2) mistake, (3) fraud, (4) duress, or (5) undue influence." *Sidden v. Mailman*, 137 N.C. App. 669, 675, 529 S.E.2d 266, 270 (2000) (citation omitted). "Furthermore, these contracts are not enforceable if their terms are unconscionable." *Id.* (citations omitted). "Procedural unconscionability involves bargaining naughtiness in the formation of the contract, i.e., fraud, coercion, undue influence, misrepresentation, inadequate disclosure[,] [while] [s]ubstantive unconscionability involves the harsh, oppressive, and one-sided terms of a contract, i.e. inequality of the bargain." *King*, 114 N.C. App. at 458, 442 S.E.2d at 157 (citations, internal quotation marks, and ellipses omitted).

The trial court made a finding addressing the execution of the Separation Agreement between the parties. Unchallenged Finding of Fact #5 states:

> That both Parties testified that they had been discussing separation for several weeks prior to the separation agreement preparation. The Plaintiff wanted to separate because of the Defendant's addiction to pain medication, and her resulting criminal activity due to her addiction. The Defendant admitted that she has been addicted to opiates, but that she had begun suboxone treatments prior to the preparation of the separation agreement. The *Defendant insisted that she was not under the influence of pain medication when she signed the agreement and that she understood what she was signing.*

(Emphasis added). "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) (citations omitted). Because Defendant does not challenge Finding of Fact #5, we accept that she understood what the Separation Agreement terms meant and included.

Defendant argues procedural unconscionability because of her lack of legal representation. Defendant's lack of legal representation does not impute a lack of capacity amounting to procedural unconscionability.

See Weaver v. St. Joseph of the Pines, Inc., 187 N.C. App. 198, 213, 652 S.E.2d 701, 712 (2007). "[T]he law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing, or that he has made an improvident contract, when he could inform himself and has not done so." *Leonard v. Power Co.*, 155 N.C. 10, 14, 70 S.E. 1061, 1063 (1911). Both parties testified that Plaintiff offered to pay for Defendant's legal representation while separating if she so chose, but Defendant declined. Defendant's failure to engage legal representation does not afford her a remedy under the theory of procedural unconscionability. Accordingly, we find no error.

Defendant contends that she was under duress at the time of signing and that Plaintiff failed to adequately disclose assets and financial holdings to her at the execution of the Separation Agreement. Defendant alleges Plaintiff did not accurately represent his assets in his personal businesses, retirement accounts, and personal income.

"Duress exists where one, by the *unlawful* act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." *Stegall v. Stegall*, 100 N.C. App. 398, 401, 397 S.E.2d 306, 307 (1990) (citation and quotation marks omitted), *disc. review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991); *Duress*, *Black's Law Dictionary* (8th ed. 2004) ("[D]uress is considered a species of fraud in which compulsion takes the place of deceit in causing injury.").

"A duty to disclose arises . . . [when] a fiduciary relationship exists between the parties to the transaction." *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119, *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986). "The relationship of husband and wife creates such a duty." *Id.* (citation omitted). However, "[t]ermination of the fiduciary relationship is firmly established when one or both of the parties is represented by counsel." *Id.* (citations omitted).

The trial court found that Defendant signed the Separation Agreement after reviewing it at Plaintiff's attorney's office. The trial court heard competent evidence that Defendant read the agreement, declined Plaintiff's offer to pay for an attorney to represent her, and that she knew what the Separation Agreement contained and put in effect. Through Plaintiff's testimony, and corroboration by Defendant's own admission, the parties had been in separation negotiations for weeks prior to the execution of the Separation Agreement.

The trial court made the conclusion of law that Defendant "failed to show by the preponderance of the evidence, that . . . the separation agreement was signed as a result of coercion, duress or undue influence or inadequate disclosure; or that the terms of the separation agreement are unconscionable." We hold that the trial court's conclusion of law is supported findings of fact that are supported by competent evidence. For the reasons stated above, we hold there was no procedural unconscionability, including lack of capacity, duress, or inadequate disclosure, present at the execution of the Separation Agreement.

Defendant next contends the Separation Agreement was substantively unconscionable because it contains "harsh, one-sided, and oppressive terms." We disagree.

For a contract to be substantively unconscionable, the "inequality of the bargain . . . must be so manifest as to shock the judgment of a person of common sense, and the terms so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *King*, 114 N.C. App. at 458, 442 S.E.2d at 157 (citation, quotation marks, and ellipses omitted). "[T]here is no requirement for the trial court to make an independent determination regarding the fairness of the substantive terms of the agreement, so long as the circumstances of execution were fair." *Id.* (citation and quotation marks omitted).

The trial court made the following finding of fact:

> That the [c]ourt finds that while the separation agreement gives a vast majority of the marital assets to the Plaintiff, the Defendant did receive certain benefits, such as health insurance and remained beneficiary of the Plaintiff's life insurance. The Plaintiff also agreed that the Defendant could have any of the personal property that she wanted. The Defendant testified that she received virtually no personal property. However, the Defendant was arrested on August 14, 2016 after being involved in a Felonious Hit and Run, and stayed in jail for a week before making bond. The Plaintiff changed the locks to the residence after her arrest and did not allow the Defendant to return. The Plaintiff has offered to bring the Defendant any property she wants, but says that she will not indicate what property she wants.

The trial court heard evidence that Defendant willingly and voluntarily signed the Separation Agreement. Defendant received visitation

rights to the minor children, beneficiary status from Plaintiff's life insurance policy, health insurance, and any personal property from the marital residence. The trial court's findings were supported by competent evidence and it is not this Court's role to reweigh the value of the contract's substantive terms. Accordingly, we hold that the Separation Agreement was not substantively unconscionable.

Conclusion

The Separation Agreement was not void for lack of consideration, as both parties received items of value upon its execution. The trial court's findings of fact are supported by competent evidence that the parties did separate after the execution of the Separation Agreement. There is not sufficient evidence on appeal to find the trial court erred in finding the parties did not reconcile. Defendant has not put forth evidence that tends to show she did not understand the material terms of the Separation Agreement or that she was forced into signing it without legal representation or under duress. For the foregoing reasons, we hold that the Separation Agreement signed by Plaintiff and Defendant was not substantively unconscionable.

AFFIRMED.

Judges DAVIS and ZACHARY concur.

CHARLENE PERHEALTH STANDRIDGE, Plaintiff
v.
JAMES EDWARD STANDRIDGE, Defendant

No. COA17-493

Filed 5 June 2018

Divorce—equitable distribution—claims filed prior to separation date—no jurisdiction

Where the parties filed their claims for equitable distribution prior to their stipulated date of separation, the trial court had no subject matter jurisdiction to enter an equitable distribution order.

Appeal by plaintiff from order entered 31 January 2017 by Judge Regina M. Joe in District Court, Richmond County. Heard in the Court of Appeals 4 October 2017.

Buckner Law Office, PPLC, by Richard G. Buckner, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

STROUD, Judge.

Plaintiff Charlene Perhealth Standridge ("Wife") appeals from the trial court's equitable distribution order. Wife argues that the trial court erroneously concluded that it could not consider for equitable distribution funds defendant James Edward Standridge ("Husband") had deposited into his personal account and farm account but later withdrew. Because no claim for equitable distribution was filed after the parties' date of separation, the trial court did not have subject matter jurisdiction to enter the equitable distribution order, so we do not reach this issue on appeal and instead must vacate the order.

Background

Husband and Wife were married on 26 November 1992. On 15 April 2015, Wife filed her complaint for divorce from bed and board and equitable distribution of the marital property. On 15 June 2015, Husband filed a motion to dismiss, answer, and counterclaims for divorce from bed and board and equitable distribution.

A pretrial order was entered on 14 April 2016 and the parties stipulated to several facts, including their date of separation, 12 September 2015. On 21 January 2017, following a hearing, the trial court entered an equitable distribution order. In the order, the trial court found as fact that "although this action was filed on April 15, 2015, the final date of separation of the parties for purposes of this trial and of this Order is by stipulation of the parties September 12, 2015." Wife timely appealed to this Court.

Subject Matter Jurisdiction

Neither party raised a question of jurisdiction on appeal, but where the record shows subject matter jurisdiction does not exist, this Court should address it *ex mero motu*:

> The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court. When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. Every court necessarily has the inherent judicial

> power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction.

Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 580, 350 S.E.2d 83, 85-86 (1986) (citations omitted). *See also Carpenter v. Carpenter*, 245 N.C. App. 1, 8, 781 S.E.2d 828, 835 (2016) ("It is well settled that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." (Citation and quotation marks omitted)). In addition, if a court does not have subject matter jurisdiction over a claim, the parties cannot confer jurisdiction on the court by their agreement to have the court rule on their case. *See State v. Fisher*, 270 N.C. 315, 318, 154 S.E.2d 333, 336 (1967) ("It is well established law that the parties cannot, by consent, give a court jurisdiction over *subject matter* of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver or estoppel.").

Under the North Carolina General Statutes, a party may assert a claim for equitable distribution only after the parties have separated:

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

N.C. Gen. Stat. § 50-21(a) (2017) (emphasis added). Where a claim for equitable distribution is filed prior to the date of separation, the trial court does not have subject matter jurisdiction over the claim. *See Atkinson v. Atkinson*, 132 N.C. App. 82, 510 S.E.2d 178 (J. Greene, dissenting), *reversed for the reasons stated in the dissent*, 350 N.C. 590, 516 S.E.2d 381 (1999) (per curiam).[1] The timing of the pleadings created

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1. Judge Greene's dissent, which the Supreme Court adopted as its majority, stated: "I accept the general premise that Judge Smith, who entered the order in dispute dismissing plaintiff's claim for equitable distribution (ED), could not overrule Judge Cobb's earlier order denying defendant's motion to dismiss plaintiff's ED claim. It appears the basis for both motions (*i.e.*, that plaintiff and defendant were not separated at the time the ED claim was filed and it therefore was premature) was the same. . . . In addressing the merits of the motion to dismiss, Judge Smith concluded that plaintiff's ED claim was not asserted after the date of separation and before the entry of the divorce, thus making it invalid. I agree. There are findings to support this conclusion and those findings are supported in

the same jurisdictional defect in *Miller v. Miller*, __ N.C. App. __, __, 799 S.E.2d 890, 893 (2017), where the wife filed a complaint for divorce from bed and board and equitable distribution while the parties were still living together, and the husband filed an answer which also alleged "the parties were 'not living separate and apart.' " *Id.* at __, 799 S.E.2d at 893. The parties did not begin living separate and apart until months after the filing of the complaint and answer. *Id.* at __, 799 S.E.2d at 893. While the trial court had no jurisdiction to enter an equitable distribution order based upon the initial pleadings, the final outcome in *Miller* was different because the jurisdictional defect was addressed at the trial court level and ultimately the equitable distribution claim was preserved. *Id.* at __, 799 S.E.2d at 899.

This Court has found subject matter jurisdiction where an original request for equitable distribution was filed prior to the parties' actual date of separation, but a party later filed a counterclaim requesting equitable distribution after the date of separation. *See Gurganus v. Gurganus*, __ N.C. App. __, __, 796 S.E.2d 811, 815 ("Concerning the required separation of the parties as a prerequisite for jurisdiction to adjudicate an equitable distribution claim, there is no indication in the record that the parties were separated at the time plaintiff filed her complaint. The record does show, however, that the parties separated on or about 22 March 2001, before defendant filed his answer and counterclaim. . . . Therefore, regardless of whether the parties were separated at the time plaintiff filed the complaint, the record is clear that the parties were separated by the time defendant asserted his claim for equitable distribution. Therefore the trial court did have subject matter jurisdiction to equitably distribute the marital property."), *disc. rev. denied*, 369 N.C. 753, 799 S.E.2d 621 (2017).

But the present case differs from *Gurganus* because both claims for equitable distribution here occurred prior to the date of separation. Wife filed her complaint on 15 April 2015 requesting a divorce from bed and board from Husband. In her complaint, Wife noted that the parties

> were married on November 26, 1992 in Richmond County, North Carolina, and lived together as husband and wife until sometime in 2004, and since that time, although they have continued to live under the same roof, they have

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this record. Because plaintiff had no valid ED claim prior to the time she dismissed it, the refiling of that same claim is also invalid." *Atkinson*, 132 N.C. App. at 90, 510 S.E.2d at 182 (J. Greene, dissenting) (citations omitted).

> been living in a constant state of separation from each other, and have at no time since 2004 resumed the marital relationship which formerly existed between them.

Wife's 15 April 2015 complaint requested an equitable distribution of the marital property of the parties. Husband filed his motion, answer, and counterclaim -- including a claim for equitable distribution -- on 15 June 2015. Husband alleged that the parties "are not separated and continue to reside with one another in the same house as a married couple." Wife filed her reply to the Husband's counterclaim on or about 14 July 2015 and admitted "that the parties continue to live in the same house[.]" The parties stipulated in the pretrial order that their date of separation was 12 September 2015 -- roughly five months after Wife's complaint was filed and three months after Husband's counterclaim. Thus, while both parties raised a claim for equitable distribution, both raised it *prior* to the date of separation.

No claim for equitable distribution was made after the date of separation, so the trial court did not have subject matter jurisdiction over equitable distribution of the marital property. We must vacate the trial court's order.

Conclusion

For reasons stated above, we vacate the trial court's order on equitable distribution.

VACATED.

Judges HUNTER and TYSON concur.

STATE v. CLAPP

[259 N.C. App. 839 (2018)]

STATE OF NORTH CAROLINA
v.
JOHN CLAPP III, DEFENDANT

No. COA17-1104

Filed 5 June 2018

1. Motor Vehicles—driving while impaired—probable cause—findings of fact

Three of the four findings of fact challenged by the State regarding defendant's second encounter with a law enforcement officer for impaired driving in the same night were not supported by competent evidence. Defendant was stopped for impaired driving 30 minutes after being released from his first arrest for impaired driving, not 40 minutes; there was no evidence defendant was wearing a leg brace on the night in question so as to induce the officer to inquire about mobility issues; and the evidence did not support a finding that the officer observed no other signs of defendant's impairment.

2. Motor Vehicles—driving while impaired—probable cause—totality of circumstances

The trial court erred in granting defendant's motion to suppress evidence regarding his second driving while impaired arrest in the same night where there was sufficient and uncontroverted evidence establishing probable cause. The law enforcement officer observed several signs that defendant had been drinking and was under the influence of alcohol, defendant admitted that he had driven his car after being released from his first arrest for impaired driving, and the officer had personal knowledge of defendant's blood alcohol level one hour and forty minutes prior to the second encounter. The officer testified that according to the standard elimination rate of alcohol for an average person, he believed defendant was still impaired during the second encounter. These factors, taken as a whole, were sufficient to support a reasonable basis for believing defendant committed the offense of impaired driving.

Appeal by the State of North Carolina from an order entered 31 May 2017 by Judge Patrice A. Hinnant in Wilkes County Superior Court. Heard in the Court of Appeals 16 April 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellee.

BERGER, Judge.

John Leonard Clapp III ("Defendant") was arrested on September 5, 2015 for driving while impaired. Less than three hours later, Defendant was again arrested for driving while impaired and, because of his first arrest, driving while license revoked. Defendant moved to suppress evidence which the State planned on using to prove his second driving while impaired arrest, and the trial court granted this motion. The State appeals, arguing that the uncontroverted evidence was sufficient to establish probable cause for Defendant's arrest. We agree, and therefore reverse.

Factual and Procedural Background

Defendant's motion to suppress was heard in Wilkes County Superior Court on May 15, 2017. The State's witnesses at the suppression hearing were Officer Tyler Hall and Officer Craig Greer of the North Wilkesboro Police Department. Defendant did not introduce any evidence.

Evidence presented by the State tended to show that on September 5, 2015, officers with the North Wilkesboro Police Department pulled Defendant over at a Wendy's restaurant and arrested him for driving while impaired at approximately 9:30 p.m. Officer Hall parked Defendant's BMW 750i in the Wendy's parking lot and locked the vehicle.

Officer Hall transported Defendant to the county jail, where Defendant provided a breath sample for analysis at 10:25 p.m. Defendant's blood alcohol concentration based on the EC/IR II breath analysis was 0.16 grams of alcohol per 210 liters of breath. Defendant was then transferred to the magistrate's office where he was notified his license had been revoked because of his arrest. He signed a written promise to appear for his court date, and was released from the county jail at 11:35 p.m.

Thirty minutes later, at 12:05 a.m. on September 6, 2015, Officer Hall saw Defendant in the driver's seat of his BMW at a gas station approximately one-half mile from the Wendy's. No one else was in the vehicle and the engine was running. Defendant's fiancée was beside him in a different vehicle. Officer Hall testified:

> [The State:] Can you tell the Court about your observations of [Defendant's] physical appearance on the second occasion and what you observed?

[Officer Hall:] [Defendant] had an odor of alcohol coming from his person, he had slurred speech, red, glassy eyes and he was unsteady on his feet.

[The State:] You said an odor of alcohol, how strong was the odor of alcohol?

[Officer Hall:] It was a moderate odor of alcohol.

[The State:] Where did you observe these physical appearances; was he inside or outside of the car?

[Officer Hall:] He was outside of the car.

[The State:] Where was the odor of alcohol coming from?

[Officer Hall:] From his breath, it was coming from his person.

[The State:] Prior to arresting [Defendant], did he make any statements to you?

[Officer Hall:] Yes, he made a few statements.

[The State:] Can you tell the Court what statements he made to you, Officer Hall?

[Officer Hall:] He repeatedly quoted, "How am I supposed to leave a $75,000 car sitting in the Wendy's parking lot?" That's in quote.

[The State:] Did he say anything else to you?

[Officer Hall:] Yes. He also informed me that he was just driving the vehicle to where his son was staying or where his son was at the time.

[The State:] Anything else that you remember?

[Officer Hall:] He also asked if I would follow him the rest of the way.

[The State:] You did not perform any field sobriety tests on him; is that correct?

[Officer Hall:] No. Due to [Defendant's] safety, he was unable to safely stand on his feet.

. . . .

> Basically, the fact that he had just an hour and 40 minutes prior blew a positive reading, and for the fact that he was unsteady on his feet, he couldn't safely perform the task. He was not asked to perform the standardized field sobriety testing.

In response to questions on cross examination, Officer Hall testified about standard elimination rates for alcohol in the blood:

> For the average person, which I believe [Defendant] is an average person, a person's blood-alcohol concentration after reaching a peak value, which his peak value was around 16 when he quit drinking, will drop by about 0.015 an hour. For example, if he was to reach a maximum blood-alcohol level of a 15 which he blew a 16, it would take about 10 hours to completely eliminate that alcohol from his bloodstream.
>
> . . . .
>
> Due to the positive reading, we formed the opinion that he still had plenty of alcohol still in his bloodstream.

At the conclusion of the hearing, the trial court stated, "Upon presentation of evidence, review of the cases and contentions of counsel, it appears a basis hasn't been established to allow the Court in its discretion to grant the motion in its entirety."

However, the trial court filed a written order on June 8, 2017 granting the motion to suppress. The trial court made findings of fact that Defendant had a blood alcohol concentration of 0.16 one hour and forty minutes prior to the second encounter with Officer Hall, and that Officer Hall issued an affidavit and revocation report which stated he observed that "Defendant was unsteady on his feet, had a moderate odor of alcohol coming from his person, had red glassy eyes, and had slurred speech."

In granting the motion to suppress, the trial court concluded that "the facts and circumstances known to Officer [Hall] as a result of his observations . . . are insufficient, under the totality of [the] circumstances, to form an opinion in the mind of a reasonable, objective, and prudent officer that there was probable cause to arrest the Defendant for the offense of driving while impaired."

The State entered timely notice of appeal, and argues the trial court erred in granting Defendant's motion to suppress. We agree.

Standard of Review

In determining whether the trial court properly granted a defendant's motion to suppress, our review "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cathcart*, 227 N.C. App. 347, 349, 742 S.E.2d 321, 323 (2013) (citation omitted). "Conclusions of law are reviewed *de novo*." *State v. Gerard*, ___ N.C. App. ___, ___, 790 S.E.2d 592, 594 (2016) (citation omitted).

Analysis

I. Trial Court's Findings of Fact

[1] First, the State challenges the trial court's findings of fact in the written order. Specifically, the State argues that the following findings of fact are not supported by competent evidence:

> 10. Officer [Hall] encountered the Defendant at the Wilco-Hess gas station public vehicular area approximately one hour and 40 minutes after the Defendant had blown a 0.16 breath alcohol concentration on the Intoximeter EC/IR-II, and approximately 40 minutes after the Defendant had been released on the initial DWI charge.
>
> . . . .
>
> 12. Officer [Hall] noted in an affidavit to support his traffic report items that were not included in his traffic report – which were that he observed the Defendant was unsteady on his feet, had a moderate odor of alcohol coming from his person, had red glassy eyes, and had slurred speech.
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> 13. Officer [Hall] did not administer any field sobriety tests to the Defendant. Officer [Hall] did not administer a portable breath test to the Defendant. Officer Hall observed that Defendant was unsteady during the 10-15 minutes of the encounter. Officer Hall did not inquire whether Defendant had any mobility problems although Defendant had a leg brace; whether he had consumed any food, beverage or medication in the interim; what he had done nor where he had been.
>
> . . . .

> 16. Except as noted herein, Officer [Hall] did not observe any other signs of impairment during the second encounter with the Defendant.

The State contends finding of fact 10 is inaccurate because it states that Defendant encountered Officer Hall on the second occasion "approximately 40 minutes after the Defendant had been released on the initial DWI charge." We agree. The uncontroverted evidence was that Defendant had been released from the jail at 11:35 p.m. and Officer Hall approached Defendant in the gas station parking lot at 12:05 a.m. Finding of fact 10 is not supported by competent evidence, and is not binding on this Court.

The State next challenges finding of fact 12 "out of an abundance of caution." The trial court's finding of fact that Officer Hall included his observations that Defendant "was unsteady on his feet, had a moderate odor of alcohol coming from his person, had red glassy eyes, and had slurred speech" in an affidavit and revocation report was supported by competent and uncontroverted evidence. The trial court noted the observations were not in Officer Hall's incident report, but the trial court found they were included in an affidavit and revocation report. This Court is bound by the trial court's finding that Officer Hall issued an affidavit and revocation report which included his observations that Defendant "was unsteady on his feet, had a moderate odor of alcohol coming from his person, had red glassy eyes, and had slurred speech."

The State next argues finding of fact 13 is not supported by competent evidence. We agree. There was no evidence presented that Defendant wore a leg brace or had mobility issues related thereto on September 5-6, 2015. The trial court found as fact that "Defendant had a leg brace" without any evidence to support that finding. On cross examination, Officer Hall testified:

> [Defense Counsel:] Now, [he's] unsteady on his feet, we've had a prior hearing and you know his brace, can you see his brace?
>
> [Officer Hall:] I cannot see his brace.
>
> [Defense Counsel:] May he stand up? Sir, just come right here so you can see his brace. You never seen his brace?
>
> [Officer Hall:] I never seen his brace.

> [Defense Counsel:] Did you ask him before, when he was unsteady on his feet, if he had any mobility problems?
>
> [Officer Hall:] I do not recall.

The trial court's finding that Defendant wore a leg brace at any time relevant to Defendant's arrest for impaired driving is not supported by competent evidence. That Defendant wore a leg brace to a court proceeding seventeen months after his arrest, without more, is irrelevant at best. By his testimony, Officer Hall did not observe any medical device worn by Defendant during their encounters on September 5-6, 2015. Finding of fact 13, as it relates to Defendant's leg brace, is not supported by competent evidence and is not binding on this Court.

The State also argues finding of fact 16 is not supported by competent evidence because there was additional evidence of Defendant's impairment during the second encounter that was known and available to Officer Hall when he arrested Defendant for the second driving while impaired charge. We agree.

Officer Hall's knowledge of Defendant's prior blood alcohol concentration and his observation of the time that had elapsed since the administration of the EC/IR II breath test were signs that Defendant was still impaired during the second encounter. Officer Hall testified that because of Defendant's positive reading less than two hours prior to the second encounter, he believed Defendant "still had plenty of alcohol still in his bloodstream." Officer Hall's opinion was based upon the training he received that the average person eliminates alcohol from the body at a rate of 0.015 per hour from the peak blood alcohol concentration result. Officer Hall observed that Defendant was an average-sized person. Based on his observations of Defendant, his personal knowledge of the time that had passed since Defendant's breath analysis, and his training on alcohol elimination rates, Officer Hall concluded Defendant would still be impaired. Since it should take approximately ten hours for the alcohol in Defendant's blood to be removed from his system, this was a red flag to Officer Hall and a sign that Defendant was probably impaired at the time of the second encounter. The trial court's finding that Officer Hall did not observe any other signs of impairment is not supported by competent evidence, and is therefore not binding on this Court.

Moreover, the uncontroverted evidence presented by the State does not support the trial court's conclusion of law that "the facts and circumstances known to Officer [Hall] as a result of his observations on September 6, 2015, of the Defendant are insufficient, under the totality of [the] circumstances" to establish probable cause.

II. Probable Cause

[2] An officer may arrest an individual if the officer has probable cause to believe that individual has committed a criminal offense. N.C. Gen. Stat. § 15A-401(b) (2017). Our Supreme Court has stated that

> [p]robable cause is defined as those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.

State v. Biber, 365 N.C. 162, 168-69, 712 S.E.2d 874, 879 (2011) (citations and quotation marks omitted). To establish probable cause, "it is not necessary to show that the offense was actually committed, only that the officer had a reasonable ground to believe it was committed." *State v. Tappe*, 139 N.C. App. 33, 36, 533 S.E.2d 262, 264 (2000) (citation omitted). "Probable cause is a flexible, common-sense standard[,]" *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984), that "deals with probabilities and depends on the totality of the circumstances." *State v. Overocker*, 236 N.C. App. 423, 433, 762 S.E.2d 921, 927, *writ denied*, *disc. review denied*, 367 N.C. 802, 766 S.E.2d 686 (2014) (citation and quotation marks omitted).

The offense of driving while impaired for which Defendant was arrested is committed when an individual

> drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
>
> (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 20-138.1 (2017).

Here, the State presented sufficient and uncontroverted evidence establishing probable cause to arrest Defendant for driving while

impaired. Defendant admitted to Officer Hall that he had driven his BMW between their two encounters. During the second encounter, Officer Hall observed that Defendant had red-glassy eyes, a moderate odor of alcohol, slurred speech, and that Defendant was unsteady on his feet to the extent that it was not safe to conduct standard field sobriety tests. While Officer Hall did not observe Defendant's driving behavior, he did have personal knowledge that Defendant had a blood alcohol concentration of 0.16 one hour and forty minutes prior to the second encounter. Officer Hall testified that based upon the standard elimination rate of alcohol for an average individual, Defendant would probably still be impaired. Thus, there was a reasonable basis for Officer Hall to believe that Defendant had driven his BMW while under the influence of alcohol.

The information available to Officer Hall, along with his personal observations of Defendant, when taken as a whole, provided Officer Hall with probable cause to believe Defendant had probably committed the offense of driving while impaired.

Conclusion

Based upon the totality of the circumstances, probable cause existed to justify Defendant's second arrest for impaired driving. The trial court erred in granting Defendant's motion to suppress. Accordingly, we reverse and remand to the trial court.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
TAMMY RENEE HOWARD

No. COA17-1143

Filed 5 June 2018

1. Search and Seizure—search warrant—probable cause—nexus between objects sought and place to be searched

The application for a warrant to search defendant's house and vehicles for evidence of counterfeit merchandise established a sufficient nexus between the objects sought and the place to be searched where the accompanying affidavit stated that counterfeit merchandise had previously been delivered to the home, defendant was continuing to conduct a business selling counterfeit merchandise despite previous warnings and arrests, and the officer had substantiated that defendant resided at the home.

2. Search and Seizure—search warrant—staleness of evidence—prior criminal activity

The Court of Appeals rejected defendant's argument that the only evidence in a search warrant application linking her residence with criminal activity was stale as a matter of law since it was a crime that occurred twenty months earlier. Because of the history and continuous nature of defendant's business selling counterfeit merchandise, the evidence of the prior crime was not so far removed as to be considered stale.

3. Criminal Law—motion to suppress—entry of conclusions of law—statutory requirement

Where the trial court failed to provide any explanation for the denial of defendant's motion to suppress evidence obtained in connection with a search of her home, the Court of Appeals remanded the case to the trial court for entry of appropriate conclusions of law pursuant to N.C.G.S. § 15A-977(f).

Appeal by defendant from judgment entered 16 March 2017 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Torrey D. Dixon, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

TYSON, Judge.

Tammy Renee Howard ("Defendant") appeals from judgment entered upon a jury's conviction of felonious use or possession of counterfeit trademark goods with intent to sell and having a value exceeding $10,000. We find no error in the trial court's denial of Defendant's motion to suppress. We remand to the trial court to enter appropriate conclusions of law.

I. Background

On 22 June 2015, North Carolina Secretary of State's Trademark Enforcement Division Special Agent Derek Wiles ("Agent Wiles") obtained a search warrant to search the residence and vehicles located at 13606 Coram Place in Charlotte, North Carolina. During the search of the premises, Agent Wiles and his team discovered counterfeit items located in the house, garage, and inside a van parked adjacent to the house. The officers seized hundreds of counterfeit items, including handbags, watches, and sunglasses, as well as over 2700 designer labels, with an approximate suggested retail value of two million dollars.

Defendant was indicted for felony criminal use of counterfeit trademark on 19 January 2016. On 13 March 2017, she filed a motion to suppress all the evidence recovered and all statements made in connection with the search of 13606 Coram Place. The trial court denied Defendant's motion. Defendant failed to object to the subsequent entry and admission at trial of evidence obtained as a result of the search.

The jury returned a verdict finding Defendant guilty of felony use or possession of counterfeit trademark goods. Defendant was sentenced to 6-17 months imprisonment, which was suspended for 36 months of supervised probation. Defendant was required to serve an active sentence of 45 days during the first 12 months of her probation. Defendant entered timely notice of appeal.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court erred by denying her motion to suppress, and in the alternative, the trial court erred by failing to provide its rationale during its ruling from the bench.

IV. Motion to Suppress

A. Standard of Review

Defendant failed to object at trial to the entry of the evidence obtained from the search of 13606 Coram Place to preserve the error, but has assigned plain error review on appeal. *See State v. Miller*, 198 N.C. App. 196, 198, 678 S.E.2d 802, 805 (2009).

To show 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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation marks omitted).

B. Probable Cause for Search

Defendant argues the trial court erred in denying her motion to suppress. She asserts no reasonable grounds existed to believe the search would reveal evidence of criminal activity at 13606 Coram Place. We disagree.

A search warrant cannot be constitutionally issued absent a finding of probable cause. U.S. Const. amend. IV; N.C. Const., art. I, § 20. "Probable cause means that there must exist a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Lindsey*, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982) (citation and internal quotation marks omitted).

Our statutes mandate that an application for a search warrant must include a statement under oath that probable cause exists to believe items subject to seizure may be found at the described place that is the subject of the search, and allegations of fact supporting the statement, which may be further supported by one or more affidavits. N.C. Gen. Stat. § 15A-244 (2017). The affidavit "must establish a nexus between the objects sought and the place to be searched. Usually this connection is made by showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are

observed at a certain place." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (internal citations and quotation marks omitted).

The Supreme Court of the United States has established a "totality of the circumstances" test to determine whether the State has proved that probable cause exists. *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983). The Supreme Court of North Carolina adopted this same test. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260-61 (1984). When applying the "totality of the circumstances" test, an "affidavit is sufficient if it supplies reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *Id.* at 636, 319 S.E.2d at 256 (citation omitted).

The affidavit Agent Wiles submitted to establish probable cause for the warrant contains the following information: Agent Wiles possessed twenty-six years of law enforcement experience, during which time he had investigated thousands of cases involving counterfeit merchandise. At the time of the application, he was employed and assigned to the Secretary of State's Trademark Enforcement Division.

On 8 May 2013, a Mecklenburg County police officer informed Agent Wiles that Defendant had been found to be in possession of possible counterfeit items. She was charged with a violation of Charlotte's peddler's license ordinance. The items seized were later confirmed to be counterfeit.

As part of a compliance check/counterfeit merchandise interdiction operation at the DHL International Hub in Charlotte on 7 October 2013, Agent Wiles intercepted two packages from a known counterfeit merchandise distributor in China, addressed to Defendant at 13606 Coram Place. The boxes were inspected and were found to contain counterfeit handbags, wallets, watches, and headphones. Agent Wiles attempted a "controlled delivery" of the packages to 13606 Coram Place, but no one was home. Two other packages previously delivered by DHL were present on the porch. Agent Wiles contacted Defendant, who agreed to meet with him and consented to him bringing the other two packages with him. Defendant consented to a search of the other two packages left at the address, which contained additional counterfeit merchandise. Defendant stated she did not realize the merchandise was counterfeit, voluntarily surrendered it all, and was issued a warning.

Agent Wiles was working as a part of a compliance check outside of the Bank of America Stadium during a Carolina Panthers football game

on 3 November 2013. Defendant, doing business as "Store on Wheels," was found selling counterfeit handbags, wallets, and other items from two SUVs. Defendant was charged with felony criminal use of a counterfeit trademark, and pled guilty to the lesser included misdemeanor charge on 4 March 2014.

During another compliance check, outside of the Charlotte Convention Center on 30 May 2015, Agent Wiles found a booth rented by a business called "Store on Wheels." The booth was unmanned, but contained a large display of counterfeit items. Business cards were found at the booth with the "Store on Wheels" business name on them, along with the name "Tammy" listed as the owner. Prior to applying for the search warrant, Agent Wiles substantiated the address of 13606 Coram Place "to be the location of the [sic] Tammy Renee Howard."

C. Location of Counterfeit Items

[1] Defendant asserts the affidavit failed to contain sufficient evidence to support a reasonable belief that evidence of counterfeit items would be found at 13606 Coram Place.

Defendant argues *State v. Parsons*, __ N.C. App. __, 791 S.E.2d 528 (2016), controls the outcome of this case. In *Parsons*, the defendant was dropped off at a "burned residence and blue recreational vehicle/motor home located at 394 Low Gap Road" after allegedly purchasing decongestant used to manufacture methamphetamine. *Id.* at __, 791 S.E.2d at 538. The officers established surveillance at that location, and witnessed the defendant exiting the recreational vehicle. *Id.* The officers approached and asked the defendant to search the house and recreational vehicle, but the defendant refused. *Id.*

This Court found that those allegations in the affidavit were insufficient to connect the property location with any illegal activity. *Id.* Defendant asserts the finding that "[n]othing in the affidavit provides context to where Defendant's 'home' was or that his 'home' was 394 Low Gap Road" is similar to the situation in this case. *Id.* "[T]he simple fact that an individual is dropped off at a particular address does not establish probable cause to search that address *in the absence of other allegations of criminal activity*." *Id.* (emphasis supplied).

The affidavit in the present case included evidence of counterfeit merchandise being previously delivered to 13606 Coram Place, and evidence Defendant was continuing to conduct her business selling counterfeit items, after previous warnings and arrests, less than a month before the search warrant was executed. Agent Wiles also attested

under oath that he had substantiated Defendant resided at 13606 Coram Place. Even if Agent Wiles "did not spell out in exact detail" how he substantiated Defendant's address, the affidavit includes sufficient evidence connecting the presence of counterfeit materials with the address of 13606 Coram Place. *See State v. Edwards*, 185 N.C. App. 701, 705, 649 S.E.2d 646, 649 (2007).

After viewed in its totality, and not as singular instances or isolated events, sufficient evidence supports a reasonable cause to believe a search of 13606 Coram Place would produce contraband evidence of Defendant's criminal activity. *See Arrington*, 311 N.C. at 636, 319 S.E.2d at 256. Defendant's argument is overruled.

D. Evidence was not Stale

[2] Defendant also argues the evidence alleged in the affidavit was stale, and specifically asserts the only evidence linking the address of 13606 Coram Place with criminal activity allegedly took place in October 2013, some twenty months prior to the issuance of the search warrant.

"Generally, two factors determine whether evidence of previous criminal activity is sufficient to later support a search warrant: (1) the amount of criminal activity and (2) the time period over which the activity occurred." *McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358. No bright line rule exists governing the amount of time lapse considered reasonable, but such consideration depends "upon such variable factors as the character of the crime and the criminal, the nature of the item to be seized and the place to be searched." *Lindsey*, 58 N.C. App. at 566, 293 S.E.2d at 834 (citation omitted).

In cases where contraband is likely to be sold and disposed of, information obtained over a year prior has been held to be too stale to support probable cause to search. *Id.* at 567, 293 S.E.2d at 835. However, in cases where "the alleged crime is a complex one taking place over a number of years [and] [t]he place to be searched is an ongoing business," information that is fourteen months old is not considered stale. *State v. Louchheim*, 296 N.C. 314, 323, 250 S.E.2d 630, 636 (1979). "[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358.

Defendant argues this case is more similar to the facts in *Lindsey*, as the evidence concerned counterfeit contraband, likely to be sold and disposed of. However, the evidence in *Lindsey* concerned marijuana, which is a substance not only likely to be sold, but is also "easily

concealed and moved about." 58 N.C. App. at 567, 293 S.E.2d at 835. It appears Defendant conducted her business out of multiple vehicles and a rented booth, making the counterfeit items easy to move. It is reasonable to believe Defendant kept a large stock of contraband inventory on hand for sale, requiring an appropriate storage location. The evidence tends to show Defendant had been conducting this business over a number of years, at numerous locations, and the process was complex, necessitating the acquisition of knock-off merchandise from China and the attachment of false designer labels.

The facts of this case are more similar to those in *Louchheim*, where information supporting the warrant that was fourteen months old was held not to be stale. 296 N.C. at 323, 250 S.E.2d at 636. Because of the history and apparent continuous nature of Defendant's business, evidence that occurred twenty months prior to the execution of the search warrant is not so far removed to be considered stale as a matter of law. Defendant's argument is overruled.

V. Findings of Fact and Conclusions of Law

[3] Defendant alternatively argues this matter should be remanded to the trial court for findings of fact and conclusions of law to support its ruling on her motion to suppress.

After a motion to suppress evidence is presented at the trial court, "[t]he judge *must set forth in the record* his findings of fact and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2017) (emphasis supplied). Our Supreme Court has held, "the absence of factual findings alone is not error because only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling." *State v. Faulk*, __ N.C. App. __, __, 807 S.E.2d 623, 630 (2017) (quoting *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015)) (internal quotation marks omitted). Even so, "it is still the trial court's responsibility to make the conclusions of law." *State v. McFarland*, 234 N.C. App. 274, 284, 758 S.E.2d 457, 465 (2014).

The State argues no material conflicts in the evidence exist, and the trial court's conclusion was clear from its ruling. The record of the suppression hearing reveals no material conflicts existed. Defense counsel called Agent Wiles as a witness, and introduced a copy of the search warrant and a photograph taken at the time the search warrant was executed.

Agent Wiles' testimony revealed that (1) the search warrant had initially included a typographical error, identifying the premise to be

searched as 13605 Coram Place in a few paragraphs; (2) some houses in the location were of a similar construction as Defendant's; and, (3) the warrant referenced past events, specifically the October 2013 incident, where multiple packages delivered by DHL to 13606 Coram Place were found to contain counterfeit evidence.

On cross-examination, the State did not dispute any of the evidence, but clarified that (1) the warrant also contained the correct address; (2) once Agent Wiles realized the typographical error, he had the area secured and returned to the magistrate to correct the address; and, (3) Agent Wiles experienced no issue identifying Defendant's house to execute the search warrant, because he had previously been to her house, specifically in October 2013.

"It previously has been determined that a material conflict in the evidence does not arise when the record on appeal demonstrates that defense counsel cross-examined the State's witnesses at the suppression hearing." *State v. Baker*, 208 N.C. App. 376, 383, 702 S.E.2d 825, 830 (2010). While Agent Wiles was called as Defendant's witness at the suppression hearing, he was a witness for the State in the subsequent trial. Defendant presented evidence at the hearing, which was given by the officer who had applied for and executed the search warrant, and none of which was contradicted by the State's cross-examination.

While no material conflicts exist in the evidence presented at the suppression hearing, the judge failed to provide any rationale from the bench to explain or support his denial of Defendant's motion. The only statement from the trial court concerning Defendant's motion was, "I'm going to allow the case to go forward with some reluctance, but – I'm going to deny the Motion to Suppress." This lack of rationale from the bench "precludes meaningful appellate review." *Faulk*, __ N.C. App. at __, 807 S.E.2d at 630.

The trial court's failure to articulate or record its rationale from the bench supports a remand. *McFarland*, 234 N.C. App. at 284, 758 S.E.2d at 465 ("The mandatory language of N.C. Gen. Stat. § 15A-977(f) . . . forces us to conclude that the trial court's failure to make any conclusions of law in the record was error.").

> Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial. If the trial court determines that the motion to suppress was properly

> denied, then defendant would not be entitled to a new trial because there would have been no error in the admission of the evidence, and his convictions would stand. If, however, the court determines that the motion to suppress should have been granted, defendant would be entitled to a new trial. We have found no other prejudicial error at defendant's trial. Therefore, the trial court's failure to make adequate conclusions to support its decision to deny defendant's motion to suppress does not require that we order a new trial.

McFarland, 234 N.C. App. at 284, 758 S.E.2d at 465 (internal citations and quotation marks omitted).

As in *McFarland* and *Faulk*, we remand for the trial court to make appropriate conclusions of law to substantiate its ruling upon Defendant's motion to suppress. *See id.*; *see also Faulk*, __ N.C. App. at __, 807 S.E.2d at 630.

VI. Conclusion

Applying the "totality of the circumstances" test, Agent Wiles' affidavit accompanying the application for the search warrant for 13606 Coram Place contained sufficient evidence to show the required nexus between the items sought and the location to be searched. *McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357. Due to the nature of the alleged, continuing criminal activity, the evidence presented in the affidavit was not stale and supports a finding of probable cause. *Id.* at 577, 397 S.E.2d at 358. Defendant has failed to show error, let alone plain error, in the trial court's denial of her motion to dismiss.

The statutorily mandated conclusions of law to support the trial court's denial were not met. N.C. Gen. Stat. § 15A-977(f). We remand to the trial court for entry of appropriate conclusions of law in accordance with the statute and consistent with the precedents cited above. *See McFarland*, 234 N.C. App. at 284, 758 S.E.2d at 465; *see also Faulk*, __ N.C. App. at __, 807 S.E.2d at 630. *It is so ordered.*

NO ERROR IN PART AND REMANDED.

Judges ELMORE and ZACHARY concur.

STATE v. LENOIR

[259 N.C. App. 857 (2018)]

STATE OF NORTH CAROLINA
v.
JESSE JAMES LENOIR

No. COA17-943

Filed 5 June 2018

1. Appeal and Error—issue preservation—motion to suppress—failure to object—plain error review

Defendant did not properly preserve for appellate review the issue of whether probable cause existed to support the issuance of a search warrant where he failed, after his motion to suppress was denied, to object to the introduction of evidence that a shotgun was found in his home. However, because he expressly sought review of the issue for plain error, the Court of Appeals conducted a plain error review.

2. Search and Seizure—probable cause—supporting affidavit—sufficiency of factual support

The trial court erred in denying defendant's motion to suppress evidence of a shotgun in his residence in a prosecution for possession of a firearm by a felon where the law enforcement officer's supporting affidavit did not contain adequate factual information to establish probable cause for a search warrant. The officer's bare assertion that he observed a pipe "used for methamphetamine," without information regarding the officer's training and experience in distinguishing between a pipe used for lawful versus unlawful purposes, any detail about the appearance of the pipe, or any other information connecting defendant or his home to drug use, was insufficient to support the issuance of a search warrant. Where defendant's conviction was based solely on the discovery of the shotgun in his home, the trial court's denial of the motion to suppress evidence of the shotgun amounted to plain error.

Appeal by defendant from judgment entered 16 March 2016 by Judge Robert G. Horne in Rutherford County Superior Court. Heard in the Court of Appeals 21 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Grande, for the State.

W. Michael Spivey for defendant-appellant.

DAVIS, Judge.

In this appeal, we revisit the issue of how much factual information a law enforcement officer's affidavit must contain in order to establish probable cause for the issuance of a search warrant. Because we conclude that the affidavit at issue in this case lacked sufficient detail, we reverse the trial court's denial of the defendant's motion to suppress and vacate his conviction.

Factual and Procedural Background

On 29 July 2013 at 1:45 p.m., Sergeant Chadd Murray of the Rutherford County Sheriff's Office — along with several other law enforcement officers — went to the home of Jesse James Lenoir ("Defendant") in Forest City, North Carolina to conduct a knock and talk. Defendant's brother, David Lenoir ("David"), answered the door and invited the officers into the residence.

Sergeant Murray asked David if there was anyone else in the house, and David responded that no one else was present. Sergeant Murray noticed that a light was on in a back bedroom and asked David if he could "check and make sure nobody was there" for the safety of the officers. David gave his consent, and Sergeant Murray walked to the back bedroom where he saw a woman lying on a bed. Sergeant Murray also observed a "glass smoke pipe" on a dresser in the bedroom.

That same day, Sergeant Murray applied for a search warrant for the residence and submitted a supporting affidavit that stated, in its entirety, as follows:

> On July 29, 2013 I went to 652 Byers Road Lot 10 Forest City, N.C. for a knock and talk. Once at the residence I spoke with the tenant at the residence David Lenoir. Lenoir stated he and his brother Jesse Lenoir both lived there. David consented to a search of the residence and stated no one was inside the residence. In a back bedroom was Dawn Bradley sleeping and I could see a smoke pipe used for methamphetamine in plain view. The bedroom she was in belonged to Jessie [sic] Lenoir. Jessie [sic] was unable to be reached. Dawn would not admit to the smoke pipe being hers but she did stated [sic] Jessie [sic] and Rebecca Simmons stayed in that bedroom as well.

Based upon this affidavit, a search warrant was issued.[1] The officers then conducted a search of the home and discovered a shotgun in the same bedroom where Sergeant Murray had observed the glass pipe. The weapon was hidden from view behind a "speaker box."

On 31 July 2013, Sergeant Murray questioned Defendant about the shotgun, and Defendant admitted that the gun belonged to him. Defendant was subsequently indicted by a grand jury on 4 November 2013 for possession of a firearm by a felon. A jury trial was held on 16 March 2016 before the Honorable Robert G. Horne in Rutherford County Superior Court. Before the trial began, a hearing was held to address an oral motion to suppress made by Defendant. Despite the fact that the motion was not in writing, the State did not object on procedural grounds to its consideration by the trial court, and the court agreed to hear Defendant's motion. Following the arguments of counsel, the trial court orally denied the motion to suppress.

At trial, counsel for Defendant failed to object to the admission of evidence as to the shotgun being found in the residence during the officers' search. On 16 March 2016, the jury found Defendant guilty of possession of a firearm by a felon. The trial court sentenced him to a term of 19 to 32 months imprisonment, suspended the sentence, and placed Defendant on supervised probation for 36 months.

Defendant filed an untimely notice of appeal on 8 April 2018. However, he filed a petition for writ of *certiorari* on 12 September 2016, and this Court granted the petition on 22 September 2016.

Analysis

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress. Specifically, he contends that the search warrant issued for his residence was not supported by probable cause based on the insufficiency of Sergeant Murray's supporting affidavit.

[1] As an initial matter, we must determine whether this issue was properly preserved for appeal. Defendant acknowledges that although he made a motion to suppress the evidence of the shotgun found in his

1. Approximately three hours after obtaining and executing this search warrant, Sergeant Murray obtained a second search warrant for the residence. However, the State did not offer at Defendant's trial any evidence that was seized by the officers while they were executing the second warrant. Therefore, we confine our review to the first search warrant obtained by Sergeant Murray.

home, he failed to object when the State sought to admit that evidence at trial. Our Supreme Court has explained that

> [t]o preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial. [Defendant's] failure to object at trial waived his right to have this issue reviewed on appeal.

State v. Golphin, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (internal citations omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Accordingly, Defendant has not properly preserved this issue for appellate review.

However, in cases where a defendant fails to preserve for appellate review an issue relating to the suppression of evidence we conduct plain error review if the defendant specifically and clearly makes a plain error argument on appeal. *State v. Waring*, 364 N.C. 443, 467-68, 701 S.E.2d 615, 631-32 (2010), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d 53 (2011). Because Defendant expressly seeks such review in his appellate brief, we review for plain error the issue of whether probable cause existed to support the issuance of the search warrant obtained by Sergeant Murray.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

[2] In conducting plain error review, we must first determine whether the trial court did, in fact, err in denying Defendant's motion to suppress. *See State v. Oxendine*, __ N.C. App. __, __, 783 S.E.2d 286, 292, *disc. review denied*, __ N.C. __, 787 S.E.2d 24 (2016) ("The first step under plain error review is . . . to determine whether any error occurred at all.").

Normally, "[t]he standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (citation and quotation marks omitted). Here, however, the trial court summarily denied Defendant's motion to suppress without making any findings of fact or conclusions of law. Our Supreme Court has held that "only a material conflict in the evidence — one that potentially affects the outcome of the suppression motion — must be resolved by explicit factual findings that show the basis for the trial court's ruling. When there is no conflict in the evidence, the trial court's findings can be inferred from its decision." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (internal citations omitted).

"N.C. [Gen. Stat.] § 15A-244 requires that an application for a search warrant must contain (1) a probable cause statement that the items will be found in the place described, and (2) factual allegations supporting the probable cause statement." *State v. Taylor*, 191 N.C. App. 587, 589, 664 S.E.2d 421, 423 (2008) (citation omitted). Furthermore, "the statements must be supported by one or more affidavits particularly setting forth the circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched." *Id.* (citation, quotation marks, and brackets omitted).

In determining whether to issue a warrant, the magistrate must "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." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (citation omitted); *see also State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) ("The standard for a court reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." (citation and quotation marks omitted)).

> Probable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause, nor does it import absolute certainty. . . . If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man

> would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant.

State v. Campbell, 282 N.C. 125, 128-29, 191 S.E.2d 752, 755 (1972) (internal citation and quotation marks omitted). N.C. Gen. Stat. § 15A-245(a) provides that "information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant[.]" N.C. Gen. Stat. § 15A-245(a) (2017).

In assessing the sufficiency of Sergeant Murray's affidavit, we find instructive several decisions from our appellate courts. In *State v. Benters*, 367 N.C. 660, 766 S.E.2d 593 (2014), law enforcement officers with "extensive training and experience with indoor marijuana growing investigations" received an anonymous tip regarding the defendant's involvement in an indoor marijuana growing operation. *Id.* at 661, 766 S.E.2d at 596. After visiting the address referenced in the tip, the officers observed various gardening materials on the property including potting soil, fertilizer, and seed starting trays. However, they did not see any gardens or potted plants. Based upon their observations as set forth in an affidavit, a search warrant was issued for the property located at that address. *Id.* at 662-63, 766 S.E.2d at 596-97.

In ruling that the affidavit in support of the search warrant application was insufficient to provide probable cause, our Supreme Court stated that it was "not convinced that these officers' training and experience are sufficient to balance the quantitative and qualitative deficit left by an anonymous tip . . . , observations of innocuous gardening supplies, and a compilation of conclusory allegations." *Id.* at 673, 766 S.E.2d at 603 (citation omitted). With regard to the gardening items observed by law enforcement, the Court specifically noted that

> [n]othing [in the affidavit] indicates a fair probability that contraband or evidence of a crime will be found in a particular place beyond [the officer's] wholly conclusory allegations. The affidavit does not state whether or when the gardening supplies were, or appeared to have been, used, or whether the supplies appeared to be new, or old and in disrepair. Thus, amid a field of speculative possibilities, the affidavit impermissibly require[d] the magistrate to make what otherwise might be reasonable inferences

> based on conclusory allegations rather than sufficient underlying circumstances. This we cannot abide.

Id. at 672, 766 S.E.2d at 602 (internal citations and quotation marks omitted).

State v. Beaver, 37 N.C. App. 513, 246 S.E.2d 535 (1978), involved the warrantless seizure of a shot glass from the defendant's vehicle by a law enforcement officer during a routine traffic stop. *Id.* at 514-15, 246 S.E.2d at 537. The shot glass contained a "film of a white substance appearing to be some type of white powder." *Id.* at 517, 246 S.E.2d at 539. This Court held that the seizure was unsupported by probable cause, concluding as follows:

> [W]e cannot say that a white powder residue in a glass gives rise to facts of general knowledge or facts of a particular science so notoriously true as to support a reasonable belief on the part of the seizing officer that he was seizing contraband or evidence of a crime. We think that, absent specific testimony indicating particular knowledge on the part of the officer . . . , a white powder residue in a glass must be taken as equally indicative of lawful substances and conduct as of contraband or unlawful conduct. Such would give rise to a mere suspicion, which will not support a finding of probable cause.

Id. at 519, 246 S.E.2d at 539-40 (citation omitted).

In the present case, Sergeant Murray's affidavit simply stated that he saw "a smoke pipe used for methamphetamine" in a bedroom in Defendant's house. It made no mention at all of Sergeant Murray's training and experience; nor did it present any information explaining the basis for his belief that the pipe was being used to smoke methamphetamine as opposed to tobacco. In addition, the affidavit did not explain how Sergeant Murray was qualified to distinguish between a pipe being used for lawful — as opposed to unlawful — purposes. Indeed, the affidavit did not even purport to describe in any detail the appearance of the pipe or contain any indication as to whether it appeared to have recently been used. It further lacked any indication that information had been received by law enforcement officers connecting Defendant or his home to drugs.

As with the gardening supplies in *Benters* and the white residue in *Beaver*, a pipe — standing alone — is neither contraband nor evidence of a crime. Rather, the pipe referenced in Sergeant Murray's affidavit

"must be taken as equally indicative of lawful substances and conduct as of contraband or unlawful conduct." *Beaver*, 37 N.C. App. at 519, 246 S.E.2d at 540.

While the State cites *State v. Lowe*, 369 N.C. 360, 794 S.E.2d 282 (2016), in support of its contention that the warrant obtained by Sergeant Murray was properly issued, that case is inapposite. In *Lowe*, our Supreme Court held that probable cause supported the issuance of a search warrant where (1) the investigating officer received an anonymous tip that the defendant was selling and storing narcotics at his house; (2) the affidavit in support of the warrant listed the officer's training and experience; and (3) the officer discovered marijuana residue in a garbage bag outside the defendant's residence. *Id.* at 361-62, 246 S.E.2d at 284.

Noting that the affidavit "presented the magistrate with direct evidence of the crime for which the officers sought to collect evidence[,]" the Court ruled that "under the totality of the circumstances there was a substantial basis for the issuing magistrate to conclude that probable cause existed." *Id.* at 365-66, 794 S.E.2d at 286 (citation and quotation marks omitted). The Supreme Court distinguished its ruling in *Lowe* from its prior decision in *Benters* by noting that "[a]lthough there were many reasons the gardening equipment may have been outside the defendant's house in *Benters*, the presence of marijuana residue in defendant's trash offers far fewer innocent explanations." *Id.* at 365, 794 S.E.2d at 286 (citation and quotation marks omitted).

Here, given the absence of additional information in Sergeant Murray's affidavit to support his bare assertion that the pipe was "used for methamphetamine," we hold that the affidavit was insufficient to establish probable cause for the issuance of the search warrant. Accordingly, the trial court erred in denying Defendant's motion to suppress.

Having determined that the trial court erred, we now turn to the issue of whether the error rose to the level of plain error. Defendant was convicted of possession of a firearm by a felon. His conviction was based solely upon the discovery of a shotgun in his home. There is no indication in the record that Sergeant Murray saw the gun — which was hidden from view — prior to seeking the search warrant. Rather, the gun was found only once the search warrant had been obtained and was being executed by the officers.[2]

2. Indeed, the State makes no argument that the shotgun would have been discovered by law enforcement officers even in the absence of the search warrant obtained by Sergeant Murray.

Thus, the trial court's denial of Defendant's motion to suppress necessarily had a probable impact on his conviction because the jury could not have convicted Defendant of possession of a firearm by a felon but for the admission of evidence concerning the shotgun seized during the execution of the search warrant. *See State v. Canty*, 224 N.C. App. 514, 521, 736 S.E.2d 532, 537 (2012) ("Without the search, no weapons would have been found. Without the weapons, Defendant could not have been convicted of . . . possession of a firearm by a convicted felon."), *disc. review denied*, 366 N.C. 578, 739 S.E.2d 850 (2013). Therefore, we hold that the trial court's denial of Defendant's motion to suppress amounted to plain error.[3]

Conclusion

For the reasons stated above, we reverse the trial court's denial of Defendant's motion to suppress and vacate his conviction for possession of a firearm by a felon.

REVERSED AND VACATED.

Judges STROUD and ARROWOOD concur.

3. Based on our holding, we need not reach Defendant's additional argument that he received ineffective assistance of counsel based on his trial counsel's failure to object at trial to the evidence obtained as a result of the search warrant.

STATE OF NORTH CAROLINA
v.
KEVIN JONATHAN MITCHELL, DEFENDANT

No. COA17-212

Filed 5 June 2018

1. Stalking—felonious stalking—violation—no-contact provision

Defendant's stalking charge was properly elevated to a felony where he violated a no-contact provision of multiple court orders then in effect, in part by writing letters while he was in jail. Although the orders were each titled as "Conditions of Release and Release Order," compliance with the conditions is required during the entire prosecution, whether a defendant is being held in a detention facility or released.

2. Obstruction of Justice—common law obstruction of justice—felony—with deceit and intent to defraud

The trial court did not err in refusing to dismiss defendant's charges of felony obstruction of justice and felony attempted obstruction of justice where defendant was charged under the common law. Although common law obstruction of justice was ordinarily treated as a misdemeanor, pursuant to N.C.G.S. § 14-3(b), a misdemeanor may be elevated to a felony if it is done with deceit and intent to defraud. Here, defendant's indictments properly alleged all necessary elements of felonious obstruction of justice.

Appeal by defendant from judgments entered on or about 13 January 2016 and 15 January 2016 by Judge G. Wayne Abernathy in Superior Court, Wake County. Heard in the Court of Appeals 27 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant.

STROUD, Judge.

Defendant Kevin Jonathan Mitchell ("defendant") appeals from his convictions of felonious stalking, felonious obstruction of justice, and felonious attempted obstruction of justice. On appeal, defendant argues that the trial court erred by finding that the "Conditions of Release and

Release Order" were in effect while defendant was in custody of the Wake County Detention Center and denying his motion to dismiss the felony stalking charge. He further argues that the court erred by denying his motion to dismiss the felony obstruction of justice charges. For reasons stated below, we find no error with the trial court's judgment.

Background

The State's evidence at trial showed these facts. On 26 December 2014, defendant was in a romantic relationship and living with Nancy[1] and her four children. Defendant is the father of Nancy's youngest son. That evening, Nancy's daughters used her cell phone to text their father. The girls gave the phone back to their mother, and Nancy walked to the bedroom to read the texts. Defendant then entered the room, snatched the phone from Nancy's hand, read the text, and jumped on her. He choked Nancy and pushed her down on the bed. Nancy took the phone back from defendant, and then he asked her for keys to the house. While Nancy was looking for her set of keys, defendant sucker punched her in the face. Defendant left and Nancy called the police, who took photographs of Nancy's injuries and eventually spotted defendant walking down the road nearby. Defendant was arrested for assault on a female[2] and taken to the Wake County Detention Center.

On 26 December 2014, after defendant was arrested, a magistrate judge entered an order entitled "Conditions of Release and Release Order" (AOC-CR-200, Rev. 12/12) ("Order 1"), which denied bond and placed defendant on a 48-hour domestic violence hold.[3] In the top portion of the form, the preprinted language states:

> To The Defendant Named Above, you are ORDERED to appear before the Court as provided above and at all

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1. A pseudonym is used to protect the victim's identity and for ease of reading.

2. The parties stipulated in the record on appeal that defendant was charged with assault on a female on 26 December 2014 in Wake County File No. 14-CR-229975 and then "[s]ubsequently, on January 7, 2015, [defendant] was charged with habitual misdemeanor assault in Wake County File No. 15-CR-200503, the basis of this charge being the December 26, 2014 assault on a female charge in Wake County File No. 14-CR-229975." The parties also stipulated that "[n]one of the documents in Wake County File No. 14-CR-229975 have been included in this Record on Appeal."

3. *See* N.C. Gen. Stat. § 15A-534.1(b) (2017), "Crimes of domestic violence; bail and pretrial release" ("A defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made under this section by a judge. If a judge has not acted pursuant to this section within 48 hours of arrest, the magistrate shall act under the provisions of this section.").

> subsequent continued dates. If you fail to appear, you will be arrested and you may be charged with the crime of willful failure to appear. You also may be arrested without a warrant if you violate any condition of release in this Order or in any document incorporated by reference."

Just below this statement, the following statement was typed into a blank area of the form: "NOT TO HAVE ANY CONTACT WITH [NANCY]." Below this, the magistrate checked the box with this language: "Your release is not authorized."

The lower section of the form is entitled: "ORDER OF COMMITMENT." This portion of the form directed the Wake County Detention Center to hold defendant "for the following purpose: DV HOLD." It also stated that defendant was to be produced "at the first session of District or Superior Court held in this county after entry of this Order or, if no session is held before" 28 December 2014, then he must be brought before a magistrate "at that time to determine conditions of pretrial release."

The back of the Order has four sections which are filled in by either a Judicial Official or Jailer for each court appearance of the defendant. The four sections, from top to bottom, are:

> CONDITIONS OF RELEASE MODIFICATIONS
> SUPPLEMENTAL ORDERS FOR COMMITMENT
> DEFENDANT RECEIVED BY DETENTION FACILITY
> DEFENDANT RELEASED FOR COURT APPEARANCE

The first handwritten notes by the judge under "CONDITIONS OF RELEASE MODIFICATIONS" state that defendant's conditions of release were modified on 28 December 2014 to an $8,000.00 secured bond and "NCWV," an acronym for "no contact with victim." The next modification was on 29 December 2014, when the secured bond was increased to $10,000.00 and "no contact with victim."[4]

Nancy filed a complaint for a Domestic Violence Protective Order under N.C. General Statutes Chapter 50B against defendant alleging he had committed acts of domestic violence against her, and an ex parte domestic violence protective order ("ex parte DVPO") was issued on

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4. On 25 September 2017, the State filed a motion to amend the record on appeal, noted that the original record contains only the front page of the Conditions of Release and Release Orders, and asked this Court to allow the record on appeal to be amended so that the back side of these orders may be included. We grant this motion so that we may fully address this issue on appeal.

29 December 2014, effective until a hearing scheduled on 5 January 2015. Defendant was served with the ex parte DVPO in jail. Nancy did not appear at the 5 January 2015 hearing, so the complaint was dismissed and the ex parte order expired on that date.

On 7 January 2015, a warrant was issued for defendant's arrest for habitual misdemeanor assault in File No. 15 CRS 200503 and another order entitled "Conditions of Release and Release Order" ("Order 2") was entered on the same AOC form as Order 1. In Order 2, defendant's release was authorized upon execution of a secured bond in the amount of $20,000.00. Order 2 includes the exact same provision of "NOT TO HAVE ANY CONTACT WITH [NANCY]" as Order 1. He was also required to provide fingerprints. In the portion of the form entitled "Additional Information" was "Bond doubled pursuant to statute. Defendant has a $10,000.00 bond for 14CR229975." The Order of Commitment portion of the form directed that if defendant was not presented before a district or superior court judge by 9 January 2015, he must be brought before a magistrate "at that time to determine conditions of pretrial release." On the back of Order 2, in "Conditions of Release Modifications," defendant's conditions of release were modified on 8 January 2015 to a $40,000.00 secured bond and no contact with victim.

On 29 January 2015, the assault on a female charge in File No. 14 CR 229965 was apparently dismissed, so Order 1 was no longer in effect[5]. Nancy received six letters from defendant between 2 January 2015 and 23 February 2015. The first letters were cordial but escalated to threats when she did not respond or reply. Nancy testified at trial that the letters led her to file for a second domestic violence protective order against defendant, although there is no Chapter 50B order other than the one issued on 29 December 2014 in the record on appeal. Nancy also received an envelope marked "Return to Sender. Not Deliverable as Addressed. Unable to Forward" addressed to the Federal Building on Fayetteville Street in Raleigh with her address as the return address. Nancy testified that she did not write this letter or know anything about it before it arrived at her house. The letter contained a bomb threat and demand for one million dollars, purportedly made by Nancy. Defendant was later questioned and eventually admitted to writing the letter and confirmed to investigators there was no bomb in the building. Defendant

5. As noted above, the parties stipulated that the record on appeal contains no further documents from File No. 14 CR 229975. The back side of Order 1 contains the modification entry: "Dismissed" and is dated 29 January 2015, so with no additional information available, we can only presume that this means that file itself must have been dismissed at that time.

was indicted for assault on a female and habitual misdemeanor assault on 23 February 2015 in Wake County File No. 15 CRS 200503.

Another letter purportedly written by Nancy was delivered to the Wake County District Attorney's Office on 25 March 2015. An investigator in the office was told the letter had been sent by way of "jail mail," which means that it was sent by an inmate from the Wake County Detention Center. This letter stated that Nancy had made false allegations of assault against defendant and made demands and threats of committing a crime or terrorist attack if those demands were not met. Investigators spoke with Nancy about the letter, and she denied writing or sending it. Defendant was charged with felony stalking while a court order is in effect based upon the letters to Nancy and two counts of felony obstruction of justice based upon the letters to the Federal Building and the District Attorney's office.

A jury trial was held on these charges on 11 January 2016 in Wake County Superior Court. At the close of all the evidence but before the case went to the jury, the trial court granted defendant's motion to dismiss the original obstruction of justice charge in 15 CRS 5832 regarding the Federal Building bomb threat, since the evidence showed the letter was not addressed properly, so the offense was never completed. Instead, the trial court allowed the lesser included offense of attempted obstruction of justice to be submitted to the jury in its place. The jury found defendant guilty of assault on a female, felonious stalking, felonious obstruction of justice, and felonious attempted obstruction of justice. Defendant admitted to his status as a habitual felon. The trial court entered judgment on or about 13 January 2016 and an amended judgment on or about 15 January 2016. Defendant timely appealed to this Court.

Analysis

I. Motion to Dismiss Felony Stalking While Court Order in Effect Charge

[1] Defendant's first argument on appeal is that the trial court erred in denying defendant's motion to dismiss the felony stalking charge by finding Orders 1 and 2 were in effect while defendant was in custody. The trial court concluded that when defendant sent the letters, he was subject to three orders: (1) Order 1; (2) Nancy's first ex parte DVPO; and (3) Order 2. Defendant argues that conditions of release stated in Orders 1 and 2 do not apply *until* the person has been released from custody, and since defendant was in jail when he wrote the letters, the orders did not apply.

As the issue is whether the trial court reached a proper conclusion of law, we review *de novo*. *See*, *e.g.*, *State v. Barnhill*, 166 N.C. App. 228, 230-31, 601 S.E.2d 215, 217 (2004) ("Although the trial court's findings of fact are generally deemed conclusive when supported by competent evidence, a trial court's conclusions of law . . . [are] reviewable *de novo*. . . . [T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." (Citations and quotation marks omitted)).

Defendant was charged with felonious stalking under subsection (d) of N.C. Gen. Stat. § 14-277.3A (2017): "A defendant who commits the offense of stalking when *there is a court order in effect prohibiting the conduct* described under this section by the defendant against the victim is guilty of a Class H felony." N.C. Gen. Stat. § 14-277.3A(d) (emphasis added). The offense of stalking is defined by N.C. Gen. Stat. § 14-277.3A(c):

> A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:
>
> (1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.
>
> (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

Defendant does not argue the trial court should have dismissed the charge of stalking under N.C. Gen. Stat. § 14-277.3A(c), which is a Class A1 misdemeanor. Defendant challenges only the elevation of the charge to a Class H felony based upon the existence of a "court order in effect prohibiting the conduct described." N.C. Gen. Stat. § 14-277.3A(d).

Under N.C. Gen. Stat. § 15A-534(a) (2017), a judicial official may place various restrictions on a defendant as "conditions of pretrial release[,]" including "restrictions on the travel, associations, *conduct*, or place of abode of the defendant[.]" (Emphasis added). And under N.C. Gen. Stat. § 15A-534.1, additional conditions may be placed on a defendant charged with various crimes of domestic violence. On appeal, defendant argues that he was not subject to the conditions of pretrial release in Orders 1 and 2 because he never posted his bond and

instead remained in jail during the entire time period when the letters were sent. He argues he was not "released" so a "condition of release" could not apply to him.

Defendant's argument is deceptively simple and focused on the title of the Orders and on the word "release," while ignoring the substance of the detailed provisions of the Orders. Although Orders 1 and 2 are each titled as "Conditions of Release and Release Order," we look to the entirety of an order when interpreting it and focus on the content, rather than the title, of the order. *See*, *e.g.*, *Cleveland Constr., Inc. v. Ellis-Don Constr. Inc.*, 210 N.C. App. 522, 535, 709 S.E.2d 512, 522 (2011)("Court judgments and orders must be interpreted like other written documents, not by focusing on isolated parts, but as a whole." (Citation and quotation marks omitted)); *McNair v. Goodwin*, 262 N.C. 1, 5, 136 S.E.2d 218, 221 (1964) ("The effect of an order or judgment is not determined by its recitals, but by what may or must be done pursuant thereto.").

The trial court's form orders in this case, despite the title, contain much more than just conditions of release. Under the title of the form is a reference to two articles of Chapter 15A of the North Carolina General Statutes: Article 25, which deals with pretrial commitment to a detention facility, and Article 26, which contains provisions related to bail and pretrial release. The top portion of the form includes provisions based upon Article 25, and the bottom portion of the form, entitled "Order of Commitment," includes provisions based upon Article 26.

Under N.C. Gen. Stat. § 15A-521(a) (2017):

> Every person charged with a crime and held in custody who has not been released pursuant to Article 26 of this Chapter, Bail, must be committed by a written order of the judicial official who conducted the initial appearance as provided in Article 24 to an appropriate detention facility as provided in this section.

Section (b) describes what must be in the order of commitment:

> (b) Order of Commitment; Modification. -- The order of commitment must:
>
> (1) State the name of the person charged or identify him if his name cannot be ascertained.
>
> (2) Specify the offense charged.
>
> (3) Designate the place of confinement.
>
> (4) If release is authorized pursuant to Article 26 of this Chapter, Bail, state the conditions of release. If a separate

> order stating the conditions has been entered, the commitment may make reference to that order, a copy of which must be attached to the commitment.
>
> (5) Subject to the provisions of subdivision (4), direct, as appropriate, that the defendant be:
>
> a. Produced before a district court judge pursuant to under Article 29 of this Chapter, First Appearance before District Court Judge,
>
> b. Produced before a district court judge for a probable cause hearing as provided in Article 30 of this Chapter, Probable-Cause Hearing,
>
> c. Produced for trial in the district or superior court, or
>
> d. Held for other specified purposes.
>
> (6) State the name and office of the judicial official making the order and be signed by him.

N.C. Gen. Stat. § 15A-521(b).

"Form AOC-CR-200, Rev. 12/12," the form order the trial court used for Orders 1 and 2, is a comprehensive order which includes both conditions of release and commitment. This order can be modified but remains in effect from the time a defendant is arrested until the charges upon which the order is based are dismissed or the defendant is convicted of the crime. *See generally* N.C. Gen. Stat. §§ 15A-521; 15A-534. Upon conviction, the trial court would enter a judgment or other disposition as appropriate under N.C. General Statutes Chapter 15A, Subchapter XIII. But the order remains *in effect* during the entire prosecution. At each step of the process, this order memorializes the trial court's determinations governing the defendant, whether the defendant is held in a detention facility or released.

Some of the terms of the order would apply whether the defendant is committed or released, while others would apply only in one circumstance or the other. For example, if a defendant posts the bond set for his release, he is released. If he does not post the bond, he is not released, but the order remains *in effect*. Some preprinted options of the order are procedural facts that could apply in a particular case and are not pretrial release conditions, although they are relevant to the types of conditions which may be placed upon a defendant. Here, the trial court's typed addition "NOT TO HAVE ANY CONTACT WITH [NANCY]" contains no additional language to indicate this provision would only apply after defendant had met conditions of release and was released. But the order remains *in effect* until the charges are disposed of, whether the defendant is committed or released.

Order 1 was "in effect" as of 26 December 2014 until 29 January 2015, when the assault on a female charges in File No. 14 CR 229975 were apparently dismissed. On 26 December 2014, the magistrate added a provision to Order 1 stating "NOT TO HAVE ANY CONTACT WITH [NANCY]." This provision had no conditions or limitations; none of the preprinted provisions on the form above this addition were checked and they did not apply to defendant. Below the added provisions, the magistrate checked the box indicating "[y]our release is not authorized" and ordered the Wake County Detention Center to hold defendant for a "DV hold," or domestic violence hold under N.C. Gen. Stat. § 15A-534.1(b).

Order 1 was modified several times by the trial court, as indicated by the handwritten notations on the back. On 28 December 2014, defendant's bond was set at $8,000.00 secured and on 29 December 2014, it was increased to $10,000.00, but both modifications included "NCWV." Thus, the "CONDITION OF RELEASE MODIFICATIONS" were the setting of the bond and increase of the bond; there was no modification to the no-contact provision originally stated on the front of the form, since the trial court noted "NCWV" on the reverse side of the order to show that this original provision remained in effect. As explained above, the charges for which this Order was entered were apparently dismissed on 29 January 2015, so Order 1 ceased to be "in effect" on that date.

Order 2 was based upon charges of habitual misdemeanor assault in File No. 15 CR 200503. It was entered by the magistrate judge on 7 January 2015. Order 2 includes the exact same provision of "NOT TO HAVE ANY CONTACT WITH [NANCY]" as Order 1 , in the same place on the form and not subject to any other conditions. On Order 2, defendant was also required to provide fingerprints. In the portion of the form entitled "Additional Information" the court entered: "Bond doubled pursuant to statute. Defendant has a $10,000.00 bond for 14CR229975." The Order of Commitment portion of the form directed that if defendant was not presented before a district or superior court judge by 9 January 2015, he must be brought before a magistrate "at that time to determine conditions of pretrial release." Order 2 remained in effect until 13 January 2016, when the charge of habitual misdemeanor assault was "consolidated with 15 CRS 4737," the habitual felon charges.

Therefore, either Order 1, Order 2, or both were "in effect" from 26 December 2014 until 13 January 2016.[6] Defendant sent the first letter

6. Defendant does not dispute that the ex parte DVPO which was in effect from 26 December 2014 to 5 January 2015 would be a "court order in effect prohibiting the conduct described under" N.C. Gen. Stat. § 14-277.3A. In addition, this time period was also covered by Order 1, so the additional prohibition of the ex parte DVPO is superfluous.

to Nancy on 2 January 2015 and the last letters were sent on 23 February 2015, so all the letters to Nancy were sent when an order was "in effect." N.C. Gen. Stat. § 14-277.3A(d). We must now determine whether the orders also "prohibit[ed] the conduct described under this section by the defendant against the victim[.]" *Id.*

The "conduct described under this section" in N.C. Gen. Stat. § 14-277.3A(d) includes "harassment" and the definition of harassment includes contacting a person in any manner "including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions…." N.C. Gen. Stat. § 14-277.3A(b)(2). Defendant was ordered not to contact Nancy, and "contact," including written contact by a letter, is "conduct described under this section." N.C. Gen. Stat. § 14-277.3A(d).

In addition, defendant's argument focusing on just the word "release" in Orders 1 and 2 is not consistent with the specific terms or legislative intent of the stalking offense punishable under N.C. Gen. Stat. § 14-277.3A. We interpret the prohibition on "contact" with Nancy in Orders 1 and 2 in a manner in keeping with the intent of N.C. Gen. Stat. § 14-277.3A, which is set forth within the statute:

> a) Legislative Intent.–The General Assembly finds that stalking is a serious problem in this State and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim's quality of life and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time.
>
> The General Assembly recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. *Therefore, the General Assembly enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences. The General Assembly intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts,*

> *communications, and conduct.* The General Assembly recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

N.C. Gen. Stat. § 14-277.3A(a) (emphasis added).

Both orders stated "NOT TO HAVE ANY CONTACT WITH [NANCY]." Defendant does not argue that the threatening letters to Nancy do not fall under the type of communication prohibited by N.C. Gen. Stat. § 14-277.3A; he argues only that the requirement that he was "NOT TO HAVE ANY CONTACT WITH [NANCY]" did not apply to him while he was in detention. As discussed above, the requirement as stated on Order 1 and Order 2 was an independent provision prohibiting certain conduct: contacting Nancy. By its terms, the prohibition was not conditioned on defendant's release or commitment but was required as long as the Order was in effect. We hold that the trial court did not err in denying defendant's motion to dismiss the felony stalking charge.

II. Motion to Dismiss Felony Obstruction of Justice Charges

[2] Defendant's second and final argument on appeal is that the trial court erred by denying his motion to dismiss the felony obstruction of justice charges because the crimes can be committed without deceit and intent to defraud. Defendant claims that the trial court concluded that deceit and intent to defraud are not necessary and inherent elements of obstruction of justice.

The indictment in 15 CRS 4737 alleged that defendant

> unlawfully, willfully and feloniously obstructed justice with deceit and intent to defraud by intentionally giving false information to the District Attorney's Office by writing a letter purporting to be from the victim in Wake County case 15 CRS 200503 recanting her earlier statements, implicating the charging officer in highly unethical and illegal behavior, and threatening to place explosives in the Wake County Courthouse. This act was done in violation of the common law of North Carolina and against the peace and dignity of the State.

Similarly, the indictment in 15 CRS 5832 alleged defendant

> unlawfully, willfully and feloniously obstructed justice with deceit and intent to defraud by intentionally sending

> a letter purporting to be from the victim in his pending court cases and containing a bomb threat to the personnel of the United States Federal Courthouse located on New Bern Avenue, Raleigh, NC 27601. This act was done in violation of the common law of North Carolina and against the peace and dignity of the State.

At trial, defendant argued that the obstruction of justice charges should be misdemeanors, not felonies, based on *State v. Glidden*, 317 N.C. 557, 346 S.E.2d 470 (1986). The trial court granted defendant's motion to dismiss the obstruction of justice charge in 15 CRS 5832, since the evidence showed that the offense was never completed -- the letter never reached the Federal Building -- and instead instructed on the lesser included offense of attempted obstruction of justice, a class I felony. But the court refused to dismiss the remaining obstruction of justice felony charges based upon defendant's argument that to be a felony, the offense must always involve deceit and fraud. Defendant now argues this was error and that the North Carolina Supreme Court mandated a definitional test to elevate misdemeanor offenses to felonies under N.C. Gen. Stat. § 14-3(b) (2017).[7], and the obstruction of justice offenses at issue here -- which involved sending threatening letters -- should not have been elevated to a felony because such offense "does not by its definition include the elements of secrecy and malice[.]"

Glidden, which defendant relies on, is inapposite to the present case. In *Glidden*, "[t]he issue before this Court [was] whether the misdemeanor of transmitting an unsigned threatening letter in violation of N.C.G.S. § 14-394 is an offense which is made a felony by N.C.G.S. § 14-3(b)." *Glidden*, 317 N.C. at 558, 346 S.E.2d at 470. The defendant in *Glidden* was charged under N.C. Gen. Stat. § 14-394 (2017), which makes transmission of an anonymous threatening letter a Class 1 misdemeanor; the State then sought to elevate the charge to a felony based upon N.C. Gen. Stat. § 14-3(b). The North Carolina Supreme Court held that the offense of transmitting an unsigned letter did not fall within the class of misdemeanors under N.C. Gen. Stat. § 14-3(b) punishable as felonies because "the offense of transmitting unsigned threatening letters does not by definition include the elements of secrecy *and* malice." *Glidden*, 317 N.C. at 561, 346 S.E.2d at 473.

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7. N.C. Gen. Stat. Ann. § 14-3(b): "If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony."

Here, defendant was charged with common law obstruction of justice; he was not charged under N.C. Gen. Stat. § 14-394 (2017). While it is true that at common law, obstruction of justice was ordinarily treated as a misdemeanor offense, this Court has repeatedly recognized felony obstruction of justice as a crime under N.C. Gen. Stat. § 14-3(b). *See*, *e.g.*, *State v. Cousin*, 233 N.C. App. 523, 537, 757 S.E.2d 332, 342-43 (2014) ("The elements of common law felonious obstruction of justice are: (1) the defendant unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud."); *State v. Blount*, 209 N.C. App. 340, 343, 703 S.E.2d 921, 924 (2011) ("Common law obstruction of justice, the offense with which defendant was charged, is ordinarily a misdemeanor. N.C. Gen. Stat. § 14-3(b) provides that a misdemeanor may be elevated to a felony if the indictment alleges that the offense is infamous, done in secrecy and malice, or done with deceit and intent to defraud." (Citations, quotation marks, brackets, and ellipses omitted)). We are bound by prior decisions of this Court. *See*, *e.g.*, *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.").

The indictments here properly alleged all necessary elements of felonious obstruction of justice. We hold that the trial court properly denied defendant's motion to dismiss the charges of felony obstruction of justice and felony attempted obstruction of justice.

Conclusion

We find no error with the trial court's judgment.

NO ERROR.

Judges HUNTER and DAVIS concur.

STATE v. PARISI

[259 N.C. App. 879 (2018)]

STATE OF NORTH CAROLINA
v.
JEFFREY ROBERT PARISI

No. COA17-1221

Filed 5 June 2018

Motor Vehicles—driving while impaired—probable cause—odor of alcohol, open box, admission to drinking, clues of impairment

The State presented sufficient evidence that a law enforcement officer had probable cause to stop and cite defendant for driving while impaired where the officer heard the occupants of defendant's car arguing as the car approached the checkpoint, there was an open box of alcoholic beverages in the car, defendant had glassy and watery eyes, defendant emitted an odor of alcohol, defendant admitted he had consumed three beers, and defendant exhibited clues of impairment during field sobriety tests.

Judge HUNTER, Robert N., dissenting.

Appeal by the State from orders entered 13 January 2016 by Judge Michael D. Duncan in Wilkes County Superior Court and 11 March 2016 by Judge Robert J. Crumpton in Wilkes County District Court. Heard in the Court of Appeals 1 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellee.

CALABRIA, Judge.

Where the State presented sufficient evidence that a law enforcement officer had probable cause to stop defendant, the trial court erred in granting defendant's motion to suppress the stop. We reverse and remand.

I. Factual and Procedural Background

On 1 April 2014, Jeffrey Parisi ("defendant") was cited for driving while impaired by Officer Gregory Anderson ("Officer Anderson") of the Wilkesboro Police Department. At a 17 June 2015 hearing in Wilkes

County District Court, defendant made an oral pretrial motion to suppress the stop that resulted in the citation, alleging a lack of probable cause, and a motion to dismiss. The district court granted defendant's motions, and the State provided oral and written notice of appeal. The court subsequently entered its written "Preliminary Order of Dismissal" ("the Preliminary Order"), which, despite its caption, only granted defendant's motion to suppress. Again, the State provided written notice of appeal.

The appeal was heard in Wilkes County Superior Court on 13 November 2015. Following the hearing, the court entered an order on 11 January 2016 affirming the decision of the district court to grant defendant's motions ("the Superior Court Order"). The matter was remanded, and on 11 March 2016, the district court entered a "Final Order Granting Motion to Suppress and Motion to Dismiss" ("the Final Order"), granting defendant's motions. The State once more appealed to superior court. On 6 April 2016, the superior court affirmed the Final Order.

The State appealed the matter to this Court. On 7 February 2017, this Court entered its opinion, dismissing in part, vacating in part, and remanding the matter. *State v. Parisi*, ___ N.C. App. ___, ___ S.E.2d ___, COA16-635 (2017). In this decision, we held that "the superior court erred in its review of the district court's preliminary determination to suppress, when it remanded the case to the district court with instructions to dismiss the case." We further held, however, that the State had no right to appeal the district court's final order granting defendant's motion to suppress, which remained undisturbed. We noted that the suppression of the stop did not mandate the dismissal of the case, vacated the orders of dismissal, and remanded for further proceedings.

On 28 July 2017, the State filed a petition for writ of certiorari, seeking this Court's review of the Superior Court Order and the Final Order. We granted this petition on 16 August 2017.

II. Motion to Suppress

In its sole argument on appeal, the State contends that the trial court erred in concluding that Officer Anderson lacked probable cause to stop defendant, and in granting defendant's motion to suppress. We agree.

A. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn

support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

B. Analysis

At trial, Officer Anderson testified that, on 1 April 2014, he was operating a check point on a public street. Defendant was driving the vehicle and, as it approached, Officer Anderson "kind of heard a disturbance between the occupants of the vehicle." He said that he could not hear what they were saying, but it sounded like they were arguing. After the vehicle stopped at the check point, Officer Anderson approached the driver's door and saw "an open box of alcoholic beverage[]" on the passenger floorboard. He did not see any open individual containers. Officer Anderson testified that defendant had "glassy, watery eyes[,]" and emitted "an odor of alcohol[.]" When asked whether he had consumed alcohol, defendant told Officer Anderson that he had consumed three beers earlier in the evening.

Officer Anderson administered the horizontal gaze nystagmus test ("HGN"), a test of impairment, and found that defendant demonstrated six "clues" indicating impairment. Officer Anderson also administered a "walk and turn" test, and defendant missed multiple steps, also an indicator of impairment. Lastly, Officer Anderson administered a "one leg stand" test, and defendant used his arms and swayed, also indicators of impairment. As a result, Officer Anderson concluded that defendant was impaired.

In the Preliminary Order, the district court found that defendant arrived at the check point, that Officer Anderson noticed defendant's glassy eyes and an open container of alcohol, and that Officer Anderson administered multiple field sobriety tests. However, the court went on to find that Officer Anderson "did not observe any other indicators of impairment during his encounter with Defendant, including any evidence from Defendant's speech[,]" and concluded that "[t]he fact[s] and circumstances known to Anderson as a result of his observations and testing of Defendant are insufficient, under the totality of the circumstances, to form an opinion in the mind of a reasonable and prudent man/officer that there was probable cause to believe Defendant had committed the offense of driving while impaired." Likewise, the Superior Court Order noted Anderson's observations, but concluded that they were insufficient. The Final Order incorporated the findings and conclusions of the Superior Court Order by reference.

The State offers ample case law to suggest that the findings of the lower courts did not support an ultimate conclusion that Officer Anderson lacked probable cause. Particularly relevant is the case of *State v. Townsend*, 236 N.C. App. 456, 762 S.E.2d 898 (2014). In *Townsend*, the officer stopped the defendant at a check point, and immediately noticed the defendant's bloodshot eyes and odor of alcohol. Two alco-sensor tests yielded positive results, and the defendant exhibited clues indicating impairment on three field sobriety tests. We held that this was sufficient to establish probable cause. *Id.* at 465, 762 S.E.2d at 905. In the instant case, as in *Townsend*, Officer Anderson noticed defendant's glassy eyes and odor of alcohol, and defendant exhibited clues indicating impairment on three field sobriety tests. And while no alco-sensor test was administered in the instant case, defendant himself volunteered the statement that he had been drinking earlier in the evening.

Our Supreme Court has held that while the odor of alcohol, standing alone, is not evidence of impairment, the "[f]act that a motorist has been drinking, when considered in connection with . . . other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. 20-138." *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 794 (1970) (quoting *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965)). Once again, in the instant cast, Officer Anderson was presented with the odor of alcohol, defendant's own admission of drinking, and multiple indicators on field sobriety tests demonstrating impairment.

The superior court, in the Superior Court Order, cited the unpublished case of *State v. Sewell*, 239 N.C. App. 132, 768 S.E.2d 650 (2015) (unpublished), as part of its reasoning in finding a lack of probable cause. We note first that, as an unpublished decision, *Sewell* is not binding upon the courts of this State. Additionally, while many such cases are extremely fact-specific, it is crucial to note that *Sewell* is easily distinguished from the instant case. The officer in *Sewell* did not identify the defendant as the source of the odor of alcohol. The defendant in *Sewell* exhibited no clues of impairment during the "one leg stand" and "walk and turn" tests. In the instant case, by contrast, Officer Anderson clearly identified defendant as the source of the odor of alcohol, and defendant exhibited clues of impairment during all three field sobriety tests. Further, in each of their orders, the lower courts found as much.

Upon our review, it seems clear that the facts, as supported by the evidence and as found by the district and superior courts, supported a conclusion that Officer Anderson had probable cause to stop and cite defendant for driving while impaired. Accordingly, we hold that the trial

court erred in granting defendant's motion to suppress the stop. We reverse the lower courts' orders and remand for further proceedings.

REVERSED AND REMANDED.

Judge BRYANT concurs.

Judge HUNTER dissents in a separate opinion.

HUNTER, JR., Robert N., Judge, Dissenting.

I respectfully dissent from the majority reversing the trial courts' grants of Defendant's motion to suppress. Instead, I would affirm the trial courts' orders.

"The standard of review in evaluating a trial court's ruling on '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. Hammonds*, 370 N.C. 158, ___, 804 S.E.2d 438, 441 (2017) (quoting *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015)). "If no exceptions are taken to findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (internal quotation marks and citation omitted). "Where the findings of fact support the conclusions of law, such findings and conclusions are binding upon us on appeal." *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991) (citation omitted). "[T]he trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998) (citation omitted).

Both Defendant and the State cite to numerous cases addressing probable cause to arrest for driving while impaired. The State, and the majority, primarily rely on *State v. Townsend*, 236 N.C. App. 456, 762 S.E.2d 898 (2014). While the findings of fact *sub judice* are analogous to *some* of the findings of fact in *Townsend*, differences between the orders are critical.

In *Townsend*, an officer stopped defendant at a checkpoint. *Id.* at 458, 762 S.E.2d at 901. The officer noticed defendant's "bloodshot eyes" and smelled a "moderate odor of alcohol about his breath." *Id.* at 458, 465, 762 S.E.2d at 901, 905. Defendant told the officer he drank "a couple of beers earlier" and stopped drinking an hour before the stop. *Id.* at 465, 762 S.E.2d at 905. The officer administered two alco-sensor tests, both

which tested position for alcohol. *Id.* at 458, 465, 762 S.E.2d at 901, 905. Additionally, defendant "exhibited clues" of impairment during three different field sobriety tests. *Id.* at 458, 465, 762 S.E.2d at 901, 905.

The trial court denied defendant's motion to suppress for lack of probable cause, and defendant appealed. *Id.* at 459, 762 S.E.2d at 901-02. Our Court cited the facts stated *supra* and the trial court's acknowledgement of the officer's twenty-two years' of experience. *Id.* at 465, 762 S.E.2d at 905. Accordingly, our Court concluded the officer had probable cause to arrest defendant. *Id.* at 465, 762 S.E.2d at 905.

Here, unlike in *Townsend*, the trial courts entered several findings weighing against a conclusion of probable cause.[1] First, Officer Anderson did not administer an alco-sensor test. Regarding Defendant's admission of drinking the night of the checkpoint, the order contains no findings of *exactly when* Defendant drank in the night. *Cf. id.* at 465, 762 S.E.2d at 905 (the trial court found defendant admitted to drinking "a couple of beers" and stopped drinking an hour before officers stopped him). Moreover, the trial courts found no facts about Officer Anderson's experience, distinguishing this case from *Townsend*. *See id.* at 465, 762 S.E.2d at 905. Of significant importance, while Officer Anderson testified as to the number of "clues" indicating impairment during the horizontal gaze nystagmus test, the trial courts entered no findings on the number of clues. Indeed, the finding regarding the horizontal gaze nystagmus test states Officer Anderson "found clues of impairment[,]" without stating the number. In addition to the findings of fact included in the majority, the trial courts found Defendant did not slur his speech, did not drive unlawfully or "bad[ly,]" answered Officer Anderson's questions, and was not "unsteady" on his feet.

The uncontested findings of fact support the trial courts' conclusions Officer Anderson lacked probable cause to arrest Defendant. Additionally, *Townsend*, as distinguished from the case *sub judice*, does not mandate reversal. Affording the trial courts "great deference" on the ruling on a motion to suppress, I would affirm the trial courts' orders. *McClendon*, 130 N.C. App. at 377, 502 S.E.2d at 908. Accordingly, I respectfully dissent.

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1. The State does not challenge any of the findings of fact. Thus, the findings are binding on appeal. *Baker*, 312 N.C. at 37, 320 S.E.2d at 673 (citation omitted). In his appellee brief, Defendant challenges two findings of fact. However, Defendant did not cross-appeal.

STATE v. RANDALL

[259 N.C. App. 885 (2018)]

STATE OF NORTH CAROLINA
v.
JEREMY MICHAEL RANDALL, DEFENDANT

No. COA17-924

Filed 5 June 2018

1. Criminal Law—post-conviction relief—DNA testing—materiality

Where defendant pleaded guilty to numerous counts of rape and statutory rape and the evidence included defendant's confession and the victim's report that defendant sexually abused her, the trial court properly denied defendant's motion for post-conviction DNA testing. Defendant failed to meet his burden of showing that there was biological evidence related to his case which would be material, and not merely relevant, to his defense.

2. Criminal Law—post-conviction DNA testing—inventory of biological evidence—preservation of issues

Defendant's argument that the trial court erred by failing to order an inventory of biological evidence pursuant to N.C.G.S. § 15A-268 was not properly preserved for appeal. While defendant's motion for post-conviction DNA testing triggered a requirement for an inventory, the law enforcement agency involved indicated the only evidence it had which was relevant to defendant's case was a computer. Defendant stated he also requested an inventory from a hospital and a social services agency, but he failed to include in the record on appeal any written requests pursuant to subsection 15A-268(a7) or that the trial court considered such a request.

Appeal by Defendant from order entered 3 March 2017 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 20 February 2018.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for the Defendant-Appellant.

DILLON, Judge.

Jeremy Michael Randall ("Defendant") appeals from an order entered by the trial court denying his motion for post-conviction DNA testing.

I. Background

In 2008, Defendant pleaded guilty to twelve counts of first-degree rape and six counts of statutory rape. He was sentenced pursuant to his plea agreement to a minimum of 240 and a maximum of 297 months.

In May 2016, Defendant filed a motion with the trial court, *pro se*, seeking DNA testing of evidence he alleged was collected by law enforcement during their investigation, including vials of blood and saliva, a bag of clothes, and a rape kit. Defendant contended that the evidence he sought to have tested "would prove that [] Defendant was NOT the perpetrator of the crimes allegedly committed on or between the years 2006, and 2007, and the requested D.N.A. testing is material to [] [D]efendant's exoneration." Defendant also filed a motion for appropriate relief ("MAR"), filed several addendums, and requested an inventory of biological evidence related to the investigation.

The trial court denied Defendant's motions. Defendant has filed a petition for writ of *certiorari* with our Court in the event that he has failed to properly preserve his right of appeal. We hereby grant Defendant's petition as to any potential defect in order to reach the merits of Defendant's appeal.

II. Analysis

On appeal, Defendant contends that the trial court erred by (1) denying his motion for post-conviction DNA testing, and (2) failing to order an inventory of biological evidence. We address each argument in turn.

A. Motion for Post-Conviction DNA Testing

[1] The standard of review for denial of a motion for post-conviction DNA testing is "analogous [to the] standard of review for a denial of a motion for appropriate relief . . . because the trial court sits as finder of fact in both circumstances." *State v. Lane*, ___ N.C. ___, ___, 809 S.E.2d 568, 574 (2018). Accordingly, the trial court's findings of fact are "binding on [our] Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion." *Id.*

> A trial court's determination of whether defendant's request for postconviction DNA testing is "material" to his defense, as defined in N.C. [Gen. Stat.] § 15A–269(b)(2), is

> a conclusion of law, and thus we review *de novo* the trial court's conclusion that defendant failed to show the materiality of his request.

Id. (emphasis added). Our Supreme Court has recently reiterated that the determination of materiality must be made "*in the context of the entire record*, and hinges upon whether the evidence would have affected the jury's deliberations." *Id.* at ___, 809 S.E.2d at 575 (internal citations omitted) (emphasis added).

Pursuant to N.C. Gen. Stat. § 15A-269, a defendant may make a motion before the trial court for the performance of DNA testing if the biological evidence meets a number of requirements, primarily that the biological evidence "[i]s material to the defendant's defense." N.C. Gen. Stat. § 15A-269(a) (2015). According to the plain language of the statute, the defendant has the burden to make the required showing that the biological evidence is material. *State v. Turner*, 239 N.C. App. 450, 453, 768 S.E.2d 356, 358-59 (2015).

Our Supreme Court has defined materiality in a post-conviction DNA context as follows: "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." *State v. Lane*, ___ N.C. ___, ___, 809 S.E.2d 568, 575 (2018). That is, materiality of evidence in the context of post-conviction DNA testing is different and more narrow than materiality of evidence in the context of a trial. Whereas evidence is deemed material at trial if it merely has a significant relationship to something relevant to the case, evidence is material in a post-conviction DNA setting only if there is a reasonable probability that its existence would have resulted in a different outcome.

In the present matter, Defendant pleaded guilty. We acknowledge the inherent difficulty in establishing the materiality required by N.C. Gen. Stat. § 15A-269 for a defendant who pleaded guilty: a defendant must show that there is a reasonable probability that DNA testing would have produced a different outcome; for example, that Defendant would not have pleaded guilty *and otherwise would not have been found guilty.* However, we do not believe that the statute was intended to completely forestall the filing of a such a motion where a defendant did, in fact, enter a plea of guilty. The trial court is obligated to consider the facts surrounding a defendant's decision to plead guilty in addition to other evidence, in the context of the entire record of the case, in order to determine whether the evidence is "material." *See Lane*, ___ N.C. at ___, 809 S.E.2d at 577 (concluding that "[w]here ample evidence, including

eyewitness testimony and defendant's own admission to law enforcement, supported a finding of defendant's guilt, defendant's motion for post-conviction DNA testing did not allege a 'reasonable probability that the verdict would have been more favorable to the defendant' ").

We note that the trial court's order clearly indicates its consideration of the circumstances surrounding Defendant's guilty plea. The trial court found, in relevant part, as follows:

> 1. The Defendant . . . pled guilty according to a plea arrangement and in doing so he swore under oath that he was in fact guilty, that he was satisfied with his lawyer's legal services, that the plea was freely, understandingly and voluntarily made. The Court having heard the sworn statements of counsel found that the plea was freely, understandingly and voluntarily made;
>
> 2. . . . . Defendant failed to allege specific facts showing materiality as required under N.C. Gen. Stat. § 15A-269 and the Defendant made only conclusory statements that the evidence is material. His statements are insufficient to compel relief sought. . . .
>
> . . . .
>
> 4. There is no credible evidence that the Defendant was denied effective assistance of counsel at the time he entered his plea of guilty or that the documents he claim[s] would assert his innocence would have been beneficial to the Defendant had the case proceeded to trial in that his victim at the time of his conviction was 14 years old and still a minor.

Our Court has held that a defendant's burden to show materiality "requires more than the conclusory statement that the ability to conduct the requested DNA testing is material to the defendant's defense." *State v. Cox*, 245 N.C. App. 307, 312, 781 S.E.2d 865, 868 (2016) (internal marks and citation omitted). Defendant's assertions in his motion that his DNA would not be found "in the rape kit collected by [the hospital]" essentially amounts to a statement that testing would show that he was not the perpetrator of the crime. In *Cox*, we concluded that the defendant's statement that "there is a very reasonable probability that [the DNA testing] would have shown that the Defendant was not the one who had sex with the alleged victim" was insufficient to establish materiality. *Id.*; *see also State v. Foster*, 222 N.C. App. 199, 205, 729 S.E.2d 116, 120

(2012) (holding that the following statement was insufficient to meet the requirements of the statute: "the ability to conduct the requested DNA testing is material to the Defendant's defense").

We conclude that Defendant has failed to show that DNA testing would have been material to his defense. Specifically, here, it appears from the record that Defendant was convicted of multiple counts of statutory rape for encounters he had with a single victim which took place over many months; that Defendant confessed to the crimes; and that the victim reported that Defendant had sexually abused her. In his motion, Defendant requested that that DNA testing be performed on certain items—including clothing, bodily fluids, strands of hair, and a rape kit—recovered from the victim over a month *after* Defendant's last alleged contact with the victim. He argues that testing would have shown that his DNA was not present on any of those items. The lack of DNA on those items, recovered well after the alleged crimes took place, would not conclusively prove that Defendant was *not* involved in a sexual "relationship" with the minor victim over a period of several months. *See State v. Brown*, 170 N.C. App. 601, 609, 613 S.E.2d 284, 288 (2005), *superseded by statute on other grounds*, *State v. Norman*, 202 N.C. App. 329, 332–33, 688 S.E.2d 512, 515 (2010) (noting that the statute does not authorize testing to establish a *lack* of biological material). In addition, the Buncombe County Sheriff's Office indicated that the only relevant evidence it had—or ever had—was a Dell computer, which officers searched for child pornography with Defendant's consent in 2008.

Given this evidence, we agree with the trial court that Defendant failed to show that there was biological evidence related to his case which would be "material to [his] defense." N.C. Gen. Stat. § 15A-269(a)(1); *see also State v. Floyd*, 237 N.C. App. 300, 303, 765 S.E.2d 74, 77 (2014) ("Defendant failed to show how DNA testing would produce 'material' evidence; that is, he failed to show how such testing would produce evidence sufficient to create a reasonable probability of a different result, given the evidence already in the trial record."). In conclusion, "[w]hile the results from DNA testing *might* be considered 'relevant,' had they been offered at trial, they are not 'material' in this postconviction setting." *State v. Floyd*, 237 N.C. App. 300, 302, 765 S.E.2d 74, 76 (2014). Accordingly, we affirm the trial court's denial of Defendant's motion for post-conviction DNA testing.

B. Request for Inventory of DNA Evidence

[2] Defendant also argues that the trial court erred in failing to order an inventory of biological evidence pursuant to N.C. Gen. Stat. § 15A-268.

This section requires the preservation of "any physical evidence, regardless of the date of collection, that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution." N.C. Gen. Stat. § 15A-268(a1) (2015).

We note that Defendant's motion for post-conviction DNA testing "triggered a requirement to inventory the biological evidence pertaining to that case and provide the inventory list . . . to the prosecution, the petitioner, and the court." *State v. Doisey*, 240 N.C. App. 441, 445, 770 S.E.2d 177, 180 (2015) (internal marks omitted). In his motion, Defendant requested that the trial court require "custodial *law enforcement* agency/agencies to inventory the biological evidence relating to this case[.]" (Emphasis added). In response, the State contacted the Buncombe County Sheriff's Department, which indicated that the only piece of evidence it had which was relevant to Defendant's case was the Dell computer.

A defendant can also request an inventory of biological evidence relevant to the defendant's case from a "custodial agency" under N.C. Gen. Stat. § 15A-268(a7) by making a *written request*. N.C. Gen. Stat. § 15A-268(a7). Defendant contends that he also requested an inventory from a hospital and from DSS, whom he alleged had the clothing, hair and blood samples, etc.; however, there is no evidence of these requests in the record. Without evidence that Defendant made proper requests pursuant to N.C. Gen. Stat. § 15A-268(a7), and without any indication that the trial court considered the issue below, "there is no ruling under [S]ection 15A-268(a7) for [our] Court to review." *Doisey*, 240 N.C. App. at 448, 770 S.E.2d at 182. Accordingly, we agree with the State that consideration of Defendant's argument under Section 15A-268(a7) is not properly before our Court and should be dismissed. *See id.*

AFFIRMED IN PART, DISMISSED IN PART.

Judges CALABRIA and TYSON concur.

STATE v. SUTTON

[259 N.C. App. 891 (2018)]

STATE OF NORTH CAROLINA
v.
LARIS SUTTON, DEFENDANT

No. COA17-35

Filed 5 June 2018

1. Search and Seizure—traffic stop—crossing double yellow lines—reasonable suspicion

The trial court's unchallenged findings of fact that a law enforcement officer observed defendant committing a traffic violation by driving across the double yellow lines in the center of the road were sufficient to support a conclusion that the officer had reasonable suspicion to conduct a traffic stop.

2. Search and Seizure—traffic stop—timing of events—conflicting evidence

The trial court's findings of fact regarding the amount of time the law enforcement officer waited for a canine unit to arrive during defendant's traffic stop were supported by competent evidence, despite some confusion in the testimony by the officer, since it is within the trial court's purview to weigh the credibility of witnesses and resolve any conflicts in the evidence.

3. Search and Seizure—traffic stop—reasonable suspicion to extend—beyond initial reason

The trial court properly concluded a law enforcement officer had reasonable suspicion to extend defendant's traffic stop beyond the initial reason for the stop upon multiple circumstances, including (1) the officer was on patrol due to complaints about drug activity near a particular road, (2) the officer had been advised to look out for defendant based upon reports defendant would be transporting large quantities of methamphetamine, (3) defendant appeared to be under the influence, and (4) another person known to the officer approached during the stop and gave information that the vehicle may be carrying drugs.

Appeal by defendant from judgment entered on or about 9 August 2016 by Judge Alan Z. Thornburg in Superior Court, Jackson County. Heard in the Court of Appeals 8 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kacy L. Hunt, for the State.

Julie C. Boyer, for defendant-appellant.

STROUD, Judge.

Defendant appeals from the trial court's order denying his motion to suppress all evidence recovered as a result of a traffic stop and subsequent dog sniff. Although the law enforcement officer had seen defendant's truck cross only once about one inch over the double yellow lines on a curvy road, crossing the center line is a traffic violation which is sufficient to justify the stop. After the stop, the officer's observations of defendant and additional information that defendant had drugs in the truck gave the officer reasonable suspicion to request a canine sniff of the car, and the canine officer arrived without unreasonable delay. We affirm the trial court's order.

Background

Defendant was indicted on trafficking in methamphetamine by transportation, trafficking in methamphetamine by possession, felonious maintaining a vehicle for keeping and/or selling a controlled substance, possession of methamphetamine, possession with intent to sell and/or deliver methamphetamine, possession of drug paraphernalia, and driving left of center on 29 February 2016. On 5 August 2016, defendant moved to suppress the traffic stop which led to his arrest based on both a lack of reasonable suspicion to justify the initial stop and on the search of defendant's vehicle after the "passage of an amount of time far in excess of any justification for said stop and seizure." The trial court held a hearing on the motion to suppress on 8 August 2016 and denied the motion both on the initial stop and to the extension of time and dog sniff. The trial court later entered a written order in accord with its rendition of the ruling on the motion to suppress in open court on 8 August 2016. Defendant reserved his right to appeal the ruling on the motion to suppress and pled guilty to all of the charges against him on or about 9 August 2016. Defendant timely filed written notice of appeal from the order denying motion to suppress and the judgment entered upon his guilty plea.

Analysis

On appeal, defendant challenges the trial court's conclusion of law that there was reasonable suspicion to stop defendant's vehicle. He also challenges some of the trial court's findings of fact and conclusions of law regarding the officer's questioning of defendant after the stop and contends the traffic stop was unreasonably extended beyond the time necessary for the traffic violation.

I. Traffic stop

[1] What a difference a few inches can make in cases dealing with traffic stops. This Court and many other appellate courts have struggled with making fine distinctions between weaving within a travel lane and "weaving plus," such as weaving repeatedly within a lane, weaving and barely crossing a fog line, weaving in the wee hours of the morning, weaving near a bar, weaving while driving under the speed limit, and many other factors. The rules regarding weaving are hazy at best.

But there is a "bright line" rule in some traffic stop cases. Here, the bright line is a double yellow line down the center of the road. Where a vehicle actually crosses over the double yellow lines in the center of a road, even once, and even without endangering any other drivers, the driver has committed a traffic violation of N.C. Gen. Stat. § 20-146 (2017). This is a "readily observable" traffic violation and the officer may stop the driver without violating his constitutional rights. *See, e.g.*, *State v. Johnson*, __ N.C. __, __, 803 S.E.2d 137, 141 (2017) ("To be sure, when a defendant does in fact commit a traffic violation, it is constitutional for the police to pull the defendant over." (Citation omitted)).

Defendant challenges none of the findings of fact regarding the initial traffic stop, so they are binding on appeal:

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

The trial court found these facts which are relevant to the traffic stop:

> 6. Daniel Wellmon is an officer with the Jackson County Sheriff's office. Officer Wellmon received his Basic Law Enforcement Training in 2009 and has maintained that certification each year through in-service training. In addition,

> Officer Wellmon is certified to operate an Intoxilyzer and has maintained that certification as required by law.
>
> 7. Officer Wellmon has worked as a Patrol officer with the Jackson County Sheriff's office since 2009 handling, among other things, serving papers, traffic stops, regular patrol duties and community patrols. During his Tenure as a Deputy Sheriff, Officer Wellmon has made in excess of 500 Chapter 20 related investigations.
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> 8. On the 13th day of January, 2015 Officer Wellmon was working a regular day shift beginning at 6 am through 6 pm. He was operating a marked Dodge Charger equipped with Blue lights, sirens, radio and a computer. His assignment for that day was to conduct a community patrol of Cabe Road because the Sheriff's office had received multiple complaints about drug activity in that area.
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> 9. That same morning Officer Wellmon was advised by a State Bureau of Investigation Agent, who was involved in drug related investigations, to be on the lookout for a black vehicle driven by [defendant]. According to the Agent, this vehicle was bringing large quantities of methamphetamine to a supplier off of Cabe Road.
>
> 10. At approximately 3:09 pm on January 13, 2016, Officer Wellmon was traveling on Cabe Road behind a white Ford Ranger Pick-up truck. Cabe Road is a dead end, curvy, paved road located in Jackson County and is of sufficient width for two lanes of travel. The officer observed the Ford Ranger travel left of center with the driver's side tires crossing over the double yellow lines approximately one inch.
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> 11. Officer Wellmon activated his blue lights and the vehicle pulled into Comfort Road, a one lane gravel driveway off of Cabe Road.

Defendant argues that the trial court erred in concluding that "Officer Wellmon had reasonable suspicion to stop the Defendant's vehicle for failing to operate his vehicle on the right half of the roadway that was of sufficient width for more than one lane of traffic in violation of N.C.G.S. 20-146(A)." Defendant relies heavily on *State v. Derbyshire*, 228 N.C. App. 670, 677, 745 S.E.2d 886, 891 (2013) and contends that the facts of this case are "substantially similar, and, in fact, even less suspicious than the facts presented in *Derbyshire*."

But the facts of *Derbyshire* differ greatly from this case. *Derbyshire* was a "weaving plus" case in which this Court held that the officer did not have a sufficient basis for a reasonable suspicion to stop the defendant. *Id.* ("On a number of occasions, this Court has determined that an officer has the reasonable suspicion necessary to justify an investigatory stop after observing an individual's car weaving in the presence of certain other factors. This has been referred to by legal scholars as the 'weaving plus' doctrine." (Citation omitted)). But the *Derbyshire* Court emphasized in a footnote that the defendant's car did *not* cross the center line of the road:

> The right side of Defendant's tires did not cross the line separating his lane of traffic from oncoming traffic. Rather, the tires crossed the line separating those two lanes of traffic headed in the same direction. At no point did Defendant cross the center line or the solid white line on the outer edge of the road.

Id. at 675, n.1, 745 S.E.2d at 890, n.1. *Derbyshire* and the other cases cited by defendant's brief are weaving or "weaving plus" cases; none address readily observable traffic violations.

Here, the uncontested findings of fact show that the officer saw defendant's vehicle cross the double yellow lines in the center of the road, in violation of N.C. Gen. Stat. § 20-146(a). Cases from this Court and the Supreme Court have consistently held that when an officer observes a traffic violation, the officer has reasonable suspicion to stop the vehicle. In *State v. Jones*, the officer saw the defendant's truck cross the double yellow lines in the center of the road, " 'slightly left of center in a curve.' " *State v. Jones*, __ N.C. App. __, __ S.E.2d __, 2018 WL 1597450, at *1 (Apr. 3, 2018) (No. COA17-796). This Court rejected the defendant's argument in *Jones* that the officer needed some additional basis for reasonable suspicion for a traffic stop where he had seen the traffic violation:

> Defendant's argument . . . ignores the fact that Trooper Myers' direct observations provided reasonable suspicion for the vehicle stop. Under North Carolina law, Defendant's act of crossing the double yellow centerline clearly constituted a traffic violation. N.C. Gen. Stat. § 20-150(d) (2017) ("The driver of a vehicle shall not drive to the left side of the centerline of a highway upon the crest of a grade or upon a curve in the highway where such centerline has been placed upon such highway by the Department of Transportation, and is visible.").

> This Court has made clear that an officer's observation of such a traffic violation is sufficient to constitute reasonable suspicion for a traffic stop.

Jones, __ N.C. App. at __, __ S.E.2d at __, 2018 WL 1597450, at *4 (citations omitted).

Officer Wellmon saw defendant's truck cross the double yellow lines in the center of the road, which is a traffic violation, so the trial court correctly concluded that he had reasonable suspicion to stop defendant's vehicle based upon the uncontested findings of fact. This argument is without merit.

II. Extension of Traffic Stop

A. Findings of Fact

[2] Defendant next argues that the "trial court erred in finding and concluding that the length and scope of the stop was reasonable under the totality of the circumstances as it is not supported by competent evidence." Defendant challenges four findings of fact as not supported by the evidence. "The applicable standard in reviewing a trial court's determination 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." *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (citations and quotation marks omitted).

The trial court first made these uncontested findings of fact regarding the stop itself and extension of the stop:

> 12. Officer Wellmon approached the vehicle and identified the defendant to be the driver. Officer Wellmon noticed that [defendant] appeared confused. His speech was so fast that the officer had a difficult time understanding him. The defendant began to stutter and mumble his words.
>
> 13. As the Defendant handed his license and registration to the Officer his hands were quivering.
>
> 14. As Officer Wellmon asked the defendant questions, the defendant's eyes veered away from the officer and he would not make eye contact.
>
> 15. In Officer Wellmon's opinion, the nervousness exhibited by the Defendant was much more extreme than that of any motorists he had previously stopped for a Chapter 20 violation.

16. Officer Wellmon observed the Defendant's eyes to be bloodshot and glassy, like a mirror, and the skin underneath his eyes were ashy in appearance. The defendant, in answer to the officer's inquiry, denied consuming any impairing substance.

17. Based on Officer Wellmon's training and experience, the behaviors and physical appearance of the Defendant were consistent with someone having used methamphetamine.

18. When asked where he was going, the defendant told the Officer he was going to "Rabbit's" house because he had sold "Rabbit" his car and needed to collect the money.

19. The Officer knew "Rabbit" to be the nickname of Archie Stanberry. Furthermore, the officer had prior knowledge that Archie Stanberry was involved with methamphetamine and had previous drug charges involving methamphetamine. Officer Wellmon also knew that Archie Stanberry's house was located at Shadrack Lane, which is in close proximity to Cabe Road.

20. That the defendant had a small dog in his vehicle that was barking and growling at the officer. When the Officer asked if the dog would bite, the defendant, of his own volition, got out of his vehicle. Officer Wellmon testified that it is unusual for someone to exit their vehicle without being requested to do so by the Officer.

21. Because of concerns for officer safety, Officer Wellmon asked the defendant if he could pat him down for weapons. The defendant said he did not mind. During the process of checking for weapons, the defendant talked the entire time, stuttered and the officer was unable to understand anything he said.

22. The officer asked the defendant to walk to the back of his truck and as he did so, the defendant placed his hand on the vehicle for stability. When he reached the back of his vehicle, the defendant leaned on the tailgate.

23. Officer Wellmon did not perform field sobriety tests or seek a breath or blood sample from [defendant].

24. Officer Wellmon then asked the defendant for consent to search and the defendant denied that request.

25. Officer Wellmon, requested Sgt. Kenneth Woodring, who had just arrived on the scene, to make contact with a Canine Unit. Jackson County Sheriff's Office did not have a canine at that time. Macon County was closest to the location, but their canine was unavailable. At 3:17, Officer Wellmon was told that a canine from Cherokee was on the way.

26. Officer Wellmon went to his patrol vehicle to check on the validity of the defendant's license, registration and for any outstanding warrants. Before getting into his vehicle and while his driver's side door was open, Mallory Gayosso, approached Officer Wellmon and told him "that was Archie's dope in the vehicle".

27. Officer Wellmon knew that Ms. Gayosso lived near where the officer and the defendant were parked on Comfort Road. He also knew that Ms. Gayosso has given drug information to law enforcement in the past.

28. Approximately 6 minutes later, while Officer Wellmon was conducting his license and record checks, Ms. Gayosso approached him once again. She told him she had just walked down to Cabe Road from Comfort Road to get milk from her mother. Ms. Gayosso told Officer Wellmon that she had "just got off the phone Rabbit" Archie Stanberry, and that "there was dope in the vehicle and it was in a black tackle box and not to let us find it." Ms. Gayosso continued to walk back to her home.

29. During this time, the defendant remained standing at the back of his vehicle speaking with Sgt. Woodring.

Defendant challenges the next four findings as not supported by the evidence.

30. Officer Wellmon ran an inquiry on the defendant's license from Jackson County Dispatch, ran a driver's history on C.J. Leads, checked for any outstanding warrants on N.C. AWARE and NCIC. He determined the defendant's license and registration were valid and there were no outstanding warrants for his arrest. The defendant's license and registration were not returned to him. This process takes officer Wellmon 15 minutes.

> 31. Within six to seven minutes after making that determination, Sgt. Rick Queen from Cherokee Police Department's NRE Division arrived with his canine Bogart. Officer Wellmon testified the Sergeant and his canine arrived at approximately 3:47 pm.
>
> 32. That based on his training and experience and the totality of the circumstances, Officer Wellmon had reasonable suspicion to justify extending the stop until a canine unit arrived.
>
> 33. That six to seven minutes is a reasonable amount of time, following the completion of the officer's Chapter 20 investigation, to detain the Defendant based on the Officer's reasonable suspicion to believe criminal activity is afoot.

Defendant does not challenge the events described in these findings but only the trial court's findings regarding the exact timing of the events. The trial court found that defendant was detained only "six to seven" minutes after Officer Wellmon completed the Chapter 20 investigation. The court also found that "six to seven minutes" after completion of the Chapter 20 investigation was a reasonable amount of time to detain defendant while waiting for the canine officer, based upon Officer Wellmon's reasonable suspicion to believe that defendant was engaging in criminal activity. Defendant argues that "[i]n the thirty minutes from the arrival of the Sergeant to the arrival of the canine unit, Officer Wellmon could have issued a citation" and defendant should have been released. By defendant's calculations, "[i]t was a full fifteen minutes after" 3:32 pm, or 3:47 pm, "when Officer Queen even arrived on the scene with the dog[,]" not "six or seven" minutes. The State notes that although there was some confusion in the testimony regarding exact timing of the events, ultimately Officer Wellmon clarified his testimony about how long he took to check the information on the computer and when he completed the Chapter 20 investigation. Officer Wellmon testified:

> Q. Did you have an occasion at that juncture [after receiving information about defendant's license, registration, or outstanding warrants] to estimate how long it was before the K-9 arrived?
>
> A. Yes.
>
> Q. About how long was it before the K-9 arrived?

A. I would say 15.

Q. After you had completed running all theinformation, correct?

A. Yeah. Once I completed the information, it was probably six -- six, seven minutes.

Q. Okay. I guess I'm somewhat confused. I asked a second ago: How long after you finished running all the information was it before the K-9 arrived?

A. Oh, excuse me. Six to seven minutes.

Q. You had said 15 minutes.

A. I'm sorry. I got confused.

If there was any conflict in the testimony about the timing of events, the trial court resolved that conflict in the findings of fact. "It is well established that the trial court resolves conflicts in the evidence and weighs the credibility of evidence and witnesses." *Jones*, __ N.C. App. at __, __ S.E.2d at __, 2018 WL 1597450, at *2 (citation and quotation marks omitted). The evidence supports the trial court's findings as to the timing of the traffic stop and extension.

B. Conclusions of law

[3] Defendant argues next that even if the extension of time was only six or seven minutes, the trial court erred in concluding that "Officer Wellmon had reasonable suspicion to further question the defendant in that under the totality of the circumstances there existed reasonable articulable suspicion to indicate that criminal activity was afoot" and that "Officer Wellmon had reasonable suspicion to detain the defendant until the arrival of the canine officer and the delay was not unreasonable under the totality of the circumstances in this case." Defendant contends that the extension of the stop during and after the Chapter 20 investigation was "unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution and case law interpreting same." Defendant's argument is based primarily on *Rodriguez v. United States*, __ U.S. __, 191 L. Ed. 2d 492, 135 S. Ct. 1609 (2015).

In *Rodriguez*, the United States Supreme Court addressed "the question [of] whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop." *Id.* at __, 191 L. Ed. 2d at 496, 135 S. Ct. at 1612. The Court held that if a "police stop exceed[s] the time needed to handle the matter for which the stop was made,"

the stop "violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation." *Id.* at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1612 (citation, quotation marks, and brackets omitted).

Defendant contends that the "factual scenario in *Rodriguez* is very similar" to his case. In *Rodriguez*, a police officer saw a vehicle "veer slowly onto the shoulder" of a highway "for one or two seconds and then jerk back onto the road." *Id.* at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1612. Because state law prohibited driving on the shoulder of a highway, the officer stopped Rodriguez for this traffic violation at about 12:06 a.m. *Id.* at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1612. The officer was a canine officer and his dog was with him in his patrol car. *Id*. at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1612. The officer approached Rodriguez's vehicle and got his license, registration and proof of insurance. *Id.* at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1613. He then ran a record check and returned to the vehicle to get the passenger's license and question him about where they were coming from and where they were going. *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. The officer returned to his patrol car to run a record check on the passenger and called for a second officer. *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. He returned to Rodriguez's vehicle a third time to issue a written warning ticket at about 12:27 or 12:28 am. *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. At that point, the officer acknowledged that he had taken care of " 'all the reason[s] for the stop[.]' " *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. But then he asked for permission to walk his dog around defendant's car, and Rodriguez said no. *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. He had Rodriguez get out of the car and wait for the second officer to arrive. *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. At 12:33 a.m., the second officer arrived and the first officer had his canine sniff the car; the canine alerted, leading to the discovery of a "large bag of methamphetamine." *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. The entire stop took about twenty-seven minutes prior to the dog sniff, and the stop was extended by about seven to eight minutes after completion of the investigation of the traffic violation for the dog sniff. *Id.* at __, 191 L. Ed. 2d at 498, 35 S. Ct. at 1614.

Defendant argues that here, the entire stop was about forty-one minutes, and it was extended six to seven minutes for the dog sniff, so under *Rodriguez*, it was unreasonable because its duration was too long. Defendant argues that "based upon the totality of the circumstances,

performing these functions by checking a driver's information and issuing a traffic citation for driving left of center should reasonably have been completed in less than forty-one minutes." Defendant does not explain how he contends that Officer Wellmon could have completed the Chapter 20 portion of the stop more quickly or why the length of the Chapter 20 portion of the stop was unreasonable under the totality of the circumstances. But even if the stop could have been completed more quickly, defendant ignores a crucial part of the *Rodriguez* analysis. The Court held that the officer may not conduct the traffic stop "in a way that prolongs the stop, *absent the reasonable suspicion ordinarily demanded to justify detaining an individual*." *Id.* at __, 191 L. Ed. 2d at 499, 35 S. Ct. at 1615.

In *Rodriguez*, based upon the findings made by the district court, there were no other circumstances which could have given the officer a basis for reasonable suspicion of any crime other than the initial traffic stop; Rodriguez had merely driven on the shoulder of the road for one or two seconds, which was a traffic violation, but there were no other facts which might arouse suspicion of wrongdoing. *Id.* at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1612. The district court found that " 'Officer Struble had [no]thing other than a rather large hunch' " and determined that "no reasonable suspicion supported the detention once Struble issued the written warning." *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. But the Supreme Court specifically noted that if a law enforcement officer has a basis for reasonable suspicion which develops during the stop, the stop can be extended accordingly. *Id.* at __, 191 L. Ed. 2d at 499, 35 S. Ct. at 1615.

As in *Rodriguez*, the dog sniff here extended the stop. But the Supreme Court noted that the next inquiry was "whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation," and since the Eighth Circuit Court of Appeals had not reviewed the district court's conclusion on this issue, the Supreme Court remanded the case for review of this issue. *Id.* at __, 191 L. Ed. 2d at 501, 35 S. Ct. at 1616-17.

Unlike in *Rodriguez*, here the trial court addressed the basis for reasonable suspicion to extend the stop. Defendant's argument ignores the many uncontested findings of fact which support the trial court's conclusion that Officer Wellmon had reasonable suspicion to extend the stop for the dog sniff. Officer Wellmon was patrolling Cabe Road based upon complaints about drug activity and he had been advised by the State Bureau of Investigation to be on the lookout for defendant based upon reports he was "bringing large quantities of methamphetamine to a

supplier off of Cabe Road." After he stopped the truck, Officer Wellmon identified defendant as the person he was on the lookout for and noticed defendant was confused, spoke so quickly he was hard to understand, and began to "stutter and mumble his words."[1] Defendant did not make eye contact when talking to Officer Wellmon and his nervousness was "much more extreme" than that of most drivers stopped by the officer. His eyes were bloodshot and glassy and the skin underneath his eyes was ashy. Based upon his training and experience, Officer Wellmon believed defendant's "behaviors and physical appearance" were consistent with methamphetamine use. Defendant told Officer Wellmon he was going to "Rabbit's" house, and Officer Wellmon knew that "Rabbit" was involved with methamphetamine and that he lived nearby. When defendant got out of the car -- without having been asked -- he put his hand on the car for stability. And although these facts alone would have given Officer Wellmon reasonable suspicion, at this point a woman Officer Wellmon knew had given "drug information to law enforcement in the past" approached and told him she had talked to Rabbit and defendant had "dope in the vehicle and it was in a black tackle box" and not to let the police find it. These facts were more than sufficient to give Officer Wellmon a reasonable suspicion that defendant may have drugs in his vehicle and to justify a dog sniff, and the trial court's conclusions of law were supported by the findings of fact. This argument is also without merit.

Conclusion

We affirm the trial court's order denying defendant's motion to suppress.

AFFIRMED.

Judges BRYANT and CALABRIA concur.

1. The SBI had told Officer Wellmon to be on the lookout for defendant in a black vehicle, but defendant was the registered owner of the white truck he was driving when he was stopped.

STATE v. TEAGUE

[259 N.C. App. 904 (2018)]

STATE OF NORTH CAROLINA
v.
JOSEPH EDWARDS TEAGUE, III

No. COA17-1134

Filed 5 June 2018

Search and Seizure—search warrant—probable cause—drugs in residence

There was a substantial basis for a warrant to search defendant's residence where a police detective's warrant application stated there were marijuana-related items in defendant's trash dumpster, defendant had a history of drug charges, and database searches linked defendant to the residence to be searched.

Appeal by defendant from judgment entered 8 December 2016 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 17 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kevin G. Mahoney, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

TYSON, Judge.

Joseph Edward Teague, III ("Defendant") appeals from a judgment entered upon a plea agreement from which he pleaded guilty to a count of possession with intent to sell or distribute marijuana and possession of marijuana. We find no error.

I. Background

On 6 March 2014, Raleigh Police Detective N.D. Braswell applied for a search warrant for the premises located at 621 Manchester Drive in Raleigh, North Carolina. In his probable cause affidavit (the "Affidavit"), submitted to a magistrate, Detective Braswell stated that "he received information from a concerned citizen in the neighborhood who wants to remain anonymous . . . that he/she believes narcotics are being sold from 621 Manchester Drive." The Affidavit does not state when Detective Braswell received this information from the anonymous tipster, nor what led the tipster to "believe[] narcotics [were] being sold from

621 Manchester Drive." Based upon the anonymous tip, Detective Braswell began an investigation and surveillance of activities occurring at 621 Manchester Drive (the "Residence").

According to the Affidavit, Detective Braswell drove by the Residence and checked the license plate number on a 1989 Buick automobile parked in the driveway through CJLEADs, a law enforcement database. This database search showed the automobile was registered to Laura Teague. In the Affidavit, Detective Braswell stated, "I am familiar with this address and the son of Ms. Teague from my previous assignments as a patrol beat officer with Raleigh Police Department. Joseph Edwards Teague III is the son of Ms. Teague."

Detective Braswell "then checked city of Raleigh databases" and found Defendant had an established waste and water utilities account for the Residence. Detective Braswell "utilized another database and confirmed that [Defendant] lives at 621 Manchester Dr."

After noting the "regular refuse day for [the Residence] is Thursday," Detective Braswell averred in the Affidavit that he had "conducted a refuse investigation in the early morning hours of Thursday." Detective Braswell did not designate what was the date of the Thursday he had conducted the refuse investigation, nor to which "Thursday" he referred. The trash can Detective Braswell searched was located to the left of the driveway of the Residence, "only inches from the curb line." There was not a house or structure located to the left of the Residence. The nearest structure to the left of the Residence was a church at an unspecified distance.

Inside the trash can, Detective Braswell found three white trash bags. Detective Braswell found a red Solo cup containing a green leafy substance; five cut-open food saver bags; and a Ziplock bag containing trace residue "of what appear[ed] to be marijuana" inside the trash bags. Inside one of the trash bags, Detective Braswell also found a Vector butane gas container, which he noted in the Affidavit can be "used to make butane hash oil by extracting the THC from marijuana through the use of butane." According to the Affidavit, Detective Braswell "utilized a narcotics analysis reagent kit to test the substance for marijuana. The green leafy substance field tested positive for marijuana."

In the Affidavit, Detective Braswell also included information about prior criminal charges and case dispositions involving Defendant, including:

> [Defendant] was charged with possession [of] marijuana [of] less than one half ounce and possession of drug paraphernalia . . . . He accepted a plea to possession of drug paraphernalia. [Defendant] was charged with

> simple possession of marijuana and possession of drug paraphernalia . . . and dismissed by [the] DA. [Defendant] was charged with PWISD marijuana, maintaining a dwelling for controlled substance, and possession of drug paraphernalia. . . . He accepted a plea to possession of drug paraphernalia.

On 6 March 2014, Detective Braswell submitted an application along with the Affidavit to obtain a warrant to search Defendant's Residence. The magistrate found probable cause and issued the search warrant. Pursuant to that warrant, law enforcement officers searched Defendant's Residence on 7 March 2014, and the following items were seized:

1. 358 grams of marijuana
2. 40.39 grams of marijuana
3. 39 grams butane hash oil
4. $1,015 in United States currency
5. 55 grams of butane hash oil in multi-colored containers
6. 2 empty red plastic containers
7. Time Warner mail addressed to Defendant.
8. 1 gram of butane hash oil on a Silpat.
9. a black pelican case containing a glass marijuana pipe
10. a Mastercool pump
11. a metal bowl, glass bowl, temp, gauge, hot plate, razor blades, and a skinny glass cylinder
12. plastic air tight containers with marijuana residue
13. an assortment of marijuana pipes

On 21 July 2014, a grand jury indicted Defendant for two counts of possession with intent to sell or deliver ("PWISD") marijuana and one count of maintaining a dwelling for controlled substances. The grand jury subsequently returned three superseding indictments. The final superseding indictment charged Defendant with PWISD marijuana, PWISD of a schedule VI controlled substance, maintaining a dwelling for a controlled substance, and felony possession of marijuana.

Prior to trial, Defendant filed a motion to suppress the search of the Residence, and argued the information in Detective Braswell's Affidavit

was insufficient to establish probable cause for the magistrate to issue the search warrant. In his motion to suppress, Defendant asserted the lack of information regarding: (1) when the anonymous tip was made to Detective Braswell; (2) the basis or source of the anonymous informant's information; (3) the date on which Detective Braswell conducted the refuse investigation; (4) the contents of the trash bag being linked to the Residence or Defendant; and, (5) any indication on the trash can connecting it to the Residence.

On 30 October 2015, the trial court conducted a hearing upon Defendant's motion to suppress. The trial court denied Defendant's motion and entered a written order containing the following findings of fact:

> 1. That a search warrant was granted by a Wake County Magistrate that was dated March 6, 2014 for the search of the dwelling of 621 Manchester Drive, Raleigh, North Carolina 27612.
>
> 2. Within the Search Warrant application, there was a probable cause affidavit attached in support of the warrant application.
>
> 3. This affidavit given by Detective N. Braswell with the Raleigh Police Department, listed his experience of 12 years as a law enforcement officer and description of the types of previous drug investigations he had been involved in.
>
> 4. The affidavit additionally gives information that Detective Braswell received information from an anonymous concerned citizen in the neighborhood of Manchester Drive that they believed narcotics were being sold from 621 Manchester Drive.
>
> 5. The affidavit further states as a result of receiving that information, Detective Braswell began his investigation by driving by the residence and inquiring as to who the registered owner was of [the] car in the driveway under the carport of the home.
>
> 6. The affidavit lists that the registered owner of the vehicle seen in the driveway as Laura Teague with an address of 6104 Ivy Ridge Road, Raleigh, North Carolina 27612.
>
> 7. The affidavit states that Detective Braswell was familiar with this address and the son of Ms. Teague known as

Joseph Teague, III, from previous assignments with the Raleigh Police Department.

8. The affidavit states that Detective Braswell checked City of Raleigh databases and Joseph Teague, III had a solid waste and water account for the address of 621 Manchester Drive. Detective Braswell also utilized other databases and confirmed that Joseph Teague, III resided at 621 Manchester Drive, Raleigh, North Carolina.

9. The affidavit includes information that Detective Braswell conducted a refuse investigation in the early morning hours of Thursday and that Thursdays are the regular trash collection days for 621 Manchester Drive.

10. Within the affidavit, it does not list a date or any reference to a specific Thursday that the refuse investigation was collected.

11. The affidavit includes that the refuse can was to the left of the concrete driveway only inches from the curb line and there are no other residences to the left of 621 Manchester Drive.

12. The affidavit indicates that the results of the refuse investigation yielded three white trash bags that were tied shut. Within the bags the following was located: marijuana residue that was located within a red solo cup that field tested positive [for] marijuana, five open food saver bags and one Ziploc bag that also contained marijuana residue that also field tested positive for marijuana, and [a] Vector butane gas container.

13. Detective Braswell further lists in the affidavit that Butane gas containers can be used to make butane hash oil by extracting THC from marijuana using the Butane, and that hash oil can be smoked or taken orally.

14. Lastly, Detective Braswell listed the criminal history of Joseph Teague, III, indicating prior drug convictions from 2009 and 2010.

15. The trash pull was done for the purpose of corroborating the information received by Detective Braswell from the concerned citizen and furthering the investigation.

> 16. While there is no specific date listed for what Thursday the refuse investigation was done, this Court has found that a reasonable magistrate using common sense would indicate that this refuse investigation was done within a relatively short time after receiving the information from the concerned citizen and the beginning of this investigation.

Based upon these findings, the trial court concluded that, under "the totality of the circumstances . . . there was sufficient evidence for probable cause for the basis of the Search Warrant for [the Residence,]" and denied Defendant's motion to suppress.

At trial, Defendant's counsel renewed his objection to the search resulting from the search warrant prior to the evidence being introduced at trial. At the close of the State's evidence, Defendant and the State entered into a plea agreement wherein Defendant agreed to plead guilty to PWISD marijuana and felony possession of marijuana, and the State agreed to voluntarily dismiss the remaining charges. Defendant reserved the right to appeal the denial of his motion to suppress.

The trial court fined Defendant $300, sentenced Defendant to a term of six to seventeen months of imprisonment, and suspended the sentence to twenty-four months of supervised probation. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

"An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2017). Defendant reserved the right to appeal the trial court's denial of his motion to suppress pursuant to his plea of guilty to the charged offenses. The State does not contest Defendant's right to appeal. This appeal is properly before us.

III. Standard of Review

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

that a magistrate had probable cause to issue a search warrant." *State v. Worley*, __ N.C. App. __, __. 803 S.E.2d 412, 416 (2017).

IV. Analysis

A. Probable Cause

The Fourth Amendment to the Constitution of the United States requires probable cause must be shown before a search warrant may be issued. U.S. Const. amend. IV. Defendant argues the search warrant to search his Residence was not supported by sufficient probable cause.

To determine whether probable cause existed to issue a search warrant, a reviewing court looks to the "totality of the circumstances." *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984); *see Illinois v. Gates*, 462 U.S. 213, 238, 76 L.Ed.2d 527, 548 (1983). Under the "totality of the circumstances" test, an affidavit submitted to obtain a search warrant provides sufficient probable cause if it provides

> reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty.

Arrington, 311 N.C. at 636, 319 S.E.2d at 256 (citations omitted). "When reviewing a magistrate's determination of probable cause, this Court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that articles searched for were probably present." *State v. Hunt*, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002) (citations omitted).

> A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than commonsense, manner. [T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Riggs, 328 N.C. 213, 222, 400 S.E.2d 429, 434-35 (1991) (alterations in original) (citations and quotation marks omitted).

B. Staleness

To support his argument that probable cause did not exist to support issuance of the search warrant, Defendant asserts that the information obtained from the anonymous tipster and Detective Braswell's investigation of the trash can outside the Residence were potentially stale.

> The test for staleness of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. Common sense must be used in determining the degree of evaporation of probable cause. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock.

State v. Lindsey, 58 N.C. App. 564, 565-66, 293 S.E.2d 833, 834 (1982) (citations, internal quotation marks, and ellipsis omitted). "[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. The continuity of the offense may be the most important factor in determining whether the probable cause is valid or stale." *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 358 (1990) (internal citations omitted).

"[C]ommon sense is the ultimate criterion in determining the degree of evaporation of probable cause." *State v. Pickard*, 178 N.C. App. 330, 335, 631 S.E.2d 203, 207 (2006) (citing *State v. Jones*, 299 N.C. 298, 305, 261 S.E.2d 860, 865 (1980)). "Other variables to consider when determining staleness are the items to be seized and the character of the crime." *Id.* at 335-36, 631 S.E.2d at 207. A defendant's past criminal conduct and reputation for criminal conduct is relevant to whether probable cause exists. *See State v. Sinapi*, 359 N.C. 394, 399-400, 610 S.E.2d 362, 365-66 (2005) (recognizing a defendant's drug-related criminal history recited in an officer's affidavit as relevant to finding probable cause to issue a warrant to search the defendant's residence for evidence of drug crimes).

Here, Detective Braswell's Affidavit states, in relevant part:

> I have received information from a concerned citizen in the neighborhood who wants to remain anonymous for fear of retaliation that he/she believes narcotics are being sold from [the Residence]. When I received this information I started an investigation.

. . .

> The regular refuse day for [the Residence] is Thursday. I conducted a refuse investigation in the early morning hours of Thursday and there was a green refuse can to the left of the concrete driveway only inches from the curb line.

Although the Affidavit does not state when or over what period of time the anonymous tipster observed criminal activity at Defendant's Residence, when the tipster relayed this information to police, or the exact date Detective Braswell conducted the refuse search, the Affidavit was based on more than just the information supplied by the anonymous tipster and the information regarding the refuse search. Detective Braswell's Affidavit included details regarding database searches indicating Defendant had a waste and water utility account at the Residence, that Defendant resided at the Residence, that Detective Braswell was familiar with the Residence and Defendant from his previous assignment as a patrol officer. The Affidavit also recounted Defendant's prior charges for possession of drug paraphernalia, PWISD marijuana, and maintaining a dwelling for a controlled substance.

To the extent the information from the anonymous tip may have been stale, it was later corroborated by Detective Braswell's refuse search, in which Detective Braswell found a Solo cup containing marijuana residue, plastic bags containing marijuana residue, and a butane gas container that Detective Braswell specified is consistent with the potential manufacturing of butane hash oil. These averments are sufficient grounds to provide a magistrate with "a reasonable ground to believe . . . the proposed search [would] reveal the presence upon the premises" of the drug-crime related items sought in the search warrant. *Lindsey*, 58 N.C. App. at 565, 293 S.E.2d at 834.

Detective Braswell averred in his Affidavit that "the regular refuse day for [the Residence] is Thursday. I conducted a refuse investigation in the early morning hours of Thursday[.]" Although the Affidavit is not explicit about which "Thursday" Detective Braswell conducted the refuse search, a "common sense" reading of the Affidavit would indicate the "Thursday" referred to by Detective Braswell was the most recent Thursday to 6 March 2017, the date he swore out the Affidavit and submitted the search warrant application. *See Pickard*, 178 N.C. App. 330, 335, 631 S.E.2d 203, 207.

For purposes of addressing Defendant's argument that Detective Braswell's refuse search was potentially stale, we take judicial notice of

the records of the United States Naval Observatory. *See State v. Garrison*, 294 N.C. 270, 280, 240 S.E.2d 377, 383 (1978) (taking judicial notice of U.S. Naval Observatory report to affirm nighttime element in burglary conviction). "A court may take judicial notice, whether requested or not." N.C. Gen. Stat. § 8C-1, Rule 201(c) (2017). The 2014 edition of the U.S. Naval Observatory's Nautical Almanac indicates 6 March 2014 was a Thursday. Nautical Almanac Office of the United States Naval Observatory, The Nautical Almanac for the Year 2014 (2014).

A magistrate drawing reasonable inferences from the Affidavit would have a substantial, common-sense basis to conclude the "Thursday" referred to in the Affidavit was the day Detective Braswell swore out his Affidavit and applied for the search warrant. The magistrate could reasonably infer Detective Braswell would not delay in applying for a search warrant given the nature with which marijuana-related evidence may quickly dissipate. *See Lindsey*, 58 N.C. App. at 567, 293 S.E.2d at 835 (noting that marijuana "can be easily concealed and moved about and which is likely to be disposed of or used.").

Even if the anonymous tip was potentially stale, the refuse search, Defendant's prior history of drug charges and offenses, and the database searches linking Defendant to the Residence all provided sufficient probable cause to issue the search warrant. Defendant does not contest the legality of the refuse search conducted by Detective Braswell.

The Supreme Court of North Carolina noted in *Sinapi*, a case involving a refuse search for drug-related evidence, that a magistrate may "rely on his personal experience and knowledge related to residential refuse collection to make a practical, threshold determination of probable cause," and he is "entitled to infer that the garbage bag in question came from [the] defendant's residence and that items found inside that bag were probably also associated with that residence." *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365 (holding that a search warrant was supported by probable cause where the defendant had been previously arrested twice for drug-related offenses and several marijuana plants were discovered in a garbage bag outside the defendant's home).

In addition to our Supreme Court in *Sinapi*, the courts of other jurisdictions have recognized:

> that "the recovery of drugs or drug paraphernalia from the garbage contributes significantly to establishing probable cause." *U.S. v. Briscoe*, 317 F.3d 906, 908 (8th Cir.2003) (holding that marijuana seeds and stems found in the defendant's garbage were sufficient, standing alone, to

> establish probable cause because "simple possession of marijuana seeds is itself a crime under both federal and state law"); *see also U.S. v. Colonna*, 360 F.3d 1169, 1175 (10th Cir.2004) (holding that evidence of drugs in the defendant's trash cover, while potentially indicating only personal use, was sufficient to establish probable cause because "all that is required for a valid search warrant is a fair probability that contraband or evidence of a crime will be found in a particular place") (quoting *Illinois*, 462 U.S. at 238, 76 L.Ed.2d at 543).

State v. Lowe, 242 N.C. App. 335, 341, 774 S.E.2d 893, 898 (2015), *aff'd in part*, *rev'd in part on other grounds*, 369 N.C. 360, 794 S.E.2d 282 (2016).

Presuming, *arguendo*, the anonymous tip was so stale as to be unreliable, the marijuana-related items obtained from Detective Braswell's refuse search and attested to in his Affidavit, Defendant's criminal history, and the database searches specifically linking Defendant to the Residence to be searched, provided a substantial basis upon which the magistrate could determine probable cause existed to issue the search warrant of Defendant's Residence, under the totality of the circumstances. *See Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365 (determining refuse search resulting in evidence of marijuana provided probable cause for search warrant to issue); *see also Arrington*, 311 N.C. at 641, 319 S.E.2d at 259 (specifying that a court reviewing the existence of probable cause to issue a search warrant is to employ the totality of the circumstances test).

V. Conclusion

The Affidavit and application submitted by Detective Braswell to obtain the warrant to search Defendant's Residence gave the magistrate a substantial basis to conclude probable cause existed to issue the warrant. Recognizing the deference we are to give to the magistrate's determination of probable cause and deferring to the reasonable inferences the magistrate could have made based on the information contained in Detective Braswell's Affidavit, this Court concludes the magistrate had a substantial basis for determining probable cause that the evidence to be searched for and seized was located at Defendant's Residence. *See Hunt*, 150 N.C. App. at 105, 562 S.E.2d at 600.

The trial court's order, which denied Defendant's motion to suppress, is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and BERGER concur.

STATE v. VENEY

[259 N.C. App. 915 (2018)]

STATE OF NORTH CAROLINA
v.
RODNEY VENEY

No. COA17-1323

Filed 5 June 2018

Criminal Law—jury instructions—outside presence of defense counsel

Where the trial court in a criminal trial erroneously rendered instructions to potential jurors during a recess at the voir dire stage of jury selection while defendant's counsel was absent, the error was not structural error because it did not occur during a critical stage of trial. Further, the erroneously rendered instruction to abstain from independent research was harmless error, since the same standard administrative instructions were given to the jury on numerous occasions throughout the trial proceedings without objection.

Judge DIETZ concurring with separate opinion.

Judge BERGER concurring with separate opinion.

Appeal by defendant from judgment entered 21 March 2017 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 17 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

TYSON, Judge.

Rodney Veney ("Defendant") appeals from judgments entered upon his convictions for three counts of assault with a deadly weapon inflicting serious injury. Defendant argues the trial court committed a structural error by instructing prospective jurors outside the presence of defense counsel, which deprived him of his Sixth Amendment right to counsel. The State has proved the conceded error was harmless beyond a reasonable doubt.

I. Background

Defendant was charged with assault with a deadly weapon with the intent to kill inflicting serious injury ("AWDWIKISI") for stabbing Valerie Wright on 12 May 2015. On 6 July 2015, a grand jury returned a true bill of indictment. On 17 August 2015, the grand jury returned a superseding indictment charging Defendant with three counts of AWDWIKISI for stabbing Valerie Wright, Krystal Octetree and Dahmon Scott. The three charges of AWDWIKISI were joined for trial with other charges from a different indictment for first-degree burglary and conspiracy to commit felonious assault.

Defendant was tried before a jury on the 5 December 2016. During the *voir dire* portion of jury selection, the trial court called a recess. While waiting to resume jury selection, and while Defendant's trial counsel was outside of the courtroom, the trial court gave the following instruction to the prospective juror pool, which Defendant contests on appeal:

> COURT: While [defense counsel's] gone, let me give you some instructions, all of you, if you happen to sit on this jury, you're picked for this jury.
>
> As you've been told by the lawyers and by me, you have to try this case based on what you hear in the courtroom uninfluenced by any outside factor whatsoever. This case must be tried based upon the evidence presented and the law as I give it to you.
>
> I was licensed to practice law in 1970. That's 46 years. At that time, the largest office in the law firm was the law library. Now lawyers walk around with a law library on their cell phone. Okay? Which means it gives them access to the law, and it gives you access to the law or access to anything you want to know. If something comes up in the case, I mean, you could Google "burglary" and get some kind of definition.
>
> The reason I say that to you is just to remind you please don't do that. Please don't do that. Okay? Please don't do any research on your own. Don't go to any alleged crime scene. Don't read the law. If something comes up during the testimony with reference to forensic evidence from the City-County Bureau of Investigation, don't Google the term or whatever.

> You're not investigators. You're jurists. Everything you need to know you'll hear in the presentation of the evidence or in the legal principles that I will describe to you. So please don't resort to any matter of investigation on your own. Don't read any law. Don't do any research. Don't do anything of that nature please. You're instructed not to. The Supreme Court has advised me to tell you that that would be improper.

On 9 December 2016, the jury returned verdicts finding Defendant not guilty of first-degree burglary, not guilty of conspiracy to commit felonious assault, but guilty of three counts of assault with a deadly weapon inflicting serious injury ("AWDWISI"). The trial court sentenced Defendant to three consecutive sentences of twenty-six months to forty-four months imprisonment. Defendant's trial counsel gave oral notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court from an appeal of a final judgment of the superior court in a criminal case based upon the jury's convictions of Defendant following pleas of not guilty. N.C. Gen. Stat. §§ 7A-27(b), 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) (citing *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007)).

> Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.

State v. Garcia, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (internal citations and quotation marks omitted). Structural "error[ ] is reversible *per se*." *Id.*

The Supreme Court of the United States has made "a distinction between structural errors, which require automatic reversal, and all other errors, which are subject to harmless-error analysis." *Arnold v. Evatt*, 113 F.3d 1352, 1360 (4th Cir. 1997). "The United States Supreme Court emphasizes a strong presumption against structural error."

State v. Polke, 361 N.C. 65, 74, 638 S.E.2d 189, 195 (citing *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)), *cert. denied*, 552 U.S. 836, 169 L. Ed. 2d 55 (2006).

IV. Analysis

A. Preservation

Defendant's sole argument is that the trial court committed structural error by denying him his Sixth Amendment right to counsel by delivering instructions to potential juror pool during *voir dire*, while his counsel was absent from the courtroom. Defendant does not assert any arguments against the specific content of the disputed instructions. Defendant conceded at oral arguments before this Court that if the trial court's recitation of instructions to the potential jurors was not structural error, then it was harmless.

Generally, "structural error, no less than other constitutional error, should be preserved at trial." *Garcia*, 358 N.C. at 410, 597 S.E.2d at 745. "Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Rawlings*, 236 N.C. App. 437, 443-4, 762 S.E.2d 909, 914 (2014) (citing *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004)). Defendant did not object at trial to the trial court's giving of instructions to potential jurors in his counsel's absence. "Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). Defendant does not assert plain error on appeal. The State conceded at oral arguments on this matter that it does not contest whether Defendant preserved his argument.

In *State v. Colbert*, the Supreme Court of North Carolina reviewed a defendant's assertion of structural error, based upon the trial court starting jury selection approximately twenty minutes before the defendant's counsel had arrived in the courtroom. *State v. Colbert*, 311 N.C. 283, 285, 316 S.E.2d 79, 80 (1984). The Court noted "that defendant did not object to the foregoing procedure; however, he does bring the alleged error forward by assignment of error and argument in briefs before the Court of Appeals and this Court." The Court proceeded to address the defendant's arguments on the merits. *Id.*

Following our Supreme Court in *Colbert* and the concession by the State, we address Defendant's structural error argument on the merits. *See id.*

B. Structural Error

The State conceded at oral argument that the trial court erred by giving instructions to prospective jurors in defense counsel's absence, but argues that this error did not amount to structural error and was harmless beyond a reasonable doubt.

The Sixth Amendment to the Constitution of the United States grants defendants the right to assistance of counsel. U.S. Const. amend. VI. An individual is entitled to the assistance of counsel in all criminal prosecutions where his liberty is at stake regardless of whether the offense is "classified as petty, misdemeanor, or felony[.]" *Argersinger v. Hamlin*, 407 U.S. 25, 37, 32 L. Ed. 2d 530, 538 (1972). Denial of counsel during a *critical stage* is "so likely to prejudice the accused at trial that their costs of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984).

Structural errors are rare constitutional errors that prevent a criminal trial from " 'reliably serv[ing] its function as a vehicle for determination of guilt or innocence.' " *Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 (citation omitted); *see Arnold v. Evatt*, 113 F.3d 1352, 1360 (4th Cir. 1997) (stating that "judges should be wary of prescribing new structural errors unless they are certain that the error's presence would render every trial in which it occurred unfair."). Our Supreme Court stated:

> The United States Supreme Court has identified only six instances of structural error to date: (1) complete deprivation of right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 9, L. Ed. 2d 799 (1963); (2) a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927); (3) the unlawful exclusion of grand jurors of the defendant's race, *Vasquez v. Hillery*,474 U.S. 254, 88 L. Ed. 2d 598 (1986); (4) denial of the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122 (1984); (5) denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984); and (6) constitutionally deficient jury instructions on reasonable doubt, *Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182 (1993). *See Johnson v. United States*, 520 U.S. 461, 468-69, 137 L.Ed.2d 718, 728 (identifying the six cases in which the United States Supreme Court has found structural error).

State v. Polke, 361 N.C. 65, 73, 638 S.E.2d 189, 194 (2006).

A critical stage is "a step of a criminal proceeding that . . . [holds] significant consequences for the accused." *Bell v. Cone*, 535 U.S. 685, 696, 152 L. Ed. 2d 914, 927-28 (2002) (citing *Hamilton v. Alabama*, 368 U.S. 52, 54, 7 L. Ed. 2d 114 (1961), and *White v. Maryland*, 373 U.S. 59, 60, 10 L. Ed. 2d 193, 194 (1963)). Denial of counsel during a critical stage of trial has been established where there is "complete denial of counsel . . . if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659, 80 L. Ed. 2d at 668 (1984). The appropriate remedy is automatic reversal, when counsel is "totally absent . . . during a critical stage of the proceeding." *Id.* at 659 n. 25, 80 L. Ed. 2d at 668 n. 25. Jury selection is a critical stage of the trial. *Colbert*, 311 N.C. at 285, 316 S.E.2d at 80. (citing *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976)).

Defendant asserts that he is entitled to "automatic reversal without any showing of prejudice" since the trial court violated his Sixth Amendment right to counsel when the court, in the absence of his counsel, instructed the potential jury members to abstain from doing independent research regarding the case. In support of his argument, Defendant relies upon *State v. Colbert*, in which the Supreme Court of North Carolina held that the defendant's Sixth Amendment right to counsel was violated during a critical stage when the trial court instructed the state to begin jury *voir dire* when defense counsel was absent, and thus could never be treated as harmless error. *Id.* at 286, 316 S.E.2d at 79, 80-81.

In *Colbert*, our Supreme Court found structural error where the trial court allowed the prosecution to question and strike prospective jurors in the defense counsel's absence. *Id.* at 286, 316 S.E.2d at 80-81. Unlike in *Colbert* where the defendant was denied his right to counsel during the critical stage of jury selection, here the challenged instructions were not given during jury selection, but during a recess. *Id.* at 283, 316 S.E.2d at 79.

The Supreme Court of the United States has recognized that a defendant does not have an absolute right to consult with counsel during a brief recess. In *Perry v. Leake*, the Supreme Court held that a state trial court's order directing the defendant not to consult with his counsel during a fifteen-minute recess following direct examination of the defendant was not a deprivation of the defendant's constitutional right to counsel. *Perry v. Leake*, 488 U.S. 272, 283-84, 102 L. Ed. 2d 624, 635-36 (1989).

Defendant also asserts the case of *State v. Luker* supports his structural error argument. In *State v. Luker*, our Supreme Court held that

where the defendant had been denied counsel "for the presentation of his evidence and closing arguments at his trial," the defendant was denied his Sixth Amendment right to counsel. *State v. Luker*, 311 N.C. 301, 301, 316 S.E.2d 309, 309 (1984). This denial of counsel was held to be reversible error. *Id.*

Defendant argues the trial court's giving of instructions to potential jurors during *voir dire* while his counsel was absent, deprived him of his right to counsel at a critical stage of trial, which like in *Luker*, requires automatic reversal. *Id.* At bar, unlike in *Luker*, Defendant's counsel had not withdrawn from the case, but simply failed to timely return from the morning break at the specified time of 11:37 a.m.

During the two minutes Defendant's counsel was out of the courtroom, *voir dire* did not continue. Instead, the trial court made use of this time to generally instruct the potential jury members to abstain from site visits or independent research regarding the case. During these two minutes, neither the court nor the State questioned prospective jurors. Here, the absence of defense counsel is not comparable to the absence of defense counsel in *Luker*. Examination of a criminal defendant and closing arguments are both critical stages of a trial that hold significant consequences for the accused.

During those stages defense counsel has the opportunity to build his client's credibility, present his version of the facts and evidence, and argue critical points and evidence in the case. Here, Defendant's counsel was absent for two minutes after a morning recess and the *voir dire* was resumed when Defendant's counsel returned to the courtroom. This short recess was not a critical stage of the trial and did not result in significant consequences for Defendant. *See id.*

Presuming, *arguendo*, and as the State concedes, the trial court erred in making general comments to the jury pool in a brief recess during a critical stage of jury selection, while Defendant's counsel was absent for two minutes, no activity relating to selecting the jury, such as questioning or striking, occurred during this period of time. We cannot agree that Defendant was completely deprived of his Sixth Amendment right to counsel during the critical stage of jury selection to be *per se* awarded a new trial, because of the trial court's recitation of general instructions regarding administrative matters during the two minutes his counsel was absent. *See State v. Rouse*, 234 N.C. App. 92, 95, 757 S.E.2d 690, 692 (2014) ("The *complete* denial of counsel is one of the six forms of structural error identified by the United States Supreme Court." (citations omitted) (emphasis supplied)). None of the instructions touched

upon jury selection or prejudiced Defendant, and Defendant's counsel was otherwise present for all other portions of jury selection and *voir dire*, except for the two minutes at issue.

We hold that because Defendant's counsel was not absent during a critical stage of the trial proceedings, *per se* structural error did not occur.

C. Harmless Beyond a Reasonable Doubt

While the State concedes, the trial court erred by giving instructions to the jury while defense counsel was absent, the State has also proved such error was harmless beyond a reasonable doubt.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." *State v. Hammonds*, 370 N.C. 158, 167, 804 S.E.2d 438, 444 (2017) (citations omitted).

Harmless-error analysis is appropriate in cases where a defendant has been denied the Sixth Amendment's right to counsel. *State v. Thomas*, 134 N.C. App. 560, 571, 518 S.E.2d 222, 230 (1999).

The State argues that the trial court's instructions to prospective jurors were harmless beyond a reasonable doubt. We note that the trial court gave the jury similar instructions at different times during trial while counsel was present without objection. The instructions were given to the pool of *potential* jury members, some of which may have been struck by counsel or excused by the court, and never had any impact on Defendant's conviction.

In *Satterwhite v. Texas*, the trial court conducted a hearing on the psychological evaluation of defendant. *Satterwhite v. Texas*, 486 U.S. 249, 252, 100 L. Ed. 2d 284, 291 (1988). The defendant was denied counsel while his competency was determined during the examination. *Id.* The defendant claimed that his Sixth Amendment right to counsel had been violated. *Id.* at 253, 100 L. Ed. 2d at 292. The Supreme Court of United States refused to apply *per se* or automatic reversal, and instead conducted a harmless-error analysis to determine whether the defendant's right to counsel was violated. *Id.* at 258, 100 L. Ed. 2d at 295. The Supreme Court determined that the error that occurred in that case was not harmless, since the psychiatrist was the only expert to testify on the issue of the defendant's competency. *Id.* at 260, 100 L. Ed. 2d at 296. The Court noted that it was "impossible to say beyond a reasonable doubt"

that the jury did not rely on the psychiatrist's testimony in rendering a verdict. *Id.*

Unlike in *Satterwhite*, where the jury heavily relied on the psychiatrist's testimony during deliberations, here the same or substantially similar instructions were given to the jury on numerous occasions throughout the trial proceedings without objection, thus making the jury's reliance on the instructions given by the trial court during the *voir dire* recess less impactful. The trial court rendered standard instructions to the potential jurors about not doing outside research, talking about the case while trial is pending, reading the law, and visiting the crime scene. None of the contested instructions were specific to the witnesses and evidence or the facts or law related to the offenses of which Defendant was charged. The trial court's error in giving these instructions without Defendant's counsel present is harmless beyond a reasonable doubt.

V. Conclusion

The trial court's rendering of instructions to potential jurors during a recess at the *voir dire* stage of jury selection while Defendant's counsel was absent was not structural error because this specific time was not a critical stage of trial. The State has met its burden to show that the conceded error in the trial court's giving of the challenged instructions without Defendant's counsel being present was harmless beyond a reasonable doubt. *It is so ordered.*

HARMLESS ERROR.

Judge DIETZ concurs with separate opinion.

Judge BERGER concurs with separate opinion.

DIETZ, Judge, concurring.

The trial court violated Veney's Sixth Amendment rights by speaking to the jury pool about the ground rules for serving as a juror outside the presence of Veney's counsel. The court should not have done so, and no trial court should do this again.

Nevertheless, I am persuaded by the Fourth Circuit's analysis in *United States v. Owen*, 407 F.3d 222, 226 (4th Cir. 2005). As Judge Luttig explained in *Owen*, even if the error occurred at a point of the criminal proceeding that could be called a "critical phase" in the abstract,

structural error analysis turns not on labels but on whether the error affects and contaminates the entire criminal proceeding to such a degree that it casts doubt on the fairness of the trial process. *Id.*

Here, the trial court's brief discussion with the jury pool—a discussion that was essentially about housekeeping rules governing their conduct if selected to serve—did not affect and contaminate the entire subsequent proceeding. The court did not discuss the charges against Veney or the law to be applied to those charges. Moreover, Veney could have asked for the jury to be instructed not to conduct outside research once seated and informed of the subject matter of the case, if this were a concern. And the court did, in fact, instruct the jury on this issue later in the proceeding, while Veney's counsel was present.

Veney conceded at oral argument that, unless we apply the structural error rule, he cannot prevail because this Sixth Amendment violation was harmless beyond a reasonable doubt. Because the trial court's error was not a structural one, I concur in the Court's judgment finding no prejudicial error.

BERGER, Judge, concurring in separate opinion.

I fully concur with the majority's opinion, but write separately to address the apparent conflict between *State v. Colbert*, 311 N.C. 283, 316 S.E.2d 79 (1984) and *State v. Garcia*, 358 N.C. 382, 597 S.E.2d 724 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

As noted in the majority's opinion, the defendant in *State v. Colbert* did not preserve his argument on appeal. *Colbert*, 311 N.C. at 285, 316 S.E.2d at 80. Even so, our Supreme Court reviewed the merits of that defendant's arguments for harmless error. *Id.* at 286, 316 S.E.2d at 81. However, our Supreme Court more recently declined to review a purported structural error that was not preserved. In *State v. Garcia*, our Supreme Court stated, "It is well settled that constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *Garcia*, 358 N.C. at 410, 597 S.E.2d at 745 (citation and quotation marks omitted). Further, "[s]tructural error, no less than other constitutional error, should be preserved at trial." *Id.*

Here, Defendant waived review of his argument by failing to preserve the issue at trial. But for the State's concession at oral argument concerning preservation, it would appear this Court should follow *Garcia*, and harmless error review should not be utilized. Also, Defendant failed to argue for plain error review on appeal. This case, however, presents

the unusual circumstance in which Defendant's trial counsel was potentially unaware of the error committed by the trial court in her absence. Defendant never had the knowledge to object, or otherwise preserve the argument for review. As such, Rule 2 would be the appropriate vehicle for this Court to reach the merits of Defendant's argument.

WFC LYNNWOOD I LLC AND WFC LYNNWOOD II LLC,
DELAWARE LIMITED LIABILITY COMPANIES, PLAINTIFFS
v.
LEE OF RALEIGH, INC., CHARLES L. PARK
AND SUN OK HELLNER, DEFENDANTS

No. COA17-562

Filed 5 June 2018

1. Contracts—commercial lease—default—liquidated damages—burden of proof

Despite an argument by defendants tenant and guarantors that the liquidated damages provision in a commercial lease was a double damage provision and therefore void, the trial court did not err in awarding liquidated damages where defendants failed to meet their burden of showing that the damages from the breach of the lease were not difficult to ascertain, that the amount stipulated was not a reasonable estimate, or that the amount stipulated was not reasonably proportionate to plaintiffs' actual damages.

2. Attorney Fees—commercial lease—reciprocal attorney fees provision—guarantors

The requirements of N.C.G.S. § 6-21.6 controlled in a situation involving reciprocal attorney fees where the commercial lease at issue was a business contract and not evidence of indebtedness as defendants argued and where the lease was executed after the effective date of the statute. Where a lease provision explicitly subjected the guarantor to liability for attorney fees, the guarantors here were jointly and severally liable with the tenant for attorney fees, despite not satisfying the requirements of section 6-21.6 on their own.

3. Attorney Fees—statutory award—sufficiency of findings—counsel's affidavit

The trial court erred in its award of attorney fees in a suit for breach of a commercial lease by finding as fact that the plaintiffs'

counsel charged a customary fee for like work where the counsel's affidavit did not address comparable rates by other attorneys in the same field of practice.

Judge DAVIS concurring in part and dissenting in part.

Appeal by defendants from orders entered 27 January 2017 and 24 March 2017 by Judge R. Allen Baddour, Jr. in Wake County Superior Court. Heard in the Court of Appeals 13 December 2017.

Smith Moore Leatherwood LLP, by Eric A. Snider and Elizabeth Brooks Scherer, for plaintiff-appellees.

Harris & Hilton, P.A., by Nelson G. Harris, for defendant-appellants.

CALABRIA, Judge.

Where defendants failed to meet their burden when challenging a liquidated damages clause, the trial court did not err in awarding liquidated damages on summary judgment. Where a commercial lease with a reciprocal attorneys' fees provision was executed after the effective date of N.C. Gen. Stat. § 6-21.6, the trial court did not err in awarding attorneys' fees pursuant to that statute. Where guarantors signed a guaranty explicitly noting their liability for outstanding attorneys' fees, the trial court did not err in holding them jointly and severally liable for attorneys' fees. Where there was insufficient evidence to support the trial court's finding that the rates charged by plaintiffs' attorneys were comparable to "the customary fee for like work," we remand for further findings. We affirm in part, vacate in part and remand in part for further findings on the amount of attorneys' fees.

I. Factual and Procedural Background

WFC Lynnwood I LLC and WFC Lynnwood II LLC ("plaintiffs") are Delaware corporations which own the Lynnwood Collection Shopping Center ("Lynnwood Collection") in Wake County. On 26 October 2011, Lee of Raleigh, Inc. ("Lee"), through its president, Sun Ok Hellner ("Hellner"), executed a lease, agreeing to lease space in Lynnwood Collection from plaintiffs. The lease contemplated a 64-month term, to run until 30 September 2017, and as part of the agreement, Lee agreed to conduct business continuously during the term of the lease. The lease also contained a reciprocal attorneys' fees provision for the recovery of fees resulting from litigation. As part of the lease, Hellner and Charles L.

Park ("Park") executed a guaranty to the lease, personally guaranteeing Lee's obligations. On 2 November 2015, Lee informed plaintiffs that it would cease operating business on 6 November 2015, and would surrender possession of the premises on 7 November 2015. Lee did so.

On 29 December 2015, plaintiffs filed a complaint against Lee, Hellner, and Park (collectively, "defendants"), alleging that Lee's abandonment of the premises constituted a default under the lease, and that plaintiffs were entitled to liquidated damages resulting from Lee's failure to remain in operation for the duration of the lease. Plaintiffs' complaint included claims for breach of contract by Lee as tenant, and breach of contract by Hellner and Park as guarantors.

On 16 February 2016, defendants filed an answer and motion to dismiss. Defendants alleged that the liquidated damages contemplated in the lease were void, that plaintiffs failed to mitigate damages, that plaintiffs lacked certificates of authority to transact business in North Carolina, and that plaintiffs' claims were barred by estoppel. Defendants further moved to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, alleging that "Plaintiffs have failed to state claims upon which relief can be granted[.]"

On 7 October 2016, plaintiffs moved for summary judgment. On 27 January 2017, the trial court entered an order granting summary judgment in favor of plaintiffs. This order awarded plaintiffs $43,253.16, plus interest; liquidated damages of $37,685.98, plus interest; and attorneys' fees, to be subsequently determined.

On 3 February 2017, plaintiffs filed a motion for attorneys' fees, noting that the trial court had already held that fees should be awarded, and thus that the issue before the court was "not *whether* attorneys' fees and costs should be awarded to [plaintiffs]; rather, the issue is the *amount* of reasonable attorneys' fees and costs[.]" On 24 March 2017, the trial court entered an order on attorneys' fees. The trial court recognized that the lease agreement included a reciprocal agreement for the payment of attorneys' fees, and that the guaranty agreement signed by Hellner and Park included a provision for the payment of attorneys' fees. The trial court considered the affidavit of plaintiffs' counsel, along with the range of hourly rates of attorneys in Wake County and the amount of work required by the case, and found that "the costs incurred by Plaintiffs were reasonable and necessary to enforce the Lease and Guaranty." The trial court therefore awarded attorneys' fees in the amount of $41,807.50 for costs incurred through 31 January 2017, and an additional $2,929.35 for costs incurred subsequently.

From the order granting summary judgment in favor of plaintiffs, and the order awarding attorneys' fees, defendants appeal.

II. Summary Judgment

In their first argument, defendants contend that the trial court erred in granting summary judgment in favor of plaintiffs, specifically with respect to liquidated damages. We disagree.

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.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

B. Analysis

[1] In its order granting summary judgment in favor of plaintiffs, the trial court awarded, *inter alia*, liquidated damages in the amount of $37,685.98, plus interest. Defendants contend that this was error, because the provision of the lease establishing liquidated damages was void.

Section 20 of the lease, addressing hours and conduct of business, required defendants to operate continuously during the term of the lease, and provided that:

> In the event of a Default by Tenant of any of the conditions in this Article 20, Landlord shall have, in addition to any and all remedies herein provided, the right at its option to collect not only the Minimum Rent, but Additional Rent at the rate of one three hundred and sixty fifth (1/365th) of the amount of the annual Minimum Rent for each day Tenant is in Default or Breach of the provisions of this Article. Landlord and Tenant specifically acknowledge that the Additional Rent remedy provided for in the immediately preceding sentence is a provision for liquidated damages and is not a penalty, that the damages which Landlord is likely to suffer should Tenant breach any of the conditions in this Article are impossible to calculate at the time this Lease is executed, and because of its indefiniteness or uncertainty, the amount stipulated is a reasonable estimate of the damages which would probably be caused by a Breach or is reasonably proportionate to the [damages]

> which would be caused by such Breach, and the parties have specifically negotiated this provision, without which Landlord would not have entered into this Lease.

Defendants concede that they did not operate continuously for the term of the lease, thus violating Section 20, and that, if the "Additional Rent" described above is not a void provision, defendants would be liable for the amount described. However, defendants contend that this is a "double damage provision," and thus void.

"Liquidated damages are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable . . . if the breach occurs." *Knutton v. Cofield*, 273 N.C. 355, 361, 160 S.E.2d 29, 34 (1968) (citation and quotation marks omitted). "A stipulated sum is for liquidated damages only (1) where the damages which the parties reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach." *E. Carolina Internal Med., P.A. v. Faidas*, 149 N.C. App. 940, 945-46, 564 S.E.2d 53, 56 (citations and quotation marks omitted), *aff'd per curiam*, 356 N.C. 607, 572 S.E.2d 780 (2002). The party seeking to invalidate a liquidated damages clause bears the burden of proving the provision is invalid. *Seven Seventeen HB Charlotte Corp. v. Shrine Bowl of the Carolinas, Inc.*, 182 N.C. App. 128, 131-32, 641 S.E.2d 711, 713-14 (2007).

Defendants, challenging the liquidated damages provision, bear the burden of showing that damages were not difficult to ascertain, that the amount stipulated was not a reasonable estimate, or that the amount stipulated was not reasonably proportionate to plaintiffs' actual damages. Instead, defendants broadly describe the liquidated damages clause as "a penalty." Defendants contend that "if double rent as provided for in Landlords' form lease is a reasonable estimate of damages suffered from (a) lost percentage rent and (b) other damages resulting from failure to continuously operate; it cannot be, in a mathematical sense, a reasonable estimate of simply (b) other damages resulting from failure to continuously operate."

Defendants' argument concerning "lost percentage rent" refers to a secondary argument. Defendants contend that the sentence in Section 20

providing for "Additional Rent" should have been removed from the final draft of the agreement. Defendants cite a deposition which purports that the sentence was only in the agreement as the result of an editing error. Per this deposition, the sentence was only to remain there if percentage rent was paid under the lease. Because the lease contained no percentage rent provision, the provision of Section 20 granting "Additional Rent" should have been similarly stricken.

Even assuming *arguendo* that defendants' argument is true, and that the sentence is the result of an editing error, that fact amounts to parol evidence. "[P]arol evidence is not admissible to contradict the language of the contract." *Thompson v. First Citizens Bank & Tr. Co.*, 151 N.C. App. 704, 709, 567 S.E.2d 184, 189 (2002). The language of Section 20 is plain and clear. Pursuant to that section, in the event of breach by defendants, plaintiffs are entitled to "Additional Rent." Defendants' arguments as to how that section arrived in the final document are parol evidence, and will not be considered to contradict the agreement.

Defendants' argument, then, is that the liquidated damages provision was based on both actual damages and lost percentage rent, which shows that the liquidated damages provision was not a reasonable estimate of actual damages. However, because any arguments concerning percentage rent were parol evidence, the trial court was not to consider them, nor will this Court. As such, defendants are left with no argument as to whether the liquidated damages sought by plaintiffs were not a reasonable estimate of damages, or reasonably proportionate to damages suffered. We hold, therefore, that defendants did not meet their burden with respect to the liquidated damages clause, and that the trial court did not err in enforcing it.

As an aside, defendants suggest that this is a "double damage" provision, and is therefore void as a penalty. Defendants cite to a New York decision in support of their argument. Our analysis above, however, addresses this point. To wit: Defendants bore the burden of challenging the liquidated damages provision, be it "double damage" or otherwise, and have failed to meet that burden. This argument by defendants does not change our analysis, nor does it require additional consideration.

III. Attorneys' Fees

In their second argument, defendants contend that the trial court erred in awarding attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.6.

A. Standard of Review

"The decision whether to award attorney's fees is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion." *Egelhof v. Szulik*, 193 N.C. App. 612, 620, 668 S.E.2d 367, 373 (2008). "An abuse of discretion occurs when a decision is either manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 620-21, 668 S.E.2d at 373 (citations and quotation marks omitted).

B. Recoverable Fees

[2] In its order awarding attorneys' fees, the trial court held:

> The requirements of N.C. Gen. Stat. § 6-21.6 are satisfied to make the reciprocal attorneys' fee provision in the Lease valid and enforceable, because: the Lease is a business contract; the parties executed the contract by hand; and the terms and conditions concerning a possible award of attorneys' fees and legal expenses apply with equal force to Plaintiffs and Lee of Raleigh, Inc.

On appeal, defendants contend that the trial court erred in awarding attorneys' fees pursuant to that section. Defendants note that attorneys' fees are generally not recoverable absent express statutory authority, and that the fees in the instant case should have been enforced under N.C. Gen. Stat. § 6-21.2, not N.C. Gen. Stat. § 6-21.6. We disagree.

The statute upon which the trial court relied provides:

> Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract.

N.C. Gen. Stat. § 6-21.6(b) (2015). By contrast, the statute upon which defendants rely provides:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

. . .

> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2(2) (2015). Defendants contend that the lease agreement at issue is not a "business contract," but is rather "evidence of indebtedness," and that the provisions of N.C. Gen. Stat. § 6-21.2 apply, rather than those of N.C. Gen. Stat. § 6-21.6. Defendants therefore contend that the amount of attorneys' fees owed were capped at 15% of the "outstanding balance" on the lease.

Defendants concede that, pursuant to N.C. Gen. Stat. § 6-21.6, "under most commercial leases entered today, a Landlord could choose to seek actual reasonable attorneys' fees under reciprocal attorneys' fee provisions such as Section 31.6 of the Lease, rather than seek a reasonable attorneys' fee, under G.S. § 6-21.2, of 15% of the outstanding balance." Defendants contend, however, that N.C. Gen. Stat. § 6-21.6 was not effective when the lease was signed.

N.C. Gen. Stat. § 6-21.6 became effective on 1 October 2011. In their brief, defendants concede that Lee executed the lease on 3 October 2011, after the effective date of the statute. The trial court likewise found that Hellner, as Lee's president, executed the lease on 3 October 2011, that Park and Hellner executed the guaranty on 3 October 2011, and that Steven Fogel, a manager for plaintiffs, executed the lease on 26 October 2011. It is therefore clear that the lease was executed after the effective date of N.C. Gen. Stat. § 6-21.6, and that Lee, as signatory to the lease, was subject to statutory attorneys' fees as contemplated by N.C. Gen. Stat. § 6-21.6.

Defendants further contend, however, that Hellner and Park, as guarantors, should not be subject to the same attorneys' fees, as the guaranty they signed lacked a reciprocal attorneys' fee provision. It is true that Park was not a party to the lease, and Hellner only signed the lease in her capacity as a representative of Lee. It is also true that the guaranty, on its own, does not satisfy the requirements of N.C. Gen. Stat. § 6-21.6. However, this Court has held that an unconditional guaranty of charges provided for in a lease can subject a guarantor, despite not being a party to the lease itself, to liability for attorneys' fees. *See RC Assocs. v. Regency Ventures, Inc.*, 111 N.C. App. 367, 374, 432

S.E.2d 394, 398 (1993) ("[t]he language in the guaranty contract is sufficient to put a guarantor on notice that he will be liable for attorney's fees if he fails to make the guaranteed payment before the creditor finds it necessary to employ an attorney to collect the debt"); *Devereux Props., Inc. v. BBM & W, Inc.*, 114 N.C. App. 621, 625, 442 S.E.2d 555, 557 (1994) (holding that, where a guaranty agreement covered "each and every obligation of Tenant under this Lease Contract[,]" and the lease required payment of attorneys' fees, the guarantors were likewise responsible for attorneys' fees).

In the instant case, not only did the guaranty cover "each and every obligation" under the lease generally, it specifically included "all damages including, without limitation, all reasonable attorneys' fees and disbursements incurred by Landlord or caused by any such default and/or by the enforcement of the Guaranty." Certainly, if we have held that a general guaranty pertaining to "each and every obligation" under the lease subjects the guarantor to liability for attorneys' fees, one which *explicitly* cites attorneys' fees must likewise subject the guarantor to liability for attorneys' fees.

It is clear, therefore, that the agreement was executed after the effective date of N.C. Gen. Stat. § 6-21.6, that Lee is liable for attorneys' fees as outlined in that statute and the reciprocal attorneys' fees provision of the lease, and that Hellner and Park, as guarantors pursuant to a guaranty that explicitly notes liability for attorneys' fees, are likewise jointly and severally liable with Lee for attorneys' fees. We hold that the trial court did not err in its award of attorneys' fees.

C. Amount of Fees

[3] Defendants also challenge the amount of attorneys' fees awarded. Defendants contend that the trial court's findings of fact are "general and conclusory, and not sufficient to enable the reviewing Court to determine whether or not the award of attorney's fees was reasonable." We agree.

"[I]n order for the appellate court to determine if the statutory award of attorneys' fees is reasonable the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989). In its order awarding attorneys' fees, the trial court found:

> 12. Counsel's Affidavit outlines the rates and hours billed for each of the timekeepers at Plaintiffs' counsel's law

> firm, Smith Moore Leatherwood LLP, who worked on this lawsuit.
>
> 13. Counsel's Affidavit outlines the legal costs incurred by Plaintiffs through January 31, 2017, in connection with bringing and pursuing this lawsuit to enforce their rights under the Lease and Guaranty.
>
> 14. The Court is aware of the range of hourly rates charged by law firms in Wake County as well as in North Carolina for litigation of business contracts like this. The Court finds that the hourly rates billed to Plaintiffs as set forth in Counsel's affidavit are fair and reasonable and conform to or are less than hourly rates charged in and around North Carolina and specifically in Wake County by firms and attorneys with comparable experience in matters of comparable complexity.
>
> 15. The pursuit of this matter by Plaintiffs reasonably required written discovery, depositions of four fact witnesses, and a Rule 30(b)(6) deposition, preparation for trial, and summary-judgment motions practice. The Court finds that the steps taken by Plaintiffs to enforce their Lease and Guaranty were reasonable and necessary, and that the time and labor expended by Plaintiffs' counsel were reasonable.
>
> 16. The Court finds that the costs incurred by Plaintiffs were reasonable and necessary to enforce the Lease and Guaranty.

In short, the trial court found that (1) counsel's rates were set forth in an affidavit; (2) those rates were comparable and reasonable for the work done, the subject matter of the case, and the experience of the attorneys, (3) the specific work done by counsel was reasonable and necessary, and therefore (4) the costs incurred by plaintiffs were reasonable and necessary.

Defendants contend that these findings were not supported by evidence in the record, arguing that the affidavit itself is "too vague to provide sufficient competent evidence to support the findings of fact in the Attorneys [sic] Fee Order[.]" The affidavit in question was signed by the primary attorney in the case, and included statements (1) that he was a Senior Associate with the firm, and had practiced law since 2007 and in North Carolina since 2011; (2) that he billed at a rate of $260 per hour

in 2015 and 2016, and $285 per hour in 2017, as compared to his normal billing rates of $260, $275, and $315 per hour in each of those respective years; (3) that others worked on the case as well, and he included their billing rates. The attorney also provided detailed tables of the names, hours worked, and dollars billed by different attorneys, and the various expenses incurred throughout the proceedings, to calculate his total amount.

However, the affidavit offers no statement with respect to comparable rates in this field of practice. Nor did counsel offer comparable rates at the hearing on attorneys' fees. It is therefore clear that there was insufficient evidence before the trial court of "the customary fee for like work" for the trial court to make a finding on that point, and to award attorneys' fees accordingly.

We hold that, with respect to the amount of attorneys' fees awarded, the trial court erred by making a finding with respect to "the customary fee for like work," absent evidence to support such a finding. We vacate the order with respect to the amount awarded, and remand that issue to the trial court. "On remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999).

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge TYSON concurs.

Judge DAVIS concurs in part and dissents in part by a separate opinion.

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

I concur in the result reached by the majority in granting summary judgment in favor of Plaintiffs. I respectfully dissent, however, from the portion of the majority's opinion vacating the trial court's award of attorneys' fees.

The majority holds that the trial court's findings regarding the attorneys' fees award were unsupported by competent evidence because Plaintiffs' affidavit in support of their motion for fees did not expressly contain a statement with respect to "comparable rates in the field of practice." In my view, the trial court's findings show that it exercised its authority to take judicial notice of facts relevant to that issue, which it was permitted to do. Finding of Fact No. 14 stated as follows:

> 14. The Court is aware of the range of hourly rates charged by law firms in Wake County as well as in North Carolina for litigation of business contracts like this. The Court finds that the hourly rates billed to Plaintiffs as set forth in Counsel's affidavit are fair and reasonable and conform to or are less than hourly rates charged in and around North Carolina and specifically in Wake County by firms and attorneys with comparable experience in matters of comparable complexity.

This Court has previously upheld an award of attorneys' fees pursuant to which the trial court took judicial notice of customary hourly rates. In *Simpson v. Simpson*, 209 N.C. App. 320, 703 S.E.2d 890 (2011), we held that "a district court, considering a motion for attorneys' fees . . . , is permitted, although not required, to take judicial notice of the customary hourly rates of local attorneys performing the same services and having the same experience." *Simpson*, 209 N.C. App. at 328, 703 S.E.2d at 895. Although *Simpson* involved the award of fees in connection with a child custody modification issue, I am unable to discern any valid reason why a trial court should not be permitted to similarly invoke the judicial notice doctrine in connection with an award of attorneys' fees under N.C. Gen. Stat. § 6-21.6.

I believe the findings contained in the trial court's order with regard to the award of attorneys' fees were sufficient to satisfy N.C. Gen. Stat. § 6-21.6. Accordingly, I dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JUNE 2018)

ANDERSON v. N.C. STATE BD. OF ELECTIONS & ETHICS ENFORCEMENT No. 17-1370	Wake (17CVS12072)	Dismissed
BELLAMY v. BRANSON No. 17-666	Wake (16CVD246)	Vacated and Remanded.
CITY OF HICKORY v. GRIMES No. 17-441	Catawba (16CVS1023)	Reversed and Remanded
COFFEY v. COFFEY No. 17-1243	Carteret (16CVD508)	Reversed
GREATER HARVEST GLOBAL MINISTRIES, INC. v. BLACKWELL HEATING & AIR CONDITIONING, INC. No. 17-630	Cumberland (15CVS8010)	Affirmed
IN RE B.A.S. No. 17-1367	Iredell (17JT75)	Vacated and Remanded
IN RE C.D.W. No. 17-352	Buncombe (16SPC1159)	Affirmed
IN RE D.M.O. No. 17-1342	Orange (15JT46)	Affirmed
IN RE E.L.J. No. 17-1138	Wake (15JT303-304)	Affirmed
IN RE M.D. No. 17-1198	Wake (17SPC2225)	Affirmed
IN RE M.T. No. 17-1347	Guilford (15JT203)	Affirmed
IN RE T.T. No. 17-985	Durham (06JB353)	Affirmed, Remanded for Correction of Clerical Error
IN RE Z.R. No. 17-950	Cabarrus (14JT146-148)	Affirmed
KAPLAN v. KAPLAN No. 17-1042	Union (15CVD305)	Affirmed

LI v. ZHOU No. 17-1069	Forsyth (14CVS3654) (16CVS2169)	Dismissed
MIDGETTE v. CONCEPCION No. 17-1230	Pitt (16CVS1967)	Affirmed
NAPOLI v. SCOTTRADE, INC. No. 17-783	Henderson (16CVS1771)	Affirmed
PREFERRED CONCRETE POLISHING, INC. v. PIKE No. 17-1092	Forsyth (15CVS6738)	Affirmed
RAMIREZ v. STUART PIERCE FARMS, INC. No. 17-525	N.C. Industrial Commission (X07653)	Affirmed
ROBESON CTY. ENFORCEMENT UNIT v.HARRISON No. 17-558	Robeson (16CVD215)	Affirmed
ROUND BOYS, LLC v. VILL. OF SUGAR MOUNTAIN No. 17-515	Avery (14CVS297)	Affirmed
SILVER v. CHASE PROPS., INC. No. 17-1204	Orange (16CVD926)	Affirmed
STATE v. ALLEN No. 17-973	Union (14CRS51109)	Dismissed
STATE v. ANTONE No. 16-1203	Columbus (12CRS674)	Affirmed
STATE v. BRAWLEY No. 17-287-2	Rowan (15CRS55547)	Vacated and Remanded
STATE v. CHARLES No. 17-937	Henderson (14CRS52174-75)	No Error
STATE v. COOK No. 17-885	Rutherford (16CRS2070)	Reversed and Remanded
STATE v. COREY No. 17-1031	Burke (14CRS52667) (16CRS1782)	Vacated and remanded in part; Affirmed in part
STATE v. FOSTER No. 17-989	Vance (13CRS50790)	No Plain Error in Part, No Error in Part

STATE v. FREEMAN No. 17-469	Davie (14CRS50399)	Vacated and Remanded for resentencing
STATE v. HICKS No. 17-1109	Mecklenburg (14CRS247592) (15CRS25914) (16CRS32661)	No Error
STATE v. HILL No. 17-993	Wayne (14CRS54833)	NO ERROR, REMANDED FOR NEW SENTENCING HEARING
STATE v. HOPPES No. 17-861	Cleveland (13CRS54582)	No Error
STATE v. LAWING No. 17-231	Wake (14CRS7299)	No Error
STATE v. LEWIS No. 17-1096	Hoke (94CRS357) (94CRS360) (94CRS367-368)	Vacated and Remanded
STATE v. MURRAY No. 17-769	Brunswick (12CRS50974-75) (13CRS2020-21)	No Error
STATE v. PERRY No. 17-1223	Mecklenburg (16CRS10739-40)	No Error
STATE v. RUCKER No. 17-809	Iredell (11CRS57344) (11CRS57346)	No Error
STATE v. SANCHEZ No. 17-1135	Mecklenburg (15CRS11913-15) (15CRS9033-34)	No Error
STATE v. SCOTT No. 17-1181	Mecklenburg (13CRS223624)	No Error
STATE v. SIMMONS No. 17-952	Forsyth (14CRS53555)	Vacated and Remanded

STATE v. SMITH No. 17-1116	Rowan (11CRS52570-76) (11CRS52579-83) (11CRS52589-90) (11CRS52598-604) (11CRS52608)	No Error
STATE v. SURRATT No. 17-1285	Catawba (15CRS4600) (15CRS4601)	No Error
STATE v. TAYLOR No. 17-545	Moore (14CRS1555) (14CRS1559) (14CRS1566-68) (14CRS1573-74) (14CRS1577-78) (14CRS1583) (14CRS1585) (14CRS1587-88) (14CRS1591-92) (14CRS1595) (14CRS1597-600) (14CRS1603) (14CRS1607-10) (14CRS1929) (14CRS1930) (14CRS1931-34) (14CRS1935) (14CRS1936-37) (14CRS1949-52) (15CRS1593-95) (16CRS17) (16CRS4) (16CRS642)	No Prejudicial Error
STATE v. TOMLIN No. 17-351	Guilford (03CRS89524)	Reversed
STATE v. YATER No. 17-390	Wayne (14CRS50339-40)	No Error
STRAZZANTI v. DOLCE No. 17-1217	Mecklenburg (16CVD8615)	Reversed and Remanded
SWAN BEACH COROLLA, L.L.C. v. CTY. OF CURRITUCK No. 17-411	Currituck (12CVS334)	Dismissed
WHITE v. GUEST SERVS., INC. No. 17-1156	N.C. Industrial Commission (15-036879)	Affirmed

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filing requirements of N.C.G.S. § 160A-393(c) necessary to seek review of quasi-judicial decisions of decision-making boards. The trial court properly concluded that petitioners were procedurally barred from challenging the specified order for the first time at the certiorari review hearing and did not err in affirming that order. **Jeffries v. Cty. of Harnett, 473.**

Preservation of issues—double jeopardy—motion to dismiss—Where defendant argued on appeal that the State's voluntary dismissal of a murder charge after a mistrial terminated the jeopardy that attached at his first murder trial, he preserved the issue for appeal by raising his double jeopardy defense in a written motion to dismiss before the second trial. **State v. Courtney, 635.**

Preservation of issues—failure to raise argument in trial court—The State waived an argument that satellite-based monitoring constitutes a special needs search by failing to raise the issue in the trial court. **State v. Grady, 664.**

Preservation of issues—motion in limine—no additional evidence offered—Plaintiff did not preserve for appeal her objection to a motion in limine limiting and excluding certain testimony in a medical malpractice action where the trial court allowed the hospital's motion and plaintiff did not proffer evidence that she contended should have been allowed. **Ingram v. Henderson Cty. Hosp. Corp., Inc., 266.**

Preservation of issues—procedural posture—The Court of Appeals rejected petitioners' argument that a decision of the county board of adjustment they were procedurally barred from challenging should have been reviewed on the merits due to being in the same procedural posture as an earlier board decision that was reviewed by the trial court. The postures were procedurally different because petitioners unambiguously expressed their intent to appeal the earlier decision and lodged specific, written objections to that decision prior to the hearing in the trial court. **Jeffries v. Cty. of Harnett, 473.**

Preservation of issues—waiver—motion to dismiss—In a delinquency action involving a pulled fire alarm at a middle school, defendant waived appellate review of the denial of a motion to dismiss for insufficient evidence by failing to renew his motion at the close of all the evidence. Suspension of the appellate rules to allow review is not appropriate absent an indication of manifest injustice, which cannot be shown where sufficient evidence was presented for each element of a criminal offense. **In re I.W.P., 254.**

Record on appeal—failure to include ordinance—subject to dismissal—mootness—Intervening-respondents' arguments that the trial court misinterpreted a county unified development ordinance (UDO) to require a nexus between the farming activities and the shooting activities on their land were dismissed because the parties failed to include the UDO in the record on appeal and because the Court of Appeals' resolution of the appeals from two other orders rendered the arguments moot. **Jeffries v. Cty. of Harnett, 473.**

Record—supplement—consideration of documents contained therein—In an appeal from a summary judgment, the Court of Appeals was not required to consider documents contained within a Rule 11(c) supplement to the record filed on appeal where the additional documents were served with the motion to supplement the brief but were not offered into evidence or filed with the superior court. Rule 56 requires that summary judgment be decided on the materials on file. Moreover, plaintiff did not make a timely objection. **French Broad Place, LLC v. Asheville Sav. Bank, S.S.B., 769.**

CHILD CUSTODY AND SUPPORT—Continued

CORPORATIONS—Continued

to attend a subsequent meeting to which the board invited him for the purpose of speaking on his own behalf regarding his termination. **Emerson v. Cape Fear Country Club, Inc., 755.**

CRIMINAL LAW

Assault with a deadly weapon with intent to kill—jury instructions—self-defense—contemporaneous felonious conduct—The trial court did not err in a case arising from a robbery committed during a poker game by overruling defendant's objections to instructions that barred him from claiming self-defense and by rejecting his proposed language for an assault with a deadly weapon with intent to kill (AWDWIK) charge. N.C.G.S. § 14-51.2(c)(3) does not have a causal nexus requirement, and self-defense was not available where defendant was contemporaneously engaged in felonious conduct. Moreover, any error by the trial court in including the AWDWIK charge as a disqualifying felony was not prejudicial where defendant had already admitted to possession of a firearm by a felon prior to the charge conference. **State v. Crump, 144.**

Flight—instructions—sufficiency of evidence—prejudice—There was insufficient evidence to support an instruction on flight in a prosecution for charges including insurance fraud which arose from the burning of defendant's house where there was no more than a suspicion or conjecture that defendant fled the scene and no evidence that defendant took steps to avoid prosecution. However, giving the instruction was not prejudicial error because it was most directly related to the charge of setting fire to a dwelling house, of which defendant was found not guilty. **State v. Locklear, 374.**

Insufficient findings—motion to suppress—waiver of counsel—communication with law enforcement—The trial court failed to address key factual issues before denying defendant's motion to suppress in a first-degree murder case involving a gang-related shooting at a residence. Without facts addressing communication between defendant and a law enforcement officer between the time defendant invoked his right to counsel and the time he agreed to waive his right to counsel, the appellate court cannot meaningfully determine whether the officer's comments were reasonably likely to elicit an incriminating response from defendant. **State v. Santillan, 394.**

Jury instructions—outside presence of defense counsel—Where the trial court in a criminal trial erroneously rendered instructions to potential jurors during a recess at the voir dire stage of jury selection while defendant's counsel was absent, the error was not structural error because it did not occur during a critical stage of trial. Further, the erroneously rendered instruction to abstain from independent research was harmless error, since the same standard administrative instructions were given to the jury on numerous occasions throughout the trial proceedings without objection. **State v. Veney, 915.**

Motion for post-conviction DNA testing—appropriate review—statutory factors—The trial court erroneously addressed defendant's motion for post-conviction DNA testing as a motion for appropriate relief, and consequently failed to conduct the relevant analysis of the factors contained in N.C.G.S. § 15A-269 to determine whether defendant satisfied the requirements for post-conviction DNA testing. Therefore, the Court of Appeals could not evaluate whether defendant's motion was properly denied, necessitating remand to the trial court to conduct a review under the appropriate statute. **State v. Shaw, 703.**

SEARCH AND SEIZURE—Continued

WORKERS' COMPENSATION—Continued

ZONING—Continued

Unified development ordinance—due process—arbitrary and capricious— In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her claim that the UDO was unconstitutionally arbitrary or capricious as applied to her. The zoning ordinance was within the scope of the county's police power, and it protected the natural environment of a remote portion of the Outer Banks and the people who lived there. The limited interference with plaintiff's use of her property was reasonable, and plaintiff's trouble was created by her decision to build on a certain area of her lot that required a Coastal Area Management Act permit (in addition to compliance with the UDO). **LeTendre v. Currituck Cty., 512.**

Unified development ordinance—due process—vagueness—In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her claim that the UDO was unconstitutionally vague to the extent it required the wings of her home to be structurally dependent. Plaintiff's argument incorrectly assumed that the UDO required structural dependency, and the UDO plainly prohibited more than one principal structure per lot, while allowing accessory structures. **LeTendre v. Currituck Cty., 512.**

Unified development ordinance—equal protection—building permit—In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her equal protection claim because there was no forecast of evidence that defendant county applied its zoning ordinance in a manner that treated plaintiff differently from other property owners in the same district. **LeTendre v. Currituck Cty., 512.**

Unified development ordinance—layout of interior rooms—validity—In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner's claim that the UDO violated N.C.G.S. 153A-340(l) was an improper basis for the preliminary injunction. Plaintiff's argument that the UDO impermissibly attempted to regulate the interior layout of rooms was a misconstruction of the UDO. **LeTendre v. Currituck Cty., 512.**

Unified development ordinance—preemption by building code—location and use of buildings and structures—In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her claim that the UDO impermissibly regulated construction practices and was preempted by the N.C. Building Code. The UDO dealt solely with the location and use of buildings and structures as expressly authorized by statute. **LeTendre v. Currituck Cty., 512.**